

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

Case No. 01-1379

MISSOURI MUNICIPAL LEAGUE, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION

and

UNITED STATES OF AMERICA,

Respondents.

**On Petition for Review of an Order of the
Federal Communications Commission**

PETITIONERS= BRIEF

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This matter is before the Court on a petition for review of a final order of the Federal Communications Commission (FCC) in *In re Missouri Municipal League, et al.*, FCC 00-443, 2001 WL 28068 (rel. January 12, 2001) (“*Missouri Order*”). In the *Missouri Order*, the FCC determined that it lacks authority under Section 253 of the Telecommunications Act of 1996 (the “Act”), 47 U.S.C. § 253, to preempt a Missouri statute that bars public entities in the state from providing or facilitating the provision of telecommunications services to the public. The Petitioners contend that the *Missouri Order* is contrary to law.

The Petitioners submit that oral argument on this matter will aid in the Court’s understanding of the issues and applicable law to be considered, and they request thirty (30) minutes for oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iv
STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION	ix
STATEMENT OF ISSUES PRESENTED.....	ix
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	5
1. The Petitioners’ Stake in the Outcome of this Proceeding	5
2. The Missouri Barrier to the Provision of Municipal Telecommunications Services or Facilities	6
3. The Telecommunications Act	8
a. The 103 rd Congress	10
b. The 104 th Congress	17
c. Section 703 of the Telecommunications Act	19
4. The Texas Litigation.....	20
5. The <i>Missouri Order</i>	24
SUMMARY OF ARGUMENT	27
ARGUMENT.....	28
I. THE TERM “ANY ENTITY” IN SECTION 253(a) OF THE TELECOMMUNICATIONS ACT APPLIES TO PUBLIC ENTITIES	28
A. The Relevant Standards	30
B. The Language, Structure, Purposes and Legislative History of the Telecommunications Act Require Preemption of HB 620 ...	31

1.	The Language of the Act.....	31
2.	The Structure and Context of the Act.....	39
3.	The Purposes of the Act.....	42
4.	The Legislative History of the Act.....	44
C.	HB 620 Cannot Be Sustained Under Section 253(b).....	46
II.	THIS COURT OWES THE FCC NO DEFERENCE.....	47
	CONCLUSION	50
	CERTIFICATE OF COMPLIANCE.....	51
	CERTIFICATE OF SERVICE	
	ADDENDUM	

TABLE OF AUTHORITIES

Cases:

<i>Alarm Industry Communications Council v. Federal Communications Comm’n</i> , 131 F.3d 1066 (D.C. Cir. 1997).....	x, 31, 32,42, 43
<i>Alden v. Maine</i> , 527 U.S. 706 (1999)	29
<i>Arkansas AFL-CIO v. Federal Communications Comm’n</i> , 11 F.3d 1430 (8 th Cir. 1993).....	31
<i>Asgrow Seed Co. v. Winterboer</i> , 513 U.S. 179 (1995).....	32
<i>Bailey v. United States</i> , 516 U.S. 137, 145 (1995).....	33
<i>Bell Atlantic Telecommunications. Cos. v. Federal Communications Comm’n</i> , 131 F.3d 1044 (D.C. Cir. 1997).....	31
<i>Brogan v. United States</i> , 522 U.S. 398 (1998).....	34
<i>Brown & Williamson Tobacco Co. v. Food and Drug Administration</i> , 153 F.3d 155 (4 th Cir. 1998), <i>aff’d</i> , 529 U.S. 120 (2000)	39
<i>Chevron U.S.A., Inc. v. Natural Resources Defense Council</i> , 467 U.S. 837 (1984).....	x, 31, 47, 48
<i>City of Abilene, Texas v. Federal Communications Comm’n</i> , 164 F.3d 49 (D.C. Cir. 1999).....	1-4, 23-26, 31
<i>Consumer Product Safety Comm’n v. GTE Sylvania, Inc.</i> , 447 U.S. 102, 108 (1980).....	30
<i>Food and Drug Administration v. Brown & Williamson Tobacco Corp.</i> , 520 U.S. 120 (2000)	x, 31, 41
<i>Freitag v. Commissioner of Internal Revenue</i> , 501 U.S. 868 (1991)	x, 34
<i>Garcia v. San Antonio Metropolitan Transit Authority</i> , 469 U.S. 528 (1984).....	29

<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991).....	x, 1-2, 21-22, 25, 30, 48
<i>Gulf Power, Inc. v. FCC</i> , 208 F.3d 1263 (11 th Cir. 2000), <i>cert. granted</i> , (January 19, 2001)	4, 27, 37-38, 49
<i>Hallstrom v. Tillamook County</i> , 493 U.S. 20 (1989)	x, 34
<i>Harrison v. PPG Industries, Inc.</i> , 446 U.S. 578, 592 (1980)	x, 34
<i>Louisiana Pub. Serv. Comm’n v. Federal Communications Comm’n</i> , 476 U.S. 355 (1986)	4, 29, 44
<i>Malone v. White Motor Corp.</i> , 345 U.S. 497 (1978).....	28
<i>Maryland v. Louisiana</i> , 451 U.S. 725 (1981)	28
<i>McCulloch v. Maryland</i> , 4 Wheat. 316 (1819)	28
<i>Morales v. Trans World Airlines, Inc.</i> , 504 U.S. 374 (1992).....	30, 31
<i>NLRB v. Federbush Co.</i> , 121 F.2d 954 (2d Cir. 1941).....	33
<i>Ragsdale v. Wolverine Worldwide, Inc.</i> , 218 F.3d 933 (8 th Cir. 2000).....	31, 47-48
<i>Reno v. ACLU</i> , 117 S.Ct. 1329 (1997)	8
<i>Retail Clerks v. Schermerhorn</i> , 375 U.S. 96 (1963).....	29
<i>Reves v. Ernst & Young</i> , 507 U.S. 170 (1993)	30
<i>Rice v. Santa Fe Elevator Corp.</i> , 331 U.S. 218 (1947)	28
<i>Robinson and Gustafson v. Alloyd Co</i> , 513 U.S. 561 (1995)	39
<i>Russello v. United States</i> , 464 U.S. 16 (1983).....	41
<i>Salinas v. United States</i> , 522 U.S. 52 (1997).....	x, 1, 3, 22-23, 26-27, 35-36, 49

<i>Skidmore v. Swift & Co.</i> , 323 U.S. 134 (1944)	48
<i>Trainmen v. Baltimore & Ohio R. Co.</i> , 331 U.S. 519 (1947)	34, 39
<i>United States v. Albertini</i> , 472 U.S. 675 (1985)	36
<i>United States v. Gonzales</i> , 520 U.S. 1 (1997).....	x, 33, 38, 41
<i>United States v. James</i> , 478 U.S. 597 (1986).....	34
<i>United States v. Turkette</i> , 452 U.S. 576 (1981)	30, 34

Administrative Orders:

<i>In the Matter of Federal-State Joint Board on Universal Service, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge</i> , CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, <i>Fourth Order On Reconsideration</i> , FCC 97-420 (rel. December 30, 1997)	40
<i>Instructions for Completing Universal Service Worksheet</i> , FCC Form 457 (rel. March 4, 1998).....	40
<i>In the Matter of Enforcement of Section 275(A)(2) of the Communications Act of 1934, As Amended By the Telecommunications Act of 1996, Against Ameritech Corporation</i> , 13 FCC Rcd 19046 (September 25, 1998)	32
<i>In the Matter of Federal-State Joint Board on Universal Service</i> , CC Docket No. 96-45, <i>Report to Congress</i> , FCC 98-67 (rel. April 10, 1998).....	39
<i>In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers= Use of Customer Proprietary Network Information and Other Customer Information</i> , CC docket No. 96-115, <i>Second Report and Order and Further Notice of Proposed Rulemaking</i> , FCC 98-27 (rel. February 26, 1998)	41
<i>In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996</i> , CC Docket No. 96-98, <i>First Report and Order</i> , FCC 96-325 (rel. August 8, 1996)	8-9

In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996: Amendment of the Commission’s Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, Report and Order, FCC 98-20, 1998 WL 46987, (rel. February 6, 1998).....37

In re Missouri Municipal League, et al., FCC 00-443, 2001 WL 28068 (rel. January 12, 2001) (“Missouri Order”) passim

In the Matter of The Public Utility Commission of Texas CCBPol 96-13 et al., Memorandum Opinion and Order, FCC 97-346 (rel. October 1, 1997)9, 21

In the Matter of Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling, CCBPol 97-1, Memorandum and Order, FCC 97-336, ¶ 40 (rel. September 9, 1997).....46

Constitution and Federal Statutes:

U.S. Constitution, Art. VI., Cl. 2.....28

Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 *et. seq.* (amending the Communications Act of 1934) passim

Public Utility Holding Company Act (PUHCA) of 1935 15, 17, 42

47 U.S.C. § 153 (40)20

47 U.S.C. § 222.....40

47 U.S.C. § 224 19, 37, 40-41

47 U.S.C. § 25140

47 U.S.C. § 253 passim

47 U.S.C. § 25440

47 U.S.C. § 402(a)ix

28 U.S.C. § 2342.....ix

28 U.S.C. § 2343.....	ix
5 U.S.C. § 706(2)(A)	ix

Federal Legislative Materials:

141 Cong. Rec. at S.7906 (June 7, 1995)	17-18
141 Cong. Rec. at S8174 (June 12, 1995)	18
S. Rep. No. 105-25, Part I, 105th Cong. 1st Sess. (1997)	7
S. Rep. No. 103-367, 103d Cong., 2d Sess., 1994 WL 509063 (1994).....	12-16
Hearings on S.1822 Before the Senate Committee on Commerce, Science and Transportation, 103d Cong., 2d Sess. (1994) A&P HEARINGS S.1822 (Westlaw).....	10-11
H. R. Rep. No. 104-230, 10 th Cong., 2d Sess. (1996)	18

State Statutes:

Revised Statutes of Missouri Section 392.410(7) (HB 620)	passim
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Miscellaneous:

American Public Power Association, <i>Straight Answers to More False Charges Against Public Power</i>	17
FCC’s Brief of Respondents in <i>City of Abilene v. FCC</i>	4, 10, 22
FCC’s Brief of Respondents in <i>Gulf Power v. FCC</i>	37-38
FCC’s Petition for Certiorari in <i>Gulf Power v. FCC</i>	27, 38
R. Rudolph and S. Ridley, <i>Power Struggle: The Hundred Year War Over Electricity</i> (1986).....	15
Webster=s New International Dictionary (2d ed. 1957)	33

**PRELIMINARY STATEMENT OF SUBJECT
MATTER JURISDICTION AND APPELLATE JURISDICTION**

On January 12, 2001, acting pursuant to its jurisdiction under Section 253 of Telecommunications Act, 47 U.S.C. § 253, the FCC released a final agency order denying preemption of Section 392.410(7) of the Revised Statutes of Missouri. On February 12, 2001, the Petitioners timely filed a Petition for Review by this Court pursuant to 47 U.S.C. § 402(a), 5 U.S.C. § 706(2)(A), 28 U.S.C. §§ 2342 and 2344, and Rule 15(a) of the Federal Rules of Appellate Procedure. Venue lies in this Circuit pursuant to 28 U.S.C. § 2343.

STATEMENT OF ISSUES PRESENTED

Section 253(a) of the Telecommunications Act provides that “No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of *any entity* to provide any interstate or intrastate telecommunications service” (emphasis added). Section 253(d) of the Telecommunications Act of 1996 states that the FCC “shall” preempt any statute that creates a barrier to entry in violation of Section 253(a). Section 392.410(7) of the Revised Statutes of Missouri prohibits public entities from providing or facilitating the provision of all telecommunications services, with certain limited exceptions.

1. Did the FCC err in failing to find that Congress’s use the modifier “any” in an expansive, unrestricted way in Section 253(a) required the agency to give the word modified – “entity” – its broadest possible scope in the absence of any indication

elsewhere in the text or legislative history of the Telecommunications Act requiring a narrower interpretation?

Salinas v. United States, 522 U.S. 52, 57 (1997)

United States v. Gonzales, 520 U.S. 1, 5 (1997).

Freitag v. Commissioner of Internal Revenue, 501 U.S. 868, 874-75 (1991).

Harrison v. PPG Industries, Inc., 446 U.S. 578, 592 (1980).

2. Did the FCC misapply the “plain statement” standard of *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1992) by failing to appreciate that when Congress uses the modifier “any” in an expansive, unrestricted way and neither the statute nor the legislative history compels a narrowing construction, Congress satisfies the “plain statement” standard, *Salinas v. United States*, 522 U.S. 52, 57 (1997).

3. Must the FCC preempt Section 392.410(7) of the Revised Statutes of Missouri because it obstructs the federal objectives of the Act?

Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843 n.9 (1984).

Ragsdale v. Wolverine Worldwide, Inc., 218 F.3d 933, 936 (8th Cir. 2000).

Food and Drug Administration v. Brown & Williamson Tobacco Corp., 520 U.S. 120, 133 (2000).

Alarm Industry Communications Council v. Federal Communications Comm’n, 131 F.3d 1066 (D.C. Cir. 1997).

STATEMENT OF THE CASE

The Supreme Court has repeatedly held that when Congress uses the modifier “any” in an expansive, unrestricted way in a statute, courts must credit Congress with understanding and intending to do what it has done and must give the word or phrase modified its broadest possible scope, unless a narrower construction is compelled by other language in the statute or its legislative history. In *Salinas v. United States*, 522 U.S. 52 (1997), the Court unanimously confirmed that this rule of statutory construction applies even in cases involving federal preemption of “traditional” state powers, in which court’s must apply the heightened “plain statement” standard of *Gregory v. Ashcroft*, 501 U.S. 452 (1992). Specifically, *Salinas* held that Congress’s use of the modifier “any” creates no ambiguity about its intent and is sufficient to satisfy *Gregory*’s “plain statement” standard.

In the *Missouri Order*, the FCC unanimously found that the Missouri barrier to municipal entry is unwise, unnecessary to achieve any legitimate state purpose and contrary to the Telecommunications Act’s explicit goal of opening local markets to competition. *Missouri Order* at ¶¶ 3,10,11. Three of the five FCC commissioners filed separate statements to underscore these points. The FCC concluded, however, that *Gregory* precludes it from preempting the Missouri law because the term “any entity” in Section 253(a) does not unmistakably compel the agency to protect public entities, as distinguished from “independent entities subject to state regulation,” from state barriers to entry. *Id.* at ¶ 9. The FCC also stated that it was bound by *City of Abilene, Texas v.*

FCC, 164 F.3d 49 (D.C. Cir. 1999), in which the U.S. Court of Appeals for the District of Columbia Circuit had upheld a prior FCC decision not to preempt a Texas law similar to the Missouri law at issue here.

As this Court will observe when it reads the *Missouri Order* and *Abilene*, the FCC and the D.C. Circuit reached the wrong conclusion because they asked the wrong question. Given Congress's use of the term "any entity" in an unqualified way in Section 253(a), the FCC and the D.C. Circuit should have asked, "Is there any language elsewhere in the statute or legislative history that would compel a narrowing construction of the term "any entity"? Instead, they asked, "Is there anything in the statute or legislative history that would compel a broad interpretation of these words?" As a result, even though the FCC and the D.C. Circuit found nothing elsewhere in the statute or legislative history that even hinted that Congress intended the term "any entity" to be read restrictively, much less something that compelled the conclusion that this was Congress's intent, they nevertheless concluded that *Gregory* required them to deny preemption.

In *Harrison v. PPG Industries, Inc.*, 446 U.S. 578 (1980), the Supreme Court held that the term "any other final action" must be interpreted broadly, and it observed that "it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute. In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark." *Id.*, 446 U.S. at 592. That is precisely the mistake that the FCC and the D.C. Circuit made here. In effect, the FCC

and the D.C. Circuit rejected the *Salinas* Court’s teaching that the term “any entity” should *itself* be viewed as a “plain statement” and instead insisted on finding a *second*, independent “plain statement” that would *confirm* that Congress really meant what it said when it used the term “any entity.” The D.C. Circuit’s failure to apply or even mention *Salinas* is especially noteworthy and troubling because the Supreme Court decided *Salinas* while the *Abilene* case was on appeal and the Abilene petitioners relied heavily on that case in their reply brief and oral argument.

