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

IN THE

Supreme Court of the United States

JEREMIAH W. NIXON, ATTORNEY GENERAL OF MISSOURI, *ET AL.*,
Petitioner,

-AND-

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES,
Petitioners,

-AND-

SOUTHWESTERN BELL TELEPHONE, L.P.,
FKA SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

MISSOURI MUNICIPAL LEAGUE, *ET AL.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE HIGH TECH BROADBAND COALITION AND THE FIBER-TO-THE-HOME COUNCIL AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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PRELIMINARY STATEMENT

The High Tech Broadband Coalition ("HTBC") and the Fiber-to-the-Home Council ("FTTH Council") respectively submit this brief as *amici curiae*, pursuant to Rule 37.3 of the Rules of this Court.[1]

INTEREST OF *AMICI CURIAE*

Amici are leading national organizations that collectively represent the interests of every industrial sector participating in the deployment of advanced telecommunications services[2] – more commonly called "broadband" – in the United States. *Amici* advocate for public policies that promote broadband deployment and competition, because widespread broadband adoption is necessary to produce enormous societal and economic benefits for United States consumers, workers, and businesses.

The High Tech Broadband Coalition is an unincorporated industry alliance formed by the leading trade associations of the computer, telecommunications equipment, semiconductor, consumer electronic, software, and manufacturing sectors in the United States. The six trade associations that comprise

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk of this Court. No counsel for any party has authored this brief in whole or in part. No monetary contributions to the preparation or submission of this brief have been made by any person or entity other than *amici curiae* and their counsel.

[2] The Telecommunications Act of 1996 (the "1996 Act") defines the term "advanced telecommunications capability" as "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology." Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, Title VII § 706(c)(1) (reproduced in the notes under 47 U.S.C. § 157).

HTBC thus represent more than 15,000 corporations running the gamut of the high-technology industry, the continued success of which increasingly depend upon consumer adoption of broadband:

a. The Business Software Alliance ("BSA") is an international organization representing leading software and e-commerce developers in 65 countries around the world.

b. The Consumer Electronics Association ("CEA") represents companies that lead the consumer electronics industry in the development, manufacturing, and distribution of audio, video, mobile electronics, communications, information technology, multimedia, and accessory products, as well as related services. More than 1,000 member companies generate more than $90 billion in annual factory sales.

c. The Information Technology Industry Council ("ITI") represents the world's leading providers of information technology products and services, including computer, networking, data storage, communications, and Internet equipment, software, and services. In 2000, ITI member companies employed more than one million people in the United States and exceeded $668 billion in worldwide revenues.

d. The National Association of Manufacturers ("NAM") is the largest United States industrial trade association, with more than 14,000 members and 350 member associations in every industrial sector and all 50 States.

e. The Semiconductor Industry Association ("SIA") is the premier trade association representing the $102 billion United States microchip industry. SIA member companies account for more than ninety percent of United States-based semiconductor production.

f. The Telecommunications Industry Association ("TIA") is the leading trade association serving the communications and information technology industry, with proven strengths in standards development, domestic and international public policy, and trade shows. Through its worldwide activities, TIA facilitates business development opportunities and a competitive market environment. The association also provides a forum for its 700 member companies, the manufacturers and suppliers of products and services used in global communications.

While its members each serve as a major force for advocating the public policy objectives of their own members, HTBC was established to highlight their common interest in, and to ensure sustained advocacy for, public policies that promote broadband deployment and competition.

The Fiber-to-the-Home Council is a not-for-profit association of more than eighty companies and municipalities deploying fiber-to-the-home[3] ("FTTH") technology and services in the United States and around the world. Its members represent all areas of broadband industries, including telecommunications, computing, networking, system integration, engineering, and content providers, as well as traditional telecommunications providers, utilities, and municipalities. The FTTH Council was established in 2001 to educate the public on the opportunities and benefits of FTTH

[3] The phrase "fiber-to-the-home" commonly denotes a particular kind of broadband architecture predicated on the use of fiber optic cables extended to end-user customer premises. While the infrastructure that supports the Internet, and some large businesses, already employ high-speed fiber optics, in the proverbial "last mile" between incumbent local exchange carriers ("ILECs") and end-users, copper wire telephone lines and lower-bandwidth broadband technologies predominate. Deploying FTTH loops enables higher bandwidth data communications in the last mile.

solutions, and to advocate policies that promote FTTH deployment.

