IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Case No. 01-1379

MISSOURI MUNICIPAL LEAGUE, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION

and

UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of an Order of the
Federal Communications Commission

MISSOURI PETITIONERS' OBJECTIONS TO PETITIONS FOR RECONSIDERATION OR RECONSIDERATION *EN BANC*

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November 4, 2002

MISSOURI PETITIONERS' OBJECTIONS TO PETITIONS FOR RECONSIDERATION OR RECONSIDERATION *EN BANC*

The Federal Communications Commission ("FCC") and Southwestern Bell Telephone Company ("SWBT") have asked the Court to reconsider or reconsider *en banc* the decision of one of its panels in *Missouri Municipal League, et al. v. FCC*, 299 F.3d 949 (8th Cir. 2002) ("*MML Opinion*"). The Missouri Petitioners submit that none of the arguments that the FCC and SWBT have presented in their petitions warrants reconsideration.

The petitions raise no new arguments or authorities that were not before the panel when it reached its decision. Both the FCC and the Missouri Petitioners called several new developments to the panel's attention after oral argument, and the panel referred to several of these submissions in its opinion. Thus, the petitions merely reflect the FCC's and SWBT's dissatisfaction with the way that the panel decided the arguments before it.

I. THE PANEL CORRECTLY APPLIED THE "PLAIN STATEMENT" STANDARD OF *GREGORY v. ASHCROFT*

Section 253(a) of the Telecommunications Act provides 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 service" (emphasis added). In the *MML Opinion*, the panel unanimously found that the term "any entity" in Section 253(a) protects entities of all kinds, including public entities, from state barriers to entry such as the Missouri ban on municipal provision of telecommunications services. The *MML Opinion* reflects the panel's substantial experience with the Telecommunications Act, its deep respect for state sovereignty, and its faithful adherence to the "plain statement" standard of *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

First, the panel put Section 253(a) into its statutory context and found that Section 253(a) was intended to help advance the purposes of Telecommunications Act "to increase competition in the area of telecommunications services and to ensure delivery of universal service." *MML*

Opinion, 299 F.3d at 951. As Congress had not defined "entity" in the Act, the panel applied the Supreme Court's standard requirement that courts give terms that are undefined in a statute their common, ordinary meaning. *MML Opinion*, 299 F.3d at 953, citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992); *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning"). The panel thus concluded that "[t]here is no doubt that municipalities and municipally owned utilities are entities under a standard definition of the term." *MML Opinion*, 299 F.3d at 953. Specifically, the panel looked to *Black's Law Dictionary* 553 (7th ed. 1999), and observed that an "entity" is "'[a]n organization (such as a business or a governmental unit) that has a legal identity apart from its members,'" and that "a public entity is a 'governmental entity, such as a state government or one of its political subdivisions.'" *MML Opinion*, 299 F.3d at 953. The panel recognized that municipalities derive their authority from the state and should not be considered "separate entities." *Id*, citing *Sailors v. Board of Educ.*, 387 U.S. 105, 107-08 (1967). The panel concluded, however, that "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. The plain meaning of the term 'entity' includes all organizations, even those not entirely independent from other organizations." *Id*.

Next, the panel found that Congress's expansive, unrestrictive use of the modifier "any" signified its intent "to include within the statute all things that could be considered as entities." *MML Opinion*, 299 F.3d at 953-54. In support of this conclusion, the panel cited Supreme Court cases spanning more than five decades, in which the Court had "time and again" held that the term "any" prohibits a narrowing construction. *Id*. at 954. The panel gave particular weight to *Salinas v. United States*, 552 U.S. 52 (1997), in which the Court had *unanimously* held that Congress's expansive, unrestricted use of "any" undercuts attempts to impose a narrowing

construction, leaves no doubt about congressional intent, and satisfies *Gregory*'s "plain statement" standard. *MML Opinion*, 299 F.3d at 954, citing *Salinas*, 522 U.S. at 60.

The panel then turned to *City of Abilene v. FCC*, 164 F.2d 49 (D.C. Cir. 1999), in which the court had found that "any entity" does not include public entities. The panel did not find *Abilene* persuasive because the D.C. Circuit had failed to mention *Salinas* or any of the other Supreme Court cases on the effect of the modifier "any" and had instead concluded that "any entity" should be read narrowly because the court could not discern Congress's "tone of voice" or emphasis in using that term. *MML Opinion*, 299 F.3d at 955.

In conclusion, the panel found that Congress clearly and unmistakably intended that "any entity" in Section 253(a) include municipalities.

> 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).

