No. 02-1238, 02-1386 and 02-1405

IN THE

Supreme Court of the United States

JEREMIAH W. NIXON, ATTORNEY GENERAL OF MISSOURI, *et al.*,
Petitioners,
v.
MISSOURI MUNICIPAL LEAGUE, *et al.*,
Respondents.

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

BRIEF OF SPRINT CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether 47 U.S.C. § 253(a), which provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," preserves or preempts the States' sovereign authority to prohibit their political subdivisions from offering telecommunications services to the public.

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PRELIMINARY STATEMENT

Sprint Corporation ("Sprint") respectfully submits this brief as *amicus curiae*, pursuant to Rule 37.3 of the Rules of this Court.[1]

INTEREST OF SPRINT CORPORATION AS *AMICUS CURIAE*

Sprint has substantial local, long distance, and wireless telephony operations throughout the United States. Several Sprint subsidiaries are incumbent local exchange carriers ("ILECs") serving approximately eight million local access lines in predominantly rural communities of eighteen states, including more than 250,000 local access lines in Missouri. Other Sprint subsidiaries offer nationwide wireless and long distance services, and provide competitive local exchange service in more than thirty states.

Sprint's customer, employee, and shareholder constituencies are vitally interested in this case. The question presented asks whether Section 253(a) of the Telecommunications Act of 1996 (the "1996 Act") preserves or preempts the power of the States to prohibit their political subdivisions from entering local telecommunications markets. Without meaningful state control, market entry by political subdivisions into this complex, volatile industry creates significant risks to taxpayers, who are forced to subsidize the ventures, impedes effective competition, and harms the employees and shareholders of private sector companies like Sprint that have invested in local communities. The D.C. Circuit and the FCC have construed Section 253(a) to preserve state authority in this important area. Their decisions are consistent with the statutory language and structure, and promote the pro-

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[1] Sprint's brief is submitted on written consents of the parties, which were filed with the Clerk of the Court. No counsel for a party authored the brief in whole or in part, and no persons other than Sprint made a monetary contribution to the preparation of this brief. Sup. Ct. R. 37.6.

competitive objectives of Congress. The Eighth Circuit, however, has construed Section 253(a) to preempt state authority and thereby abdicate to each municipality the decision whether to enter local telecommunications markets, regardless of any statewide public policy or competitive market concerns. This construction of the statute undermines effective competition and seriously threatens Sprint's investments and interests in Missouri and other states.

SUMMARY OF ARGUMENT

The Eighth Circuit's construction of Section 253(a) cannot be squared with the pro-competitive purposes of the 1996 Act or the central role that Congress gave to the States in implementing the Act's requirements. Congress gave the States significant new powers to ensure a level playing field for competition in local telecommunications markets and to prevent discriminatory and other anti-competitive practices by individual competitors. There is no basis to presume that Congress intended to delegate such powers to the States over private competitors, but to preempt the States' traditional sovereign authority to control market entry by its own instrumentalities when necessary to protect the development of effective local competition.

The 1996 Act is designed to end monopoly control of local telecommunications markets and to promote fair competition for our nation's telecommunications services. Congress envisioned that such competition would stimulate increased investment in telecommunications and information technologies, reduce the need for government regulation, and ultimately improve services to consumers. Congress recognized that these goals could not be achieved if incumbent providers and other competitors were able to use cross-subsidies and discriminatory tactics to distort and impede effective local competition. The 1996 Act thus contains numerous proscriptions and reforms that are intended to detect and eliminate cross-subsidization, prevent anti-competitive practices, and allow for fair competition.

Congress intended for the States to play a primary role in implementing the 1996 Act. The 1996 Act preserves many of the traditional regulatory powers of the States over local markets. It also delegates significant new powers to the States to help break monopoly control of local telecommunications markets and to ensure a level playing field for new entrants. Among other things, Congress empowered the States to arbitrate and approve "interconnection agreements," which set forth the terms and conditions under which new entrants may obtain non-discriminatory access to the network elements and services of ILECs; to prevent cross-subsidization of intrastate services; to propose new support mechanisms for universal service that replace implicit subsidies for rural customers (through inflated urban and business customer rates) with fair and explicit contributions from all telecommunications providers; and to verify to the FCC that any Bell operating company ("BOC") seeking approval to enter long distance markets has adequately opened its local markets to competition and is not engaging in cross-subsidization of its services or other discriminatory practices.