Since 2000, the telecommunications sector in the United States has lost 600,000 jobs, and private deployment of next-generation broadband technologies has been insufficient. Deployment by municipalities and municipally-owned utilities, in contrast, has accelerated. *Amici* are thus acutely interested in this case, and urge the Court to affirm the Eighth Circuit's decision and interpretation of the phrase "any entity" in Section 253(a) of the 1996 Act to encompass both public and private entities.

SUMMARY OF ARGUMENT

As both Congress and the FCC have repeatedly recognized, the national deployment of broadband and other advanced telecommunications services is in the Nation's interest. Their conclusions are not surprising given the enormous benefits to be reaped through these new technologies, not only in terms of growth to the economy (a substantial factor alone, as numerous studies show), but also in terms of telemedicine, distance learning, telecommuting, and entertainment.

United Nations statistics show that the United States currently ranks eleventh in nationwide broadband penetration. Recent data also demonstrate that municipalities are an important link in enhancing penetration, especially in rural and less densely populated areas. Municipal entry into the telecommunications market has been enormously valuable in countless instances of deployment in areas that are not an investment priority for private sector providers. *Amici* recount just a handful of examples of the very real benefits that have obtained when municipalities have deployed broadband on behalf of their residents, not only in terms of additional valuable services, but also enhanced competition for existing services.

Precluding states from erecting barriers to municipal entry into the market for advanced telecommunications services is not only appropriate from a policy perspective, it is also legally the right result and consistent with Congress's intention when it enacted the 1996 Act. The legislative history plainly demonstrates that Congress carefully selected broad language, "any entity," when it described the scope of the competition it sought to protect. Moreover, the legislators, Senator Lott in particular, specifically focused on the importance of the utilities and expressly recognized the contributions of municipalities in this important area. Senator Lott summarized Congress's broad intent by stating that they were "construct[ing] a framework where everybody can compete everywhere in everything."

By protecting municipalities and municipally-owned utilities from state-imposed barriers to entry into the market for advanced telecommunications services, the Eighth Circuit's interpretation of Section 253(a) furthered Congress's express pro-competitive objectives in the 1996 Act, especially in rural and other markets too small to attract necessary private investment in such services. The decision of the court of appeals, as Congress intended, thus permits municipalities to perform the same critical role in the deployment of advanced telecommunications services as they played in the electrification of rural communities in the twentieth century.

ARGUMENT

I. MUNICIPALITIES AND MUNICIPALLY-OWNED UTILITIES ARE AN IMPORTANT AND IN SOME CASES CRITICAL FORCE DRIVING THE DEPLOYMENT OF BROADBAND IN RURAL AMERICA.

A. Wider Broadband Access to All Americans Will Create Enormous Economic and Societal Benefits.

Both Congress and the FCC have recognized the importance of the deployment of advanced telecommunications services to the public interest and welfare of the Nation. Section 706 of the 1996 Act directed the FCC to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." Telecommunications Act of 1996, 110 Stat. 56, Title VII § 706(a)-(b) (reproduced in the notes under 47 U.S.C. § 157) ("Section 706"). If the FCC finds that such capability is not being deployed in a reasonable and timely manner, Congress further mandated the FCC to "take immediate action to accelerate deployment of such capability" through, among other measures, "regulatory forbearance" and "removing barriers to infrastructure investment." *Id.* Commenting on the value of broadband, Chairman Powell recently noted that "the importance of broadband deployment to the public interest and welfare is too great to disregard any potential method of facilitating that deployment."[4]

Widespread broadband adoption has the potential to transform the Nation's social, educational, and economic life.

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[4] *In re Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, FCC 01-360, CC Docket No. 01-337, at 2 (rel. Dec. 20, 2001) (Separate Statement of Michael K. Powell).

Among others, it presents enormous opportunities in telemedicine, distance learning, e-government, telecommuting, e-commerce, and entertainment.[5] Broadband deployment, moreover, can serve as a powerful catalyst for strengthening and improving the United States economy, benefiting consumers and producers, employees and shareholders alike. *See generally* Robert W. Crandall and Charles L. Jackson, Criterion Economics LLC, *The $500 Billion Opportunity: The Potential Economic Benefits of Widespread Diffusion of Broadband Internet Access* ("*Potential Economic Benefits of Widespread Diffusion*") (July 2001) http://www.criterioneconomics.com/documents/Crandall_Jackson_500_Billion_Opportunity_July_2001.pdf (last visited Oct. 8, 2003). Yet, despite the importance of broadband to the Nation's competitiveness in the global marketplace, according to statistics published by the United Nations, the United States ranks eleventh in the world in broadband penetration, with just seven subscribers per every 100 inhabitants. *See* United Nations, International Telecommunication Union, *Top 15 economies by 2002 broadband penetration, 2002* (updated Apr. 4, 2003), http://www.itu.int/ITU-D/ict/statistics/at_glance/top15_broad.html (last visited Oct. 16, 2003).