The FCC also made three other significant errors. First, despite recognizing that applying Section 253(a) to public entities would advance the purposes of the Telecommunications Act and, conversely, that excluding them would frustrate those purposes, the FCC gave no weight to these findings in interpreting Section 253(a). Rather, the opinion of the FCC and the separate statements of the three commissioners indicate that the FCC erroneously believed that it could not consider the purposes of the Act because its hands were tied by *Abilene*. *Missouri Opinion* at ¶ 10; Separate Statements of Commissioners Kennard, Tristani and Ness. The FCC failed to appreciate that the purposes of the Act is one of the traditional tools of statutory construction that courts and agencies *must* take into account in interpreting the statute.¹ Furthermore, the FCC also failed to recognize that its findings compel the conclusion that Section 392.410(7) of the Revised Statutes of Missouri (HB 620) must be preempted because it creates an “outright or actual conflict between federal and state law, where compliance

¹ Notably, the D.C. Circuit itself failed to consider the purposes of the Act in *Abilene*.

with both federal and state law is in effect physically impossible” and “stands as an obstacle to the accomplishment and execution of the full objectives of Congress.” *Louisiana Pub. Serv. Comm’n Federal Communications Comm’n*, 476 U.S. 355, 368-69 (1986).

Second, in its brief to the *Abilene* court, the FCC conceded that the legislative history of Section 253 is replete with evidence that Congress intended the term “any entity” to cover municipal electric utilities, but the FCC insisted that this legislative history was irrelevant to municipalities, such as Abilene, that do not operate their own electric utilities.² The court accepted this argument, finding that the legislative history relates to an issue not before the court – “whether public utilities are entities within § 253(a)’s meaning.” *Abilene*, 164 F.3d at 53 n.7. When it issued the *Missouri Opinion*, however, the FCC interpreted the legislative history more narrowly – and erroneously. In particular, the FCC completely ignored the compelling proof in the legislative history that Congress intended to treat all electric utilities, whether publicly or privately owned, the same for the purposes of the Act.

Third, the FCC’s reading of “any entity” in the *Missouri Order* is also irreconcilable with the position that the agency is currently taking before the Supreme Court in another case, *Gulf Power, Inc. v. FCC*, 208 F.3d 1263 (11th Cir. 2000), *cert. granted*, (January 19, 2001). In that case, the FCC insists, as it previously insisted to the

² The relevant pages of the FCC’s brief are included in the Appendix at Attachment A. Note, the parties have agreed to file separate appendices pursuant to Circuit Rule 30.A.

Eleventh Circuit, that when Congress used the term “any” in an unrestrictive way various sections of the Telecommunications Act, it precluded the FCC and the courts from imposing limitations that Congress did not impose itself.

STATEMENT OF FACTS

1. The Petitioners’ Stake in this Proceeding

When the electric power industry emerged a century ago, the private sector focused on the most densely populated and lucrative markets and literally left most of rural America in the dark. In response, residents of thousands of communities that were not large or profitable enough to attract private power companies created their own electric utilities, recognizing that electrification was critical to their economic development and survival. Public power systems also emerged in several large cities, where residents believed that competition was necessary to lower prices, raise the quality of service, or both.

Today, the patterns that marked the evolution of the electric power industry are repeating themselves in the telecommunications industry. As private telecommunications providers focus on large, lucrative markets, many smaller communities are at risk of falling behind in obtaining the full benefits that access to advanced telecommunications services can bring in the Information Age. These benefits include the ability to attract new businesses and hold on to existing ones, the ability to provide promising educational and employment opportunities, the ability to improve the quality and reduce the costs of health care, and the ability to achieve a high quality of life.

The Petitioners and the communities they serve believe that they must rely on themselves again if they are to survive and thrive in this century. They believe that telecommunications are as basic to modern life as electricity, water and roads, and that they must develop their own facilities to ensure that their residents will obtain prompt and affordable access to advanced telecommunications services. Furthermore, as the FCC itself found in ¶ 10 of the *Missouri Order*, communities that operate their own electric utilities have the potential to become “major competitors in the telecommunications industry” and can “further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities.”

1. The Missouri Barrier to the Provision of Municipal Telecommunications Services or Facilities

On August 28, 1997, the 89th General Assembly of Missouri enacted House Bill 620 to repeal and replace Section 392.410 of the Revised Statutes of Missouri. The portion of the new Section 392.410 that applies to municipalities and municipal electric utilities reads as follows:

No political subdivision of this state shall provide or offer for sale, either to the public or to a telecommunications provider, a telecommunications service or telecommunications facility used to provide a telecommunications service for which a certificate of service authority is required pursuant to this section. Nothing in this subsection shall be construed to restrict a political subdivision from allowing the nondiscriminatory use of its rights-of-way including its poles, conduits, ducts and similar support structures by telecommunications providers or from providing telecommunications services or facilities:

- (1) For its own use;
- (2) For 911, E-911 or other emergency services;
- (3) For medical or educational purposes;

- (4) To students by an educational institution;
- (5) Or Internet type services.

The provisions of this subsection shall expire on August 28, 2002.

Section 392.410(7).

With certain exceptions, providers of telecommunications services are generally required to obtain certificates of service authority. HB 620 thus prohibits municipalities and municipal electric utilities either from providing such services themselves or from making their facilities available to other persons for use in competing with incumbent providers.

Furthermore, for municipal electric utilities in Missouri and elsewhere throughout the United States, this is a time of profound change as the electric power industry undergoes restructuring and deregulation. Congress and many states are now struggling to develop approaches that would preserve the competitive balance in the electric power industry from which the Nation has benefited greatly for decades.³ With investor-owned and cooperatively-owned electric utilities free to enter into new lines of business, form alliances with telecommunications providers of their choice, and offer consumers “one-stop shopping” for energy, communications and other services, HB 620 threatens to place

³ Congress’s concern about preserving healthy competition in the electric power industry is reflected in the statements of various members of Congress in a hearing on the role of public power in a competitive environment. S. Rep. No. 105-25, Part I, 105th Cong. 1st Sess. 85-92 (1997), Appendix at B.

municipal electric utilities at a severe competitive disadvantage in the electric power field.⁴

3. The Telecommunications Act

On February 8, 1996, the President signed the Telecommunications Act of 1996 into law. As the Supreme Court has observed, the Act was “an unusually important legislative enactment.” *Reno v. ACLU*, 117 S.Ct. 1329, 1338 (1997). The new law “fundamentally” changed telecommunications regulation from a paradigm that encouraged monopolies to one that seeks to foster robust competition in all telecommunications markets.⁵ The FCC has succinctly described the local competition goals of the Act as follows:

In this rulemaking and related proceedings, we are taking the steps that will achieve the pro-competitive, deregulatory goals of the 1996 Act. The Act directs us and our state colleagues to remove not only statutory and regulatory impediments to competition, but economic and operational impediments as well. We are directed to remove these impediments to competition in *all* telecommunications markets, while also preserving and advancing universal service in a manner fully consistent with competition.

...

[U]nder the 1996 Act, the opening of one of the last monopoly bottleneck strongholds in telecommunications -- the local exchange and exchange access markets -- to competition is intended to pave the way for

⁴ Section 103 of the Telecommunications Act and the FCC’s implementing orders and regulations, 47 C.F.R. § 1.4000 et seq., 61 Fed. Reg. 52887 (October 9, 1996), have effectively eliminated the constraints that the Public Utility Company Holding Company Act of 1935 had previously imposed on the ability of the major investor-owned electric utilities to provide telecommunications services. At the same time, rural electric cooperatives are not constrained by the Missouri law.

⁵ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *First Report and Order*, FCC 96-325, ¶1 (rel. August 8, 1996).

enhanced competition in *all* telecommunications markets, *by allowing all providers to enter all markets*. The opening of *all telecommunications markets to all providers* will blur traditional industry distinctions and bring new packages of services, lower prices and increased innovation to American consumers. *The world envisioned by the 1996 Act is one in which all providers will have new competitive opportunities as well as new competitive challenges*.

Id., ¶¶ 3, 4 (emphasis added).

In developing the Act, Congress recognized that strong measures were necessary to encourage and assist potential providers of telecommunications services to enter into competition with entrenched incumbent local exchange carriers. Thus, Congress “armed” the FCC with “powerful tools to dismantle the legal, operational and economic barriers that frustrated competitive entry in the past.”⁶ Recognizing that incumbents could thwart the national policies of the Act at the state and local level, where they have historically had enormous political influence, Congress expressly prohibited state and local governments from impairing the ability of *any* potential provider to enter *any* telecommunications market:

Section 253 – Removal of Barriers To Entry

(a) In General - No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of *any entity* to provide any interstate or intrastate telecommunications service.

47 U.S.C. § 253(a) (emphasis added). In enacting Section 253(a), the 104th Congress adopted *verbatim* the operative language of the preemption provision on which the 103rd

⁶ *In the Matter of the Public Utility Commission of Texas*, FCC 97-346, 1997 WL 603179 (rel. Oct. 1, 1997) ¶ 2 (“*Texas Order*”).

Congress had reached consensus before recessing – Section 230(a)(1) of S.1822. Thus, as the FCC acknowledged in *Abilene*, the legislative history of that provision is an integral part of the legislative history of Section 253.⁷

a. The 103rd Congress

During the 103rd Congress, the American Public Power Association (“APPA”) and other representatives of public power utilities urged Congress to do everything possible to encourage such entities to participate actively in the development of what was then called the “National Information Infrastructure.” APPA advised Congress that some of its members were willing to provide telecommunications services themselves and others were willing to make their telecommunications infrastructure and facilities available to potential competitors of incumbent providers, if doing so would not subject them to the burdensome requirements applicable to telecommunications carriers. APPA appealed to Congress to accommodate both groups.

At a Senate hearing on S.1822, William J. Ray presented written and oral testimony on behalf of APPA.⁸ This testimony acquainted Congress with the remarkable accomplishments of the municipal electric utility of Glasgow, Kentucky, which had brought its small rural community into the Information Age, far exceeding the achievements of the private sector in many larger communities. Mr. Ray also testified

⁷ Excerpt From FCC’s Brief in *Abilene*, Appendix at A.

⁸ Hearings on S. 1822, The Communications Act of 1994, Before the Senate Committee on Commerce, Science and Transportation, 103d Cong, 2d Sess., A&P Hearings S.1822 (Westlaw) at 351-61 (“Hearings on S.1822”), Appendix at C.

that, with appropriate incentives, some public power utilities would make their telecommunications infrastructure and facilities available to telecommunications providers and other public power systems would follow in Glasgow's footsteps and provide competitive telecommunications services themselves. Shortly after Mr. Ray completed his testimony, Senator Trent Lott (R-MS), a Senate manager of the Telecommunications Act and now the Senate Majority Leader, observed "I think the rural electric associations, the municipalities, and the investor-owned utilities, are all positioned to make a real contribution in this telecommunications area, and I do think it is important that we make sure we have got the right language to accomplish what we wish accomplished here."⁹

APPA's appeals were successful. To promote competition and diversity in the telecommunications industry, the Senate crafted both the key definitions and the preemption provisions of the S.1822 in ways that encouraged public power utilities to become involved in the full spectrum of telecommunications activities. Rather than treat providers of comparable services differently, S.1822 embraced an activity-based approach that defined various communications services and subjected all providers of the telecommunications services, including utilities, to the same benefits and the same burdens. In particular, in summarizing the major features of the bill, the Senate Report on S.1822 noted (with our emphasis added):

5. Entry by electric and other utilities into telecommunications

⁹ Hearings on S.1822 at *378-79, Appendix at D.

S. 1822 allows *all* electric, gas, water, stem [sic], and other utilities to provide telecommunications (section 302 of S. 1822, new section 230(a)).¹⁰

Notably, the reference to “new Section 230(a)” was to the preemption provision of S.1822.

The Senate Report on S.1822 also assured public power utilities that were considering making their telecommunications infrastructure and facilities available to telecommunications providers that doing so would not subject the utilities to treatment as telecommunications carriers. At the same time, the Report assured public power utilities that were considering crossing over the line and becoming providers of telecommunications services themselves that they would not merely be subject to the burdens of the Act but also to the full panoply of the benefits that it provided.

Specifically, the Report stated that S.1822 defined the term “telecommunications service” as “the direct offering of telecommunications for profit to the general public or to such classes of users as to be effectively available to the general public regardless of the facilities used to transmit such telecommunications services.”¹¹ In explaining this definition, the Report used the term “entities” to refer to all potential providers of “telecommunications service,” whether public or private:

The definition of “telecommunication service” in new subsection (jj) was broadened from the version in S.1822 as introduced to ensure that *all entities* providing service equivalent to the telephone exchange services provided by the existing telephone companies are brought under title II of the 1934 Act.

¹⁰ *S. Rep. No. 103-367*, 103d Cong., 2d Sess. 22 (1994), 1994 WL 509063, Appendix at E.

¹¹ *Senate Report on S. 1822* at 122.

This expanded definition ensures that these competitors will make contributions to universal service. . . .¹²

In the following paragraph, the Report illustrated the application of these principles through an example involving electric utilities:

New subsection (kk) provides a definition of “telecommunications carrier” as *any* provider of telecommunications services, except for hotels, motels, hospitals, and other aggregators of telecommunications services. *For instance, an electric utility that is engaged solely in the wholesale provision of bulk transmission capacity to carriers is not a telecommunications carrier. A carrier that purchases or leases the bulk capacity, however, is a telecommunications carrier to the extent it uses that capacity, or any other capacity, to provide telecommunications services.* Similarly, a provider of information services or cable services is not a telecommunications carrier to the extent it provides such services. *If an electric utility, a cable company, or an information services company also provides telecommunications services, however, it will be considered a telecommunications carrier for those services.*¹³

This passage did not distinguish between publicly-owned and privately-owned electric utilities, and on the next page, the Report confirmed that no such distinction was intended. There, discussing Section 230(a)(1), the preemption provision of S.1822, the Report made clear that S.1822 applied to public power utilities as well as to other electric utilities. Thus, in explaining one of the exceptions to Section 230, the Report stated:

Paragraph (2) also states that *States or local governments* may make their own telecommunications facilities available to certain carriers and not others so long as making such facilities available is not a telecommunications service. This provision essentially allows a *State or local government* to discriminate not in the regulations it imposes, but in its offering of State-owned or local-owned [facilities to] telecommunications carriers.¹⁴

¹² *Senate Report on S.1822* at 56 (emphasis added).

¹³ *Senate Report on S.1822* at 54-55 (emphasis added).

¹⁴ *Senate Report on S.1822*, at 56 (emphasis added).

The Report then gave another example that left no room for doubt that Congress had public power utilities in mind at the time that it developed the precursor of Section 253(a):

For instance, some State or local governments own and operate municipal energy utilities with excess fiber optic capacity that they make available to telecommunications carriers. Such a municipal utility may not have sufficient capacity to make it available to all carriers in the market. This provision clarifies that *State or local governments may sell or lease capacity* on these facilities to some entities and not others without violating the principle of nondiscrimination. Since the offering of telecommunications capacity alone is not a “telecommunications service,” the nondiscrimination provisions of this section would not, in any case, apply to the offering of such capacity.¹⁵

Taken together, and especially when viewed in the context of the issues that APPA had raised with Congress and the competitive purposes of the Act, these passages evidence that (1) Congress understood the term “entities” to cover *all* public and private providers of “telecommunications service,” including electric utilities; (2) Congress understood “electric utilities” to include “State or local” energy utilities; and (3) Congress intended that, if State or local electric utilities chose to cross the line from leasing infrastructure and facilities to providing telecommunications services themselves – as Congress knew that Glasgow, Kentucky, had done – they would be subject to the same obligations and benefits as the Act extended to all other carriers of telecommunications service. One obligation included the duty to contribute funds to the universal service program, and one benefit included receiving protection from state barriers to entry.

¹⁵ *Senate Report on S.1822*, at 56 (emphasis added).