Municipal entry into intrastate telecommunications markets creates the same risks of improper cross-subsidization and anti-competitive practices that Congress sought to eliminate under the 1996 Act. While municipal entry into telecommunications markets to compete with incumbent and competitive providers may appear pro-competitive on its face, it certainly is not the type of competition envisioned by Congress. Municipalities are historically less efficient than private sector companies in providing competitive telecommunications services, yet they enjoy numerous financial, regulatory, and other advantages that are difficult if not impossible to quantify or regulate. For example, a municipality can subsidize its operations with taxes and other public revenues, can issue tax-free debt, has superior access to public rights-of-way, and is not subject to the same profit expectations or accounting standards as a private company. These advantages enable municipalities to undercut private competitors in the provision of telecommunications services. If unchecked, therefore, government entry into local telecommunications markets can impede competition, deter private entrants, and undermine the purposes of the 1996 Act.

To protect against such harms, many states have chosen to prohibit their political subdivisions from providing local telecommunications services and have focused instead on promoting competition through traditional governmental actions such as tax incentives and regulatory reform. States that have permitted their political subdivisions to enter into local markets have become embroiled in extensive efforts to implement and enforce "level playing field" laws. These state laws attempt to limit the ability of government entrants to use tax subsidies and other advantages to undercut private competitors, and are similar in design and purpose to many provisions of the 1996 Act.

It would be surpassing strange for Congress to have given the States such a central role under the 1996 Act in preventing discriminatory, anti-competitive practices by private entrants, while at the same time preempting the States' authority to control market entry by their own political subdivisions to protect against the same potential harms. Such a result not only undermines the pro-competitive purposes of the 1996 Act, but, as Petitioners have fully addressed, significantly intrudes on the sovereign authority of the States.

The D.C. Circuit and the FCC correctly determined that the words "any entity" in Section 253(a) do not evince a plain and unmistakable intent by Congress to preempt the States' traditional authority over their political subdivisions. This interpretation comports with the "plain statement" rule of *Gregory v. Ashcroft*, 501 U.S. 452 (1991), (FCC Pet. App. at

7a), is consistent with the statutory scheme and structure, and promotes the pro-competitive purposes of the 1996 Act by preserving state control over government entry into local telecommunications markets. The Eighth Circuit, in contrast, has wrongly interpreted Section 253(a) to preempt the sovereign authority of the States over their political subdivisions in this vital area. The Eighth Circuit's ruling allows individual municipalities to enter local telecommunications businesses even when a state has determined that such entry will distort the marketplace and impede competition. This interpretation of Section 253(a) is inconsistent with the "plain statement" rule, improperly ignores the role that Congress gave to the States in preventing such harms in the local telecommunications markets, and cannot be squared with the structure and pro-competitive purposes of the 1996 Act.

ARGUMENT

I. THE 1996 ACT WAS DESIGNED TO ACHIEVE AN ORDERLY TRANSITION FROM LOCAL MONOPOLIES TO MARKET-BASED COMPETITION BY ENSURING A LEVEL PLAYING FIELD FOR NEW ENTRANTS.

Prior to 1996, local telecommunications markets were viewed as natural monopolies and were regulated by state commissions and the FCC to ensure that consumers paid just and reasonable rates for services. In enacting the 1996 Act, Congress sought to replace local monopolies with market-based competition that would enhance the level and quality of telecommunications services available to consumers. The 1996 Act was expressly designed "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Telecommunications Act of 1996, 110 Stat. 56, 56 (1996).[2]

Congress recognized that these goals could not be achieved unless market participants were able to compete on a level playing field. As Senator Breaux explained:

> Competition is really what America is all about. And fair competition is what this committee and this Congress [are] charged with guaranteeing to all of the companies that are engaged in technology and technological development in this country. Some industries, however, I think insist on just a fair advantage as opposed to fair competition. And our job, of course, is to ensure fair competition for all.