Several recent studies have detailed the economic benefits of broadband deployment and wider nationwide access to broadband. The aforementioned July 2001 study by Drs. Crandall and Jackson estimated that universal adoption of broadband access could provide United States consumers with several hundred billion dollars in economic benefits per

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[5] *See generally* Telecommunications Industry Association, *The Economic and Social Benefits of Broadband Deployment*, at 9-28 (October 2003) ("*Economic and Social Benefits of Broadband Deployment*") http://www.tiaonline.org/policy/broadband/Broadbandpaperoct03.pdf (last visited Oct. 8, 2003).

year.[6] A June 2001 study by the Yankee Group predicted $223 billion in cost savings from universally available broadband in the United States.[7] A January 2002 study coauthored by scholars at the University of California at Berkeley, The Brookings Institution, and the Momentum Research Group found that improved efficiencies in business and government operating expenses in the United States already had saved nearly $155 billion, and had the potential of producing $500 billion in savings by 2010.[8] These actual and potential economic benefits, moreover, are by no means isolated to enterprise-sized organizations, "dot-coms," and traditional technology industries. Instead, "[o]rganizations of all sizes and across all industries have adopted Internet business solutions as a tool for lowering operating costs and increasing revenues."[9]

B. Municipalities Are An Important Link in Achieving Nationwide Broadband Access.

In its Third Report issued pursuant to Section 706, the FCC concluded that advanced telecommunications capability was, as of that time, on a national level, being deployed in a reasonable and timely manner. *In re Inquiry Concerning the*

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[6] *Potential Economic Benefits of Widespread Diffusion*, at 2. This study also found that accelerating broadband deployment would provide increased economic benefits. In particular, an acceleration of ubiquitous broadband availability is worth an estimated $500 billion to United States consumers and producers. *Id.*, at 54.

[7] *The Collaborative Commerce Value Statement: A $223 billion Cost Savings Opportunity Over Six Years*, Module B-to-B Commerce & Applications, Vol. 6, No. 6, Yankee Group (Boston, Mass., June 14, 2001).

[8] Hal Varian, Robert E. Litan, Andrew Elder, and Jay Schulter, *The Net Impact Study: The Projected Economic Benefits of the Internet in the United States, United Kingdom, France and Germany*, at 19 (Jan. 2002), http://netimpactstudy.com/NetImpact_Study_Report.pdf (last visited Oct. 9, 2003).

[9] *Id.*, at 4.

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, Third Report, 17 FCC Rcd 2844, ¶ 1 (February 6, 2002) ("*Third Report*"). It also found, however, that only 37 percent of the most sparsely-populated outlying areas have access to high-speed service, and that "there continues to be a significant disparity in access to advanced services between those living in rural population centers and those living in sparsely-populated outlying areas." *Id.* ¶ 109. In many such areas, for example, digital subscriber lines ("DSL"), currently one of the most widely-used broadband technologies, cannot affordably be deployed in a manner that makes service available to all residents. Depending upon the DSL technology, a customer must be a maximum of 18,000 feet from a local telephone company's central office to receive DSL service. *See In re Verizon Telephone Companies*, 17 FCC Rcd 23598, ¶¶ 4-5 (Chief, Wireline Bureau, Nov. 18, 2002); *see also Third Report*, 17 FCC Rcd 2844, Appendix B, ¶¶ 27-29. In order to alleviate these distance limitations, a significant investment in remote facilities and fiber technologies must be made to bring the DSL enabling network closer to the customer's premises, which can be an investment barrier in rural and sparsely populated regions. The FCC has recognized that this distance limitation "has prevented DSL from being offered to all potential end-users and thus has impeded DSL deployment in more sparsely populated and remote locations." *See In re Verizon Telephone Companies*, 17 FCC Rcd 23598, ¶ 4 (Chief, Wireline Bureau, Nov. 18, 2002).