Congress's discussion of the role of utilities under the Act reinforces these conclusions. As the Report notes, while working on the definitions and preemption provisions of S.1822, Congress realized that a potentially significant class of electric utilities might not be able to join all other electric utilities in providing telecommunications services – the electric utilities that were subject to the Public Utility Holding Company Act (PUHCA) of 1935.¹⁶ Congress responded by making clear in the Report that it intended to authorize “*all* electric, gas, water, stem [sic], and other utilities to provide telecommunications” (emphasis added),¹⁷ including electric utilities subject to PUHCA, for the following reasons:

First, *electric utilities in general have extensive experience in telecommunications operations. Utilities operate one of the Nation's largest telecommunications systems-much of it using fiber optics.* The existence of this system is an outgrowth of the need for real time control, operation and monitoring of electric generation, transmission and distribution facilities for reliability purposes. *Within the utility world, registered holding companies are some of the more prominent owners and operators of telecommunications facilities. For example, one registered holding company, the Southern Co., has approximately 1,700 miles of fiber optics cables in use, with several hundred more miles planned.*

¹⁶ PUHCA had been enacted in response to a broad range of abusive practices by investor-owned electric utilities controlled by certain major holding companies. As one commentator has colorfully observed, these utilities had established holding companies that managed “fantastic aggregates of geographically and socially unrelated systems scattered from hell to hallelujah,” including real estate companies, water companies, street and railroad ventures, and fuel and engineering firms, ranging from the Philippines to central and southern Europe and South America. R. Rudolph and S. Ridley, *Power Struggle: The Hundred Year War Over Electricity* 52 (1986). In PUHCA, Congress responded, in part, by requiring these holding companies to register under the Act and to refrain from making investments or providing services in areas outside the electric power industry.

¹⁷ *Senate Report on S.1822* at 22.

Second, *electric utilities are likely to provide economically significant, near-term applications* such as automatic meter reading, remote turn on/turn off of lighting, improved power distribution control, and most importantly, conservation achieved through real-time pricing.

With real-time pricing, electric customers would be able to reprogram major electricity consuming appliances in their homes (such as refrigerators and dishwashers) to operate according to price signals sent by the local utility over fiber optic connections. Electricity costs the most during peak demand periods. Since consumers tend to avoid higher than normal prices, the result of real-time pricing would be significant “peak shaving”-reduction in peak needs for electric generation. Because electric generation is highly capital intensive, reductions in demand can become a driving force for basic infrastructure investment in local fiber optic connections. Registered holding companies are leaders in the development of real-time pricing technology.

Third, registered holding companies have sufficient size and capital to be effective competitors. Collectively, registered companies serve approximately 16 million customers-nearly one in five customers served by investor-owned utilities. Three registered companies who have been active in the telecommunications field, Central and South West, Entergy, and Southern Co., have contiguous service territories that stretch from west Texas to South Carolina.¹⁸

The passage quoted above confirms that Congress had a profound understanding of the electric power industry, was acutely aware that electric utilities of all kinds were well-situated to help the Nation achieve its telecommunications goals, and intended to treat all members of the “utilities world” alike. Furthermore, as Congress observed, registered holding companies and their electric utility subsidiaries were potentially significant players in the telecommunications field because they collectively served approximately 16 million customers in 1994. During the same period, public power utilities collectively

¹⁸ *Senate Report on S.1822* at 10-11 (emphasis added).

served approximately 35 million customers.¹⁹ The Act’s legislative history demonstrates that Congress was as intent on eliminating barriers of entry for state and local government electric utilities as it was for registered holding companies.

b. The 104th Congress

The 103rd Congress ended without passage of new telecommunications legislation. Congress still had much to do in drafting other areas of law, and significant issues remained to be resolved concerning the effect of the Act’s preemption provisions on the ability of local governments to manage their rights-of-way. But Congress’s work on what was to become Section 253(a) of the Telecommunications Act was essentially done. As a result, there was not much additional legislative history on this issue. What there was, however, corroborated that the 104th Congress understood and intended that the term “any entity” apply to local governments, particularly those that operate their own municipal electric utilities.

For example, during the floor debates in the Senate on June 7, 1995, Senator Lott rose to summarize the major features of the Act. Two of his statements are particularly relevant here. First, Senator Lott explained that PUHCA was being amended “to allow registered electric utilities to join with *all other utilities* in providing telecommunications services, providing the consumer with smart homes, as well as smart highways.”²⁰ Second, Senator Lott observed,

¹⁹ American Public Power Association, *Straight Answers to More False Charges Against Public Power*, <http://www.appanet.org>.

²⁰ *Cong. Rec.* S7906 (June 7, 1995) (emphasis added), Appendix at F.

In short, [the Act] constructs a framework where *everybody* can compete *everywhere* in *everything*. It limits the role of Government and increases role of the market. It moves from the monopoly policies of the 1930s to the market policy of the future.

Toward that end, the removal of all barriers to and restrictions from competition is extremely important, and it is the primary objective, and I believe, the accomplishment of this legislation

Id (emphasis added).

In a colloquy on the Senate floor one week later, Senator Kempthorne (R-ID) and Senator Hollings (D-SC), the sponsor of S.1822, clarified for the record that the 104th Congress understood that Section 253(a) originated in S.1822 and had “no problem” with affording Section 253(a) the same scope as its predecessor in S.1822.²¹ The 104th Congress’s understanding that Section 253(a) applied indiscriminately to utilities of all kinds is also reflected in the final Joint Explanatory Statement of the Committee of Conference on the bills that became the Telecommunications Act:

New section 253(b) clarifies that nothing in this section shall affect the ability of a State to safeguard the rights of consumers. In addition to consumers of telecommunications services, the conferees intend that this includes the consumers of electric, gas, water or steam utilities, *to the extent such utilities choose to provide telecommunications services*. Existing State laws or regulations that reasonably condition telecommunications activities of a monopoly utility and are designed to protect captive utility ratepayers from the potential harms caused by such activities are not preempted under this section. However, *explicit prohibitions on entry by a utility into telecommunications are preempted under this section*.²²

²¹ 141 Cong. Rec. at S8174 (June 12, 1995), Appendix at G.

²² H.R. Rep. No. 104-230, 104th Cong., 2d Sess. (1996) (emphasis added), Appendix at H.

Referring to this passage, its author, Congressman Dan Schaefer (R-CO) confirmed in a letter to former FCC Chairman Reed Hundt that “Congress recognized that utilities may play a major role in the development of facilities-based local telecommunications competition,” that “any prohibition on their provision of this service should be preempted,” and that the FCC “must reject any state and local action that prohibits entry into the telecommunications business by any utility, *regardless of the form of ownership or control.*” Appendix at I (emphasis added). Subsequently, many other members of Congress made the same point to the FCC. Appendix at J.

c. Section 703 of the Telecommunications Act

At the same time that Congress enacted Section 253, it made extensive revisions to the pole attachment requirements in Section 224 of the Communications Act of 1934. With these actions, Congress showed that it knew how to treat local governments, political subdivisions and instrumentalities as inseparable from their State governments, yet Congress did so only for the purposes of Section 224 and not for the purposes of Section 253.

Specifically, in Section 703(1) of the Telecommunications Act, Congress amended the definition of a “utility” in Section 224(a)(1) of the 1934 Act to include “a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications.” This definition would have applied to federal, state and local government entities and to cooperatives and railroads, which had all been exempt from

federal pole attachments requirements since 1978. Congress avoided this result by stating in Section 224(a)(1) that, “as used in this section,” the term “utility” does not include “any railroad, any person who is cooperatively organized, or any person who is owned by the Federal Government or any State.” In Section 224(a)(3), Congress also defined the term “State,” solely for the purposes of Section 224, as “any State, territory, or possession of the United States, the District of Columbia, *or any political subdivision, agency or instrumentality thereof* “ (emphasis added).²³ Notably, Congress could easily have imposed similar limitations on the term “entity” in Section 253(a), but it conspicuously did not do so.

4. The Texas Litigation

In 1995, the Texas legislature enacted a law that prohibited the municipalities and municipal electric utilities of Texas from providing certain telecommunications services either directly or indirectly. In November 1995, the municipal electric utility of San Antonio agreed to lease one half of its fiber optic strands to ICG Telecom Group, a privately-owned telecommunications provider that intended to use the fiber to compete with the incumbent telephone company in San Antonio. In May 1996, the Attorney General of Texas issued an opinion letter finding that this agreement violated the Texas law. ICG promptly petitioned the FCC to preempt the Texas law pursuant to Section 253 of the Telecommunications Act. Shortly afterward, the City of Abilene filed a second

²³ For general purposes, 47 U.S.C. § 153(40) provides that “The term “State” includes the District of Columbia and the Territories and possessions.”

petition asking the FCC to preempt the Texas law as applied to Texas municipalities, such as Abilene, that do not operate their own electric utilities.

After waiting more than a year for an FCC decision, ICG withdrew its petition, terminated its agreement with San Antonio's electric utility, and turned its attention to other markets. As a result, when the FCC finally issued its decision in October 1997, it limited its holding to the facts that Abilene had presented, stating that "we do not decide at this time whether section 253 bars the state of Texas from prohibiting the provision of telecommunications services by a municipally-owned electric utility." *Texas Order*, & 179. Invoking *Gregory v. Ashcroft*, the FCC observed that it could preempt a state's exercise of the "fundamental" and "traditional" state power to regulate its own political subdivisions only if Congress had made a "plain statement" to that effect in the statute or its legislative history. Finding that Section 253 did not go far enough in furnishing such a statement, the FCC upheld the Texas statute. *Texas Order*, ¶ 173.

Abilene appealed the FCC's decision to the United States Court of Appeals for the District of Columbia Circuit. In its opposing brief, the FCC conceded that the legislative history of Section 253(a) includes that of its predecessor in S.1822 and that the history of both the 103rd and 104th Congresses is replete with evidence that Congress intended to protect public power utilities from state barriers to entry. The FCC insisted, however, that the Court should not consider this legislative history because it applied only to municipal electric utilities, whose rights were not before the Court, and not to municipalities, such as Abilene, that do not operate their own electric utilities. Here are the FCC's own words:

The legislative history cited by petitioners does not clarify whether Congress intended for Section 253 to preempt State laws that regulate municipalities. See Pet. Br. 10-17. *Most of the legislative materials quoted by petitioners focus on the provisions of telecommunications service by utilities*^[8] These materials are not pertinent to this case. In the Order challenged by petitioners, the Commission expressly declined to decide “whether section 253 bars the State of Texas from prohibiting the provision of telecommunications services by a municipally-owned electric utility.” *Order* ¶ 179.

[8] See S. Rep. No.367, 103d Cong., 2d Sess. 55 (1994 Senate bill, whose preemption provision for removing entry barriers formed the basis for section 253, defined “telecommunications carrier” to include “an electric utility” that “provides telecommunications services”); Conference Report 127 [on the Telecommunications Act] (“explicit prohibitions on entry by a utility into telecommunications are preempted” under Section 253; Letter from Congressman Dan Schaefer to FCC Chairman Reed Hundt (section 253 requires the Commission to “reject any state or local action that prohibits entry by any utility, regardless of the form of ownership or control”); Letter from Senator J. Robert Kerry to FCC Chairman Reed Hundt (by using the term “any entity” in section 253, “Congress intended to give entities of all kinds, including publicly-owned utilities, the opportunity to enter these markets”).

FCC Abilene Brief, Appendix at A.

While the Abilene appeal was pending before the D.C. Circuit, the Supreme Court decided *Salinas v. United States*, 522 U.S. 52 (1997). As a result, in its reply brief and at oral argument, Abilene urged the D.C. Circuit to apply the teaching of *Salinas* that Congress’s use of the modifier “any” in an expansive, unrestrictive way precludes narrowing constructions, removes any ambiguity and satisfies the *Gregory v. Ashcroft* standard unless the language or legislative history compel a different result.²⁴ But the

²⁴ See Abilene’s Reply Brief at 6-7, Appendix at K; see also discussion of *Salinas* in Section I.B.1 below.

D.C. Circuit did not apply or even mention *Salinas* in its opinion. To the contrary, in the key passage of the opinion, it analyzed the issues in a manner that was wholly inconsistent with the approach that *Salinas* prescribed:

Abilene thinks it important that [Section 253(a)] places the modifier “any” before the word “entity.” If we were dealing with the spoken word, the point might have some significance, or it might not, depending on the speaker’s tone of voice. A speaker, by heavily emphasizing the “any” in “any entity,” might be able to convey to his audience an intention to include every conceivable thing within the category of “entity.” But we are dealing with the written word and we have no way of knowing what intonation Congress wanted readers to use. All we know is that “entity” is a term Congress left undefined in the Telecommunications Act. The term may include a natural person, a corporation, a partnership, a limited liability company, a limited liability partnership, a trust, an estate, an association. *See Alarm Indus. Communications Comm. v. FCC*, 131 F.3d 1066 (D.C. Cir. 1997). Abilene maintains that it is also linguistically possible to include a municipality under the heading “entity.” But it is not enough that the statute could bear this meaning. If it were, *Gregory*’s rule of construction would never be needed. *Gregory*’s requirement of a plain statement comes into play only when the federal statute is susceptible of a construction that intrudes on State sovereignty. Other than the possibility just mentioned, Abilene offers nothing else, and certainly no textual evidence, to suggest that in using the word “entity,” Congress deliberated over the effect this would have on State-local government relationships or that it meant to authorize municipalities, otherwise barred by State law, to enter the telecommunications business.

Abilene, 164 F.3d at 52.

Aside from its failure to apply *Salinas*, the D.C. Circuit also said nothing about the structure, policies or purposes of the Act in interpreting Section 253. The court also failed to take the legislative history into account, even though APPA was a party to the case and advised the court that most of its member municipal electric utilities operated as departments or boards of their local governments. Rather, the court accepted the FCC’s distinction between Abilene and municipalities that operate their own utilities and

concluded that “the statements [from the legislative history that Abilene] quotes deal with an issue not before us -- whether public utilities are entities within § 253(a)’s meaning.” *Abilene*, 164 F.3d at 53 n.7.

5. The *Missouri Order*

In the Missouri case, the petitioners focused squarely on the issue that the FCC’s *Texas Order* and the D.C. Circuit’s *Abilene* decision had left unresolved – whether Section 253(a) bars states from erecting barriers to entry by local governments that operate their own electric utilities. The FCC unanimously found that the Missouri law was unwise and contrary to the purposes of the Telecommunications Act:

[M]unicipally-owned utilities and other utilities have the potential to become major competitors in the telecommunications industry. In particular, we believe that the entry of municipally-owned utilities can further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities. We emphasized this fact in our August 2000 report on the deployment of advanced services. In that report, we presented a case study detailing advanced services deployment in Muscatine, Iowa where the municipal utility competes with other carriers to provide advanced services to residential customers. . . . Our case study is consistent with APPA’s statements in the record here that municipally-owned utilities are well positioned to compete in rural areas, particularly for advanced telecommunications services, because they have facilities in place now that can support the provision of voice, video, and data services either by the utilities, themselves, or by other providers that can lease the facilities.

Missouri Order, ¶ 10.

The FCC also found that the Missouri law in issue is unnecessary to achieve any legitimate state purpose:

We continue to recognize, as the Commission did in the *Texas Preemption Order*, that municipal entry into telecommunications could raise

issues regarding taxpayer protection from economic risks of entry, as well as questions concerning possible regulatory bias when a municipality acts as both a regulator and a competitor. While some parties maintain that these types of advantages make it unfair to allow municipalities and municipally-owned utilities to compete with private carriers, we believe these issues can be dealt with successfully through measures that are much less restrictive than an outright ban on entry, such as through non-discrimination requirements that require the municipal entity to operate in a manner that is separate from the municipality, thereby permitting consumers to reap the benefits of increased competition.

Missouri Order, ¶ 10.

Nevertheless, the FCC upheld the Missouri law, finding that “the legal authorities that we must look to in this case compel us to deny the Missouri Municipals’ petition.”

Missouri Order, ¶ 10. Chairman William Kennard and Commissioner Gloria Tristani jointly filed a separate statement to emphasize that this result, “while legally required, is not the right result for consumers in Missouri. Unfortunately, the Commission is constrained in its authority to preempt HB 620 by the D.C. Circuit’s *City of Abilene* decision and the U.S. Supreme Court’s decision in *Gregory v. Ashcroft*.”²⁵ Similarly, Commissioner Susan Ness stated in a separate statement that

I write separately to underscore that today’s decision not to preempt a Missouri statute does not indicate support for a policy that eliminates competitors from the marketplace. In passing the Telecommunications Act of 1996, Congress sought to promote competition for the benefit of American consumers.

