Nos. 02-1238, 02-1386, 02-1405

In The Supreme Court of the United States

JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri,

Petitioner,

v.

MISSOURI MUNICIPAL LEAGUE, et al.,

Respondents.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES,

Petitioners,

v.

MISSOURI MUNICIPAL LEAGUE, et al.,

Respondents.

SOUTHWESTERN BELL TELEPHONE, L.P.,
fka Southwestern Bell Telephone Company,

Petitioner,

v.

MISSOURI MUNICIPAL LEAGUE, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF AMICUS CURIAE OF CONGRESSMAN RICK BOUCHER IN SUPPORT OF RESPONDENTS

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INTEREST OF CONGRESSMAN BOUCHER AS *AMICUS CURIAE*[1]

Congressman Rick Boucher represents the Ninth District of Virginia, in the mostly rural, southwestern area of the state. A focus of his career in the House of Representatives has been promoting the economic development of the District. The decline of the region's tobacco industry and some other industries have created the challenge of finding new opportunities for jobs and growth. Congressman Boucher identified telecommunications as part of the solution for the economic challenges facing Southwest Virginia, and since the 1990s, he has been one of the leaders in the effort by the Congress to reform the law of telecommunications. In particular, he has promoted local government telecommunications projects, since the Blacksburg (Virginia) Electronic Village kicked off in 1993, up through and including the Bristol Virginia Utilities' Optinet offerings, some of which began in 2003. Because Congressman Boucher has insight into how the 1996 Telecommunications Act came about, and what the 1996 Act was supposed to accomplish for areas like his district in Southwest Virginia, where some local governments are providing telecommunications services, his views will be of assistance in its consideration of the issue of whether Congress intended in the 1996 Act to preempt state laws

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[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, and the Virginia Towns of Abingdon, Front Royal, and Richlands, the Cities of Bedford, Bristol, Danville, Martinsville, Radford, and Salem, and the members of Virginia Municipal Electric Association No. 1, made a monetary contribution to the preparation and submission of this brief.

that would be barriers to the entry of local governments into the market for providing telecommunications services.

SUMMARY OF ARGUMENT

State laws prohibiting local governments from providing telecommunications services are invalid. In the 1996 Telecommunications Act, the Congress provided that the states may not prohibit "any entity" from providing telecommunications services. The words "any entity" should be given their ordinary meaning, which certainly includes a governmental entity. Congress chose not to make the same distinction in section 253(a) between public and private entities that was made in the pole attachment section of Act, 47 U.S.C. § 224, a part of the Act on which Congressman Boucher focused specifically. The Federal Communication Commission's contrary interpretation is inconsistent with the plain meaning of the statutory language, the intent of Congress, and the policy goals of the Act. This Court should honor the intent of Congress and allow local governments to offer commercial telecommunications services, notwithstanding any barriers to market entry enacted by the States.

ARGUMENT

1. The 1996 Telecommunications Act was the product of years of work by Congressman Boucher and other Members of Congress to increase the availability of telecommunications services and competition among telecommunications providers.

The 1996 Telecommunications Act was the end result of years of Congressional attention to the problem of

competition in the telecommunications industry. In 1989, Congressman Boucher, along with Senator Albert Gore of Tennessee, introduced legislation to permit telephone companies to offer cable television service within their telephone services areas. 135 Cong. Rec. E1814 (May 22, 1989). In 1991, Congressman Boucher and others introduced the Communications Competitiveness and Infrastructure Modernization Act of 1991. 137 Cong. Rec. E2064 (June 6, 1991). In 1993, Congressman Boucher sponsored H.R. 1312, the Local Exchange Infrastructure Modernization Act; H.R. 1504, the Communications Competitiveness and Infrastructure Modernization Act of 1993; and H.R. 1757, the High Performance Computing and High Speed Networking Act of 1993. *See* 139 Cong. Rec. E617 (Mar. 11, 1993); 139 Cong. Rec. E799 (Mar. 29, 1993), 139 Cong. Rec. E988 (Apr. 21, 1993).[2]

In years preceding enactment of the 1996 Act during the 104th Congress, Congressman Boucher served (and continues to serve) on the Telecommunications, Trade, and Consumer Protection Subcommittee of the House of Representatives' Committee on Commerce,[3] and the Courts and Intellectual Property Subcommittee of the House of Representatives' Committee on the Judiciary. In addition, through the 103rd Congress, Congressman Boucher served as Chairman of the Science Subcommittee of the House Committee on Science, Space and Technology.