Telecommunications Oversight: Hearings Before the Senate Comm. on Commerce, Science, and Transp., 104th Cong. (1995), *at* WL, A & P Telecom Hearings (13), at *14 (Jan. 9, 1995) (statement of Sen. Breaux, Member, Comm. on Commerce, Science, and Transp.). Accordingly, numerous provisions of the 1996 Act were designed to eliminate the ability of certain competitors to discriminate against other competitors (either in access to network facilities or in charges for underlying services) and to prevent cross-subsidization of services to undercut competition.[3]

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[2] *See also* S. 652, 104th Cong. (1995) ("AN ACT To provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition, and for other purposes."); H.R. 1555, 104th Cong. (1995) ("A BILL To promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.").

[3] Congressional concerns about potential cross-subsidization animated the earliest proposals for telecommunications legislation. *See*, *e.g.*, S. 1822, 103d Cong. § 234 (1994), *at* WL, A & P Sen. 1822

Section 251(c), for example, imposes several duties on ILECs in order to open their markets to competition. Among other things, an ILEC must permit new entrants to "interconnect" their facilities and equipment with the ILEC's network; provide unbundled access to certain of its network elements; and offer its retail telecommunications services to new entrants for resale at wholesale rates. 47 U.S.C. § 251(c)(2)-(4). In each case, the terms and conditions under which such access and services are provided must be "just, reasonable, and nondiscriminatory." *Id.* Congress also included a "most favored nation" provision, Section 252(i), which requires "[a] local exchange carrier [to] make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." *Id.* § 252(i). And Congress authorized state commissions to reject any interconnection agreement negotiated by a BOC and another carrier that "discriminates against a telecommunications carrier not a party to the agreement." *Id.* § 252(e)(2)(A)(i).

In addition to the general duties imposed on ILECs under Sections 251 and 252, Congress enacted specific provisions

("PREVENTION OF CROSS SUBSIDIES.—In addition to regulations on cross-subsidization that are prescribed under other provisions of this Act, the Commission shall prescribe cost allocation regulations to prevent any Bell operating company or affiliate that offers services that have market power from using revenues from such services to subsidize competitive information services."); H.R. Rep. No. 103-560 § 101 (1994), *at* WL, A & P H.R. Rep. 103-560 (Jan. 9, 1995) ("The prevention of such cross-subsidization shall ensure that telephone rates for basic service reflect only the cost of providing such service, and shall further ensure that as quality telecommunications technology is deployed in both urban and rural areas future cost efficiencies are reflected in those rates.") (accompanying H.R. 3636, 103d Cong. (1994) (the "National Communications Competition and Information Infrastructure Act of 1994")).

designed to prevent the BOCs (and, in some cases, other ILECs), from cross-subsidizing their services and discriminating against new entrants.[4] For example, Section 271 prohibits the BOCs from offering long distance services until they have demonstrated that their local markets are adequately opened to competition. *See generally id.* § 271(a)-(c) (prohibiting BOC provision of interLATA services unless certified by the FCC that a BOC has met the "competitive checklist"). This includes a showing by the BOCs that new entrants have been offered interconnection, access to network elements, and resale services on "just," "reasonable," and "nondiscriminatory" terms, as required under Sections 251 and 252. *See id.* §§ 251(c), 252(d).