In the Telecommunications Act, Congress recognized the competitive potential of utilities and, in section 253, sought to prevent complete prohibitions on utility entry into telecommunications. The courts have concluded, however, that section 253 is not sufficiently clear to permit

²⁵ The separate statements of Commissioners Kennard, Tristani and Ness are appended to the end of the *Missouri Order* (see Addendum attached hereto).

interference with the relationship between a state and its political subdivisions. [Citing *Abilene*].

Nevertheless, municipal utilities can serve as key players in the effort to bring competition to communities across the country, especially those in rural areas. In our recent report on the deployment of advanced telecommunications services, we examined Muscatine, Iowa, a town in which the municipal utility was the first to deploy broadband facilities to residential consumers. The telephone and cable companies in Muscatine responded to this competition by deploying their own high-speed services, thereby offering consumers a choice of three broadband providers. It is unfortunate that consumers in Missouri will not benefit from the additional competition that their neighbors to the north enjoy.

Believing that it could not distinguish *Abilene* once it found that Missouri law treats municipal electric utilities as constituent parts of their municipalities, the FCC gave no weight to the findings quoted above in interpreting the term “any entity.” Nor did the FCC apply the approach dictated by *Salinas*. Rather, in a footnote, it read *Salinas* as holding only that a court, confronted with an ambiguous federal statute, should opt for an interpretation that does not disturb the federal-state balance. *Missouri Opinion*, at ¶ 14 n.49.

The FCC similarly found no compelling support in the legislative history for reading the term “any entity” broadly. According to the FCC, the legislative history generally does not distinguish between public and private electric utilities, except where it states that municipal electric utilities may lease their infrastructure to telecommunications providers, and therefore does not indicate clearly, or at all, whether Congress intended to preempt barriers to entry by public entities. *Missouri Order*, at ¶ 14 n.49. The FCC did not address its own prior admissions to the D.C. Circuit about the legislative history, nor

did it even mention the parts of the legislative history reflecting that Congress intended to treat all electric utilities alike under the Telecommunications Act. *Missouri Order*, at ¶ 18.

The FCC attempted to minimize the significance of the inconsistency between its interpretations of the term “any” in the *Missouri Order* and in the *Gulf Power* case. According to the FCC, the Eleventh Circuit’s decision rejecting the FCC’s interpretation in *Gulf Power* demonstrated that “any” need not necessarily be read expansively. *Missouri Order*, at ¶ 14. The FCC did not address the fact that it was simultaneously arguing to the Supreme Court that the Eleventh Circuit’s decision was clearly wrong, because it “could not have been clearer” from Congress’s unrestrictive use of the term “any” in various sections of the Telecommunications Act that Congress intended to extend pole attachment rights to “a larger class of beneficiaries...than the subclasses with which Congress was most acutely concerned.”²⁶

SUMMARY OF ARGUMENT

1. Under the rationale of *Salinas v. United States* and numerous other Supreme Court precedents cited below, this Court must interpret the term “any entity” in Section 253(a) of the Telecommunications Act as covering entities of all kinds, including public entities, unless it finds language elsewhere in the statute or the legislative history compelling the conclusion that Congress intended to exclude public entities from the definition of “any entity.” No such language exists.

²⁶ FCC’s *Petition for Certiorari* at 20, Appendix at L.

2. In interpreting Section 253(a), the Court must apply the “traditional tools of statutory construction” – the language, structure, purposes and legislative history of the Act. These tools of construction all compel the same conclusion – Congress intended the term “any entity” in Section 253(a) to cover entities of all kinds, including public entities.

3. The Missouri Law in issue, HB 620, is preempted by Section 253 of the Telecommunications Act because it prohibits public entities covered by Section 253(a) from providing telecommunications services and because it cannot be justified as “necessary” to fulfill any of the public-interest objectives specified in Section 253(b).

ARGUMENT

I. THE TERM “ANY ENTITY” IN SECTION 253(a) OF THE TELECOMMUNICATIONS ACT APPLIES TO PUBLIC ENTITIES

Article VI, Clause 2, of the Constitution provides that federal law “shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.” Ever since the Supreme Court’s decision in *McCulloch v. Maryland*, 4 Wheat. 316, 427 (1819), it has been settled that any state law that conflicts with federal law is “without effect.” *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

Preemption analysis “[s]tarts with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.” *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Accordingly, “[t]he purpose of Congress is the ultimate touchstone” in determining the effect of federal law on state legislation. *Malone v. White Motor Corp.*,

345 U.S. 497, 504 (1978), quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963).

Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.

Louisiana Pub. Serv. Comm'n v. Federal Communications Comm'n, 476 U.S. at 368-69.

There was a time when uncertainties existed about whether Congress could preempt state laws dealing with “fundamental” or “traditional” state functions. In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1984), the Supreme Court laid these uncertainties to rest:

We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is “integral” or “traditional.” Any such rule leads to inconsistent results at the same time that it disserves principles of democratic self-governance, and it breeds inconsistency precisely because it is divorced from those principles. If there are to be limits on the Federal Government’s power to interfere with state functions -- as undoubtedly there are -- we must look elsewhere to find them.

Id. at 546-47. The proper place to look, the Supreme Court concluded, is the federal political process. *Id.* at 555.²⁷

²⁷ See also *Alden v. Maine*, 527 U.S. 706, 806 (1999) (Souter, J., dissenting) (“[I]n light of *Garcia* . . . the law is settled that federal legislation enacted under the Commerce Clause may bind the States without having to satisfy a test of undue incursion into state sovereignty”).

In *Gregory v. Ashcroft*, the Supreme Court set forth the relevant standard for determining whether Congress intended to preempt state laws involving “traditional” or “fundamental” state functions. In such cases, the Court said, an agency or court must find that Congress made a “plain statement” to that effect. *Id.*, 501 U.S. at 467. The statement need not be express, but Congress’s intent must be “plain to anyone reading the Act.” *Id.* (“This does not mean that the Act must mention [the preempted issue] explicitly.... But it must be plain to anyone reading the Act that it covers [that issue]” (citations omitted)).

Assuming (without conceding) that the Missouri law is the product of an exercise of “fundamental” or “traditional” state powers, this case does not present substantial questions of “States’ rights.” Rather, it boils down to a simple case of whether Congress manifested in the language, structure, legislative history and purposes of the Telecommunications Act, the intent to protect municipalities and public power utilities from state and local barriers to entry. As shown below, the answer is plainly “Yes.”

A. The Relevant Standards

In ascertaining whether Congress intended to preempt a state law, the starting point is “the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.” *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992); *accord Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993); *United States v. Turkette*, 452 U.S. 576, 580 (1981); *Consumer Product Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

In determining whether the meaning of a statute is “plain,” one must examine the statute in its entirety, utilizing all of the “traditional tools of statutory construction.” *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843 n.9 (1984). These tools include the language, structure, purposes and legislative history of the act. *Id.*; *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933, 936 (8th Cir. 2000); *Arkansas AFL-CIO v. Federal Communications Comm’n*, 11 F.3d 1430, 1441 (8th Cir. 1993); *Bell Atlantic Telephone Companies v. Federal Communications Comm’n*, 131 F.3d 1044, 1047 (D.C. Cir. 1997); *Alarm Industry Communications Council v. Federal Communications Comm’n*, 131 F.3d 1066 (D.C. Cir. 1997).

In the following sections, we demonstrate that each of the factors emphasized above supports the Petitioners’ position. Afterward, the Petitioners show that the D.C. Circuit and the FCC failed to analyze the issues correctly in the *Abilene* and *Missouri* cases.

B. The Language, Structure, Purposes and Legislative History of the Telecommunications Act Require Preemption of HB 620

1. Language of the Act

The term “entity” is not defined in Section 253(a) of the Telecommunications Act or in the general definitions of the Communications Act, collected in 47 U.S.C. § 153, that apply throughout the Act unless expressly overridden by section-specific definitions. The term “entity” must therefore be given its common, ordinary meaning. *Morales*, 504

U.S. at 383; *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) (“When terms used in a statute are undefined, we give them their ordinary meaning.”)

Standing alone, the term “entity” includes both public and private entities. As the D.C. Circuit found in *Alarm Industry Communications Council*,²⁸ definitions of “entity” found in standard non-technical dictionaries include (1) “something that exists as a particular and discrete unit,” (2) a “functional constituent of a whole” and (3) “the broadest of all definitions which relate to bodies or units.” *Id.*, 131 F.3d at 1069. Local governments and public power utilities meet all of these definitions.²⁹ At the very least, “political subdivisions” of a state operate as “functional constituent[s] of a whole.”³⁰

²⁸ In the *Alarm Industry* case, the D.C. Circuit rejected an unduly restrictive FCC interpretation of the term “entity” in Section 275 of the Act, finding that this term should ordinarily be given its broad, common meaning. The Court declined to afford the FCC’s interpretation any deference, finding that it “reflect[ed] no consideration of other possible interpretations, no assessment of statutory objectives, no weighing of congressional policy, no application of expertise in telecommunications.” *Alarm Industry*, 131 F.3d at 1069.

²⁹ Indeed, in ¶ 10 of the *Missouri Order*, the FCC itself refers to public power utilities as “municipal entities.”

³⁰ In its decision on remand of *Alarm Industry*, the FCC found that the term “entity” is broad enough to encompass units of local government. In that decision, the FCC found that “entity” should be interpreted expansively when necessary to achieve the pro-competitive purposes of the Act; that such an interpretation is “consistent with the idea that ‘entity’ is ‘the broadest of all definitions which relate to bodies or units,’” which is “reflected in judicial and statutory definitions of ‘entity’ in other contexts;” and that “[e]ntity’ has been statutorily defined to include . . . a division of a government bureau....” *In the Matter of Enforcement of Section 275(A)(2) of the Communications Act of 1934, As Amended By the Telecommunications Act of 1996, Against Ameritech Corporation*, 13 FCC Rcd 19046, ¶¶ 10, 16 (September 25, 1998).

It is not appropriate, however, to view the term “entity” in isolation. “We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme. The meaning of the statutory language, plain or not, depends on context.” *Bailey v. United States*, 516 U.S. 137, 145 (1995) (citations and inner quotations omitted). In the oft-quoted words of Judge Learned Hand, “Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used ...” *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (L. Hand, J.).

As the Supreme Court has repeatedly recognized, when Congress uses the modifier “any” in an expansive, unrestricted way, no ambiguity results, and Congress’s broad intent must be given effect unless the statute or its legislative history compels a contrary conclusion. For example, in *United States v. Gonzales*, 520 U.S. 1 (1997), the Supreme Court interpreted the term “any” in the phrase “any other term of imprisonment.” The Court found,

The question we face is whether the phrase “any other term of imprisonment” means what it says, or whether it should be limited to some subset of prison sentences -- namely, only federal sentences. Read naturally, the word “any” has an expansive meaning, that is, “one or some indiscriminately of whatever kind.” Webster’s Third New International Dictionary 97 (1976). Congress did not add any language limiting the breadth of that word, and so we must read § 924(c) as referring to all “term[s] of imprisonment,” including those imposed by state courts. There is no basis in the text for limiting § 924(c) to federal sentences.

Gonzales, 520 U.S. at 5.

Similarly, in *Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 529 (1947), the Court found that the term “any proceeding arising under this Act” was “unmistakable on its face” and entitled to broad effect as there was “not a word [in the statute] which would warrant limiting this reference....” In *United States v. James*, 478 U.S. 597, 604-605 (1986), the Court found that “the language ‘any damage’ and ‘liability of any kind’ undercuts a narrow construction.” In *Harrison v. PPG Industries, Inc.*, 446 U.S. at 589, the Court found that “the phrase, ‘any other final action,’ in the absence of legislative history to the contrary, must be construed to mean exactly what it says, namely, any other final action.”

Likewise, in *United States v. Turkette*, 452 U.S. 576, 580-81 (1981), the Court found that the term “any union or group of individuals associated in fact” covered both legitimate and illegitimate enterprises within its scope and that Congress “could easily have narrowed the sweep of the definition by inserting a single word, ‘legitimate.’” In *Freitag v. Commissioner of Internal Revenue*, 501 U.S. 868, 874-75 (1991), the Court found that the term “any other proceeding” “could not be more clear,” that the statute’s text “contains no limiting term that restricts its reach,” that courts ‘are not at liberty to create an exception where Congress has declined to do so,’” quoting *Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1989), and that “[n]othing in the legislative history contradicts the broad sweep of [that term].” In *Brogan v. United States*, 522 U.S. 398, 400-02 (1998), the Court found that the term “any false statement” must be interpreted broadly to include a false statement “of whatever kind.”

In *Salinas v. United States*, the Supreme Court *unanimously* held that the same rule of statutory construction applies in cases involving federal preemption of “traditional” or “fundamental” state powers. Specifically, in response to the argument that the term “any” in the phrase “any business or transaction” in a federal bribery statute should be limited to bribery involving federal funds and that reading the phrase broadly would disturb the federal-state balance, the Court stated

The enactment’s expansive, unqualified language, both as to the bribes forbidden and the entities covered, does not support the interpretation that federal funds must be affected to violate § 666(a)(1)(B)... The prohibition is not confined to a business or transaction which affects federal funds. *The word “any,” which prefaces the business or transaction clause, undercuts the attempt to impose this narrowing construction.*

Salinas, 522 U.S. at 57. The Court recognized that *Gregory* requires courts to deny federal preemption of traditional state powers unless Congress has made a “plain statement” of its intent to preempt and that all ambiguities should be resolved in favor of interpretations that do not disturb the federal-state balance. The Court concluded, however, that when Congress uses the term “any” without restriction, it creates no ambiguity and requires courts to get on with the business of preempting the offending state law:

“No rule of construction, however, requires that a penal statute be strained and distorted in order to exclude conduct clearly intended to be within its scope....” *United States v. Raynor*, 302 U.S. 540, 552, 58 S.Ct. 353, 359, 82 L.Ed. 413 (1938). As we held in *Albertini*, *supra*, at 680, 105 S.Ct., at 2902.

“Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature. *Heckler v. Mathews*, 465 U.S.

728, 741- 742, 104 S.Ct. 1387, 1396-1397, 79 L.Ed.2d 646 (1984). Any other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, § 1, of the Constitution. *United States v. Locke*, 471 U.S. 84, 95-96, 105 S.Ct. 1785, 1792-1794, 85 L.Ed.2d 64 (1985).”

These principles apply to the rules of statutory construction we have followed to give proper respect to the federal-state balance. As we observed in applying an analogous maxim in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), “[w]e cannot press statutory construction to the point of disingenuous evasion even to avoid a constitutional question.” *Id.*, at --, n. 9, 116 S.Ct., at 1124, n. 9 (internal quotation marks omitted). *Gregory* itself held as much when it noted the principle it articulated did not apply when a statute was unambiguous. See *Gregory*, 501 U.S., at 467, 111 S.Ct., at 2404. A statute can be unambiguous without addressing every interpretive theory offered by a party. It need only be “plain to anyone reading the Act” that the statute encompasses the conduct at issue. *Ibid.* Compare *United States v. Bass*, 404 U.S. 336, 349-350, 92 S.Ct. 515, 523-524, 30 L.Ed.2d 488 (1971) (relying on Congress’ failure to make a clear statement of its intention to alter the federal-state balance to construe an ambiguous firearm-possession statute to apply only to firearms affecting commerce), with *United States v. Lopez*, 514 U.S. 549, 561-562, 115 S.Ct. 1624, 1630-1631, 131 L.Ed.2d 626 (1995) (refusing to apply *Bass* to read a similar limitation into an unambiguous firearm- possession statute).

Salinas, 520 U.S. at 59-60. Given the lack of ambiguity in Congress’s use of “any” in *Salinas*, the Court looked to the legislative history, not for confirmation that Congress meant what it said when it used the term “any,” but for evidence that Congress did *not* mean what it said -- “[O]nly the most extraordinary showing of contrary intentions’ in the legislative history will justify a departure from that language.” *Id.* at 57-58, quoting *United States v. Albertini*, 472 U.S. 675, 680 (1985).

