

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 phase 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)nstead 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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