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

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PETITIONERS REPLY BRIEF

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PETITIONERS' REPLY BRIEF

INTRODUCTION

In this brief, the Missouri Petitioners reply to the briefs that the Federal Communications Commission, the State of Missouri, and Southwestern Bell Telephone Company filed on April 24, 2001. As shown below, the respondents have conceded, ignored or responded erroneously to all of the Petitioners' main points and authorities. In particular, the Commission has misinterpreted, and the State of Missouri and Southwestern

Bell have completely ignored *Salinas v. United States*, 522 U.S. 52 (1997). In that case, the Supreme Court dealt with precisely the same issue that is now before this Court – whether Congress's "expansive, unqualified" use of the modifier "any" in a federal statute that is said to preempt a "traditional" state power satisfies the "plain statement" standard of *Gregory v. Ashcroft*, 501 U.S. 452 (1991), in the absence of any other language in the statute or its legislative history that would compel a narrowing construction. In *Salinas*, the Supreme Court unanimously answered that question in the affirmative, and that answer controls this case.

In Section 253(a) of the Telecommunications Act, Congress used the term "any entity" without restriction, and "entity" is commonly understood to encompass public entities as well as private entities. In fact, in the *Missouri Order*, the Commission itself refers to the Petitioners as "municipal entities."[1] There is no language elsewhere in the Act or its legislative history that would compel a narrowing construction. To the contrary, the Commission has determined excluding municipal entities from Section 253 would be inconsistent with the purposes of the Act. Specifically, in paragraph 10 of the *Missouri Order*, the Commission found that the Missouri law at issue and similar state barriers to entry thwart municipal electric utilities from becoming "major competitors in the telecommunications industry" and "further[ing] the goal of the 1996 Act to bring the

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[1] *In re Missouri Municipal League, et al.*, FCC 00-443, 2001 WL 28068 (rel. January 12, 2001) ("*Missouri Order*"), ¶ 10.

benefits of competition to all Americans, particularly those who live in small or rural communities."

For these and the other reasons discussed below and in the Petitioners' opening brief, the Court should grant the Petition for Review and overturn the *Missouri Order*.

ARGUMENT

I. THE COMMISSION HAS MISSTATED THE RELEVANT STANDARD OF REVIEW

According to the Commission, "'[t]he question before this Court is not whether there might have been a better way for the agency to resolve the conflicting issues with which it was faced, but whether the agency's choice is a reasonable one.'" Commission's Brief at 12, quoting *Southwestern Bell Telecommunications. Co. v. FCC,* 153 F.3d 523, 535 (8th Cir. 1998). The Commission then asks the Court to uphold the *Missouri Order* on the ground that the Commission "reasonably" declined to construe Section 253 as preempting the Missouri law at issue. *Id*. at 13. In other words, the Commission asks the Court to defer to the agency's decision.

As the Petitioners showed in their opening brief, at 47-48, the interplay between *Chevron U.S.A., Inc*. v. *Natural Resources Defense Council*, 467 U.S. 837 (1984) and *Gregory v. Ashcroft* precludes deference to the Commission's interpretation in this case. Under *Chevron*, a court reviewing an agency decision must first independently determine whether Congress has "directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If the court answers that question in the affirmative, "that is the end of the

matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id*. at 842-43. Ordinarily, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id*. at 843. In cases involving *Gregory*'s "plain statement" standard, however, the court must deny federal preemption if the statute is silent or ambiguous on the matter at issue. Thus, the court cannot reach the second *Chevron* stage, in which deference to the Commission's interpretation would come into play. The *Southwestern Bell* case that the Commission quotes does not hold otherwise. It merely states the general rule that applies in cases that do not involve *Gregory*'s "plain statement" standard.

As the Petitioners further maintained in their opening brief, at 48-49, the Commission's rationale in the *Missouri Order* also does not merit deference for substantive reasons. For one thing, as the D.C. Circuit held in *Alarm Industry Communications Council v. Federal Communications Comm'n*, 131 F.3d 1066, 1069 (D.C. Cir. 1997), the Commission's interpretations are not entitled to deference when they "reflect no consideration of other possible interpretations, no assessment of statutory objectives, no weighing of congressional policy, [and] no application of expertise in telecommunications." The Commission's analysis in the *Missouri Order* suffers from all of these shortcomings.