Once a BOC obtains approval to offer long distance services, Section 272 further requires that such services only be offered through a separate affiliate. Congress imposed this requirement to "discourage, and facilitate the detection of, improper cost allocation and cross-subsidization between the BOC and its section 272 affiliate." *In re Application by Qwest Communications International Inc. for Authorization to Provide In-Region, InterLATA Services in Minn.*, Memorandum Opinion & Order, WC Docket No. 03-90, 2003 FCC LEXIS 3549, at *85 (¶ 62) (June 26, 2003) ("*Qwest Application*").[5] The affiliate must operate independently from the

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[4] *See, e.g.*, *In re Implementation of the Telecommunications Act of 1996: Accounting Safeguards under the Telecommunications Act of 1996*, Report & Order, 11 F.C.C.R. 17,539, 17,556 (¶ 39) (1996) ("Sections 260, 271, 274, 275 and 276 of the Communications Act of 1934 all expressly prohibit BOCs, and in some cases, other incumbent local exchange carriers from subsidizing services permitted under those sections from their 'telephone exchange service' or their 'basic telephone service.' . . . In addition, section 273(g) states that the Commission may prescribe such additional rules and regulations as may be necessary to prevent cross-subsidization.").

[5] In rejecting a First Amendment challenge to Section 272, the Commission noted: "Certainly Congress's interest in managing an orderly

BOC; maintain separate books and records; have separate officers, directors, and employees; and "conduct all transactions with the [BOC] of which it is an affiliate on an arm's length basis." 47 U.S.C. § 272(b)(5).[6] Congress also expressly prohibited the BOC and its affiliate from discriminating against competitors in the offering and provision of services. *See id.* § 272(e).

Congress included similar safeguards in the 1996 Act governing the BOCs' manufacturing, electronic publishing, and alarm monitoring activities. *See id.* § 273 (manufacturing),[7]

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transition to competition in the local markets is an important one. Section 272, like section 274, [which the D.C. Circuit upheld against a First Amendment challenge,] advances that goal by discouraging discrimination and cross-subsidization by the BOCs." *In re Petition of U S West Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, Memorandum Opinion & Order, 14 F.C.C.R. 16,252, 16,284 (¶ 59) (1999) (citing *BellSouth Corp. v. FCC*, 144 F.3d 58, 69-70 (D.C. Cir. 1998)). *See also Communications Law Reform: Hearings Before the Subcomm. on Telecomms. and Fin. of the House Comm. on Commerce*, 104th Cong. (1995), *at* WL, A & P Telecom Hearings (16), at *300 (May 11, 1995) (statement of Lisa Rosenblum, Deputy Chairman, New York Public Service Commission, on behalf of the National Association of Regulatory Utility Commissioners) ("During the transition to a competitive market, it is essential that regulators and competitors are able to detect improper cross subsidization or discriminatory practices. A separate subsidiary requirement would make it easier to detect these practices.").

[6] Section 272(f) contains a "sunset" provision for the separate affiliate requirements, unless the FCC determines to extend the period. 47 U.S.C. § 272(f).

[7] A BOC authorized to enter the equipment market must do so through a separate subsidiary, *see* 47 U.S.C. § 273(d)(3), and the FCC is charged with "prescrib[ing] such additional rules and regulations as the Commission determines are necessary to . . . prevent discrimination and cross-subsidization in a [BOC's] dealings with its affiliate and with third parties," *id.* § 273(g).

§ 274 (electronic publishing),[8] § 275 (alarm monitoring).[9] These provisions, like Sections 271 and 272, were intended to prevent cross-subsidization and discrimination by requiring the BOCs to offer such services only through separate affiliates and on equal terms and conditions to competitors.

As a further part of "leveling the playing field" for competition, the 1996 Act mandated that federal support for "universal service" be explicit. During the monopoly era, ILECs were permitted to subsidize the cost of providing service to high-cost (*e.g.*, residential and rural) customers by charging inflated rates to toll and business users. The 1996 Act's new model for market-based rates made this approach unsustainable. *See* H.R. Rep. No. 104-204, at 68 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 33 (the Act "make[s] such internal subsidies much less viable because deregulation would remove the near-guaranteed returns allowed in a regulated market, and with them the ability of the regulated firm to subsidize high-cost customers"). Section 254 thus requires the FCC to establish new support mechanisms for universal service that are "explicit and sufficient," 47 U.S.C. § 254(e), funded by *all* telecommunications carriers providing interstate telecommunications services, *see id.* § 254(d), and available to any eligible telecommunications carrier, *see id.* § 254(e).