In commenting on the FCC's findings in its Third Report, moreover, the United States Department of Commerce, Office of Technology Policy, also noted that "smaller and rural

communities [were] seeing deployment less rapidly" than urban areas.[10] The Department of Commerce further warned:

> It is important to note * * * that the current generation of broadband technologies (cable and DSL) may prove woefully insufficient to carry many of the advanced applications driving future demand. Today's broadband will be tomorrow's traffic jam, and the need for speed will persist as new applications and services gobble up existing bandwidth. While long-haul data transport capacity exploded in the 1990s, last-mile capability upgrades have proceeded much more slowly.[11]

Indeed, as recently as August 21, 2003, the FCC found that deployment of one leading next generation of broadband technology – FTTH loops – "is still in its infancy." *In re Report and Order and Order on Remand and Further Notice of Proposed Rulemaking* ("*Triennial Review Order*"), FCC 03-36, CC Docket Nos. 01-338, 96-98, and 98-147, at 164, ¶ 274 (Aug. 21, 2003). Based on information received from Corning, Inc., the FCC found that "only 47 communities throughout the nation currently enjoy widespread FTTH deployment." *Id.* Corning's estimates also indicated that, as of January 2003, municipalities had deployed more than 25% of all FTTH loops to homes. *Id.*, at 165 n.809. Indeed, municipalities had deployed 18,100 FTTH loops to homes, more than *forty-five times* the number deployed by Bell Operating Companies.[12] The rate of municipal deployment is,

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[10] United States Department of Commerce, Office of Technology Policy, *Understanding Broadband Demand: A Review of Critical Issues,* at 6 (Sept. 23, 2002), http://www.technology.gov/reports/TechPolicy/Broadband_020921.pdf.

[11] *Id.* (footnote omitted).

[12] Specifically, Corning estimated that competitive local exchange carriers ("CLECs") had deployed 44,890 FTTH loops to homes; small ILECs had deployed FTTH loops to 3,600 homes; Bell Operating

if anything, growing. An October 2003 study by Render, Vanderslice & Associates found that municipalities and municipally-owned utilities accounted for 32% of FTTH deployments. *See* Render, Vanderslice & Associates, *Fiber-to-the-Home the Third Network 2003/2004* (Oct. 2003).

Not surprisingly, the FCC has singled out utilities, "particularly municipal utilities in rural areas, [as] willing to build advanced telecommunications networks to offer a full range of services where incumbent cable operators and telephone companies are not.'' *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Ninth Annual Report*, 17 FCC Rcd 26901, ¶ 13 (Dec. 31, 2002) ("*Ninth Report*"). Utilities have certain inherent competitive advantages that make market entry more attractive for them:

> [T]hey already own and operate rights of way and existing networks along which broadband-enabling infrastructure can be deployed. Moreover, in rural and remote areas where traditional telecommunications infrastructure may be lacking, utilities often have existing full coverage. Thus, the additional investment required to add broadband capability to these networks can be less than new network deployments, and it can serve the purpose of bridging the digital divide in many areas that may never see deployments using other platforms.[13]

Companies had deployed FTTH loops to only approximately 400 homes; and municipalities had deployed FTTH loops to approximately 18,100 homes. *Triennial Review Order*, at 165 n.809.

[13] *Economic and Social Benefits of Broadband Deployment*, at 26. The high cost of creating the necessary infrastructure to provide advanced telecommunications services is obviously significant in terms of attracting new entrants to the market. The economic attraction for new entrants is the possible return from that investment through sales to end users of a variety of voice, data, and video services. To the extent that Missouri and its *amici* are defending the right to block competition by noting the challenged statute's exception for municipalities that provide only

In addition, the FCC has recognized that utilities are uniquely positioned to deploy Broadband over Power Line ("BPL") technology, which uses electrical power lines to transmit high-speed communications. BPL is a particularly promising new type of broadband infrastructure "[b]ecause power lines reach virtually every community in the country." *In re Inquiry Regarding Carrier Current Systems, including Broadband over Power Line Systems, Notice of Inquiry*, FCC 03-100, ET Docket No. 03-104 (rel. Apr. 28, 2003), ¶ 1. In particular, the FCC has stated that "BPL could bring Internet and high-speed broadband access to rural and underserved areas, which often are difficult to serve due to the high costs associated with upgrading existing infrastructure and interconnecting communication nodes with new technologies." *Id*. BPL is likely to be a cost-effective means for rural municipally-owned electrical utilities to provide broadband service to their communities.