Furthermore, because the *Missouri Order* is not thorough, well-reasoned or consistent with prior and later agency pronouncements, it lacks the characteristics that

would give it the "power to persuade, if lacking power to control." Petitioners Opening Brief at 48-49, quoting *Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944). The Commission's appellate counsel apparently agree, as they have abandoned two of the key grounds on which the Commission decided the *Missouri Order*.

First, in footnote 49 of the *Missouri Order*, the Commission rejected the Petitioners' contention that *Salinas* governs this case, holding that *Salinas* stands only for the proposition that a court, confronted with an ambiguous statute, should opt for an interpretation that does not disturb the federal-state balance. That was clearly an incorrect interpretation of *Salinas*, as the Supreme Court went on to say that courts should not shrink from disturbing the federal-state balance when Congress has removed any ambiguity by using the modifier "any" in an expansive, unqualified way. *Salinas*, 522 U.S. at 57. In this appeal, the Commission's counsel suggest a different reason for rejecting the teaching of *Salinas* and the Supreme Court's other "any" cases – now the claim is that these cases are irrelevant because the modifier "any" in Section 253(a) "simply begs the question: What does 'entity' mean." Commission's Brief at 14-15.

Second, in paragraph 14 of the *Missouri Order*, the Commission declined to apply to the Petitioners the *Salinas*-like analysis that the Commission had itself advanced to the Eleventh Circuit in *Gulf Power, Inc. v. FCC*, 208 F.3d 1263 (11th Cir. 2000), *cert. granted*, (January 19, 2001). According to the Commission, the agency was not bound by its analysis in *Gulf Power* because the Eleventh Circuit's rejection of that analysis confirmed that "any entity" need not be read broadly. *Id*. Confronted with the inconsistency between

this position and the position that the Commission had subsequently taken in its petition for certiorari to the United States Supreme Court – i.e., that the Eleventh Circuit's decision was wrong because the court had failed to give "any" its natural, expansive meaning[2] – the Commission has now taken the new position that *Gulf Power* is distinguishable because it does not involve possible federal preemption of a traditional state power. Commission's Brief at 17 n.17.

As shown below, both of the Commission's new arguments are as flawed as its original ones. But even if the new arguments had more merit, they would not be entitled to deference. "The short – and sufficient – answer to [the Commission's demand for deference] is that the courts may not accept appellate counsel's *post hoc* rationalizations for agency action. It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Assn. v. State Farm Mut.*, 463 U.S. 29, 50 (1983).

II. *SALINAS* GOVERNS THIS CASE

In their opening brief, at 31-37, the Petitioners showed that (1) *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546-47 (1984), laid to rest any doubts about Congress's authority under the Commerce Clause to preempt exercises of "traditional" state powers; (2) *Gregory* reaffirmed *Garcia* and added that the appropriate

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[2] In their opening brief, filed on March 26, 2001, the Petitioners quoted from the Commission's petition for certiorari in *Gulf Power*. Petitioners' Opening Brief at 36-37. On April 6, 2001, the Commission made the same arguments in its Petitioners' Brief to the Supreme Court, 2001 WL 345195, at *31-*32.

way for courts to afford states the respect they deserve is to deny federal preemption of traditional state powers unless Congress has made a "plain statement" that it intends such a result, *Gregory*, 501 U.S. at 467; and (3) *Salinas* made clear that when Congress uses the modifier "any" in an "expansive, unqualified" way in a statute, this "undercuts the attempt to impose [a] narrowing construction," removes any potential ambiguity about the breadth of the word or phrase modified, and meets *Gregory*'s "plain statement" standard, in the absence of language elsewhere in the statute or its legislative history that requires a narrowing construction. Petitioners' Opening Brief at 31-38. *Salinas* also held that "only the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language." *Salinas*, 522 U.S. at 57-78 (citations and inner quotations omitted).

In their briefs, the Commission, the State of Missouri, and Southwestern Bell do not respond directly to the Petitioners' simple and straightforward argument based on *Salinas*. Instead, they counter with various other legal and policy arguments. None of these arguments has merit.