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[8] Section 274 similarly prohibits the separate affiliates and their respective BOCs from cross-subsidizing services. *See id.* § 274(b)(4) (noting that a separate affiliate and its BOC must value assets and keep records of asset transfers "in accordance with such regulations as may be prescribed by the Commission or a State commission to prevent improper cross subsidies").

[9] Section 275 requires an ILEC engaged in the provision of alarm monitoring services to: "(1) provide nonaffiliated entities, upon reasonable request, with the network services it provides to its own alarm monitoring operations, on nondiscriminatory terms and conditions; and (2) not subsidize its alarm monitoring services either directly or indirectly from telephone exchange service operations." *Id.* § 275(b)(1)-(2).

By eliminating implicit subsidies and creating a new framework for universal service, Congress again sought to level the playing field and remove any competitive disadvantages resulting from the old framework. Indeed, in Section 254(k), Congress made clear its aversion to *any* form of rate subsidization under the new competitive regime, expressly providing that:

> A telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition. The Commission, with respect to interstate services, and the States, with respect to intrastate services, shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services.

Id. § 254(k).

The 1996 Act thus dramatically changed the landscape of telecommunications. Congress mandated that local telecommunications markets transition quickly from a single provider subsidizing its services to certain customers with implicit subsidy flows from other groups of customers, to multiple providers operating on a level playing field and offering services at market-based rates. Pursuant to this mandate, the FCC has taken steps to remove such cross-subsidies so that Congress' twin goals of effective competition and universal service can coexist. As more fully shown below, municipal entry into local telecommunications markets creates similar risks of cross-subsidization and discrimination. State laws prohibiting municipal entry, like the Missouri statute overturned by the Eighth Circuit, are thus designed to protect against the very same market distortions that the 1996 Act sought to eliminate. Preserving such laws is not only consistent with—but indeed critically necessary to ensure—the growth of efficient, market-based competition as envisioned by Congress.

II. CONGRESS EXPECTED THE STATES TO PLAY A CENTRAL ROLE IN IMPLEMENTING THE 1996 ACT AND DELEGATED SIGNIFICANT NEW POWERS TO THEM TO HELP ENSURE A LEVEL PLAYING FIELD FOR COMPETITION.

States have historically played the primary role in regulating intrastate telecommunications markets. The 1996 Act preserves much of this traditional authority and delegates significant new powers to the States to help implement the pro-competitive objectives of Congress. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 412 (1999) (Breyer, J., concurring in part and dissenting in part) ("When, in 1996, Congress decided to attempt to introduce competition into the market for local telephone service, it deemed it wise to take advantage of the policy expertise that the state commissions have developed in regulating such service."). Removing the States' ability to prohibit their political subdivisions from entering into the field, as the Eighth Circuit's decision has done, is contrary to the role given the States by Congress in the 1996 Act.

As a general matter, Congress expressly preserved the States' authority to "establish[] access and interconnection obligations of local exchange carriers" that are additional to and consistent with the requirements of the 1996 Act. 47 U.S.C. § 251(d)(3)(A). Congress also preserved the States' authority to establish and enforce other regulations, "including requiring compliance with intrastate telecommunications service quality standards or requirements." *Id.* § 252(e)(3). In Section 253(b) and (c), Congress similarly preserved the authority of the States to impose reasonable, competitively neutral requirements for universal service, protection of the public safety and welfare, service quality, and management of public rights-of-way. *Id.* § 253(b)-(c).

In addition to preserving these traditional powers, the 1996 Act delegated broad new authority to the States. Section 252 empowers the States to arbitrate and approve the interconnection agreements under which ILECs and new entrants compete for local services. *See id.* § 252(b)-(e). The States are authorized to impose terms and conditions that are "just," "reasonable," and "nondiscriminatory," to reject negotiated agreements that provide preferential treatment to a new entrant or are otherwise "not consistent with the public interest, convenience, and necessity," *id.* § 252(e)(2)(A)(ii), and to adjudicate any disputes arising from approved agreements.