The FCC has advanced precisely the same interpretation of the term “any,” first to the Eleventh Circuit, and more recently to the Supreme Court.³¹ The specific issue before the Eleventh Circuit, and now before the Supreme Court, is whether the pole-attachment provisions of Section 224 of the Communications Act, as amended by Section 703 of the Telecommunications Act, cover attachments by carriers of wireless telecommunications services, as the FCC had found in its *Pole Attachment Order*.³² In a brief to the Eleventh Circuit, the FCC defended that decision as follows:

[The *Gulf Power*] Petitioners challenge the Commission’s determination that Section 224 applies to wireless carriers, despite the fact that Section 224(f) expressly states that a utility must provide “any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit or right-of-way” and Section 224(d) prescribes an interim pole attachment rate formula for “any telecommunications service” [FCC’s underlines]. 47 U.S.C. § 224(d)(3) & (f). Petitioners efforts to invent a wireline limitation on the scope of Section 224 is flatly at odds with its plain language.³³

Finding further support for its “plain-language interpretation” in Congress’s use of the term “any” in Sections 224(a)(4) and (d)(3) of the Act, the FCC went on to say that it had recognized in the *Pole Attachment Order* that “[i]n both sections, the use of the word ‘any’ precludes a position that Congress intended to distinguish between wire and wireless attachments.”³⁴

³¹ *Gulf Power, Inc. v. FCC*, 208 F.3d 1263 (11th Cir. 2000), *cert. granted*, (January 19, 2001).

³² *Implementation of Section 703(e) of the Telecommunications Act of 1996: Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, 13 FCC Rcd 6777, & 40 (February 6, 1998).

³³ FCC’s *Gulf Power* Brief at 37, Appendix at M.

³⁴ FCC’s *Gulf Power* Brief at 38.

Later in its brief, the FCC was even more emphatic about the significance of Congress's unqualified use of the term "any:"

By granting attachment rights to "any telecommunications carrier," Congress expressed clearly its intent that wireless telecommunications carriers receive the protection of Section 224. *United States v. Gonzales*, 117 S.Ct. 1032, 1035 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, one or some indiscriminately of whatever kind.") (internal quotation marks and citation omitted); *accord Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1186 (11th Cir. 1997) ("any" means "all").³⁵

Without specifically addressing the FCC's plain-language argument, the Eleventh Circuit found that Congress did not intend to grant wireless providers pole attachment rights. *Gulf Power*, 208 F.3d at 1273-74. In response, the FCC petitioned the Supreme Court to review *Gulf Power*, insisting that, as a result of Congress's use of the term "any" in an unrestricted way in various provisions of the Telecommunications Act, it "could not have been clearer" that Congress intended to extend pole attachment rights to "a larger class of beneficiaries . . . than the subclasses with which Congress was most acutely concerned."³⁶

In summary, under *Salinas* and the other Supreme Court precedents quoted above, as well as under the FCC's own rationale in the *Gulf Power* case, the term "entity" is broad enough to cover public entities, and Congress's expansive, unrestricted use of the modifier "any" precludes a narrowing interpretation of that term.

³⁵ FCC's *Gulf Power* Brief at 39-40 (FCC's underlining).

³⁶ FCC's *Petition for Certiorari* at 20, Appendix at L.

2. The Structure and Context of the Act

As previously discussed, proper statutory construction also requires that a court look to the overall statutory scheme. In *Brown & Williamson Tobacco Co. v. Food and Drug Administration*, 153 F.3d 155 (4th Cir. 1998), *aff'd*, 529 U.S. 120 (2000), the court found that “statutory language must be examined by ‘reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole’” and that “acts of Congress ‘should not be read as a series of unrelated and isolated provisions.’” *Id.* at 163, quoting *Robinson and Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995). Thus, the term “any entity” in § 253(a) should also be read in the context of the overall context and the statutory scheme of the Act.

Nothing in the structure or language of other provisions of the Telecommunications Act suggests that Congress intended to give the term “any” anything but its broadest possible meaning in Section 253(a). Rather, as in *Trainmen*, “[t]here is not a word which would warrant limiting this reference. . . .” 331 U.S. at 529. Quite the contrary is true.

First, the juxtaposition of “any entity” and “telecommunications service” in Section 253(a) reinforces the conclusion that Congress intended the term “any entity” to apply to any potential provider of telecommunications service, including public entities. As the FCC confirmed in its report to Congress on the key definitions in the Telecommunications Act,³⁷ the term “telecommunications service” is the primary structural device through which Congress allocated various burdens and incentives to

achieve its purposes under the Act. For example, providers of telecommunications service must comply with the interconnection requirements imposed by Section 251, with the universal service contribution requirements imposed by Section 254, with the common carrier duties imposed by Title II of the Communications Act, and the with consumer privacy requirements imposed by Section 222.³⁸ At the same time, the Act encourages persons to provide telecommunications service by affording them nondiscriminatory access to poles, ducts, conduits and rights of way under Section 224, opportunities for interconnection under Section 251, universal service subsidies under Section 254, and protection from state barriers and local barriers to entry under Section 253(a). None of these provisions distinguishes between public and private providers of telecommunications service. Indeed, public entities are covered by each of these provisions. It would be unreasonable and inequitable to suppose that Congress intended to subject public entities to the burdens of the Act without also affording them the corresponding benefits.

³⁷ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, FCC 98-67, at ¶ 32 (rel. April 10, 1998).

³⁸ In numerous decisions, orders, forms and other issuances, the FCC has in fact subjected public power utilities that provide “telecommunications” or “telecommunications services” to the same requirements as other entities engaged in the same activities. For example, the Commission’s *Universal Service Order* and FCC Form 457 require state and local government “entities” to contribute funds to universal service mechanisms if they provide “interstate telecommunications” or “telecommunications services.” *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report and Order*, FCC 97-157, ¶¶ 784, 800 (rel. May 8, 1997); Instructions to FCC Form 457.

Second, as noted above, Congress carefully distinguished privately-owned entities from “political subdivisions” or “instrumentalities” of a state for the purposes of the pole-attachment provisions of Section 224 of the Act and, at the same time, conspicuously failed to do so for the purposes of Section 253(a). This is significant, for as the Supreme Court noted in *Gonzales*, ““Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion,”” 520 U.S. at 5, quoting *Russello v. United States*, 464 U.S. 16, 23 (1983).³⁹ The Court should draw a similar conclusion in this instance.

Third, in *Brown & Williamson*, the Supreme Court emphasized that reading a statute in context may require reading the statute in the light of other related legislative activities. *Id.*, 529 U.S. at 154-55. As indicated above, this is a time of profound change as the electric power industry undergoes restructuring and deregulation. Recognizing that the competition among public and private electric utilities has served the Nation well for more than a century, Congress and many states are struggling to develop approaches that would preserve the competitive balance in the electric power industry. With investor-

³⁹ The FCC has similarly held that “[w]hen Congress uses explicit language in one part of a statute . . . and then uses different language in another part of the same statute, a strong inference arises that the two provisions do not mean the same thing.” *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, *Second Report and Order and Further Notice of Proposed Rulemaking*, FCC 98-27, ¶ 32 n.113 (rel. February 26, 1998), quoting *Cabell Huntington Hospital, Inc. v. Shalala*, 101 F.3d 984, 988 (4th Cir. 1996).

owned and cooperatively-owned electric utilities free to enter into new lines of business, form alliances with telecommunications providers of their choice, and offer consumers “one-stop shopping” for energy, communications and other services, laws such as the Missouri law in issue could put public power utilities at a severe competitive disadvantage.

Furthermore, in enacting the Telecommunications Act, Congress amended PUHCA to eliminate the barriers that would have prevented large investor-owned electric utilities from providing telecommunications services. It is inconceivable that Congress would have taken this step, which could fundamentally alter the competitive balance in the electric power industry if public power utilities did not have the same flexibility to provide telecommunications services, unless Congress believed that it had adequately protected public power utilities from state barriers to entry in Section 253(a). At the very least, one would have expected Congress to say something about this in the language or legislative history of the Act, but it said nothing at all. Moreover, if Congress were concerned about assuring that utility holding companies could provide telecommunications services, it was certainly concerned that public power utilities that served more than twice as many customers could also provide those services.

3. The Purposes of the Act

In *Alarm Industry*, the D.C. Circuit rejected an unduly restrictive FCC interpretation of the term “entity” in Section 275 of the Act, finding that this term should ordinarily be given its broad, common meaning. The Court declined to afford the FCC’s

interpretation any deference, finding that it “reflect[ed] no consideration of other possible interpretations, no assessment of statutory objectives, no weighing of congressional policy, no application of expertise in telecommunications.” *Alarm Industry*, 131 F.3d at 1069. Such a determination is all the more appropriate here.

In the *Missouri Order* and the accompanying statements of Commissioners Kennard, Tristani and Ness, the FCC could not have stated more clearly that municipal entry would advance the policies and purposes of the Telecommunications Act and that state barriers of the kind that Missouri has enacted thwart the attainment of such policies and purposes. The FCC expressly recognized that “municipally-owned utilities and other utilities have the potential to become major competitors in the telecommunications industry” and can “further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities.” *Missouri Order*, ¶ 10.

The FCC also found that state barriers to municipal entry are unnecessary to achieve any legitimate state purpose.

We continue to recognize, as the Commission did in the *Texas Preemption Order*, that municipal entry into telecommunications could raise issues regarding taxpayer protection from economic risks of entry, as well as questions concerning possible regulatory bias when a municipality acts as both a regulator and a competitor. While some parties maintain that these types of advantages make it unfair to allow municipalities and municipally-owned utilities to compete with private carriers, we believe these issues can be dealt with successfully through measures that are much less restrictive than an outright ban on entry, such as through non-discrimination requirements that require the municipal entity to operate in a manner that is separate from the municipality, thereby permitting consumers to reap the benefits of increased competition.

Missouri Order, ¶ 11.

Based on these findings, it was patently unreasonable for the FCC to conclude that that Congress intended to deny public entities, and particularly public power utilities, the protections from state barriers to entry that Section 253 provides. Furthermore, the FCC's findings compel the conclusion that HB 620 must be preempted because it creates an "outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible" and "stands as an obstacle to the accomplishment and execution of the full objectives of Congress." *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 368-69.

The reality in Missouri is that unless this Court acts forcefully to preempt HB 620, there will be no effective competition and no real consumer choice for years in many parts of the state. That will be especially true in rural areas, which private telecommunications providers may continue to ignore for years, just as private electric power companies ignored these areas years ago. The Petitioners stand ready, willing and able to serve their communities, as they have done with success in the electric power area for decades.

4. The Legislative History of the Act

While resort to the legislative history is unnecessary in view of the clear expression of congressional intent in the language, structure and purposes of the Telecommunications Act, reference to the legislative history further confirms that, far

from intending that the term “any entity” in Section 253(a) be read narrowly, Congress fully intended that it serve to protect public entities from state barriers to entry.

As discussed at length above in the Statement of Facts, the legislative history of § 253(a), including the history of its precursor in S.1822, confirms that Congress understood that public entities could accelerate development of our National Information Infrastructure by providing or facilitating the provision of competitive telecommunications services, especially in rural areas; that Congress intended to encourage as many public entities as possible to play these roles in their communities; and that Congress manifested this intent through the definitions and preemption provisions of the Act. *See* the references in Section 3 of the Statement of Facts to “all entities,” “all other utilities,” “everybody can compete everywhere in everything,” and “regardless of the form of ownership or control.” The legislative history also confirms that Congress intended to treat all electric utilities alike with respect to the burdens and benefits imposed by the Telecommunications Act, including the benefit of protection from state barriers to entry.

In summary, nowhere does either the FCC in this case or the D.C. Circuit in the *Abilene* case point to a single reference in legislative language, in the Act’s purposes, in the Act’s structure, or in the legislative history that requires the words “any entity” to be read restrictively to exclude “public entities” from their meaning. The Commission has thus failed to meet its burden to show that the words “any entity” should be narrowly construed.

C. HB 620 Cannot Be Sustained Under Section 253(b)

For the reasons discussed in the previous sections, HB 620 violates Section 253(a) of the Telecommunications Act. As a result, the Telecommunications Act and the Supremacy Clause required the FCC to preemption of HB 620 unless the State of Missouri showed that HB 620 was necessary to meet at least one of the public-purpose exceptions set forth in Section 253(b). That provision reads as follows:

STATE REGULATORY AUTHORITY.--Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers:

The FCC has established the following standard for determining when state action is sufficient to satisfy the requirements of Section 253(b):

Section 253(b) preserves a State's authority to impose a legal requirement affecting the provision of telecommunications services, but only if the legal requirement is: (i) "competitively neutral"; (ii) consistent with the Act's universal service provisions; and (iii) "necessary" to accomplish certain enumerated public interest goals. Thus, we must preempt the [measures in issue] pursuant to section 253(d) unless they meet all three of the criteria set forth in section 253(b).

In the Matter of Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling, CCBPol 97-1, Memorandum and Order, FCC 97-336, ¶ 40 (rel. September 9, 1997) (footnote omitted).

HB 620 cannot satisfy any of these standards. It is not "competitively neutral," as its restrictions apply only to public entities. It undermines the Telecommunications Act's universal service provisions by reducing both the number of potential providers of

universal service and the number of potential contributors to universal service mechanisms. HB 620 was not promoted, nor can it now be defended, as being “necessary” to achieve any of the public interest goals enumerated in Section 253(b). In fact, the FCC’s finding that *Missouri* law was unnecessary and lacked any legitimate state purpose precludes any finding that HB 620 can be justified under Section 253(b). Rather, the sole purpose of HB 620 was to preserve the monopolies of incumbent telecommunications providers in local markets, which is precisely the opposite of the national policy reflected in the Telecommunications Act.

II. THIS COURT OWES THE FCC NO DEFERENCE

The FCC’s decision in the *Missouri Order* is not entitled to deference. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the Supreme Court established the relevant standards for review of agency interpretations of their enabling legislation. In *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933 (2000), this Court succinctly summarized these standards as follows:

In *Chevron* . . . , the Supreme Court explained the analysis that a court must utilize when reviewing agency decisions which apply or interpret a statute that the agency administers. The *Chevron* test has two parts. First, a reviewing court must determine whether congressional intent is clear from the plain language of the statute. *See id.* at 842-43, 104 S.Ct. 2778. “In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.” *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S.Ct. 1811, 100 L.Ed.2d 313 (1988) (citation omitted). When an analysis of the statute reveals a clear congressional intent, an agency interpretation of the statute contrary to that intent is not entitled to deference. *See id.* A court must not defer when, it “appears from the statute or legislative history that the accommodation is not one that Congress would have sanctioned.” *Chevron*, 467 U.S. at 845, 104 S.Ct. 2778. If, however,

the language of the statute is ambiguous, and the legislative history reveals no clear congressional intent, a reviewing court must defer to a reasonable agency interpretation of the statutory provision. *See id.* at 843, 104 S.Ct. 2778. In all cases, although the level of deference afforded an agency interpretation may appear high, the court remains the final authority in matters of statutory interpretation and “must reject administrative constructions which are contrary to clear congressional intent.” *Id.* at 843 n. 9, 104 S.Ct. 2778.

Ragsdale, 218 F.3d at 936.

The FCC’s determinations would ordinarily be entitled to deference in the second *Chevron* stage, in which the Court interprets a statute that is silent or ambiguous with respect to the issue in question, *Chevron*, 467 U.S. at 843. But in cases involving the “plain statement” standard of *Gregory v. Ashcroft*, a reviewing court need not, and cannot, reach the second *Chevron* stage, because the determination of whether preemption is appropriate must be based solely on whether *Congress* has spoken to the precise issue at hand. It follows that the Court cannot consider, much less defer to, the FCC’s administrative interpretations of the term “any entity.”