First, while conceding that *Gregory* expressly rejected an "explicit statement" standard,[3] the Commission essentially admits that it imposed such an explicit-statement

[3] Commission's Brief at 7, quoting *Gregory*, 501 U.S. at 467 ("This does not mean that the Act must mention [the preempted issue] explicitly....But it must be plain to anyone reading the Act that it covers [that issue]."). The State of Missouri and Southwestern Bell have apparently overlooked *Gregory*'s unequivocal rejection of an "explicit statement" standard. The State contends that the Petitioners had to prove their case through "some express statement that Congress intended in enacting

standard on the Petitioners in all but name. According to the Commission, it required the Petitioners to meet an "extremely heavy burden" of proving, solely by reference to the text of the Act, that "in using the word 'entity,' Congress deliberated over the effect this would have on State-local government relationships or that it meant to authorize municipalities, otherwise barred by State law, to enter the telecommunications business."[4] This test is not only far more demanding than *Gregory*'s "plain statement" standard, but it is also absurd.

Statutes rarely, if ever, say on their faces that Congress deliberated over what it had done. As the Supreme Court observed in *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 592 (1980), "it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute." Not surprisingly, none of the cases that Southwestern Bell cites as examples of what Congress must do to preempt traditional state powers supports the standard that the Commission required the Petitioners to meet.[5]

Second, as indicated above, the Commission's current position on *Salinas* and the Supreme Court's other "any" cases is that these cases are irrelevant here because

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§ 253(a), and specifically in using the term 'entity,' to supercede a state's sovereignty over its political subdivisions." *Missouri Brief* at 38. Southwestern Bell claims that *Gregory* requires an "explicit" statement of congressional intent. Southwestern Bell's Brief at 6.

4 Commission's Brief at 15-17, citing *City of Abilene v. Federal Communications Comm'n*, 164 F.3d 49, 53 (D.C. Cir. 1999).

5 Southwestern Bell's Brief at 7-9. These cases, moreover, merely exemplify one way for Congress make its intent "unmistakably clear" and are entirely consistent with

Congress's expansive use of "any" in Section 253(a) "simply begs the question: What does 'entity' mean." Commission's Brief at 14-15. The State of Missouri likewise contends that "[t]he ambiguity surrounding the term 'entity' renders appellants' arguments about the term 'any' moot. 'Any' is merely a modifier." Missouri's Brief at 39. These arguments border on the frivolous.[6]

As the Commission knows very well, courts and agencies "are obligated to interpret statutory language in a manner that gives meaning to each word – if at all possible – over an interpretation that renders certain words superfluous." These are the Commission's own words, taken from an order that the Commission just released on April 27, 2001.[7] Yet, the Commission and the State of Missouri would have this Court read the term "any" right out of Section 253(a).

Furthermore, for at least the last fifty years, the Supreme Court has repeatedly rejected the very argument that the Commission and the State of Missouri are making here. As the cases discussed at pages 33-36 of the Petitioners' opening brief make clear, Congress's expansive, unqualified use of the modifier "any" has the purpose and effect of

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the Supreme Court's "any" cases, including *Salinas*, which highlight another way for Congress to achieve the same end.

6 Southwestern Bell conspicuously fails even to mention *Salinas* and the Supreme Court's other "any" cases.

7 *In the Matter of Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended,* CC Docket No. 96-149, *Order on Remand,* FCC 01-140 (rel. April 27, 2001) at ¶ 20, citing *Hoffman v. Connecticut Dept. of Income Maintenance,* 429 U.S. 96, 103 (1989); *Northwest*

removing potential ambiguities and limiting the discretion of courts and agencies to impose narrowing constructions. *See, e.g., Salinas*, 522 U.S. at 57 ("The word "any" ... undercuts the attempt to impose [a] narrowing construction."); *Freitag v. Commissioner of Internal Revenue*, 501 U.S. 868, 875 (1991), quoting *Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1989) (when Congress uses the modifier "any" without restriction, courts "'are not at liberty to create an exception where Congress has declined to do so.'"). The Commission is now stressing the same point to the Supreme Court in *Gulf Power* -- "As the FCC recognized [in its administrative *Pole Attachment Order*], in Section 224(d)(3) as in Section 224(a)(4), 'the use of the word "any" precludes a position that Congress intended to distinguish between wire and wireless attachments.'"[8]

Thus, Congress's expansive use of "any" does not "beg" the question of what "entity" means in Section 253(a). Rather, it answers that question as follows: the term "entity" in Section 253(a) must be deemed to cover every possible kind of entity. In other words, given Congress's unrestricted use of "any" in Section 253(a), the real question in this case is not whether "entity" in Section 253(a) *necessarily* covers public entities, as the

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Forest Resource Council v. Glickman, 82 F.3d 825, 833-34 (9th Cir. 1996); *Office of Consumer's Counsel v. FERC*, 783 F.2d 206, 220 (D.C. Cir. 1986).

