No. ___
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2002

Jeremiah W. (Jay) Nixon, Attorney General
State of Missouri,

Petitioner,

v.

Missouri Municipal League, et al.
Respondents.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

# PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

In enacting 47 U.S.C. § 253(a), which bars the states from prohibiting "any entity" from providing intrastate or interstate telecommunications services, did Congress clearly and manifestly deprive the states of the ability to bar their own political subsidiaries from entering the telecommunications business?

## PARTIES TO THE PROCEEDING

Petitioner is the State of Missouri, which appeared at the Federal Communications Commission and intervened in the court of appeals. Southwestern Bell Telephone, L.P., also intervened below. Respondent below was the Federal Communications Commission. The petitioner below was the Missouri Municipal League, which is the respondent here.

**TABLE OF CONTENTS**



**TABLE OF AUTHORITIES**

**CASES**

**CONSTITUTIONAL AND STATUTORY AUTHORITIES**

**OTHER SOURCES**

**No. ____**

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**In the**
**SUPREME COURT OF THE UNITED STATES**
**October Term, 2002**

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**JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL**
**STATE OF MISSOURI,**
**Petitioner,**

**v.**

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

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**to the United States Court of Appeals**
**for the Eighth Circuit**

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# PETITION FOR WRIT OF CERTIORARI

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The State of Missouri, through its Attorney General, Jeremiah W. (Jay) Nixon, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit restricting the State's ability to define the authority of its own political subdivisions.

## Opinions Below

The opinion of the court of appeals (Appendix ("App.") A-2 through A-13), filed August 14, 2002, is reported at 299 F.3d 949 (8th Cir. 2002). The court of appeals' order denying rehearing, entered November 20, 2002, appears in the appendix at A-14. The opinion of the Federal Communications Com-mission (App. A-15 through A-32) is reported at 16 F.C.C.R 1157 (2001).

## Jurisdiction

The court of appeals entered its judgment on August 14, 2002. That court denied rehearing on November 20, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

**Constitutional and Statutory Provisions Involved**

*Constitution of the United States, Article VI, cl. 2:*

This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding

*47 U.S.C. § 253(a):*

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

*Mo. Rev. Stat. § 392.410.7 (1997):*

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 institu-tion;
(5) Or Internet type services.

The provisions of this subsection shall expire on August 28, 2002.[1]

[1] Though the statute as considered by the Federal Communications Commission would have expired in August, 2002, the statute's life was extended by the Missouri General Assembly in earlier 2002. Truly Agreed to and Finally Passed Conference Committee Substitute for House Bill No. 1402, 91st General Assembly. The concluding sentence now reads, "The provisions of this subsection shall expire on August 28, 2007." Mo. Rev. Stat. § 392.410.7 (Supp. 2002). *See* A-5, n.7.

## INTRODUCTION AND STATEMENT

Using a wide variety of models, states create a range of political subdivisions. As the sovereign, each state dictates what each subdivision can and cannot do. This case presents a direct conflict between two courts of appeals – reflected in decisions by two state supreme courts, and in decisions by a state court of appeals and a federal district court – regarding whether Congress has appropriated the States' ability to define the authority of their subdivisions. In the decision below, the U.S. Court of Appeals for the Eighth Circuit held that Congress authorized any subdivision of the State of Missouri to engage in the telecommunications business – despite express provisions of state law that preclude such activities.

In 1997, the Missouri General Assembly enacted §392.410.7, Mo. Rev. Stat. (1997). Section 392.410.7 restricts the authority of political subdivisions of the State of Missouri from providing or offering for sale the kind of telecommunications service for which a certificate of service authority is required. Section 392.410.7 states that it shall not be construed to restrict a political subdivision from allowing nondiscriminatory use of its rights of way or from providing certain kinds of telecommunications services or facilities such as those for its own use, for emergency services, medical or educational purposes, or Internet type services. But the General Assembly decided that it is not appropriate for State subdivisions – whether they be cities, counties, school districts, fire protection districts, levee districts, or some other organization – to become telecommunications providers.

That statute was attacked by the Missouri Municipal League and a handful of municipal utilities (collectively the "Missouri Municipals") in a petition filed on July 8, 1998, with the Federal Communications Commission. The Missouri Municipals claimed that § 392.410.7 is preempted by 47 U.S.C. 253(a). Section 253(a), a part of the Federal Telecommuni-cations Act of 1996, bars state or local laws from prohibiting or having the effect of prohibiting "the ability of any entity to provide any interstate or intrastate telecommunications service."