A recent study[14] compiled the following examples of initiatives undertaken by municipalities and municipally-owned utilities across the country to deploy advanced telecommunication services:

> a. "Since early 2001, the city of Glenwood Springs, [Colorado,] has buried additional fiber optic material to carry broadband through Glenwood Springs * * * while laying electricity cables. The project cost $3 million, which came from the electric department's budget. As a result, Glenwood Springs was the first Colorado municipality to offer broadband Internet service on its

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broadband for internet access, they ignore the practical realities arising from the industry economics. Simply put, in order to make competition in this market a reality, a company must be given access to all potential sources of revenue deriving from the costly investment in the infrastructure; limiting the return on the investment to one element, such as internet access alone, virtually ensures that market entry will not occur as it will not be economically viable.

[14] *Economic and Social Benefits of Broadband Deployment*, at 29-32.

own network. Because of the network, a hospital in Glenwood Springs will be able to send x-rays to the Mayo Clinic in Rochester, Minnesota, and receive a response within 15 minutes, rather than the eight hours it took with dial-up service. Home mortgage applications will receive similarly quick treatment. Glenwood Springs' network combines Ethernet cable with antennas. Most customers receive and transmit their signals wirelessly, via antennas on their homes. Because of the network's success, the Colorado municipalities of Fort Morgan, Aspen, Carbondale, and New Castle have requested information and advice from Glenwood Springs on building their own networks.[15]"

b. "LaGrange, Georgia, has four advanced broadband Internet networks, which are able to serve the entire city's businesses, residents and schools. It also has the LaGrange Internet TV Initiative, which offers free internet access to all city residents via cable television. It uses an enterprise-based government structure so that instead of collecting local taxes to provide services, it generates revenues by delivering services like electricity, water, sewer and telecommunications. The city's broadband network operations generate more than $1 million in revenue for the city each year.[16]"

c. "The city of Kutztown recently completed work on Pennsylvania's first municipal fiber-optic network, a $4.6 million project, which the city began building in 2001. The network has created competition for high-speed Internet access, cable TV and telephone service in Kutztown. Service costs up to 20 percent less than similar offerings from other providers. Kutztown is one of only a

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[15] Steve Caulk, *Glenwood rolls out high-speed Internet*, ROCKY MOUNTAIN NEWS, Aug. 5, 2002.

[16] *Georgia City Named One of Top Seven Intelligent Communities in the World*, GOVERNMENT TECHNOLOGY, July 2002.

handful of U.S. cities to run fiber to every home and business. Offering speeds up to 100 Mbps, the network will provide residents the ability to monitor home security, pay water and sewer bills and track their electricity use. Officials also envision video-on-demand and music-on-demand, distance learning and telemedicine as services to be deployed using the new fiber-optic network. In addition, the network will provide Kutztown's electric utility the ability to automatically detect the location of power outages and equipment failures. It also will let the utility use automated meter reading technology that will eliminate the need for time-consuming manual checks of the borough's 2,235 electric meters each month.[17]"

d. "The Grant County Public Utility District (GCPUD) is building fiber-to-the-home in a rural community in Washington state. According to the GCPUD, FTTH is assisting small businesses, educational institutions, medical facilities and other organizations where telecom services are offered in a limited capacity. * * * Nearly 100 percent of the homes have Internet access. At least 19 Internet service providers (ISPs), two video companies, one telephone company and one security company are providing high-speed voice, video and data services. The economic impact of the broadband buildout has been significant."

e. "Kitsap County, in Washington state, is a rural community that recognizes the need for broadband. The Kitsap County Public Utility District (KCPUD) is laying 110 miles of fiber optic cable, for a total cost of $4.5 million. KCPUD believes the network will lower prices and improve retail services for consumers through

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[17] Christian Berg, *Wired in Kutztown -- Municipality sells Internet, cable TV and phone service through its own lines*, ALLENTOWN MORNING CALL, Aug. 4, 2002, *available at* 2002 WL 22496571.