[8] Commission's Brief in *Gulf Power*, 2001 WL 345195 at *32. The Petitioners disagree with the Commission's contention that its arguments in *Gulf Power* are irrelevant here. The rules of statutory construction that the Commission is advocating in *Gulf Power* are universal ones that apply even in cases involving preemption of traditional state powers.

Commission suggests, but whether that term *could* cover public entities. The answer to the latter question is most certainly, "Yes."

As the Supreme Court has repeatedly held, courts must give terms that are undefined in a statute – as "entity" is here – their common, ordinary meaning. *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 Commission does not, and cannot, deny that "entity" is commonly understood to encompass public entities. Any such denial would be preposterous in view of the many court decisions, standard non-technical dictionaries, and Commission decisions, interpretations, forms, instructions and other agency pronouncements – including the *Missouri Order* – that treat or refer to units of local government as "entities." Petitioners' Brief at 31-32.[9]

Despite conceding that "entity" commonly includes public entities, the Commission suggests that Congress may not have had understood "entity" this way. Noting that "courts…have long held that municipalities are not 'entities' independent of the states," the

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[9] The State of Missouri suggests that dictionary definitions of "entity" place no rational limits on the scope of that term and would enable even the Attorney General to provide telecommunications services. Missouri's Brief at 29. These concerns are unfounded because the text of Section 253(a) itself imposes the such limits. Section 253(a) is couched as a prohibition, not as an act of empowerment. If an entity does not have authority from another source to provide telecommunications services, nothing in Section 253(a) gives it the authority to do so. For example, but for the Missouri barrier to entry, City Utilities of Springfield would have clear authority under its home-rule charter to provide telecommunications services. Section 253(a)

Commission maintains that Congress may have intended to cover only those entities that are "independent" or "separate" from states. Commission's Brief at 13. There are several problems with the Commission's approach.

For one thing, nothing in the Telecommunications Act or its legislative history supports, much less compels, the Commission's narrowing construction. The Commission cites no examples, and neither do the State of Missouri or Southwestern Bell. Under *Salinas*, this alone is sufficient to defeat the Commission's restrictive reading of "any entity."

There also is no inconsistency between the fact that local governments are subordinate parts of their states and the fact that Congress, in Section 253(a), elected to afford units of local government federal protection from state barriers to entry. As the Supreme Court observed in the case on which the Commission primarily relies – *Sailors v. Board of Education of Kent County*, 387 U.S. 105 (1967) – states have "vast leeway" in managing their local governments, but that leeway 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.

Furthermore, the narrowing construction that the Commission would impose on the term "any entity" makes no practical sense in the context of Section 253(a). The premise of Section 253(a) is that, in the absence of an unlawful state barrier to entry, the entity in

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simply prohibits Missouri from enacting measures that would impair City Utilities from acting on that authority.

question would have authority to decide for itself whether, and to what extent, it wants to engage in telecommunications activities. There is no reason why a public entity must be "independent" or "separate" from the State for its decision to provide or facilitate the provision of telecommunications services to be a sound one that reflects local needs, complies with all local requirements, advances the national policies embodied in the Telecommunications Act, and ultimately benefits the state. Local governments make far-reaching decisions on their own discretion every day, and in acting this way, they serve as "functional constituents" of the state. As the Petitioners showed in their opening brief, at 32, that is one of the common, non-technical definitions of "entity."

Finally, in *Salinas*, 522 U.S. at 59-60, the Supreme Court noted that "[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." Similarly, in *Pennsylvania Dept. of Corrections* v. *Yeskey*, 524 U.S. 206, 212 (1998), the Court observed that "the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth" (citations and internal quotations omitted). These authorities highlight yet another canon of statutory construction that supports the Petitioners' interpretation of the term "any entity" in this case.

In summary, the Commission's effort to limit the term "any entity" to "any independent entity" or "any entity that is separate from the state" finds no support in the Telecommunications Act or its legislative history, where the Supreme Court has repeatedly

said that such support must be found. The Commission's narrowing construction also undermines the purposes of the Telecommunications Act, makes no practical sense, and violates numerous canons of statutory construction. Thus, the Commission could not fairly, reasonably, or lawfully, have concluded in the *Missouri Order* that Congress intended to exclude public entities from the scope of Section 253(a).