Litigation regarding the preemptive impact of § 253(a) was already underway in a parallel case involving Texas law. On October 1, 1997, the FCC denied the City of Abilene's re-quest to declare that certain Texas statutes, §§ 54.001, 54.201-.202 Tex. Util. Code, were preempted by § 253(a). *See* 13 F.C.C.R. 3460 (1997). Those statutes prohibit municipalities from obtaining certificates to provide telecommunications services or from selling those services, directly or indirectly, to the public. On January 5, 1999, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the FCC's decision not to preempt the Texas statutes. *City of Abilene, Texas v. Federal Communications Comm'n*, 164 F.3d 49 (D.C. Cir. 1999). The D.C. Circuit agreed with the FCC that the prin-ciples asserted by this Court in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), regarding Supremacy Clause review of state statutes preclude finding that § 253(a) preempts a state's governance of its own political subdivisions. Only when Congress manifests its intention with "unmistakable clarity" should federal law be interpreted to reach into areas of state sovereignty. 164 F.3d at 52 (citing *Gregory*, 501 U.S. at 460.) Congress was not unmistakably clear in its use of the term "any entity" in 47 U.S.C. 253(a), and accordingly, 47 U.S.C. § 253(a) fails the clarity test. 164 F.3d at 52. It thus does not preempt a state law that prohibited the state's own municipalities from providing telecommunication services. *Id*. at 52.

On January 12, 2001, the FCC issued its order regarding the Missouri Municipals petition. App. A-15 through A-32, 16 F.C.C.R. 1157 (2001). The FCC followed the course it and the D.C. Circuit had taken *City of Abilene*. The FCC determined that *Gregory* precludes it from preempting § 392.410.7, because, again, the term "any entity" in Section 253(a) does not unmistakably include political subdivisions. A-25.

The Missouri Municipals petitioned for review in the U.S. Court of Appeals for the Eighth Circuit pursuant to 47 U.S.C. § 402(a), 5 U.S.C. § 706(2)(A), 28 U.S.C. §§ 2342 and 2344, and Fed. R. App. P. 15(a). The Eighth Circuit expressly rejected the holding of the D.C. Circuit in *City of Abeline*, A-11, and reversed and

remanded the underlying case to the FCC with the mandate that the FCC include municipalities and political subdivisions among those whose authority is protected from state action by § 253, A-13. Thus the FCC is subject to two conflicting mandates. And Missouri is barred from regulating the telecommunications efforts of "any entity" that it has created or may create. Texas, by contrast, remains free to regulate its political subdivisions. Except to the extent they have already litigated the question in lower federal or state courts, states outside the Eighth Circuit and Texas do not know what they can do. And no one really knows the extent to which Congressional use of general language suffices to remove some portion of the States' sovereignty.

## REASONS TO GRANT THE WRIT

### I. Section 253(a) can curtail the states' sovereignty by depriving the states of their ability to reign in the activities of their own political subdivisions only if Congress there used "unmistakably clear" language.

This case goes to the essence of our system of "dual sovereignty." *Printz v. United States*, 521 U.S. 898, 918 (1996) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)); *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). Although the States surrendered many of their powers to the new Federal Govern-ment, they retained "a residuary and inviable sovereignty." The Federalist No. 39 at 245 (J. Madison). In recent years, this court has repeatedly declared that the States retain that sovereignty in the face of congressional acts that assail it. *E.g.*, *Printz v. United States*, 521 U.S. at 918. *Also see FMC v. S.C. State Ports Authority*, 535 U.S. 743 (2002); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *Alden v. Maine*, 527 U.S. 706 (1999).

In a long line of cases, this Court has demanded of Congress more than generalities when it limits state sovereign-ty. For example, in 1947, the Court recognized that when courts consider federal laws that affect the States' historic powers, they are to find those powers to have been removed only when that "was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Co.*, 331 U.S. 218, 230 (1947). In 1985, the Court noted its recent "reiterat[ion] that 'States occupy a special and specific position in our constitutional system,'" and that the "'constitutionally man-dated balance of power' between the States and the Federal Government was adopted by the framers to ensure the protection of 'our fundamental liberties.'" *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) (quoting *Garcia v. San Antonio Metropolitan Transit Auth*. 469 U.S. 528, 547 (1985)). Four years later, the Court considered a congressional declaration as broad as the one at issue here: the application of 18 U.S.C. § 1983 (1979) to "every person." *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989). The court held that "every person" did not include a state, again demanding that Congress "make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States." *Id*., quoting *Rice*, 331 U.S. at 230. Two years later, the court quoted *Atascadero* and *Will* with approval in *Gregory v. Ashcroft*. 501 U.S. at 460-461.