> increased competition, reduce motor vehicle and individual travel expenses, and provide better, faster and cheaper public services.[18]"
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> f. "In 1997, the city of Tacoma, Washington, built a publicly funded $100 million fiber-optic network called Click! Network, linking homes and businesses to fast Internet connections. It connects every city block with the equivalent of a T3 [or 45 Mbps] line. Over the last four years, 100 new start-up businesses have been created as a result of the fiber-optic network. In addition, the University of Washington chose Tacoma as the location for a new campus known as the Washington Technology Institute as a result of the network.[19]"

In the United States, more than 511 publicly-owned utilities now offer telecommunications services to the public, an increase of nearly fourteen percent since 2002.[20] Indeed, in terms of deployment in rural areas, municipalities and municipally-owned utilities are a driving force. In bringing advanced telecommunications services to these communities, the public utilities are mirroring the function they performed when they first electrified the areas. While the private sector focused on electrifying more densely populated and profitable urban areas, rural communities filled the void by creating their own electric utilities. As the FCC has expressed (02-1386 Pet. App. 23a), public utilities are following the same path that they did when the electrified the nation at the

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[18] Nancy Gohring, *Kitsap data 'pipe' half done; County hopes speedy Internet network will bolster economy*, SEATTLE TIMES, Jul. 31, 2002, at E1, *available at* 2002 WL 3907911.

[19] John Cook, *City of Destiny Begins to Stir Thanks in Part to the Digital Economy, Tacoma's Transformation Finally May Be Occurring*, SEATTLE POST-INTELLIGENCER, Aug. 16, 2000, at D1, *available at* 2000 WL 5301537.

[20] Brian Bergstein, *City-owned broadband networks fighting corporate telecom*, ASSOCIATED PRESS NEWSWIRES, Jan. 27, 2003.

beginning of the last century: they are once again are striving to ensure that their communities are not left behind as another technological revolution transforms the Nation's economy and society.

II. CONGRESS TAILORED THE 1996 ACT TO PROMOTE COMPETITION AND ACCELERATE DEPLOYMENT OF ADVANCED TELECOMMUNICATIONS SERVICES TO ALL AMERICANS.

By giving the expansive phrase "any entity" in Section 253(a) its ordinary and natural meaning, and thus protecting municipalities and municipally-owned utilities from state barriers to entry into the market for advanced telecommunications services, the Eighth Circuit's decision in this case furthered Congress's goals for the 1996 Act. Congress spelled out its objectives in the legislation: to "promote competition" in the telecommunications market and to "encourage the rapid deployment of new telecommunications technologies" to all Americans. Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56.

The 1996 Act advances these goals in a number of ways. It specifically mandates, for example, that the FCC and all states "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans," and further requires the FCC to conduct regular inquiries to determine "whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion." Title VII, § 706(a)-(b) (reproduced in the notes under 47 U.S.C. § 157) ("Section 706"). If the FCC determines that advanced telecommunications capability is not being deployed to all Americans in a reasonable and timely manner, the 1996 Act further charges the agency with taking "immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." *Id.*

Congress recognized, however, that its goals of robust competition and rapid deployment of advanced telecommunications technologies to all Americans could not be realized without eliminating all state and local barriers to entry. Thus, Congress provided, in Section 253(a), that "[n]o 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). By choosing the phrase "any entity," Congress signaled its clear intent that public entities, no less than private entities, not be precluded by state and local governments from competing in the telecommunications market or deploying advanced telecommunications services.

The legislative effort that culminated in the 1996 Act spanned both the 103rd and 104th Congresses. The legislative history of each makes clear that Congress understood and intended the 1996 Act to protect public entities from state and local barriers to entry.

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 in the deployment of what was being called the "National Information Infrastructure." At a Senate hearing on S. 1822 – the predecessor bill to the 1996 Act – William J. Ray, the superintendent of the Glasgow Electric Plant Board in Kentucky, presented written and oral testimony on behalf of APPA.[21] Mr. Ray advised Congress that "all electric utilities, whether owned by units of State or local government, organized as electric cooperatives, or owned by private investors, are ideally positioned to play a role in the

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[21] *The Communications Act of 1994: Hearings on S. 1822 Before the Senate Comm. on Commerce, Sci. and Transp.*, 103d Cong., 2d Sess., A&P Hearings S. 1822 (Westlaw), at *351-61 ("*Hearings on S. 1822*").

construction of the NII."[22] Shortly after Mr. Ray completed his testimony, Senator Trent Lott (R-MS), a member of the Communications Subcommittee of the Senate Commerce, Science and Transportation Committee, echoed Mr. Ray's testimony by stating: "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."[23] The Senate Report on S. 1822, in describing the import of the bill's preemption provision,[24] stated as follows: "allow[] all electric, gas, water, stem [sic], and other utilities to provide telecommunications (section 302 of S. 1822, new section 230(a))."[25]

The 104th Congress constructed the 1996 Act on the groundwork laid by the 103rd Congress. The legislative history from the 104th Congress further confirms that it understood and intended that the term "any entity" to apply to local governments, particularly those that operate their own municipal electric utilities. During the floor debates in the Senate on June 7, 1995, Senator Lott, describing the Act's major features, summarized:

> In short, [the Act] constructs a framework where everybody can compete everywhere in everything.