III. THE COMMISSION AND THE *ABILENE* COURT ERRED IN FAILING TO TAKE THE PURPOSES OF THE ACT INTO ACCOUNT IN INTERPRETING SECTION 253

In their opening brief, the Petitioners showed that one of the four "traditional tools of statutory construction" is interpreting the text of the statute in view of the statute's purposes. The Petitioners also showed that the Commission, in its *Texas* and *Missouri* orders, and the D.C. Circuit, in the *Abilene* case, erroneously failed to take the purposes of the Telecommunications Act into account in interpreting the term "any entity" in Section 253(a). Petitioners' Brief at 30-31, 42-43. This error was particularly significant, given the Commission's unanimous determination, reinforced by the separate statements of three commissioners, that the Missouri law at issue is unwise, unnecessary to achieve any legitimate state objective, and contrary to the purposes of the Act. *Missouri Order* at ¶¶ 10-11.

In its response, the Commission reaffirms its belief that the Missouri law at issue is inconsistent with the purposes of the Act, but the Commission contends that the traditional tools of statutory construction, "while useful in other contexts, are not appropriate when construing a federal statute that is susceptible of intruding on state sovereignty."

Commission's Brief at 18. According to the Commission, because *Gregory* requires the agency to glean Congress's intent solely from the text of the statute, "[t]he Commission lawfully could do no more, even though its policy preference would have been different." *Id*.

Assuming (without conceding) that the Commission was correct in declining to go beyond the text of statute in the *Missouri Order*, this would not excuse its failure to take the purposes of the Act into account in interpreting the term "any entity." That is so because the purposes of the Act – like the language and structure of the Act – are determinable from the statutory text itself.[10] Rejecting the traditional tools of statutory construction might at most excuse the Commission from relying on legislative history, but, as shown in the next section, even legislative history has a significant role to play in cases involving *Gregory*'s "plain statement" standard.

IV. THE LEGISLATIVE HISTORY OVERWHELMINGLY CONFIRMS THE PETITIONERS' INTERPRETATION OF SECTION 253

In their opening brief, the Petitioners demonstrated that the Commission's analysis of the legislative history in the *Missouri Order* is superficial, defective and inconsistent with the Commission's own representations to the D.C. Circuit in the *Abilene* case.

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10 *See, e.g. Cablevision of Boston, Inc. v. Public Improvement Commission of the City of Boston*, 184 F.3d 88, 93 (1st Cir. 1999) ("Although a large portion of the [Telecommunications Act] focuses on the deregulation of the telephone industry, Congress also *expressly* anticipated and welcomed the entry of electrical utilities into the telecommunications business.") (emphasis added).

Petitioners' Brief at 8-19. The Petitioners also showed that the legislative history, which is completely one-sided in their favor, overwhelmingly confirms that Congress intended to protect all entities, including public entities, from state barriers to entry. *Id.*

In its response, the Commission makes no effort to shore up its analysis of the legislative history.[11] Rather, the Commission simply asserts that "legislative history and other interpretative tools that look beyond the statutory text are inadequate in this context to cure inexact language. If Congressional intent is not plainly evident in the language of Section 253, then extra-textual sources cannot supply the clarity that the statutory text lacks." Commission's Brief at 18.[12]

As the Petitioners stated in their opening brief, "resort to the legislative history is unnecessary in view of the clear expression of congressional intent in the language, structure and purposes of the Telecommunications Act." Petitioners' Brief at 44. Furthermore, when Congress uses the term "any" in an unqualified way in a statute, the Supreme Court's "any" cases and *Salinas* shift to the person arguing for a narrowing construction the burden of showing that this result is compelled by something else in the statute or its legislative history. This burden is a heavy one. As *Salinas* held, "only the

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[11] The Commission denies that its current interpretation of the legislative history is inconsistent with the interpretation that it advanced to the D.C. Circuit in *Abilene*. Commission's Brief at 19n.8. The Petitioners invite the Court to decide for itself.