The now well-established *Gregory v. Ashcroft* standard is that generalities are insufficient when Congress is acting in a realm that "alter[s] the usual balance between the States and the Federal Government." *Atascadero*, 473 U.S. at 242, quoted with approval in *Gregory*, 501 U.S. at 460. In those instances, courts are to find that the States' sovereignty has been limited only when Congress has made "its intention to do so 'unmistakably clear in the language of the statute.'" 501 U.S. at 460, quoting *Atascadero*, 473 U.S. at 242. *See also See e.g*., *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316, 325 (1997); *New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co*., 514 U.S. 645, 655 (1995).

No one, in any of the cases addressing the application of 47 U.S.C. § 253(a) to state subdivisions, has made the foolish argument that setting the bounds on political subdivisions is anything but a core function of state sovereignty. Nor has anyone questioned whether the States' authority extends to determining whether, how, and where state subdivisions can operate utilities. Indeed, the power to own, maintain, and operate public utilities, such as waterworks, gas and electric plants, steel railway systems, public markets, and the like, is frequently conferred by the States upon their cities and other political subdivisions. For the purpose of carrying on such activities, they are given power to hold and manage personal and real property. But "[t]he number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion

of the State." *Hunter v. Pittsburg*, 207 U.S. 161, 178, 179 (1907), quoted with approval in *City of Trenton v. New Jersey*, 262 U.S. 182, 186-187 (1923). Nor has anyone in any of the cases questioned whether Congressional interference with the states' ability to define the authority of their subdivisions engaged in providing utilities "alters the balance between the States and the Federal Government." *Atascadero*, 473 U.S. at 242.

Instead, in each of the cases addressing § 253(a)'s application to the States, the parties have posed the correct question: did Congress, in § 253(a), "clearly and manifestly" deprive the states of the right to regulate their own subsidiaries? But the lower courts are hopelessly divided in their answers to that question.

**Courts have reached diametrically opposed decisions regarding whether the generality, "any entity," is "unmistakably clear."**

In cases challenging decisions by the FCC, the Courts of Appeals for the D.C. Circuit and the Eighth Circuits have issued diametrically opposed interpretations of the very same language in 47 U.S.C. § 253(a).

In *City of Abilene*, the D.C. Circuit recognized that the phrase "any entity" as it appears in 47 U.S.C. § 253(a) is broad enough to conceivably cover state entities such as municipal-ities. 164 F.3d at 52-53. But the D.C. Circuit also recognized that the test is not whether the phrase could cover munici-palities, but whether Congress has manifest its intention with unmistakable clarity. *Id*. at 52. The court held that such a broad generality was insufficient under the *Gregory v. Ashcroft* standard, and therefore affirmed the FCC order. Thus municipalities in Texas are still barred from entering the telecommunications business.

The Eighth Circuit reaches the precise opposite conclusion. The Eighth Circuit acknowledges the *City of Abilene* holding. A-11. But the court concludes that the term "any entity" on its face includes political subdivisions of a state. A-8. In that court's view, the use of a broad, general descrip-tion like "any" is sufficient to make the coverage of state subdivisions "clear and manifest." A-9. The Eighth Circuit reverses the FCC order and declares that § 392.410.7, RSMo. is preempted – despite the fact that with regard to munici-palities, the Missouri statute is similar to and even less restrictive than the Texas statute upheld by the D.C. Circuit.

Thus in Missouri and the other states in the Eighth Circuit, political subdivisions, including cities, are free to ignore state limitations on their authority that prevent them from entering the telecommunications business. Texas cities, by contrast, cannot exceed the boundaries the Texas legislature has set. And the FCC is caught between a rock and a hard place: it is bound, theoretically, by both the Eighth Circuit's holding that "any entity" includes the states' political sub-divisions, and the D.C. Circuit's holding that "any entity" does not include them.

The split is shown not just in *City of Abilene* and the decision below, but in other decisions on the same point.

Ironically, two of the conflicting decisions come from Eighth Circuit states. Before the Eighth Circuit decided this case, but after the D.C. Circuit decided *City of Abilene*, the Iowa Supreme Court upheld state restrictions on telecom-munications businesses to be operated by cities. *Iowa Telephone Ass'n v. City of Hawarden*, 589 N.W. 2d 245 (Iowa 1999). The City of Hawarden "intend[ed] to provide land-line local telephone services to customers located within and outside of its municipal corporate limits." *Id*. at 248. The Iowa court rejected the city's argument that paralleled the argument made by the Missouri Municipals here. *Id*. at 252. The court held that the phrase "any entity" did not provide "a clear indication" of congressional intent to remove a power that "has

traditionally been within the purview of the states." *Id*. Thus cities in Iowa face a state supreme court decision that affirms the state's ability to regulate their authority *and* an Eighth Circuit decision that erases that same authority. But in another Eighth Circuit State, Nebraska, the highest court took precisely the opposite approach. *In re Application of Lincoln Electric System*, 655 N.W. 2d 363 (Neb. 2002).[2]