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[22] *Hearings on S. 1822*, at *351-52, 353-54.

[23] *Hearings on S. 1822*, at *378-79

[24] The operative language of this provision – section 302, new section 230(a)(1), of S. 1822 – was identical to that of Section 253(a) in the 1996 Act, providing 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 services." S. 1822, 103d Cong. (2d Sess. 1994).

[25] S. Rep. No. 103-367, 103d Cong., 2d Sess. 22, 1994 WL 509063, A&P S. REP. 103-367 (1994).

Senator Lott further identified the purpose of amending the Public Utilities Holding Companies Act:

> to allow registered electric utilities *to join with all other utilities* in providing telecommunication services, providing the consumer with smart homes, as well as smart highways.[26]

The Eighth Circuit's interpretation of the term "any entity" in Section 253(a) to cover municipalities and municipally-owned utilities clearly serves Congress's pro-competitive agenda in the 1996 Act. The FCC itself has more than once expressed the view that market entry by such public entities would further the legislation's goals. Thus, while concluding that the D.C. Circuit's interpretation of Section 253(a) in *Abilene* dictated its decision in this case, the five FCC commissioners unanimously denounced the result as anticompetitive:

> 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. The Commission has found that municipally-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.

(02-1386 Pet. App. 23a (footnotes omitted).)

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[26] 141 Cong. Rec. S7906 (June 7, 1995) (emphasis added).

The FCC also referred to its August 2000 report on the deployment of advanced telecommunications services, which presented a case study detailing the deployment of such services in Muscatine, Iowa. (*Id.*, 23a-24a.) In Muscatine, the municipal utility's deployment of broadband facilities to residential consumers prompted the telephone and cable companies to deploy their own high-speed services, thus giving residential customers three high-speed service providers. (*Id.*, 24a, 44a.) The FCC stated that this case study was "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." (*Id.*, 24a.) The FCC was 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." (*Id.*, 25a.)

Writing separately, then FCC Chairman William E. Kennard and Commissioner Gloria Tristani emphasized their view that the outcome in the case, "while legally required, [was] not the right result for consumers in Missouri" because protection of municipal entry "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." (*Id.*, 42a-43a.) Chairman Kennard and Commissioner Tristani also indicated that the record in the FCC 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." (*Id.*)

A third commissioner, Susan Ness, also wrote 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." (*Id.*, 43a.) After observing that such a result was at cross-purposes with the 1996 Act, in which Congress "recognized the competitive potential of utilities," Commissioner Ness again emphasized that "municipal utilities can serve as key players in the effort to bring competition to communities across the country, especially those in rural areas." (*Id.*, 44a.)

Given the strength and unanimity of the FCC's opinion, Petitioners and the *amici* supporting them have little choice but to concede that "municipal entry into telecommunications markets to compete with incumbent and competitive providers may appear pro-competitive on its face …" (Brief of Sprint Corporation as *Amicus Curiae* in Support of Petitioners, at 3.) In their briefs, however, they nonetheless advance theories contending that municipal entry is unduly "risky" and creates the possibility of unfair competition from cross-subsidization, access to public funds, and regulatory discrimination against private providers. (Brief of the United States Telecom Association, *et al.*, as *Amici Curiae* in Support of Petitioners, at 17-24.) The FCC considered and rejected these contentions, however, finding that remedies less draconian than absolute prohibition against municipal

entry would address such concerns.[27] Surely no one would suggest that a potential for unfair competition – or isolated instances of unfair competition – in any other market would warrant compete preclusion of an entire class of competitors. Yet that is the very result Petitioners seek. The FCC wisely recognized that such an outcome is contrary to public policy. *Amici* respectfully submit that the outcome Petitioners seek is justified by neither policy nor law.

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[27] Specifically, the FCC stated:

> 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.

(02-1386 Pet. App. 25a-26a (footnotes omitted).)

CONCLUSION

The decision of the Eighth Circuit should be affirmed.

Respectfully submitted,

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October 24, 2003

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