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[2] *See* generally http://www.house.gov/boucher/docs/boucherinfotech.htm.

[3] This subcommittee is now the Subcommittee on Telecommunications and the Internet.

All of these committees shaped what ultimately became the 1996 Telecommunications Act.

The goals of the earlier legislation, like the goals of the 1996 Telecommunications Act, were to introduce the benefits of competition to all consumers of telecommunications services, to provide incentives for all kinds of providers of telecommunications services to install modern networks, and to make advanced services available in all areas of the country. The need to ensure that the benefits of advanced telecommunications capabilities were made available in rural areas was an overriding objective of Congressman Boucher, as is evidenced by his remarks in the Congressional Record discussing the importance of advanced telecommunications capabilities for economic development in small towns and rural communities. 140 Cong. Rec. E753 (Apr. 21, 1994) (comments in anticipation of H.R. 3636). As Congressman Boucher stated on the floor of the House in commenting on the conference report, the 1996 Telecommunications Act largely realized the goals of his earlier legislative efforts to bring the benefits of competition and modernization to the nation's telecommunications industry. 142 Cong. Rec. H1159 (Feb. 1, 1996) (remarks of Congressman Boucher). The passage of the 1996 Telecommunications Act was, in a very real sense, the culmination of nearly 10 years' work by Congressman Boucher and others.

In the 103rd Congress, on June 28, 1994, the House passed H.R. 3636, which was called the Communications Competition and Information Infrastructure Act of 1994. In the Senate, S. 1822, called the Communications Act of 1994, was reported out of committee but was not taken up by the full Senate prior to adjournment. As its sponsor, Senator Hollings stated, "Though that bill [S. 1822] was reported by the Commerce Committee by a vote of 18 to 2,

there was not enough time in the 103rd Congress to complete our work." 142 Cong. Rec. S687 (Feb. 1, 1996) (remarks of Senator Hollings); *see* S. Rep. No. 23, 10 (1995). The work on reforming telecommunications law resumed in the next Congress.

In the 104th Congress, on March 30, 1995, Senators Pressler and Hollings decided to "pick up where we left off in the last Congress" and introduced S. 652, which ultimately became Pub. L. No. 104-104, the Telecommunications Act of 1996. *See* 142 Cong. Rec. S687 (Feb. 1, 1996) (remarks of Senator Hollings). In the House, Congressman Boucher co-sponsored H.R. 1555. The Senate bill passed in June; the House billed passed in August. The House passed an amended version of S. 652, substituting the language of H.R. 1555, and requested a conference to resolve the differences between two versions of the bill. Congressman Boucher was selected to serve on the Conference Committee which agreed upon the final language of the 1996 Telecommunications Act. *See* 141 Cong. Rec. H10002 (Oct. 12, 1995) (listing House appointees to conference committee).

The final bill addressed a substantial number of issues on which Congressman Boucher with other congressmen had worked specifically. In particular, Congressman Boucher took a lead role in crafting portions of the law dealing with electric utilities. Along with Congressman Gillmor, Congressman Boucher introduced a bill that would allow utilities subject to the Public Utility Holding Company of 1935, 49 Stat. 803, 15 U.S.C. § 79a *et seq*. ("PUHCA") to provide telecommunications services. *See* 141 Cong. Rec. H4522 (May 3, 1995) (remarks of Congressman Gillmor). Congress ultimately approved such a provision as part of the 1996 Telecommunications

Act. Along with Congressman Markey and others, Congressman Boucher worked on refining the pole attachment provisions of earlier versions of the Act. *See* 140 Cong. Rec. H5236 (June 28, 1994) (remarks of Congressmen Markey and Boucher). Significantly, in revising the pole attachment provisions, Congressman Boucher purposefully retained language that excluded municipal utilities from the scope of the definition of "utilities" for purposes of pole attachments while not making such a limitation in the term "any entity" in 47 U.S.C. § 253(a).

For his work on telecommunications law, Network Computing magazine honored Congressman Boucher as one of the "Ten Most Important People of the Decade" of the 1990s, recognizing him as "one of the leading architects of the Telecommunications Act of 1996." Peter Morrissey, *Number 9: Rick Boucher*, Network Computing (Oct. 2, 2000).[4]

2. Consistent with the overall goals of the 1996 Telecommunications Act, Congress clearly intended to include municipalities as "entities" protected by section 253(a) of the Act.