Two courts in other circuits have also recently decided the question – and mirrored the Eighth/D.C. Circuit, and Iowa/Nebraska conflict. In *City of Bristol v. Earley*, a U.S. district court held that including political subdivisions among "any entities" is a "'straightforward statutory command.'" 145 F. Supp. 2d 741, 748 (W.D. Va. 2001) (quoting *United States v. Gonzalez*, 520 U.S. 1, 6 (1997)). That court mentioned, but rejected, *City of Abilene, Iowa Telephone*, the FCC's decision in this case, and a Georgia case, *Municipal Electric Authority of Georgia v. Georgia Public Service Commission*, 525 S.E. 2d 399 (Ga. App. 1999). In *Municipal Electric*, the Georgia court followed the D.C. Circuit's holding that "any entity" is so broad as to be "vague," and thus it did not constitute "a clear expression of congressional intent" sufficient to overrule the state's power to regulate the authority of its own subsidiaries. 525 S.E.2d at 403. Thus cities in Virginia can enter telecommunications businesses while cities in Georgia cannot – again, based on conflicting interpretations of § 253(a).

Given the stark contrast between these lines of precedent, the competitive interests involved,[3] and the number of other states that have similar statutes[4] yet to be tested, it is certain that even in the narrow context of § 253(a), the impact of this conflict will grow.

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[2] The Nebraska court also considered a parallel question: whether a political subdivision might not be prohibited from entering the telecommunications business, but might nonetheless lack authority to enter that business. *Id*. at 372. The court did not have to reach that question because it concluded that the subdivisions involved did have such authority under state law.

[3] *See* K. Tongue, "Municipal Entry into the Broadband Cable Market: Recognizing the Inequities Inherent in Allowing Publicly Owned Cable Systems to Compete Directly Against Private Providers," 95 NW. U.L. REV. 1099 (2001); R. Kawar, "Competing with City Hall: Local Government Entry into the Telecommunications Marketplace," 17 COMPUTER & HIGH TECH L.J. 169 (2000).

[4] Among them, in addition to the six where validity has already been litigated, are Arkansas (Ark. Code § 23-17-409), Florida (Fla. Stat. §§ 125.421, 166.047, 196.012, 199.183, and 212.08), Minnesota (Minn. Stat. Ann. § 237.19), Nevada (Nevada Statutes § 268.086), and Tennessee (Tennessee Code Ann. § 7-52-601 et seq.).

**The conflict among courts determining how specific congressional langauge must be to carve out a portion of the sovereign states' authority to define the powers of their own subdivisions merits the attention of this court.**

Congress frequently works along the edges of state sovereignty. It less often crosses the line. And it seldom steps so far across the line that it deprives the states of the ability to define the scope of authority of subdivisions the states themselves create and – absent such congressional action – control. Here, the courts disagree as to whether Congress takes such a step merely by using a broad term like "any entity." The use of broad terms in federal statutes is certainly not unusual – indeed, "any entity" is used elsewhere in the United States Code, though, fortunately, with more definition than § 253(a) provides. *E.g.*, 7 U.S.C. § 87(b)(2); 11 U.S.C. §§ 557(g)(1), 1126(c); 18 U.S.C. § 2702(a); 33 U.S.C. § 1502(2); 42 U.S.C. § 12818(6); 47 U.S.C. § 303c(b)(2). So is "any person." *E.g.*, 15 U.S.C. § 13a; 14 U.S.C. § 89g-2(a); 17 U.S.C. § 506(a). *See also Will v. Michigan Dept. of State Police*, 491 U.S. at 65 ("every person" as used in 18 U.S.C. § 1983 does not include the States, though it does include municipal corporations).

In light of the conflict between the line of cases represented by *City of Abilene* and the line represented by the decision below, the States do not know what to look for as they review proposed federal legislation to determine its likely impact. Is a generality like "any entity," "any person," or "every person" sufficient to warn the States that a portion of their sovereignty is at risk? Or does Congress have to say something more when it carves a piece out of the States' sovereignty? The answer should not depend on geography.

And it should not depend on manipulation of the jurisdiction of the various federal circuits. The D.C. Circuit is available as a venue on appeal not just from orders of the FCC pursuant to 28 U.S.C. § 2343, but also on appeal from orders of other administrative officers and agencies. *See* 28 U.S.C. §§ 2341(3) and 2343 (The same option applies to appeals from the Federal Maritime Commission, the Atomic Energy Com-mission, the Secretary of Agriculture, the Secretary of Transportation, and the Surface Transportation Board.). Thus a state that wants to retain its sovereignty despite a general term like "any entity" will want to lose at the agency and appeal to the D.C. Circuit, while the party wanting to assert a broad congressional usurpation of state authority will want to lose at the agency level and choose the regional court of appeals.