[12] Southwestern Bell makes the same point. Southwestern Bell's Brief at 19. In addition, Southwestern Bell claims that even a "cursory review" – which is all that Southwestern Bell provides – reveals that the legislative history does not support the Petitioners' position. The Petitioners stand on the comprehensive analysis of the legislative history in their opening brief.

most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language." *Salinas*, 522 U.S. at 57-78 (citations and inner quotations omitted). Thus, contrary to the Commission's and Southwestern Bell's contentions, the Petitioners are not relying on legislative history to overcome inexact or ambiguous statutory language. Rather, they cite the legislative history merely to confirm what is plain in the statute and to show that no one suggesting a narrowing construction could possibly meet the heavy burden that *Salinas* imposes.

V. THE STATE OF MISSOURI'S AND SOUTHWESTERN BELL'S POLICY ARGUMENTS ARE INCORRECT AND IRRELEVANT

The State of Missouri and Southwestern Bell contend that reasonable legislators and regulators can disagree about whether the Missouri barrier to municipal entry reflects good or bad policy, but the Telecommunications Act left such policy judgments solely to the states. Missouri's Brief at 40-41; Southwestern Bell's Brief at 20-26. This argument is flatly incorrect.

First, the Commission has expressly held that Congress enacted Section 253 "to ensure that its national competition policy for the telecommunications industry would indeed be the law of the land and could not be frustrated by the isolated actions of individual municipalities or states, including ... the actions of state legislatures."[13] The Commission has also succinctly summarized this "national competition policy" as follows:

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[13] *In the Matter of the Public Utility Commission of Texas*, FCC 97-346, 13 FCC Rcd 3460, 1997 WL 603179 (rel. Oct. 1, 1997) ("*Texas Order*"), ¶ 4.

> [U]nder the 1996 Act, the opening of one of the last monopoly bottleneck strongholds in telecommunications -- the local exchange and exchange access markets -- to competition is intended to pave the way for enhanced competition in *all* telecommunications markets, *by allowing all providers to enter all markets*. The opening of *all telecommunications markets to all providers* will blur traditional industry distinctions and bring new packages of services, lower prices and increased innovation to American consumers. *The world envisioned by the 1996 Act is one in which all providers will have new competitive opportunities as well as new competitive challenges*.[14]

Contrary to the State of Missouri's and Southwestern Bell's contentions, Congress most certainly did not leave the states free to decide whether, when, and to what extent they will give effect to the "national competition policy" that Congress enacted in the Telecommunications Act.[15]

Second, as the Petitioners' showed in their opening brief, at 46-47, Section 253(b) of the Telecommunications Act carefully limited the role of state policy considerations under the statutory scheme, and the Missouri barrier to municipal entry cannot be sustained under that provision. Petitioners' Opening Brief at 46-47. The State of Missouri and Southwestern Bell have not even addressed, much less refuted, the Petitioners' points and authorities on this issue.

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[14] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *First Report and Order*, FCC 96-325, ¶ 4 (rel. August 8, 1996).

[15] The State of Missouri and Southwestern Bell imply that the Missouri statute is somehow beyond the pale of Section 253 because it bars municipal governments from providing only some telecommunications services and not others. Section 253(a), however, prohibits state barriers to the provision of "*any* interstate or intrastate telecommunications service" (emphasis added).

Third, the State of Missouri claims that "restricting its political subdivisions from usurping private sector opportunities maximizes its chance to have thriving competitive telecommunications markets. Whether, as a practical matter, that strategy will bear fruit, only time will tell." Missouri's Brief at 40. As the State must know by now, however, this strategy has proven to be a disaster for rural Missouri. For confirmation of this, one need look no farther than the brief that Southwestern Bell recently filed with the Commission on April 4, 2001, in support of its application pursuant to Section 271 of the Telecommunications Act for permission to provide long distance service in Missouri.

In its entire 98-page brief, Southwestern Bell discussed the current state of competition in rural areas in Missouri in just the following two sentences:

> Although most CLECs in Missouri, like elsewhere, concentrate on major metropolitan areas, local competition is arriving in Missouri's rural areas as well. CLECs are currently serving customers in Cedar Hill (population 234), Neosho (population 9,531), and Joplin (population 44,612).[16]

This statement is a stark admission that, five years after the enactment of the Telecommunications Act, and contrary to the purposes of the Act, a vast "Digital Divide" still exists in Missouri. Because of the Missouri barrier to municipal entry, Missouri's rural communities have already lost four years during which they could have helped themselves, through their municipal utilities, to remove or mitigate the Digital Divide in Missouri, as Congress intended in enacting the Telecommunications Act.