Even if the Court could consider the FCC’s prior determinations, it should not afford them deference. In *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), the Supreme Court observed that the weight that a court should give to an agency’s judgment in a particular case “will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”

As discussed previously, the *Missouri* Order is not consistent with the plain meaning of Section 253(a), is not thoroughly or well-reasoned and is not consistent with

prior and later agency pronouncements – particularly the FCC’s position in the *Gulf Power* case. The FCC has never interpreted the term “any entity” either in accordance with *Salinas* or in the light of its own findings about the purposes and policies of the Act. As for the legislative history, the FCC’s current interpretation is inconsistent with the interpretation that it presented to the D.C. Circuit and, in addition, does not account for Congress’s clearly-expressed intent that all electric utilities be treated alike under the Telecommunications Act. In short, the *Missouri* Order merits no deference from this Court.

CONCLUSION

For all of the foregoing reasons, the Court should reverse the *Missouri Order* and declare that the term “any entity” in Section 253(a) does indeed cover entities of all kinds, including public entities.

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CERTIFICATE OF COMPLIANCE

Pursuant to Circuit Rule 28(c), and FRAP Rule 32(a)(7), I do hereby certify, based on the word count reported by our word processing system (Microsoft Word 6.0), that the foregoing Petitioners' Brief, including footnotes, does not exceed 14,000 words.

I also certify that the 3½ diskettes furnished to the Court and the parties containing an electronic copy of Petitioners' Brief have been scanned for viruses and are virus-free.

James Baller
An Attorney for Petitioners

CERTIFICATE OF SERVICE

I, James Baller, hereby certify that on this 26th day of March 2001, I caused a copy of the foregoing Petitioners Brief and a 32 inch diskette of the Petitioners= Brief, scanned for viruses and virus-free, to be served on the parties on the attached Service List by first-class U.S. Mail.

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ADDENDUM

Federal Communications Commission (F.C.C.)

Memorandum Opinion and Order

IN THE MATTER OF THE MISSOURI MUNICIPAL LEAGUE; THE MISSOURI ASSOCIATION
OF MUNICIPAL UTILITIES; CITY UTILITIES OF SPRINGFIELD; CITY OF COLUMBIA WATER
&
LIGHT; CITY OF SIKESTON BOARD OF UTILITIES.

Petition for Preemption of Section 392.410(7) of the Revised Statutes of
Missouri
CC Docket No. 98-122

FCC 00-443

Adopted: December 19, 2000

Released: January 12, 2001

By the Commission: Chairman Kennard and Commissioner Tristani issuing a joint statement;
Commissioner Ness issuing a separate statement.

I. INTRODUCTION

1. On July 8, 1998, the Missouri Municipal League, the Missouri Association of Municipal Utilities, City Utilities of Springfield, Columbia Water & Light, and the Sikeston Board of Utilities (collectively, the Missouri Municipals), on behalf of themselves and more than 600 municipalities and 63 municipal electric utilities located in Missouri, filed the above-captioned petition (Petition) asking the Commission to preempt Section 392.410(7) of the Revised Statutes of Missouri (HB 620), and declare it unlawful and unenforceable. [FN1] Several parties filed comments and reply comments addressing the petition. [FN2] The Missouri Municipals assert that HB 620 violates section 253(a) of the Communications Act of 1934, as amended, [FN3] and falls outside the scope of authority reserved to the states by section 253(b) of the Act, [FN4] and thus satisfies the requirements for preemption by the Commission pursuant to section 253(d) of the Act. [FN5]

2. For the reasons described below, we do not preempt the enforcement of HB 620 to the extent that it limits the ability of municipalities or municipally- owned utilities, acting as political subdivisions of the state, from providing telecommunications services or facilities. The Commission has found previously that political subdivisions of a state, such as a municipality, are not "entities" under section 253(a) of the Act. [FN6] We find that, under Missouri law, municipally-owned utilities are generally part of the municipality, itself, and are therefore not separate and apart from the state of Missouri, and are not entities subject to section 253(a). We do find, however, that if a municipally-owned utility has an independent corporate identity that is separate from the state, it can be considered an entity for which section 253 preemption is available.

II. BACKGROUND

3. The Missouri Municipals seek preemption of HB 620 pursuant to section 253 of the Communications Act, which Congress enacted to ensure that no state or local authority could erect legal

barriers to entry that would potentially frustrate the 1996 Act's explicit goal of opening local markets to competition. [FN7] In assessing whether to preempt enforcement of HB 620 pursuant to section 253, we first determine whether the statute is proscribed by section 253(a), which states that no state or local requirement may "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." [FN8] If we find that HB 620 is proscribed by section 253(a) standing alone, we must then determine whether it falls within the reservation of state authority set forth in section 253(b), which excludes from the scope of the Commission's preemption powers certain defined state or local requirements that are "competitively neutral," "consistent with section 254," and "necessary" to achieve the public interest objectives enumerated in section 253(b). [FN9] If a law, regulation or legal requirement otherwise impermissible under subsection (a) does not satisfy the requirements of subsection (b), we must preempt the enforcement of the requirement "to the extent necessary to correct the violation" in accordance with section 253(d). [FN10] This is the approach that the Commission has taken in prior orders addressing section 253. [FN11]

4. On August 28, 1997, the General Assembly of Missouri enacted HB 620, which replaced certain provisions of Missouri's telecommunications statute regarding the issuance of certificates of public convenience and necessity for the provision of telecommunications service. With certain limited exceptions, it prohibits political subdivisions from obtaining a certificate of service authority to provide telecommunications services or facilities. The statute states:

No political subdivision of this state shall provide or offer for sale, either to the public or to a telecommunications provider, a telecommunications service or telecommunications facility used to provide a telecommunications service for which a certificate of service authority is required pursuant to this section. Nothing in this subsection shall be construed to restrict a political subdivision from allowing the nondiscriminatory use of its rights-of-way including its poles, conduits, ducts and similar support structures by telecommunications providers or from providing telecommunications services or facilities:

- (1) For its own use;
- (2) For 911, E-911 or other emergency services;
- (3) For medical or educational purposes;
- (4) To students by an educational institution;
- (5) Or Internet type services.

The provisions of this subsection shall expire on August 28, 2002. [FN12]

5. HB 620 is similar to a Texas statute that the Commission declined to preempt. [FN13] In the Texas Preemption Order, the Commission found that a provision of the Texas Public Utility Regulatory Act of 1995 ("PURA95") [FN14] that prohibited municipalities from providing telecommunications services did not violate section 253(a). Ruling on a petition for preemption of section 3.251(d) of PURA95 filed by the City of Abilene, Texas, the Commission stated that the City of Abilene was not an "entity" separate and apart from the state of Texas for the purpose of applying section 253(a) of the Act. It found that preempting the enforcement of the Texas statute would insert the Commission "into the relationship between the state of Texas and its political subdivisions in a manner that was not intended by section 253." [FN15] The Commission reasoned that Texas retains substantial sovereign power to decide what activities to authorize its political subdivisions to undertake. With regard to such fundamental state decisions, the Commission stated that it must adhere to the standard in *Gregory v. Ashcroft*, in which the Supreme Court held that a court must not construe a federal statute to preempt traditional state powers unless Congress has made its intention to do so unmistakably clear in the language of the statute. [FN16]

6. In the Texas Preemption Order, the Commission determined that because section 253(a) is directed at requirements that "prohibit or have the effect of prohibiting the ability of any entity" to provide telecommunications services, it appears to prohibit restrictions on market entry that apply to independent entities subject to state regulation, not to political subdivisions of the state itself. [FN17] The Commission found that if it construed the term "entity" in section 253(a) in this context to include

municipalities, it would prevent states from prohibiting their political subdivisions from providing telecommunications services, despite the fact that states could limit the authority of their political subdivisions in all other respects. [FN18] The Commission did not find a clear indication of Congressional intent in section 253 to intervene in this state-local relationship as it affected municipalities, but expressly declined to address the issue of whether section 253 barred the state of Texas from prohibiting the provision of telecommunications services by a municipally-owned electric utility. [FN19]

7. The City of Abilene sought judicial review of the Texas Preemption Order before the Federal Court of Appeals for the D.C. Circuit. The D.C. Circuit upheld the Commission's interpretation of Section 253. [FN20] Citing Gregory, the court held that the text of section 253 is not sufficiently clear to find that Congress intended in 253(a) to transfer to this Commission the states' power to regulate the activities of their municipalities. [FN21] It found, in particular, that because Congress left "entity" undefined in the Communications Act, and because the City of Abilene did not offer other textual evidence to support preemption, the City could not establish that Congress clearly intended for municipalities to be considered "entities." [FN22] Consistent with the scope of the Texas Preemption Order, the court stated that the issue of whether utilities owned by municipalities are "entities" within the meaning of Section 253(a) was not before it. [FN23]

8. The Missouri Municipals argue that HB 620 squarely presents the issue of whether a state law that prohibits municipally-owned utilities from providing telecommunications service violates section 253 of the Act. [FN24] They maintain that this case differs from the Texas Preemption Order and Abilene because, in those two cases, the Commission and the court declined to rule on whether the term "any entity" in section 253 applies to utilities owned by municipalities. They state that even if the court and the Commission were correct in concluding that Congress did not clearly intend to include municipalities that do not own and operate electric utilities within the scope of section 253(a), Congress did clearly intend the term "any entity" to apply to power companies owned by municipalities. [FN25] They argue that "any entity" should be interpreted broadly to include such municipally-owned utilities, [FN26] and assert that the legislative history of section 253 confirms that these entities are included within the scope of section 253(a). [FN27]

III. DISCUSSION

9. We do not preempt the enforcement of HB 620 to the extent that it limits the ability of municipalities or municipally-owned utilities, acting as political subdivisions of the state of Missouri, from providing telecommunications services or facilities. As we found in the Texas Preemption Order, the term "any entity" in section 253(a) of the Act was not intended to include political subdivisions of the state, but rather appears to prohibit restrictions on market entry that apply to independent entities subject to state regulation. [FN28] Because we find that HB 620 is not proscribed by section 253(a), we need not determine whether it falls within the reservation of state authority set forth in section 253(b). We do find however that if a municipally-owned utility has an independent corporate identity that is separate from the state and seeks to provide telecommunications services and facilities in this context, then it can be considered an entity for which section 253 preemption is available.

10. While the legal authorities that we must look to in this case compel us to deny the Missouri Municipals' petition, we reiterate the Commission's urging in the Texas Preemption Order that states refrain from enacting absolute prohibitions on the ability of municipal entities to provide telecommunications service. [FN29] The Commission has found that municipally-owned utilities and other utilities have the potential to become major competitors in the telecommunications industry. [FN30] In particular, we believe that the entry of municipally-owned utilities can further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities. We emphasized this fact in our August 2000 report on the deployment of advanced

services. [FN31] In that report, we presented a case study detailing advanced services deployment in Muscatine, Iowa where the municipal utility competes with other carriers to provide advanced services to residential customers. [FN32] We noted that the degree of advanced services deployment in Muscatine, which has three facilities-based, high-speed service providers for residential customers, including the municipal utility, is due in part to Iowa's legal environment, which has encouraged municipal involvement in the deployment of advanced telecommunications services. [FN33] Our case study is consistent with APPA's statements in the record here that municipally-owned utilities are well positioned to compete in rural areas, particularly for advanced telecommunications services, because they have facilities in place now that can support the provision of voice, video, and data services either by the utilities, themselves, or by other providers that can lease the facilities. [FN34] We are also encouraged by the comments of Missouri River, which states that it is comprised of municipally-owned utilities that serve communities with populations of less than five thousand people in Iowa, Minnesota, North Dakota and South Dakota, and that its members have installed fiber optic facilities that they could use to provide telecommunications services in markets where there are currently no competitive alternatives. [FN35]

11. We continue to recognize, as the Commission did in the Texas Preemption Order, that municipal entry into telecommunications could raise issues regarding taxpayer protection from economic risks of entry, as well as questions concerning possible regulatory bias when a municipality acts as both a regulator and a competitor. [FN36] While some parties maintain that these types of advantages make it unfair to allow municipalities and municipally-owned utilities to compete with private carriers, [FN37] we believe these issues can be dealt with successfully through measures that are much less restrictive than an outright ban on entry, such as through non-discrimination requirements that require the municipal entity to operate in a manner that is separate from the municipality, thereby permitting consumers to reap the benefits of increased competition. [FN38]

A. Application of HB 620 to Municipalities

12. HB 620 prohibits political subdivisions from becoming certified to provide telecommunications services or facilities. According to the Missouri Municipals, HB 620 therefore prohibits municipalities from providing such services themselves or from making their facilities available to others for use in competing with the incumbent providers. [FN39] We are thus presented in this proceeding with the same issue that the Commission addressed in the Texas Preemption Order - whether section 253 bars a state from deciding that it will not permit its subdivisions to compete in the provision of certain telecommunications services. This is a fundamental issue concerning the relationship between a state and its political subdivisions. [FN40]

13. Consistent with the Texas Preemption Order and the court's holding in Abilene, we conclude that because municipalities, as political subdivisions of the state, are not "entities" within the meaning of section 253(a), HB 620 does not violate 253(a) to the extent that it prohibits them from becoming certified to provide telecommunications service or facilities. The Missouri Constitution authorizes cities with more than 5,000 inhabitants to adopt city charters allowing them to operate independently of the state, except that they may not undertake any activities which are inconsistent with the state constitution or limited by statute. [FN41] HB 620 is a statute the Missouri legislature has adopted to limit the powers of its political subdivisions, including its municipalities. HB 620 is therefore like section 3.251(d) of PURA95 in Texas in that it prohibits Missouri's municipalities, as political subdivisions of the state, from providing telecommunications service. As we found in the Texas Preemption Order, preempting the enforcement of HB 620 as it applies to municipalities would insert the Commission into the relationship between the state of Missouri and its political subdivisions in a manner that was not intended by section 253. [FN42]

14. We are not persuaded by the Missouri Municipals' arguments that we are not bound by the findings

in the Texas Preemption Order or the Abilene decision regarding the scope of section 253(a). [FN43] The court found in Abilene that although the text of section 253(a) refers broadly to "any entity," such language is not clear enough to demonstrate, pursuant to Gregory, that Congress intended to intrude upon state-local government relationships. [FN44] The Missouri Municipals, who filed their petition for preemption before the D.C. Circuit issued the January 1999 Abilene decision, argue in a supplemental filing that the Commission should not adhere to that decision, but should interpret the term "any" in section 253(a) in the same manner in which it interpreted that term in an unrelated proceeding issued after the Texas Preemption Order. Specifically, they point out that the Commission determined in the Pole Attachment Order [FN45] that Congress' use of the term, "any telecommunications carrier" in section 224 of the Act, which regulates utility pole attachments, is an express indication that Congress intended both wireless and wireline carriers to be able to attach equipment to public utility poles. [FN46] They argue, by analogy, that the Commission should similarly recognize that "any entity" in section 253(a) is a plain language indication that Congress intended to include all entities, both publicly-owned and privately-owned, within the scope of section 253(a). [FN47] The Eleventh Circuit held recently in *Gulf Power Company v. FCC* that despite Congress' use of the term "any" in section 224, the Commission does not have authority to regulate pole attachments for wireless communications because utility poles are not bottleneck facilities for wireless carriers. [FN48] For purposes of this case, Gulf Power Company demonstrates that the term "any" cannot be interpreted in its broadest sense if the statute in question is not intended to apply to every type of entity. Accordingly, we cannot interpret the term "any" in section 253(a) to include municipalities because, as explained in the Texas Preemption Order and Abilene, the statute does not apply to these entities. Indeed, the court stated in Abilene that the Act provides no evidence that Congress' intended that the term "any entity" would include every conceivable thing within the category of "entity." [FN49]

15. We also disagree with APPA that the Cowlitz River Dam cases support preemption of HB 620. APPA argues that those cases establish that when a state grants its political subdivisions authority to engage in activities that are subject to federal law, state laws that would be preempted if applied to privately-owned providers of service are also preempted as applied to the same activity by publicly-owned providers. [FN50] In the primary case, the Ninth Circuit found that a potential municipal licensee that was authorized by the Federal Power Commission to construct and operate hydroelectric dams could not be subjected to state licensing regulations, but need only show compliance with federal regulations governing dam construction in order to obtain a license. [FN51] The court therefore found that the Federal Power Commission acted within its authority in not requiring the City to comply with the relevant state laws. [FN52] Unlike the case before us here, the state did not argue that the City of Tacoma lacked legal authority to engage in hydroelectric activities in the first instance. In fact, the court stated expressly that "[w]e do not touch on the question as to the legal capacity of the City of Tacoma to initiate and act under the license once it is granted. There may be limitations in the City Charter, for instance, as to indebtedness limitations. Questions of this nature may be inquired into by the [Federal Power] Commission as relevant to the practicability of the plan, but the Commission has no power to adjudicate them." [FN53] The court thus recognized, similar to our finding here, that questions involving the "legal capacity" of the municipality to undertake hydroelectric activities must be left to the state. [FN54]

B. Application of HB 620 to Municipally-Owned Utilities

16. We conclude that we cannot adopt the Missouri Municipals' argument that, notwithstanding the Texas Preemption Order and Abilene, section 253(a) clearly applies to municipally-owned utilities that seek to provide competitive telecommunications service. [FN55] Although the Commission expressly declined in the Texas Preemption Order to decide whether section 253 barred the state of Texas from prohibiting the provision of telecommunications services by a municipally-owned electric utility, we

adhere to the analysis in that case and in Abilene regarding state sovereignty when we address this issue.