MML Opinion, 299 F.3d at 955.[1]

In closing, the panel rejected what it called the State of Missouri's "highly fanciful" argument that preemption of the Missouri statute would disable the state from preventing its own attorney general's office from providing telecommunications services. The panel noted that § 253(a) only precludes a state from removing an entity's existing authority to provide telecommunications services, and unlike Missouri's municipalities, the attorney general's office never had independent authority to provide such services. *MML Opinion*, 299 F.3d at 955-56.

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[1] The panel was mindful of the benefits of uniformity among the circuits, but it could not bring itself to accept the D.C. Circuit's rationale in view of its inconsistency with the Supreme Court's repeated instructions about the proper manner of interpreting the modifier "any." *MML Opinion*, at 955.

II. THE FCC AND SWBT HAVE NOT SUCCESSFULLY REBUTTED THE PANEL'S RULINGS

In this section, the Missouri Petitioners show that none of the FCC's and SWBT's main arguments is correct.

First, citing *Alarm Industry Communications Committee v. FCC*, 131 F.3d 1066 (D.C. Cir. 1997), the FCC disingenuously criticizes the panel for relying upon *Black's Law Dictionary*. FCC Petition at 9 n.2. As the FCC knows very well, the D.C. Circuit in *Alarm Industry* took the agency to task for relying solely upon a restrictive, highly technical definition of "entity" in *Black's Law Dictionary* when, in the court's view, that FCC should have given "entity" its ordinary, common meaning. Indeed, the court itself looked up "entity" in various standard, non-technical dictionaries and found that these definitions included "something that exists as a particular and discrete unit," a "functional constituent of a whole," and "the broadest of all definitions which relate to bodies or units." *Alarm Industry*, 131 F.3d at 1069. On remand, the FCC itself found that "entity" should be interpreted expansively when necessary to achieve the pro-competitive purposes of the Telecommunications Act; that such an interpretation is "consistent with the idea that 'entity' is 'the broadest of all definitions which relate to bodies or units,'" that such a broad interpretation is "reflected in judicial and statutory definitions of 'entity' in other contexts;" and that "entity" includes "a division of a government bureau...." *In the Matter of Enforcement of Section 275(A)(2) of the Communications Act of 1934, As Amended By the Telecommunications Act of 1996, Against Ameritech Corporation*, 13 FCC Rcd 19046, ¶¶ 10, 16 (September 25, 1998).[2]

Second, both the FCC and SWBT admit that the term "any entity" can include a public entity – indeed, SWBT concedes that this term "would ordinarily be interpreted to include

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[2] The Missouri Petitioners also presented the panel numerous other FCC interpretations, orders, forms and documents in which the agency had consistently referred to units of state and local government as "government entities."

municipalities in other contexts." FCC Petition at 8-9; SWBT Petition at 9. The FCC suggests, however, that Congress's failure to define "entity" means that a court cannot find that it has a plain meaning and must defer to the FCC's interpretation. FCC Petition at 9 and 9 n.1. Citing *City of Abilene*, the FCC and SWBT also contend that the fact that "entity" *can* include a public entity is insufficient to meet *Gregory*'s "plain statement" standard. *Id*.

Given *Gregory*'s mandate that a court search for a "plain statement" of Congress's intent, there is no merit to the FCC suggestion – without authority – that the Court cannot apply in this case the Supreme Court's standard rule requiring that courts give undefined words their common, ordinary meaning. To the contrary, as the panel correctly found, "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." *MML Opinion* at 995.

Furthermore, the FCC and SWBT have misread the panel's discussion of the term "entity." The panel never said that a broad reading of "entity," standing alone, would satisfy the *Gregory* standard. Rather, the panel found that the *combination* of "any" and "entity" is what does so. *MML Opinion*, 299 F.3d at 953-54 ("Congress's use of "any" to modify "entity" signifies its intention to include within the statute all things that could be considered as entities.")

Third, citing *Sailors* and *City of Columbus v. Ours Garage and Wrecker Service, Inc.*, 122 S.Ct. 2226, 2234 (2002), the FCC contends that the panel could not properly ignore the Supreme Court's long-standing view that municipalities are not "'sovereign entities' independent of the states from which they derive their authority…." FCC Petition at 10-11; *see also* SWBT Petition at 7-8. Again, the FCC and SWBT misstate the panel's opinion. The panel did not

ignore these cases but correctly found them irrelevant to whether a unit of local government is an "entity." *MML Opinion*, 299 F.3d at 953.[3]

Fourth, the FCC and SWBT contend that neither *Salinas* nor the other Supreme Court cases on the effect of "any" that the panel cited in its opinion involved federal preemption of a traditional state power; that where a traditional state power is at issue, a court must interpret "any" narrowly to avoid constitutional conflicts; and that the panel should have relied upon *Raygor v. Regents of the University of Minnesota*, 122 S.Ct. 999 (2002), in which the Supreme Court recently rejected a broad interpretation of "any claim" to avoid a constitutional conflict. FCC Petition at 10-13; SWBT Petition at 9-12. Again, these arguments lack merit.