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[16] *Brief in Support of Application By Southwestern Bell For Provision Of In-Region, InterLata Services in Missouri,* CC Docket No. 01-88 at 8 (filed April 4, 2001),

Unless the Court acts now to declare the Missouri barrier to municipal entry unlawful, there is no telling how much longer the State of Missouri and Southwestern Bell will continue to thwart the pro-competitive purposes of the Act. The Petitioners urge the Court to do so in a way that sends the clear and unmistakable message to state legislators in Missouri and elsewhere, that policies such as the ones that the State of Missouri and Southwestern Bell are advocating here are contrary to the Telecommunications Act and are themselves "obstacles to the accomplishment and execution of the full objectives of Congress." *Louisiana Pub. Serv. Comm'n Federal Communications Comm'n*, 476 U.S. 355, 368-69 (1986).

VI. THE *ABILENE* DECISION IS DISTINGUISHABLE AS WELL AS INCORRECT

Noting that Missouri law treats municipal electric utilities as inseparable from their municipalities and that the Petitioners have not challenged this point, Southwestern Bell and the State of Missouri contend that the Petitioners have essentially conceded that *Abilene* is indistinguishable from this case. Southwestern Bell's Brief at 11-17; Missouri's Brief at 31-36. Although the Petitioners focused on *Abilene*'s significant errors in their opening brief, Petitioners Opening Brief at 21-23, they did not, and do not, concede that *Abilene* is indistinguishable from this case.[17]

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http://www.sbc.com/Long_Distance/MO/Brief.doc. A copy of the relevant pages is included in the Addendum hereto.

[17] The Petitioners do, indeed, acknowledge that Missouri law treats municipal electric utilities as inseparable from their municipalities for some purposes. This, however, is irrelevant to determining the meaning of the term "any entity" in Section 253(a).

The Texas litigation before the Commission and the D.C. Circuit involved a municipality, the City of Abilene, that does not operate a municipal electric utility. In the *Texas Order*, the Commission focused on Abilene's circumstances and expressly held that "we do not decide at this time whether section 253 bars the state of Texas from prohibiting the provision of telecommunications services by a municipally-owned electric utility." *Texas Order*, ¶ 179. On appeal, confronted with its admitted failure to focus on the legislative history of Section 253, the Commission urged the D.C. Circuit not to consider the legislative history, arguing that it applied only to municipal electric utilities and not to municipalities, such as Abilene, that do not operate their own electric utilities. Petitioners' Opening Brief at 21-22, quoting the Commission's brief to the D.C. Circuit. During oral argument, counsel for the Commission assured the Court that the Commission would give the rights of municipalities that operate their own electric utilities a full and fair hearing in the Missouri preemption proceeding, which was then pending before the agency. Thus assured, the Court accepted the Commission's argument, finding that "the statements [from the legislative history that Abilene] quotes deal with an issue not before us -- whether public utilities are entities within § 253(a)'s meaning." *Abilene*, 164 F.3d at 53 n.7.

Because the D.C. Circuit did not address the rights of municipalities that operate their own electric utilities, one can only speculate as to what the court might have decided

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The proper interpretation of Section 253(a) is a question of federal law that turns on Congress's intent, not the intent of the Missouri legislature. *Malone v. White Motor Corp.*, 345 U.S. 497, 504 (1978), quoting *Retail Clerks v. Schermerhorn*, 375 U.S.

if it had anticipated that the Commission would later claim in the *Missouri Opinion* that the *Abilene* court had tied the Commission's hands in dealing with municipal electric utilities. To be sure, as the Commission suggests, the D.C. Circuit might have reached the same conclusion. On the other hand, since the issues and stakes would have been very different and the record showed that Congress had unmistakably sought to encourage municipal electric utilities to become active participants in the telecommunications arena, the D.C. Circuit might well have viewed the case in an entirely different light. Indeed, it might even have paid some attention to the Petitioners' argument that the case was governed by *Salinas*, which the Supreme Court decided while *Abilene* was on appeal. Because no one will ever know how the D.C. Circuit might have ruled, this Court should accept the D.C. Circuit's explicit limitation on the scope of its decision.

The Abilene case is thus not only erroneous, for the reasons that the Petitioners discussed at length in their opening brief, but it is also distinguishable. For both reasons, *Abilene* is not a case on which this Court should rely.