This fundamental question of federal power should not rest on the losing party's choice of venue. There should be one clear, consistent rule. Given the disagreement among the lower courts, such a rule is only available from this Court.

## CONCLUSION

For the reasons stated above, the Court should grant the writ.

Respectfully submitted,

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February 18, 2003

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

**PETITIONER'S APPENDIX**

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h.writ appendix

**TABLE OF CONTENTS**

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 01-1379

| | | | |
|---|---|---|---|
| The Missouri Municipal League; The Missouri Association of Municipal Utilities; City Utilities of Springfield; City of Sikeston, Missouri; Columbia Water & Light; American Public Power Association, | * | | |
| Petitioners, | * | Petition for Review of an Order of the Federal Communi-cations Commission. | |
| v. | * | | |
| Federal Communications Commission United States of America, | * | | |
| Respondents, | * | | |
| Southwestern Bell Telephone Company; | * | | |
| State of Missouri, | * | | |
| Intervenors on Appeal. | * | | |
| National Association of Telecommunications Officers and Advisors; United Telecom Council, | * | | |
| Amici on Behalf of Petitioners. | * | | |

Filed: August 14, 2002

Before WOLLMAN,[5] Chief Judge, BOWMAN, and STAHL,[6] Circuit Judges.

WOLLMAN, Chief Judge.

Various Missouri municipalities, municipal organizations, and public power companies (the Missouri Municipals) have petitioned for review of the Federal Communications Commission?s (Commission) order denying the Missouri Municipals ? petition to preempt a Missouri statute that prevents municipalities and municipally owned utilities from providing telecommunications services or telecommunications facilities. We vacate the order and remand to the Commission for further consideration.

I.

In February 1996, Congress enacted the Telecommunications Act of 1996 (the Act), which extensively amended the Communications Act of 1934, 47 U.S.C.A. §§ 151-615 (West 2001). The Act?s intended purposes are to increase competition in the area of telecommunications services and to ensure the delivery of universal provides for "removals of barriers to entry," as follows:

> (a) In general
> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
>
> (b) State regulatory authority
> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

. . .

> (d) Preemption
> If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal

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[5] The Honorable Roger L. Wollman stepped down as Chief Judge of the United States Court of Appeals for the Eighth Circuit at the close of business on January 31, 2002. He has been succeeded by the Honorable David R. Hansen.

[6] The Honorable Norman H. Stahl, United States Circuit Judge for the First Circuit, sitting by designation.

> requirement to the extent necessary to correct such violation or inconsistency. 47 U.S.C.A. §253 (West 2001 Supp.).

Section 392.410(7) of the Revised Statutes of Missouri prohibits the state?s political subdivisions from obtaining the certificates of service authority necessary to provide tele-communications services or facilities directly or indirectly to the public. It provides:

> 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-9 11 or other emergency services;
> (3) For medical or educational purposes;
> (4) To students by an educational institution; or
> (5) Internet-type services. The provisions of this subsection shall expire on August 28, 2002. Mo. Rev. Stat. § 392.4 10(7) (West 2001 Supp).[7]

The Missouri Municipals filed a petition with the Commission, asking that it preempt Mo. Rev. Stat. § 392.410(7) as being in violation of § 253(a) of the Act. The Commission employs a two-step process in examining statutes under § 253. First, it determines whether the statute violates § 253(a). If it does, then the Commission considers whether the statute falls within the reservation clause of § 253(b). If it does not, then the Commission must preempt the statute. Finding that the Missouri statute does not violate § 253(a), the Commission denied the petition, thus eliminating the need for § 253(b) review. In the matter of the Missouri Municipal League, 16 F.C.C.R. 1157 (2001). The Commission expressed its disagreement with the policy of the Missouri statute because it had found previously that "municipally-owned utilities . . . have the potential to become major competitors in the telecommunications industry . . . [and] can further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small rural communities." Id. at 1162; see also id. at 1173 (Separate Statement of Commissioner Susan Ness). Even though it expressed its desire that states not adopt the type of complete barriers to entry found in § 392.4 10(7), the Commission felt bound by legal authorities not to preempt the statute, particularly a decision of the United States Court of Appeals for the District of Columbia, City of Abilene v. FCC, 164 F.3d 49 (D.C. Cir. 1999). Missouri Municipal League, 16 F.C.C.R. at 1164-65; see also id. at 1172

[7] Missouri House Bill 1402, 2002 Mo. Legis. Serv. H.B. 1402 (Vernon?s), signed into law on July 11, 2002, extended the expiration date to August 28, 2007, as well as making certain other changes in the wording of § 392.410(7), none of which affect our analysis in this case.