In *Salinas*, the Supreme Court rejected a state official's claim that *Gregory* required a narrow reading of the phrase "any business or transaction" in a federal bribery statute, as a broad reading would disturb the federal-state balance:

> The enactment's expansive, unqualified language, both as to the bribes forbidden and the entities covered, does not support the interpretation that federal funds must be affected to violate § 666(a)(1)(B).... The prohibition is not confined to a business or transaction which affects federal funds. *The word "any," which prefaces the business or transaction clause, undercuts the attempt to impose this narrowing construction.*

Id. at 57 (emphasis added).[4] The Court recognized that, in cases in which the *Gregory* standard applies, a "plain statement" of congressional intent is required, and courts must resolve ambiguities in favor of interpretations that do not disturb the federal-state balance. The Court concluded, however, that when Congress uses the term "any" without restriction and says nothing elsewhere in the statute or legislative history to compel a narrowing construction, its

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[3] Notably, *Sailors* recognized that the "vast leeway" that states have in managing their political subdivisions ends at the point that state management "runs afoul of a federally protected right." *Sailors*, 387 U.S. at 109. Here, the Supremacy Clause and Section 253(a) furnish local governments such a federally protected right.

[4] The Court's willingness to read an unrestricted, expansive use of "any" broadly in *Salinas* is all the more noteworthy because criminal statutes are ordinarily interpreted narrowly.

intent is not ambiguous, and courts must honor that intent without bending over backwards to avoid disturbing the federal-state balance.

> As we held in [*United States v.*] *Albertini*, [472 U.S. 675,] at 680, 105 S.Ct., at 2902 [(1985)].
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> > "Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature. *Heckler v. Mathews*, 465 U.S. 728, 741- 742, 104 S.Ct. 1387, 1396-1397, 79 L.Ed.2d 646 (1984). Any 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. *United States v. Locke*, 471 U.S. 84, 95-96, 105 S.Ct. 1785, 1792-1794, 85 L.Ed.2d 64 (1985)."
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> These principles apply to the rules of statutory construction we have followed to give proper respect to the federal-state balance. As we observed in applying an analogous maxim in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), "[w]e cannot press statutory construction to the point of disingenuous evasion even to avoid a constitutional question." *Id*., at ----, n. 9, 116 S.Ct., at 1124, n. 9 (internal quotation marks omitted). *Gregory* itself held as much when it noted the principle it articulated did not apply when a statute was unambiguous. *See Gregory*, 501 U.S., at 467, 111 S.Ct., at 2404. 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 the statute encompasses the conduct at issue. *Ibid*. *Compare United States v. Bass*, 404 U.S. 336, 349-350, 92 S.Ct. 515, 523-524, 30 L.Ed.2d 488 (1971) (relying on Congress' failure to make a clear statement of its intention to alter the federal-state balance to construe an ambiguous firearm-possession statute to apply only to firearms affecting commerce), with *United States v. Lopez*, 514 U.S. 549, 561-562, 115 S.Ct. 1624, 1630-1631, 131 L.Ed.2d 626 (1995) (refusing to apply Bass to read a similar limitation into an unambiguous firearm- possession statute).
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> *The plain-statement requirement articulated in Gregory and McNally does not warrant a departure from the statute's terms. The text of §666(a)(1)(B) is unambiguous on the point under consideration here, and it does not require the Government to prove federal funds were involved in the bribery transaction.*

Salinas, 520 U.S. at 59-60 (emphasis added). Having found the text of the statute "unambiguous," the Court examined the legislative history, not for further confirmation that Congress meant what it said when it used the term "any," but for compelling proof that Congress did *not* mean what it had said. The Court also made clear that "'only the most extraordinary

showing of contrary intentions' in the legislative history will justify a departure from [the language in issue].'" *Id*. at 57-58, quoting *Albertini*, 472 U.S. at 680.

In summary, contrary to the FCC's and SWBT's claims, *Salinas* unmistakably held that Congress's use of the term "any" in an expansive, unrestrictive way creates no ambiguity about congressional intent and satisfies *Gregory*'s plain statement standard, unless something else in the statute or legislative history compels a narrowing construction. As the record before the panel here showed, not only is the language in Section 253(a) clear and unambiguous, but the structure, purposes and legislative history of the Telecommunications Act overwhelmingly support reading "any entity" to include public entities.[5]