CONCLUSION

During the congressional deliberations that led to the enactment of the Section 253 of the Telecommunications Act, Senator Lott (R-MS), now the Senate Majority Leader, observed, "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

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96, 103 (1963) ("The purpose of Congress is the ultimate touchstone" in determining the effect of federal law on state legislation.).

I do think it is important that we make sure we have got the right language to accomplish what we wish accomplished here."[18] As a key sponsor and floor manager of the Telecommunications Act, Mr. Lott's statements are entitled to substantial weight.[19] Congress did indeed find the "right language" to encourage both public and private utilities to make a "real contribution" in the telecommunications area, including the simple, straightforward and expansive language of Section 253(a): "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."

For the reasons discussed in its opening brief and above, the Court should grant the Petition for Review, reverse the *Missouri Order*, and declare that the term "any entity" in Section 253(a) applies to entities of all kinds, including public entities.

Respectfully submitted,

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[18] 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 351-61 ("Hearings on S.1822").

[19] *Lewis v. United States*, 445 U.S. 55, 63 (1980) ("Inasmuch as Senator Long was the sponsor and floor manager of the bill, his statements are entitled to weight."); *Federal Energy Administration v. Algonquin SNG, Inc*., 426 U.S. 548, 564 (1976) ("Senator Millikin himself stated without contradiction that the Amendment authorized the President... As a statement of one of the legislation's sponsors, this explanation deserves to be accorded substantial weight in interpreting the statute"); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951) ("The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt.").

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May 14, 2001

CERTIFICATE OF COMPLIANCE

Pursuant to Circuit Rule 28(c), and FRAP Rule 32(a)(7), I do hereby certify, based on the word count reported by our word processing system (Microsoft Word 6.0), that the foregoing Petitioners' Reply Brief, including footnotes, does not exceed 7,000 words.

I also certify that the 3½ diskettes furnished to the Court and the parties containing an electronic copy of Petitioners' Reply Brief have been scanned for viruses and are virus-free.

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CERTIFICATE OF SERVICE

I, James Baller, hereby certify that on this 14th day of May 2001, I caused two copies of the foregoing Petitioners Reply Brief and a 3🖴 inch diskette of the Petitioners● Reply Brief, scanned for viruses and virus-free, to be served by first-class U.S. Mail on the parties on the following Service List.

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ADDENDUM

PETITIONERS' ADDENDUM #1

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Missouri	CC Docket No. _____

To: The Commission

BRIEF IN SUPPORT OF APPLICATION BY SOUTHWESTERN BELL FOR PROVISION OF IN-REGION, INTERLATA SERVICES IN MISSOURI

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PETITIONERS' ADDENDUM #2

Southwestern Bell, April 4, 2001, Missouri

(. . . . Text omitted . . . .)

DISCUSSION

I. SOUTHWESTERN BELL IS ELIGIBLE TO SEEK INTERLATA RELIEF UNDER SECTION 271(c)(1)(A)

By any measure, competition is growing rapidly in Missouri. In the second half of 2000, CLECs' facilities-based lines grew by more than 60 percent, and UNE loops by more than 80

percent. See Tebeau Aff. ¶ 7 (App. A, Tab 1). During that same period, operational collocation arrangements grew 472 percent. Id. Indeed, CLECs' existing collocation arrangements allow them to serve more than 88 percent of the business customers in SWBT's Missouri serving area, and 79 percent of the residential customers. Id. ¶¶ 6, 30 & Table 5. The CLECs' installed switching capacity is capable of serving more customers than SWBT serves in the entire State. Id. ¶ 26 & Table 4. Moreover, although most CLECs in Missouri, like elsewhere, concentrate on major metropolitan areas, local competition is arriving in Missouri's rural areas as well. CLECs are currently serving customers in Cedar Hill (population 234), Neosho (population 9,531), and Joplin (population 44,612). Id. ¶ 6.[12]

(. . . . Text omitted . . . .)

[12] SWBT has 119 approved interconnection and/or resale agreements with CLECs in Missouri. See Tebeau Aff. ¶ 4. These agreements are listed in Tebeau Aff. Attach. B. A selection of the most significant Missouri interconnection agreements are reproduced in Appendix B of this Application. The status of federal court challenges to SWBT's agreements in Missouri is provided in Attachment 3 to this Brief.