(Separate Statement of Chairman William E. Kennard and Commissioner Gloria Tristani); and id. at 1173 (Separate Statement of Commissioner Susan Ness). The Missouri Municipals then filed a petition for a review of the Commission?s order. Southwestern Bell Telephone Co. and the State of Missouri intervened in support of the Commission?s decision.

We have jurisdiction to review final orders of the Commission under 47 U.S.C.A. § 402(a) (West 2001) and 28 U.S.C.A. § 2342(1) (West 1994).

II.

We review agency determinations under the two-step process set forth in Chevron U.S.A., Inc. v. Natural Resources Defense Council. Inc., 467 U.S. 837 (1984). First, we must determine whether congressional intent is clear from the plain language of the statute. If congressional intent is clear, a contrary interpretation by an agency is not entitled to deference. If the language of the statute is ambiguous, however, and the legislative history reveals no clear congressional intent, we must defer to a reasonable interpretation of the statutory provision made by the agency. Ragsdale v. Wolverine Worldwide, Inc., 218 F.3d 933, 936 (8th Cir. 2000), affd, 122 S.Ct. 1155 (2002).

A second plain-language standard also applies in this case. The Supreme Court requires that Congress make a plain statement that it intends to preempt state law where the preemption affects the traditional sovereignty of the states. Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991). In Gregory, the Court "confronted a statute susceptible of two plausible interpretations, one of which would have altered the existing balance of federal and state powers. . . [and] concluded that, absent a clear indication of Congress?s intent to change the balance, the proper course was to adopt a construction which maintains the existing balance." Salinas v. United States, 522 U.S. 52, 59 (1997). As the Court pointed out in Salinas, however, a "statute can be unambiguous without addressing every interpretive theory offered by a party. It need only be 'plain to anyone reading the Act" that Congress intended to alter the federal-state balance in the relevant area. Id. at 60 (quoting Gregory, 501 U.S. at 467). Thus, the Gregory plain-statement rule does not require courts to limit a statute?s scope where Congress?s intent is plain, and, in fact, "[a]ny other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, § 1, of the Constitution." Salinas, 522 U.S. at 60 (quoting United States v. Albertini, 472 U.S. 675, 680 (1985)).

In summary, the Gregory rule requires us to determine whether the statutory language plainly requires preemption. Gregory does not mandate that we conduct a balancing test of the federal interests against the state interests or that we delve into the wisdom of the competing federal and state policies. We do not assume that Congress exercises its Supremacy Clause power lightly, however, and we must be "certain of Congress? intent" before we find that federal law overrides the balance between state and federal powers. Gregory, 501 U.S. at 460. Even so, no matter how great the state interest, we should not strain to create ambiguity in a statute where none exists. See Salinas, 522 U.S. at 59-60. Accordingly, we ask a single question, is the statute?s meaning plain? If so, that ends our analysis, with the result that it must be held that Congress has preempted state law.

The dispute hinges on the meaning of the phrase "any entity" in § 253 of the Act. More precisely, do the words "any entity" plainly include municipalities and so satisfy the Gregory plain-statement rule? We hold that they do. Accordingly, because § 253 satisfies the Gregory plain-statement rule, it also satisfies Chevron?s clear-statement rule and thus the Commission?s contrary interpretation cannot stand.

We begin with the language Congress used, and, because the statute does not define the term "entity," we

presume that "the ordinary meaning of that language accurately expresses the legislative purpose." Morales v. Trans World Airlines. Inc., 504 U.S. 374, 383 (1992); see also Asgrow Seed Co. v. Winterboer, 513 U.S. 179, 187 (1995). There is no doubt that municipalities and municipally owned utilities are entities under a standard definition of the term. An entity is "[a]n organization (such as a business or a governmental unit) that has a legal identity apart from its members," and a public entity is a "governmental entity, such as a state government or one of its political subdivisions." Black?s Law Dictionary 553 (7th ed. 1999). Although municipalities in Missouri derive all of their powers from the state, and although a state can control its subdivisions in an almost limitless way, see e.g., Sailors v. Bd. of Educ., 387 U.S. 105, 107-08 (1967), municipalities and other political subdivisions have an existence separate from that of the state. It is true that as political subdivisions of the state, municipalities should not be considered independent entities. Nevertheless, the question before us is not the source from which municipalities derive their power, but whether they are included within the meaning of "any entity" as used in § 253(a). The plain meaning of the term "entity" includes all organizations, even those not entirely independent from other organizations.