Section 253(a) derives directly from earlier sessions of Congress. It was included (as new section 254) in both the House and the Senate versions of S. 652, and made new section 253(a) by the Conference Committee on S. 652. *See* H.R. Rep. No. 458, at 126-27 (1996). Section 253(a) carries over language from what was called new section 230(a), in

[4] Online at http://www.networkcomputing.com/1119/1119f1people_9.html.

§ 302 of S. 1822 from the 103rd Congress. Witnesses testifying at Senate hearings in support of S. 1822 expressed their understanding that its language would prohibit barriers to entry affecting electric utilities. *See* Testimony of Richard Green, Senate Committee on Commerce, 1994 WL 233334 (May 18, 1994) ("S. 1822 clearly recognizes that utilities can be telecommunications providers generally"); Testimony of William Ray, Senate Committee on Commerce, 1994 WL 232976 (May 11, 1994) ("Section 302 recognizes the right of electric and other utilities to provide telecommunications services"); Testimony of Lawrence Gressette, Senate Committee on Commerce, 1994 WL 232980 (May 11, 1994) ("We are particularly pleased that S. 1822 explicitly recognizes the importance of participation by electric utilities in the provision of telecommunications services and removes regulatory barriers to such participation"). In reporting S. 1822 to the full Senate, the Commerce Committee explained that section 302 of S. 1822, adding new section 230(a), "allows all electric, gas, water, steam, and other utilities to provide telecommunications." S. Rep. No. 367, at 22 (1994).

In earlier House versions of the Act, the preemption language provided that "no State or local government may . . . effectively prohibit any person or carrier from providing any interstate or intrastate telecommunications service or information service, or impose any restriction or condition on entry into the business of providing any such service." Title I, section 102(a), H.R. 3636, 103d Cong., 140 Cong. Rec. H5217 (June 28, 1994). Even before the conference on S. 652, the House followed the Senate and replaced "any person or carrier" with "any entity" in passing its version of S. 652. The language of the prohibition against barriers

to entry was simplified and broadened into what is now section 253(a).

The language of section 253(a) is deliberately broad. In shaping section 253, Congress balanced the regulatory interests of state and local government against the federal policy against barriers to entry. *See* 141 Cong. Rec. S8174-S8176 (June 12, 1995) (remarks of Senator Hollings); 140 Cong. Rec. H5228 (June 28, 1994) (remarks of Rep. Markey, in joint explanation of H.R. 3636) (describing the "overarching goal of enabling States to impose necessary and appropriate terms and conditions so long as they do not amount to an effective prohibition on entry into the telecommunications business"). Sections 253(b) and (c) represent the limit of the willingness of Congress to allow the states to regulate the market for telecommunications services. *Id.* No other exceptions to the broad language of section 253(a) were allowed.

In passing the 1996 Telecommunications Act, Congress understood that electric and other utilities would be allowed to provide telecommunications services under the Act. Congress adopted the Senate version of S. 652 on the issue of amending the PUHCA. The Senate's version paralleled H.R. 912, which Congressman Boucher had co-sponsored earlier in the House. The rationale Congress applied when it chose to include utilities covered by the PUHCA as providers of telecommunications services extends to all electric utilities.

Congress recognized that "electric utilities in general have extensive experience in providing telecommunications," that advanced telecommunications services can save energy and money for customers of electric utilities, and that electric utilities have enough customers to be

"effective competitors" in the market for telecommunications services. *See* S. Rep. No. 23, at 6-7 (1995). Similarly, Congress recognized that electric utilities and other utilities might "choose to provide telecommunications services" and section 253(b) would allow states to protect consumers of those utilities. *See* H.R. Rep. No. 458, at 127 (1996). As the legislative history indicates, Congress fully expected that electric utilities would serve as providers of telecommunications services, without distinguishing between investor-owned and municipal utilities.

Congress used the term "utilities" to include municipal utilities except where it specified otherwise. Where Congress intended to make a distinction between municipal and investor-owned utilities, it has said so in unambiguous terms. Section 703 of the 1996 Telecommunications Act revised the pole attachment provisions while retaining the distinction for purposes of section 224 between municipal and investor-owned utilities. *See* 47 U.S.C. § 224(a)(1). Like other parts of the Act, the pole attachment provisions were considered in detail over the course of several sessions of Congress. The difference between these provisions and section 253(a) highlights the intention of Congress to include both public and private entities within the scope of section 253(a).