Nothing in *Raygor* requires a different conclusion. *Raygor* involved a federal statute of general application that tolled "any claim" against a state under state law while the claim was pending in a federal court and for 30 days after it had been dismissed for lack of federal jurisdiction. The issue before the Court was whether the statute covered state-law claims against non-consenting states that had been dismissed on Eleventh Amendment grounds. Believing that the federal tolling provision would effectively extend state statutes of limitation and thus raise serious constitutional issues, and finding that "the particular context" of the provision at issue made Congress's intent unclear, the Court declined to interpret "any claim" broadly. In so doing, the Court invoked the "'fundamental canon of statutory construction that the words of a statute

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[5] The FCC attempts to distinguish *Salinas* in part on the ground that in this case, there a "dearth" of legislative history about the meaning of Section 253(a). Although the panel did not rely on legislative history – presumably because the FCC insisted that the court had to glean Congress's intent from the face of the statute – the panel could well have pointed to a wealth of information in the record confirming that Congress intended "any entity" to apply to public entities. In *City of Bristol v. Earley*, 145 F.Supp.2d 741, 748 (W.D.Va. 2001) (vacated as moot following enactment of corrective legislation), on which the panel here relied twice in its opinion, *MML Opinion* at 955, 956, the court found "Where the plain and ordinary meaning of a statute gives a 'straightforward statutory command, there is no reason to resort to legislative history.' Nevertheless, the legislative history here supports a broad, rather than narrow, interpretation" (citation and footnote omitted).

must be read in their context and with a view to their place in the overall statutory scheme.'" *Raygor*, 534 U.S. at 545-46, quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989).[6]

In contrast to the blurry statutory context of the term "any claim" in *Raygor*, the panel here dealt with a provision in which Congress had used the combination of two of the most expansive terms possible against the backdrop of a statutory scheme that gave the federal government extraordinarily broad authority "to increase competition in the area of telecommunications services and to ensure delivery of universal service." *MML Opinion*, 299 F.3d at 951. Indeed, two members of the panel here had been involved in the *Iowa Utility Board* cases, in which the Supreme Court had emphasized the pro-competitive purposes of the Act:

> [T]the question in these cases is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has.
> …
>
> The 1996 Act can be read to grant (borrowing a phrase from incumbent GTE) "most promiscuous rights" to the FCC vis-à-vis the state commissions and to competing carriers vis-à-vis the incumbents -- and the Commission has chosen in some instances to read it that way.

AT&T Crop. v. Iowa Utilities Board, 525 U.S. 366, 378 n.6, 397 (1999) (Scalia, J). *Raygor* is thus plainly distinguishable from this case.

Fifth, both the FCC and SWBT cite *Johnson v. Bank of Bentonville*, 269 F.3d 894, 896 (8th Cir. 2001), to demonstrate the level of clarity that they believe necessary to satisfy *Gregory*'s plain statement standard. FCC Petition at 9; SWBT Petition at 5 n.1. SWBT also cites additional cases that found *Gregory*'s "plain statement" standard to have been met, and it asserts that the panel's decision cannot be reconciled with these cases. SWBT Petition at 4-5. These

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[6] In a letter of March 5, 2002, the Missouri Petitioners invited the Court's attention to this passage and suggested that it "support[s] the Petitioners' argument at pages 31-44 of their opening brief that the language of Section 253(a) of the Telecommunications Act must be interpreted in the light of the Act's structure and purposes, as well as its legislative history, which all strongly reinforce the Petitioners' position in this case."

cases are not inconsistent with the panel's decision in this case. At most, they show that Congress can satisfy *Gregory* in a variety of ways. In particular, Judge Bowman's participation on both this panel and the *Bank of Bentonville* panel dispels any notion that the results in the two cases are irreconcilable.

Finally, both the FCC and SWBT attempt to shore up the State of Missouri's argument that preemption of the Missouri barrier to entry would effectively force the State to enter into the telecommunications business against its will. FCC Petition at 13-14; SWBT Petition at 2-3. This argument is not only "highly fanciful," as the court termed it, but nonsensical. The Missouri Petitioners submit that the panel correctly rejected this claim, for the reasons that it gave in its opinion. *MML Opinion* at 955-56.

CONCLUSION

In the hearings preceding the enactment of the Telecommunications Act, Senator Trent Lott (R-MS), a Senate manager of the Act, captured the essence of Congress's intent concerning municipal involvement in the telecommunications arena: "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." *Hearings on S. 1822, The Communications Act of 1994, Before the Senate Committee on Commerce, Science and Transportation*, 103d Cong, 2d Sess., A&P Hearings S.1822 (Westlaw) at 378-79. As the Missouri Petitioners showed in extensive detail in their briefs, Congress did indeed find the right language, as Senator Lott's statement can be traced directly into Section 253(a) of the Telecommunications Act. In that provision, Congress could not have used broader and more inclusive language to express its intent that all entities, including public entities, be protected from state barriers to entry. The Court should now honor that intent by rejecting the petitions for reconsideration.

Respectfully submitted,

/s/

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