Furthermore, Congress?s use of "any" to modify "entity" signifies its intention to include within the statute all things that could be considered as entities. "Read naturally, the word 'any? has an expansive meaning, that is, 'one or some indiscriminately of whatever kind." United States v. Gonzales, 520 U.S. 1, 5 (1997) (citations omitted). Time and time again the Court has held that the modifier "any" prohibits a narrowing construction of a statute. See Dep?t of Hous. & Urban Dev. v. Rucker, 122 S. Ct. 1230, 1233 (2002) (in statute requiring lease term providing for lease termination if public housing tenant or specified others engage in "any drug-related criminal activity," Congress?s "use of the term 'any? to modify 'drug-related criminal activity? precludes" limiting the statute to cover only "drug-related activity that the tenant knew, or should have known, about"); Brogan v. United States, 522 U.S. 398,400-01, 405 (1998) ("any false, fictitious or fraudulent statement" includes false statements of whatever kind); Gonzales, 520 U.S. at 5 ("any other term of imprisonment" means all prison sentences, both state and federal, where Congress did not add any language limiting the breadth of the term "any"); Freytag v. Comm?r, 501 U.S. 868, 873-74 (1991) ("any other proceeding" allows Chief Judge to assign all types of cases to a special trial judge); United States v. James, 478 U.S. 597, 605 (1986) ("any damage" and "liability of any kind" include all possible damages from a government project, not limited to just property damage); United States v. Turkette, 452 U.S. 576, 580-81 (1981) ("any enterprise" includes both legitimate and illegitimate enterprises); Harrison v. PPG Indus., Inc., 446 U.S. 578, 588-89 (1980) ("any other final action" includes all actions that constitute the agency?s last word); and Bhd. of RR Trainmen v. Bait. & 0. R. Co., 331 U.S. 519, 529 (1947) ("any proceeding arising under this Act" allows intervention in all cases under the statute); accord Southern Co. v. FCC, No. 99-15160, 2002 WL 1299142 at *10 (11th Cir. June 13, 2002) (plain meaning of "any" is "all" unless specifically limited in statute).

In Salinas v. United States, the Court was called upon to decide whether the federal bribery statute, which applies to "any business transaction," applies only to bribes affecting federal funds. The defendant, who had bribed a state official, argued that because the bribery statute upset the federal-state balance, the Gregory plain statement rule required a plain statement of congressional intent that the bribery statute apply to bribes having no effect on federal funds. In holding that the bribery statute included bribes of state officials, even where no federal funds were affected, the Court stated that "the word 'any,? which prefaces the business or transaction clause, undercuts the attempt to impose this narrowing construction." Salinas, 522 U.S. at 57. The Court also stated that "the plain-statement requirement articulated in Gregory . . . does not warrant a departure from the statute?s terms." Id. at 60.

In City of Abilene v. FCC, the Court of Appeals for the District of Columbia reviewed a Commission order that refused to preempt a Texas statute similar to Mo. Rev. Stat. § 392.410(7), holding that § 253 did not contain a

plain statement sufficient to preempt a traditional area of state sovereignty. With all due deference to our sister circuit?s holding, and mindful of our desire to maintain uniformity among the circuits, United States v. Auginash, 266 F.3d 781, 784 (8th Cir. 2001), we do not find City of Abilene to be persuasive. The D.C. Circuit noted that the mere possibility that the term "entity" could include municipalities does not satisfy Gregory. City of Abilene, 164 F.3d at 52-53. The court, however, made no mention of the Supreme Court?s cases regarding the effect of the modifier "any" on the modified term, referring instead to Congress?s "tone of voice" regarding the term "any" and the "emphasis" Congress meant to place on different words. Id. at 52. Counsel for the Commission stated at oral argument that the D.C. Circuit did not consider Salinas because of that court?s rules regarding cases not cited in the original briefs. Whatever the reason for the D.C. Circuit?s decision not to consider and discuss Salinas and like cases, we view the lack of such a discussion as detracting from the persuasiveness of its opinion. The Supreme Court has repeatedly instructed us regarding the proper manner of interpreting the modifier "any," and we follow that direction here. We find no reference in any of the Supreme Court?s decisions regarding the word "any" about Congress?s "tone of voice" and "emphasis." We note that a district court in Virginia, after considering both the "any" cases and City of Abilene, concluded that "any entity" should be read broadly and held that a Virginia statute similar to Mo. Rev. Stat. § 392.410(7) must be preempted. City of Bristol v.Earley, 145 F.Supp.2d 741, 747-49 (W.D. Va. 2001) ("it strains logic to interpret the term 'any entity? in § 253(a) to mean 'any entity except for municipalities and other political subdivisions of states").