Congress recognized the economic reality that profit-seeking companies in the private sector would seek first to serve areas with greater population density and wealth. Accordingly, Congress imposed requirements in the 1996 Telecommunications Act designed to provide additional incentives for private businesses to serve rural areas. At the same time, Congress had no intention of eliminating any potential source for the provision of telecommunications services in historically underserved areas.

Congress believed that the public would best be served if all kinds of entities were allowed to provide telecommunications services. Congress sought to enable utilities, both public and private, to become providers of telecommunications services. The amendment to the PUHCA to allow public utilities to provide telecommunications services was just one part of this program. By prohibiting all state law barriers to entry, Congress sought deliberately to open the marketplace to private and public providers of telecommunications, to maximize the potential for service in all areas.

3. Rural Southwest Virginia provides one example of an area where service from both municipal and private entities is necessary to achieve the economic development goals of the Telecommunications Act.

"Showcasing Southwest Virginia," the effort to attract new employers and businesses to Southwest Virginia, has been a full-time, daily priority for Congressman Boucher throughout his tenure as a member of the House of Representatives. Congressman Boucher has worked continuously to promote the improvement of telecommunications services available to customers in Southwest Virginia. Despite the progress that has been made in many parts of the Ninth District, limitations on the availability of advanced telecommunications services have constrained the ability of Southwest Virginia to attract new employers and make the most of the region's potential for economic development. Businesses and consumers increasingly require high bandwidth connections that remain unavailable in many areas of Southwest Virginia.

Congressman Boucher has consistently viewed the 1996 Telecommunications Act from the time of its passage as a remedial measure which addressed the telecommunications needs of Southwest Virginia. Shortly before the final vote on the Act in February 1996, Congressman Boucher launched his "Electronic Village" initiative, with the goal that every town, county, and city in the Ninth District of Virginia would acquire "electronic village" capability for high speed computer-based communications similar to the Blacksburg Electronic Village. At almost the same time, Congressman Boucher announced the launch of the fiber-optic network in the Town of Abingdon, which was planned from the beginning to provide service to both government and private customers.[5]

In subsequent years, Congressman Boucher has often repeated his understanding that the protections against barriers to entry in the 1996 Telecommunications Act extend to local governments. Congressman Boucher has written formally to the Federal Communications Commission, expressing his understanding of the meaning of section 253(a). In addition, Congressman Boucher has restated the same views in public speeches, such as the Wise County forum in October 20, 2000, letters to and informal talks with Commission members,[6] and statements to the media, such as in an article published in Washington Techway news magazine. *See* Usher, *High-speed deliverance: Are phone companies using their clout to*

[5] *See* generally http://www.house.gov/boucher/docs/eva.htm.

[6] *See* Letter of Congressman Boucher to Chairman Kennard, Mar. 16, 1999, *at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi? native or pdf= pdf&id document=6008346222 (Attachment F).

keep rural Virginia from getting wired?, Washington Techway (Mar. 26, 2001).

Since the decision of the U.S. District Court for the Western District of Virginia in *City of Bristol v. Earley*, 145 F. Supp.2d 741 (W.D. Va. 2001), and with the support of new laws from the Virginia General Assembly, a number of localities, including the City of Bristol itself, have begun telecommunications projects in Southwest Virginia. In May of 2003, Congressmen Boucher announced an award of federal funding which will enable the deployment of a fiber optic backbone for high speed Internet access in Russell and Tazewell Counties, areas which were previously unserved or underserved.

As demonstrated by the cooperative project between the City of Bristol and the Cumberland Plateau Planning District, local governments are working together in Southwest Virginia to find solutions to the lack of availability of advanced telecommunications. The return on investment for these projects can only be measured in the economic future of the region. The policies of the Telecommunications Act are being served when local governments are allowed to proceed with these projects to provide opportunities for Southwest Virginians, opportunities without which the task of achieving growth and opportunity in this area would become far more challenging.

The experience of Southwest Virginia demonstrates both the need and the potential for expansion of telecommunications services to create economic opportunities. Congress has determined in the exercise of its power to regulate interstate commerce that the availability of telecommunications services is too important to allow state law to limit which entities may provide telecommunications services. Failure

to allow local governments protection against state law barriers to entry into the telecommunications business defeats the plain language of Congress and the fundamental purposes of the 1996 Telecommunications Act.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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