17. As we stated above, the Commission clearly found in the Texas Preemption Order that section 253(a) does not apply to the political subdivisions of a state. [FN56] The Missouri Municipals have not presented any evidence that municipally-owned utilities are not considered to be political subdivisions in Missouri. Although "political subdivision" is not defined in Missouri's public service commission law, of which HB 620 is part, [FN57] the Supreme Court of Missouri has found a municipality and its municipally-owned utility to be political subdivisions under the Missouri Constitution's taxation provisions. [FN58] Indeed, it appears to be the case in Missouri that a municipally-owned utility is part of the city, itself. For example, the Missouri Municipals describe the City of Springfield in which the city council appoints a board to manage the city utility. [FN59] Although the board has authority to manage the day-to-day operations of the utility, it is clear from the board's charter that the utility is effectively a department of the city and is not an entity with a separate juridical personality. The city council must approve the utility's budget as well as the rates it charges, and like "other departments or agencies of the city," the utility must purchase supplies and equipment "in such a manner as to take advantage of the combined purchasing power of the city as a whole." [FN60] Southwestern Bell also points out that under Missouri law, municipal public utility boards are not separate entities from the municipality, but operate as part of the city government, like the mayor, zoning commissions or boards of adjustment. [FN61] Accordingly, we find that municipally-owned utilities that operate as political subdivisions of the state under Missouri law, rather than as entities with a separate juridical personality, are not entities subject to section 253(a).

18. We reject the Missouri Municipals' argument that even if municipally-owned utilities are political subdivisions of the state, the legislative history of section 253(a) demonstrates that Congress clearly intended the term, "any entity" to cover municipal electric utilities. [FN62] The Missouri Municipals cite scattered excerpts of legislative history to support their argument. They explain that the 103rd Congress heard testimony about the benefits of municipal utility entry, and then broadly defined "telecommunications service" in the precursor to the 1996 Act to include service provided by "all entities," which the Missouri Municipals infer to include municipally-owned utilities. [FN63] They also state that in a report addressing the provisions of the Act that would later become section 253(a), Congress indicated that states or local governments that own and operate municipal energy utilities may make their telecommunications facilities available to certain telecommunications carriers, but not others, without violating the principle of non-discrimination. [FN64] The Missouri Municipals also point out that the 104th Congress, which adopted the 1996 Act, noted that states may not rely on section 253(b) of the Act to prohibit a "utility" from providing telecommunications service. [FN65] We are not persuaded that this legislative history is enough to overcome the court's holding in Abilene that the "language of the federal law" must indicate that Congress intended to reach into the state governmental structure. [FN66] Even if we were to look outside the language of the statute to discern Congress' intent, the legislative history does not help clarify whether or not it intended section 253(a) to govern state-local relationships regarding the provision of telecommunications service. Other than indicating that municipal energy utilities may make their facilities available to carriers, the legislative history that the petitioners cite does not distinguish between publicly-owned and privately-owned utilities. Its limited reference to the ability of municipal energy utilities to lease spare capacity on their facilities does not indicate clearly or at all whether Congress intended to preempt states from prohibiting such a practice. We therefore cannot rely on the legislative history to find that Congress intended to include municipally-owned utilities within the scope of section 253(a). We are aware, as the Missouri Municipals point out, that the Supreme Court stated in Gregory that Congress need not list explicitly each entity that would be covered by a federal statute. [FN67] The Court did state, however, that "it must be plain" to anyone reading the Act that it covers the entity in question. [FN68] It is not plain from either the language of the statute or the legislative history that Congress intended to include municipally-owned utilities under section 253(a).

19. The Missouri Municipals also ask us to consider the impact of Congress' explicit statement in section 224(a)(1) of the Act that the term "utility," for purposes of pole attachments, does not include entities owned by the state. [FN69] They argue that Congress affirmatively preserved this state exemption when it amended the definition of "utility" in the 1996 Act, and that the fact that it did not similarly limit the term "entity" in section 253(a) proves that it intended municipalities and municipally-owned utilities to be included within its scope. [FN70] While we acknowledge that it appears that Congress considered in 1996 whether section 224 of the Act should apply to state-owned utilities, it is not plain, as it needs to be under Gregory, that Congress also considered the application of section 253(a) to state or municipally-owned utilities and then unmistakably determined that it would apply to them.

20. We note that if a municipally-owned utility sought to provide telecommunications service or facilities as an independent corporate entity that is separate from the state, we could reach a different result under section 253(a). If the utility were not acting as a political subdivision of the state, then issues of state sovereignty would not prevent the Commission from exercising its authority under section 253 to preempt the enforcement of a statute that prohibited the ability of the utility to provide telecommunications service.

21. We agree with UTC's observation that municipal utilities may have an independent corporate existence and undertake non-governmental, proprietary functions, [FN71] but under Missouri law, it is not clear that a utility can undertake even proprietary functions without authority from the state. In the Texas Preemption Order, the Commission recognized that a municipality may provide telecommunications service as a proprietary function, but stated that it did not interpret section 253 to preclude a state from exercising its authority to restrict the activities of its political subdivisions, regardless of whether such activities are governmental or proprietary in nature. It found that while the provision of telecommunications services by a municipality may be a proprietary function, the provisions of Texas law requiring that the actions of its cities be consistent with state law did not appear to distinguish between proprietary and governmental functions. [FN72] Similarly, the provisions of Missouri's law requiring that the actions of its cities be consistent with state law does not appear to distinguish between proprietary and governmental functions. [FN73] As we indicate above, the municipal entity would therefore have to have an identity that is fully separate from the state in order for the Commission to consider whether or not section 253(a) would be applicable.

22. We also note that HB 620 restricts a political subdivision from providing a telecommunication service for which a certificate of service authority is required, except that it may provide telecommunication service or facilities for "internet-type services." A municipally-owned utility should therefore be able to provide these services in Missouri whether or not it is operating as a political subdivision of the state. [FN74]

23. Because we do not find that HB 620 violates section 253(a), as it applies to municipalities and municipally-owned utilities, we do not need to reach the issue of whether it falls within the reservation of state authority in section 253(b).

IV. ORDERING CLAUSE

24. Accordingly, IT IS ORDERED, pursuant to section 253 of the Communications Act of 1934, as amended, 47 U.S.C. s 253, that the Petition for Preemption filed by the Missouri Municipal League, the Missouri Association of Municipal Utilities, City Utilities of Springfield, Columbia Water & Light, and the Sikeston Board of Utilities on July 8, 1998, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Secretary

FN1. Petition at 35.

FN2. The Commission placed the Missouri Municipals' Petition on public notice on July 14, 1998. Pleading Cycle Established for Comments on Missouri Petition for Preemption of Section 392-410(7) of the Revised Statutes of Missouri, Public Notice, CC Docket No. 98-122, DA 98-1399 (rel. July 14, 1998). We received comments from the following parties: The American Public Power Association (APPA), the City of O'Fallon, the City of St. Louis, GTE, MCI Telecommunications Corporation (MCI), the Missouri Attorney General, National Telephone Cooperative Association (NTCA), Southwestern Bell Telephone Company (Southwestern Bell), and UTC, The Telecommunications Association (UTC). The Missouri Municipals, APPA, Missouri River Energy Services (Missouri River), Southwestern Bell and UTC filed replies.

FN3. 47 U.S.C. s 253(a). Section 253 was added to the Communications Act of 1934 (Communications Act or Act) by the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. ss 151 et seq.

FN4. 47 U.S.C. s 253(b).

FN5. Petition at 23-35 (citing 47 U.S.C. s 253(d)).

FN6. Public Utility Commission of Texas, et al. Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995, CCBPol 96-13, 96-14, 96-16, 96-19, Memorandum Opinion and Order, 13 FCC Rcd 3460, 3546, para. 184 (1997) (Texas Preemption Order).

FN7. Texas Preemption Order, 13 FCC Rcd at 3480, para. 41.

FN8. 47 U.S.C. s 253(a).

FN9. 47 U.S.C. s 253(b).

FN10. 47 U.S.C. s 253(d).

FN11. Texas Preemption Order, 13 FCC Rcd at 3480, paras. 41-42; Silver Star Telephone Company, Petition for Preemption and Declaratory Ruling, Memorandum Opinion and Order, CCBPol 97-1, 13 FCC Rcd 16356, 16360-61, paras. 8-11 (1998)(Silver Star Preemption Order); AVR, L.P. d/b/a Hyperion of Tennessee, L.P. Petition for Preemption, CC Docket No. 98-92, Memorandum Opinion and Order, 14 FCC Rcd 11064, 11067-68, paras. 7-9 (1999) (Hyperion Order), recon. pending.

FN12. Mo. Rev. Stat. s 392.410(7) (1998). Under section 392.410(2) of the Missouri Public Service Commission law, a certificate of service authority is required to provide intrastate interexchange telecommunications service and local exchange telecommunications service. Mo. Rev. Stat. s 392.410(2) (1998).

FN13. Texas Preemption Order, 13 FCC Rcd at 3544, para. 179.

FN14. Tex. Rev. Civ. Stat. Ann. Art. 1446c-0 (West Supp. 1996) (hereinafter PURA95).

FN15. Texas Preemption Order, 13 FCC Rcd at 3544, para. 179.

FN16. Id. at 3545, para. 181, citing Gregory v. Ashcroft, 501 U.S. 452 (1991).

FN17. Id. at 3546-47, para. 184.

FN18. Id. at 3546-47, para. 184.

FN19. Id. at 3544, para. 179. In the Texas Preemption proceeding, ICG Access Services filed and later withdrew a petition for declaratory ruling that addressed the ability of municipally-owned utilities to provide telecommunications services. The City of Abilene apparently did not operate an electric utility at the time of the filing of its petition, and did not address the ability of municipal utilities to provide service in Texas. See also UTC Reply Comments at 2.

FN20. City of Abilene, Texas, et al. v. FCC, 164 F.3d 49 (D.C. Cir. 1999).

FN21. Id. at 51-52, citing Gregory, 501 U.S. at 461.

FN22. Id. at 52.

FN23. The Court stated,

"In a brief, one-paragraph appeal to 'legislative history' consisting of a committee report and two post-enactment letters from Members of Congress, Abilene fails to acknowledge that the statements it quotes deal with an issue not before us - whether public utilities are entities within s 253(a)'s meaning."
164 F.3d at 53, n.7.

FN24. Letter from James Baller, The Baller Herbst Law Group, on behalf of the Missouri Municipals, to the Honorable William E. Kennard, the Honorable Susan Ness, the Honorable Harold Furchtgott-Roth, the Honorable Michael Powell, the Honorable Gloria Tristani, Cc Docket No. 98-122 (filed Jan. 26, 1999) at 2-4 (Missouri Municipals Jan. 26, 1999 Letter).

FN25. Letter from James Baller, The Baller Herbst Law Group, on behalf of the Missouri Municipals, to Magalie Roman Salas, Secretary, FCC, Cc Docket No. 98- 122 (filed June 1, 1999) (Missouri Municipals June 1, 1999 Letter) at 2. See also MCI Comments at 2-4; UTC Comments at 9-14; Missouri River Reply at 4-5.

FN26. Petition at 17-19, Missouri Municipals Jan. 26, 1999 Letter at 4-6. See also MCI Comments at 3-4.

FN27. Petition at 6-15, 32-34.

FN28. Texas Preemption Order, 13 FCC Rcd at 3546-47, para. 184.

FN29. Id. at 3549, para. 190.

FN30. See Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CC Docket No. 98-102, Fifth Annual Report, FCC 98-335 (rel. Dec. 23, 1998).

FN31. Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-146, Second Report, FCC 00- 290 (rel. Aug. 21, 2000) (Section 706 Second Report). Advanced services refer to "high-speed" services that offer a transmission speed of 200 kilobits per second in at least one direction, thereby allowing a customer, for example, to change Internet web pages "as fast as one can flip through the pages of a book." *Id.* at paras. 10-11.

FN32. *Id.* at paras. 139-51.

FN33. *Id.* at para. 140.

FN34. APPA Comments at 3. See also Letter from James Baller, The Baller Herbst Law Group, on behalf of Missouri Municipals, to Jodie Donovan-May, Policy Division, Common Carrier Bureau, CC Docket No. 98-122 (filed Sept. 14, 1999) (Missouri Municipals Sept. 14, 1999 Letter) at Attachment F (describing the broadband services various municipally-owned utilities provide in small communities in Georgia); Letter from James Baller, The Baller Herbst Law Group, on behalf of Missouri Municipals, to Magalie Roman Salas, FCC Secretary, CC Docket No. 98-122 (filed Apr. 26, 1999) at 1 (stating that municipal power utilities are already using their facilities to provide a range of communications services in 33 states that have not enacted regulations prohibiting them from doing so); MCI Comments at 4 (stating that MCI is partnering with municipal electric utilities, rural electric cooperatives and other local government entities in a number of Midwestern states to provide telecommunications services to business and residential customers). Municipally-owned utilities also serve large cities, including Los Angeles, Seattle, Cleveland and San Antonio, and are also potential competitors in these areas.³⁴ APPA Comments at 1-2. See also Missouri River Energy Services Reply at 3.

FN35. Missouri River Comments at 3. Missouri Municipals Sept. 14, 1999 Letter at Attachment A (listing municipally-owned cable systems located primarily in rural or small markets in 24 states).

FN36. Texas Preemption Order, 13 FCC Rcd at 3549, para. 190.

FN37. NTCA Comments at 6; Southwestern Bell Comments at 2-4; GTE Comments at 8- 12. Several other commenters from Missouri expressed concern that municipally- owned utilities could impede competition by serving dual roles as regulator and competitor. See Letter from Rep. Chuck Graham, Missouri State Representative, 24th District, to Chairman Kennard, FCC, CC Docket No. 98-122 (filed Jan. 26, 2000); Letter from Rep. Sam D. Leake, Missouri State Representative, 9th District, to Chairman Kennard, FCC, CC Docket No. 98-122 (filed Jan. 27, 2000); Letter from Rep. Carol Jean Mays, Missouri State Representative, 50th District, to Chairman Kennard, FCC, CC Docket No. 98-122 (filed Jan. 27, 2000); Letter from Rep. Larry Crawford, Missouri State Representative, 117th District, to Chairman Kennard, FCC, CC Docket No. 98-122 (filed Jan. 27, 2000); Letter from David A. Leezer, Economic Development Center of St. Charles County, Missouri, to Chairman Kennard, FCC, CC Docket No. 98-122 (filed Feb. 7, 2000).

FN38. Texas Preemption Order, 13 FCC Rcd at 3549, para. 190. We also note that municipalities are required under section 253(c) of the Act to administer compensation requirements for public rights-of-way in a competitively neutral and non-discriminatory manner. 47 U.S.C. s 253(c). They are also subject to petitions for preemption filed under section 253 if they unlawfully favor a municipally-owned utility over other competitors.

FN39. Petition at 20-21.

FN40. Texas Preemption Order, 13 FCC Rcd at 3546, para. 183.

FN41. Missouri Constitution, Article 6, s 19(a) (1998).