Accordingly, we conclude that because municipalities fall within the ordinary definition of the term "entity," and because Congress gave that term expansive scope by using the modifier "any," individual municipalities are encompassed within the term "any entity" as used in § 253(a). This language would plainly include municipalities in any other context, and we should not hold otherwise here merely because § 253 affects a state?s authority to regulate its municipalities. Congress need not provide specific definitions for each term in a statute where those terms have a plain, ordinary meaning and Congress uses an expansive modifier to demonstrate the breadth of the statute?s application. See Gregory, 501 U.S. at 467 (statute need not explicitly mention judges to have judges included in the definition); Salinas, 522 U.S. at 60 (statute need not address every interpretive theory offered in order to be unambiguous).

We recognize Missouri?s important interest in regulating its political subdivisions. The Gregory standard is designed to respect such interests. That Salinas was a criminal case in which the state had no interest in allowing its officials to take bribes does not detract from its fundamental holding regarding the authority of Congress to change the balance of state and federal powers when it employs plain language to do so. Salinas held that by using the clearly expansive term "any," Congress expressed its intent to alter this relationship. We conclude that the same must be said about the preemption provision set forth in § 253.

Missouri also argues that because the state controls its municipalities? authority, § 253 does not apply to this case. Section 253 directs the Commission to preempt laws that prohibit "the ability of any entity" to provide telecommunications services. Missouri argues that because § 392.410(7) addresses its municipalities? authority to provide telecommunications services rather than their ability to do so, § 253 does not apply. Missouri contends that if § 392.410(7) is held to be preempted, it would not be able to prevent its attorney general?s office from providing telecommunications services. Putting aside the highly fanciful nature of this argument, it needs only to be noted that unlike municipalities, the Missouri Attorney General?s office has no independent authority to provide telecommunications services. Section 392.410(7) is a prohibition on the ability to exercise the authority that municipalities otherwise possess, precisely the type of prohibition that § 253 is designed to prevent. See City of Bristol, 145 F.Supp.2d at 748 (Virginia municipalities otherwise have authority to provide telecommunications

services and state statute designed to prohibit them from exercising that authority preempted by § 253).

The Commission?s order is vacated, and the case is remanded to the Commission for further proceedings consistent with the views set forth in this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 01-1379

The Missouri Municipal League, et al.,

Petitioners,

v.

Federal Communications Commission,

Respondents,

Southwestern Bell Telephone Co., et al.,

Intervenors on Appeal.

Order Denying Petition for Rehearing and for Rehearing En banc

The petitions for rehearing en banc are denied. The petitions for rehearing by the panel are also denied.

Judge McMillian and Judge Loken took no part in the decision in this matter.
(5128-010199)

November 20, 2002

Order Entered at the Direction of the Court:

Clerk, U.S. court of Appeals, Eighth Circuit

Before the
Federal Communications Commission
Washington, D.C. 20554

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.

CC Docket No. 98-122

Petition for Preemption of Section 392.410(7) of the Revised Statutes of Missouri

MEMORANDUM OPINION AND ORDER

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. Several parties filed comments and reply comments addressing the petition. The Missouri Municipals assert that HB 620 violates section 253(a) of the Communications Act of 1934, as amended, and falls outside the scope of authority reserved to the states by section 253(b) of the Act, and thus satisfies the requirements for preemption by the Commission pursuant to section 253(d) of the Act.

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. 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. 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." 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). 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). This is the approach that the Commission has taken in prior orders addressing section 253.

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.

5. HB 620 is similar to a Texas statute that the Commission declined to preempt. In the Texas Preemption Order, the Commission found that a provision of the Texas Public Utility Regulatory Act of 1995 ("PURA95") 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." 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.

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. 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. 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.

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. 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. 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." 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.

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. 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. They argue that "any entity" should be interpreted broadly to include such municipally_owned utilities, and assert that the legislative history of section 253 confirms that these entities are included within the scope of section 253(a).

## 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. 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 tele-communications 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. 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. We emphasized this fact in our August 2000 report on the deployment of advanced services. In that report, we presented a case study detailing advanced services deployment in Muscatine, Iowa where the municipal utility competes with other carriers to provide advanced services to residential customers. 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. 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. 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.

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. 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.

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. 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.

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 that 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. 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.

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). 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. 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 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. 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). 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. 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."

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. 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. 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. 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." 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.

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. 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. 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, 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. 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. 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." 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. 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. 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. 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. 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. 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. 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. The Court did state, however, that "it must be plain" to anyone reading the Act that it covers the entity in question. 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. 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. 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, 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. 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. 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.

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. § 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

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.

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.

Respectfully submitted,

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February 26, 2003