

## Law and Business

# Happy victor is cautious after Bristol decision

## Telecommunications competition is opened

JIM BALLER IS a happy but cautious victor.

After two unsuccessful forays, Baller – a leading Washington telecommunications attorney – got his big win last month in the Bristol Virginia Utilities Board case.

News accounts, understandably, have focused on the impact this court decision will have on smaller communities fighting to stay abreast of larger metro areas in the quest for more bandwidth.

Bandwidth, of course, is the holy grail of our information age. Localities know that without bandwidth their future could be as grim as 19th-century towns the railroads bypassed or 20th-century towns without Interstate highway access.

I want to focus on the legal issues that preceded and produced the Bristol decision, and what national impact it may have.

First, Jim Baller was hired by the Bristol authorities because of his leading role in two earlier cases. They involved the same issue Bristol faced, namely, whether a state government may prohibit its agencies and localities from offering telecommunications services. A Virginia statute passed after intense lobbying by the big telephone companies prohibited all local governments (except Abingdon) from offering Internet or other telecommunication services. My home town was exempted because our EVA fiber optics network was in place and Sprint, one of the big telephone companies, helped build it.

Congress' 1996 Telecommunications Act says, in effect, that "any entity" may compete with the big telephone companies. Yet the courts in Baller's earlier Texas and Missouri cases found that "any entity" does not include a local or state government.

What was different this time?

Baller cites the U. S. Supreme Court's 1997 decision in *Salinas v. United States*. While *Salinas* had nothing to do with telecommunications,



**Jackson S. White, Jr.**

*jack.white@naxs.com*

it involved federal preemption and the term "any." Preemption occurs whenever Congress passes a statute which overrides conflicting state laws.

*Salinas* said use of "any" in a statute precludes a narrow interpretation of the law's application. In short, "any" means what it says.

The Bristol opinion was written by U. S. District Judge James P. Jones of Abingdon. I've read it, and that opinion is a masterpiece. Baller likewise was impressed and has filed copies with the federal appeals court now considering his Missouri cases. While Jones' decision will have no binding effect on those appeals, its logic and authorities could be persuasive.

Will Jones' decision be appealed? Bristol's defendant was Virginia's Attorney General Mark Earley, a GOP candidate for governor. Editorials from near and far have urged Earley to let Jones' decision stand – because it's right for Virginia's local governments. However, the state's telecommunications industry joined this suit and could file its own appeal, with or without Earley. Only time will tell whether an appeal materializes.

One of the happiest people after Jones' decision was local Congressman Rick Boucher. He was a principal author of the telecommunications act and filed a brief urging Judge Jones to reach the decision he did. Boucher said Congress intended for competition in telecommunications to be wide open.

Now, it actually may happen.

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*Jack White is a civil trial and business attorney in Abingdon, Va.*