FN42. Texas Preemption Order, 13 FCC Rcd at 3544, para. 179.

FN43. Petition at 4-6.

FN44. Abilene, 164 F.3d at 52 (citing Gregory, 501 U.S. at 460).

FN45. Implementation of Section 703(e) of the Telecommunications Act of 1996, 13 FCC Rcd 6777 (1998) (Pole Attachment Order), aff'd in part and rev'd in part sub nom., *Gulf Power v. FCC*, 208 F.3d 1263 (11th Cir. 2000), rehearing denied, 226 F.3d 1220, petition for cert. filed (U.S. Nov. 21, 2000) (No. 00-843).

FN46. Missouri Municipals Jan. 26, 1999 Letter at 5 (emphasis in original).

FN47. *Id.* at 6; Petition at 15-16; 18-20. The Missouri Municipals also argue that the Commission includes municipalities and municipal electric utilities as "entities" that must make universal contributions under the Act. Petition at 17-18. The Commission's decision to require universal service contributions from municipal telecommunications providers was based on the statutory requirement that telecommunications providers that provide telecommunications service "for a fee" must contribute. The Commission found that "for a fee" does not necessarily mean "for profit," and therefore rejected arguments by UTC that municipal providers are not required to contribute. Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9171-72, 9177, paras. 775, 784. Unlike the current proceeding, the Commission was not addressing whether or not to preempt a state's authority to determine if its political subdivisions should be permitted to provide telecommunications service in the first place.

FN48. *Gulf Power Company v. FCC*, 208 F.3d 1263, 1273-74 (11th Cir. 2000).

FN49. Abilene, 164 F.3d at 52. We also reject the Missouri Municipals' argument that we must interpret the term "any" in the broadest sense based on the U.S. Supreme Court's holding in *Salinas v. U.S.* Petition at 30 (citing *Salinas v. U.S.*, 118 S.Ct. 469 (1997)). In that case, the Court determined that a federal bribery statute that forbid acceptance of a bribe by a covered official in connection with "any" official business or transaction must be interpreted broadly to include transactions that did not affect federal funds. *Salinas*, 118 S.Ct. at 473. It also found that the text of the overall statute, not just the phrase containing the term, "any," was broad enough to clearly encompass all types of bribes. *Id.* at 473-74. The Court went on to state that *Gregory v. Ashcroft* did not apply to the case before it because the statute was not "susceptible of two plausible interpretations, one of which would alter the existing balance of federal and state powers." *Id.* at 474-75. Unlike in *Salinas*, section 253(a) is susceptible of more than one interpretation, as the D.C. Circuit already determined in Abilene. Moreover, to preempt the statute would alter the existing balance of power between Missouri and its municipalities in a way that the Commission has said was not intended by section 253(a). Texas Preemption Order, 13 FCC Rcd at 3544, para. 179. We also disagree with the Missouri Municipals' argument that another case, *Alarm Industry Communications Council v. FCC*, requires us to interpret the term "entity" broadly so as to further Congress' intent to include municipalities and municipal utilities within the scope of section

253(a). Petition at 28-29 (citing 131 F.3d 1066 (D.C. Cir. 1997)). As we have stated in this order, we are unable to discern Congress' intent clearly enough so as to meet the Gregory standard, and therefore must find that "entity" does not include political subdivisions of the state, including municipalities and municipally-owned utilities.

FN50. Letter from Richard B. Geltman, General Counsel, APPA, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-122 (filed Sept. 29, 2000), Att. at 3- 4 (citing *State of Washington Dep't. of Game v. Federal Power Commission*, 207 F.2d 391 (9th Cir. 1953) (en banc), cert. denied, 347 U.S. 936 (1954); *City of Tacoma v. Taxpayers of Tacoma*, 43 Was. 2d 468, 262 P.2d 214 (1953); *City of Tacoma v. Taxpayers of Tacoma*, 49 Wash. 2d 781, 307 P.2d 567 (1957) (en banc), rev'd and remanded, 357 U.S. 320 (1958) (Cowlitz River Dam cases); *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946)).

FN51. *State of Washington Dep't. of Game*, 207 F.2d at 396.

FN52. *Id.* at 396.

FN53. *Id.* at 396-97.

FN54. *Id.* at 396.

FN55. Petition at 28-32. The Missouri Municipals refer to the application of HB 620 to municipal electric utilities. Other commenters refer to its applications to municipally-owned utilities. See, e.g., *Southwestern Bell Comments* at 11. We do not distinguish between municipally-owned utilities and municipal electric utilities in this Order to the extent that both operate as political subdivisions of the state.

FN56. *Texas Preemption Order*, 13 FCC Rcd at 3544-48, paras. 179-86.

FN57. The Missouri Public Service Commission law defines "municipality" to include a city, village or town. Mo. Rev. Stat. s 386.020(33) (1998).

FN58. See *City of Springfield Missouri v. Fredricks*, 630 S.W.2d 574, 575 (Mo. 1982).

FN59. Petition at 20-21, Attachment Q, *Springfield City Charter*, Art. XVI. The State of Missouri has empowered its cities and other municipalities to erect, maintain and operate public utilities. Mo. Rev. Stat. s 91.010 (1998). *Southwestern Bell* states that the utilities generally operate under the direction of a board of public utilities, which is accountable to the city council. *Southwestern Bell Comments* at 11 (citing *State ex rel. City of Springfield v. Public Serv. Comm'n.*, 812 S.W.2d 827 (Mo. Ct. App. 1991)).

FN60. Petition at 20-21, Attachment Q, *Springfield City Charter*, Art. XVI, ss 16.8, 16.12, 16.13. We also note that the Missouri Public Service Commission granted a certificate of service authority to "the City of Springfield, Missouri, through its Board of Public Utilities," to provide the limited intrastate telecommunications services that it is authorized to provide under HB 620. *Application of the City of Springfield, Missouri, through the Board of Public Utilities for a Certificate of Service Authority to Provide Nonswitched Local Exchange and Intrastate Interexchange Telecommunications Services to the Public Within the State of Missouri and for Competitive Classification*, Case No. TA-97-313, Report and Order, issued July 11, 1997. See also *Glidewell v. Hughey*, 314 S.W.2d 749, 755 (Mo. 1958) (The Supreme Court of Missouri determined that the Board of Public Utilities of Springfield "(I)ntead of

being set up in the nature of a separate municipal corporation with power to sue and be sued ...is only an administrative body or department of the City Government ..", and that the compensation and working conditions of the public utility's employees involved the exercise of legislative power and could not become a matter of bargaining and contract.).

FN61. Letter from B. Jeannie Fry, Director-Federal Regulatory, SBC, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-122 (filed Sept. 8, 1999) (Southwestern Bell Sept. 8, 1999 Letter), Attachment at 3 (citing *North Kansas City Hosp. Bd. of Trustees v. St. Lukes Northland Hosp.*, 984 S.W.2d 113, 117 and n.2 (Mo. Ct. App. 1998)). The Supreme Court of Missouri has also found that a municipal corporation that operates separate and apart from the city is still a political subdivision of the state because it derives its status as a public entity from an act of the General Assembly. *City of S. Louis v. Ryan*, 776 S.W.2d 13, 16 (Mo. 1989) (finding that the City of St. Louis does not control the manner in which the St. Louis Housing Authority, a political subdivision of the state, performs its statutorily mandated tasks).

FN62. Missouri Municipals Jan. 26, 1999 Letter at 3.

FN63. Petition at 7-9 (citing Testimony of William J. Ray on behalf of the American Public Power Association, Hearings on S.1822 Before the Senate Committee on Commerce, Science and Transportation, 103d Cong., 2d Sess. 351, 353-54 (1994); S. Rep. No. 103-367, 103d Cong., 2d Sess. 54-56 (1994)).

FN64. Petition at 10-11 (citing S. Rep. No. 103-367 at 56).

FN65. Petition at 11-13 (citing H.R. Rep. No. 104-458, 104th Cong., 2d Sess. 127 (1996)). The record also contains several letters from members of Congress stating that it was the intent of the Congress when it enacted section 253 to enable any entity, without qualification, to provide communications service, and that it expected the Commission to exercise its authority under section 253 to preempt state regulations that prohibited municipally-owned utilities from entering the telecommunications market. Petition, Attachment I, Letter from Congressman Dan Schaefer to FCC Chairman Reed Hundt, Aug. 5, 1996 (section 253 requires the Commission to "reject any state or local action that prohibits entry into the telecommunications business by any utility, regardless of the form of ownership or control"); Petition, Attachment M, Letter from Senator J. Robert Kerrey to FCC Chairman Reed Hundt, Sept. 9, 1997 (by using the term "any entity" in section 253, "Congress intended to give entities of all kinds, including publicly-owned utilities, the opportunity to enter these markets"). See also Missouri Municipals June 1, 1999 Letter, Attachment E, Letter from Congressmen Joe Moakley, Edward J. Markey, Barney Frank to FCC Chairman William E. Kennard, Apr. 20, 1999; Attachment F, Letter from Congressman Rick Boucher to FCC Chairman William E. Kennard, Mar. 16, 1999; Attachment G, Letter from Senators J. Robert Kerrey, Tom Harkin, Byron Dorgan, Paul Wellstone, John Kerrey, Mar. 26, 1999; Attachment H, Letter from Congressman Virgil H. Goode to FCC Chairman William E. Kennard, Feb. 12, 1999. These letters represent the personal views of various legislators made after the passage of section 253, and are thus not entitled to probative weight. *Bread Political Action Committee v. FEC*, 455 U.S. 577, 582, n.3, quoting *Quern v. Mandley*, 436 U.S. 725, 736, n. 10 (1978).

FN66. Abilene, 164 F.3d at 52. See also *Southwestern Bell Sept. 8, 1999 Letter*, Attachment at 6 (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (stating that legislative history associated with a federal act did not provide plain evidence that Congress intended to abrogate the Eleventh Amendment bar to suits against the states in federal court)).

FN67. Missouri Municipals' Reply at 8-9 (citing Gregory, 501 U.S. at 467 (citations omitted)).

FN68. Gregory, 501 U.S. at 467.

FN69. Petition at 15-16 (citing 47 U.S.C. s 224(a)(1)).

FN70. Petition at 15.

FN71. UTC Comments at 7. UTC refers to the Commission's decision in IT&E Overseas, Inc., in which the Commission found that the Guam Telephone Authority, a public corporation owned by the government of Guam, is separate from the government within the meaning of the Communications Act. 7 FCC Rcd 4023 (1992). This case did not implicate federal preemption of traditional state powers. It involved a circumstance in which Guam was attempting to assert jurisdiction over interstate and foreign carrier communications. To ensure that Guam did not usurp the Commission's exclusive authority to regulate such telecommunications, the Commission construed the term "any corporation" in the Communications Act to include public corporations, such as Guam's publicly- owned telephone company. The Commission explained that this interpretation of the Act was consistent with Congress' clearly expressed intent in 47 U.S.C. s 151 to centralize authority over interstate and foreign communications in one federal agency. Id. at 4025, paras. 9-12. By contrast, there is no clear expression of intent in section 253 to authorize federal preemption of state laws governing political subdivisions.

FN72. Texas Preemption Order, 11 FCC Rcd at 3547-48, para. 186.

FN73. Article 6, s 19(a) of the Missouri Constitution states,

Any city which adopts or has adopted a charter for its own government, shall have all powers which the general assembly of the state of Missouri has authority to confer upon any city, provided such powers are consistent with the constitution of this state and are not limited or denied either by charter so adopted or by statute. Such a city shall, in addition to its home rule powers, have all powers conferred by law.

Mo. Const. art. 6, s 19(a).

Article XI, section 5 of the Texas Constitution states,

Cities having more than [5000] inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters, subject to such limitations as may be prescribed by the Legislature, and providing that no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State.

Tex. Const. art. XI, s 5.

FN74. It is not clear to us whether or not a municipally-owned utility would be required to obtain a certificate of service authority to provide internet services in Missouri. A certificate of service authority is required to provide interexchange telecommunications service and local exchange telecommunications service. Mo. Stat. s 392.410(1) and (2). The definition of "telecommunications service" in Missouri's public service commission law does not address internet services specifically. Mo. Rev. Stat. s 386.020(53). "Access to the internet" is not considered a telecommunications service for purposes of the collection of sales tax in Missouri. Mo. Rev. Stat. s 144.010(13)(a).

SEPARATE STATEMENT OF CHAIRMAN WILLIAM E. KENNARD AND COMMISSIONER
GLORIA
TRISTANI

Re: The Missouri Municipal League; The Missouri Association of Municipal Utilities; City Utilities of Springfield; City of Columbia Water & Light; City of Sikeston Board of Utilities Petition for Preemption of Section 392.410(7) of the Revised Statutes of Missouri, Memorandum Opinion and Order, CC Docket No. 98-122.

We vote reluctantly to deny the preemption petition of the Missouri Municipals because we believe that HB 620 effectively eliminates municipally- owned utilities as a promising class of local telecommunications competitors in Missouri. Such a result, while legally required, is not the right result for consumers in Missouri. Unfortunately, the Commission is constrained in its authority to preempt HB 620 by the D.C. Circuit's City of Abilene decision and the U.S. Supreme Court's decision in *Gregory v. Ashcroft* that require Congress to state clearly in a federal statute that the statute is intended to address the sovereign power of a state to regulate the activities of its municipalities. Given this precedent, Section 253(a)'s prohibition on state or local laws that prohibit the ability of "any entity" to provide any interstate or intrastate telecommunications service is not sufficiently clear.

The record in this proceeding contains many letters from Members of Congress that state unequivocally that it was the intent of Congress when it enacted section 253 to enable any entity, regardless of the form of ownership or control, to enter the telecommunications market and that it intended to give the Commission authority to reject any state or local action that prohibits such entry. We urge Congress to take these views to heart and consider amending the language in section 253(a) to address clearly municipally-owned entities. This would allow the Commission to address the barriers to municipal entry that already exist in several other states, and would further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities in which municipally- owned utilities have great competitive potential. We also urge the states, as the Commission has said before, to use safeguards other than an outright ban on entry to address any unfair competitive advantage that they believe a municipally-owned utility may have. The right policy for consumers is to have as many providers of telecommunications from which to choose-barring entry by municipally-owned utilities does not give consumers that choice.

SEPARATE STATEMENT OF COMMISSIONER SUSAN NESS

Re: The Missouri Municipal League; The Missouri Association of Municipal Utilities; City Utilities of Springfield; City of Columbia Water & Light; City of Sikeston Board of Utilities Petition for Preemption of Section 392.410(7) of the Revised Statutes of Missouri, Memorandum Opinion and Order, CC Docket No. 98-122.

I write separately to underscore that today's decision not to preempt a Missouri statute does not indicate support for a policy that eliminates competitors from the marketplace. In passing the Telecommunications Act of 1996, Congress sought to promote competition for the benefit of American consumers.

In the Telecommunications Act, Congress recognized the competitive potential of utilities and, in section 253, sought to prevent complete prohibitions on utility entry into telecommunications. The courts have concluded, however, that section 253 is not sufficiently clear to permit interference with the relationship between a state and its political subdivisions. [FN75]

Nevertheless, municipal utilities can serve as key players in the effort to bring competition to communities across the country, especially those in rural areas. In our recent report on the deployment of advanced telecommunications services, we examined Muscatine, Iowa, a town in which the municipal utility was the first to deploy broadband facilities to residential consumers. The telephone and cable companies in Muscatine responded to this competition by deploying their own high-speed services, thereby offering consumers a choice of three broadband providers. It is unfortunate that consumers in Missouri will not benefit from the additional competition that their neighbors to the north enjoy.

I urge states to adopt less restrictive measures, such as separation or nondiscrimination requirements, to protect utility ratepayers or address any perceived unfair competitive advantages. Allowing the competitive marketplace to work will facilitate the type of innovation and investment envisioned by Congress when it enacted the Telecommunications Act. I join with Chairman Kennard and Commissioner Tristani in urging Congress to clarify its intention in section 253 with respect to prohibitions on entry by municipal utilities.

FN75. See *City of Abilene, Texas v. FCC*, 164 F.3d 49 (D.C. Cir. 1999).
2001 WL 28068 (F.C.C.)
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