The FCC has described the States' expanded role under these provisions as follows:

> State commissions will continue to exercise primary authority to arbitrate and approve interconnection agreements, and will continue to exercise concurrent authority to adjudicate interconnection and unbundling disputes arising from interconnection agreements. Thus, the state commissions' roles in arbitrating and enforcing the requirements of interconnection agreements will remain central, as Congress intended.

In re Core Communications, Inc. v. Verizon Md. Inc., Memorandum Opinion & Order, 18 F.C.C.R. 7962, 7972 (¶ 26) (2003).[10] The Eighth Circuit has similarly recognized that state commissions have the primary authority under federal

[10] *See also In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Third Report & Order, 14 F.C.C.R. 20,912, 20,982 (¶ 158) (1999) ("We believe that the rules and guidelines set out in this order are consistent with Congress' vision of the complementary roles for the Commission and the states with respect to access to unbundled network elements under section 251 of the Act[.]"); *id.* at 20,983-85 (¶¶ 162-168) (describing the "States' Role in Fostering Local Competition under Sections 251 and 252").

law to enforce the substantive terms of interconnection agreements, holding that "the state commissions' plenary authority to accept or reject these agreements necessarily carries with it the authority to enforce the provisions of agreements that the state commissions have approved." *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 804 (8th Cir. 1997), *aff'd in part and rev'd in part on other grounds*, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). And in its recent *Triennial Review Order*, the FCC confirmed the continuing, primary role of the States in making the granular analysis required to determine whether certain network elements must be provided on an unbundled basis to competitors under Sections 251 and 252 of the 1996 Act. *See In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report & Order on Remand, CC Docket No. 01-338 *et al.*, 2003 FCC LEXIS 4697, at *296, *305-*313 (¶¶ 186, 191-196) (Aug. 21, 2003) ("*Triennial Review Order*"). In particular, the FCC stated:

> We do not agree with incumbent LECs that argue that the states are preempted from regulating in this area as a matter of law. If Congress intended to preempt the field, Congress would not have included section 251(d)(3) in the 1996 Act.

Id. at *305 (¶ 192).[11] Although this recent order involved a different statutory provision from the one at issue here, the

[11] In response to commenters who suggested that States can ignore federal law and unbundle at will under state law, the FCC found that the States must comport with the federal regulatory regime and may not regulate in a manner that thwarts it. *Triennial Review Order*, 2003 FCC LEXIS 4697, at *305-*309 (¶¶ 192-193). As more fully shown *infra* Part III, state laws restricting municipal competition advance fair, subsidy-free competition and are consistent with the federal regulatory regime.

FCC's preemption analysis further confirms the central role that Congress intended for the States to play in implementing the local competition provisions of the 1996 Act.

Congress also intended for the States to play a vital role with respect to BOC entry into the long-distance services market. Under Section 271, the FCC must "consult with the State commission of any State that is the subject of [a BOC's] application in order to verify the compliance of the [BOC] with the [competitive checklist]."[12] 47 U.S.C. § 271(d)(2)(B). "As the Commission has repeatedly recognized, state proceedings demonstrating a commitment to advancing the pro-competitive purposes of the Act serve a vitally important role in section 271 proceedings." *Qwest Application*, 2003 FCC LEXIS 3549, at *2 (¶ 2).[13] The 1996 Act thus effectively assigns an initial "gatekeeper" function for BOC entry to the States, which must verify that the level playing field conditions envisioned by Congress have been

[12] In a hearing before the House, then FCC Chairman Reed Hundt described the federal and state roles under Section 271 stating: "Each State would have the obligation and the opportunity to verify compliance with the checklist. . . . Then, subsequent to that, the FCC would have a final verification process that is fairly compressed in time, in fact, extremely compressed in time, but that gives us assurance in the nature of review—a substantive review that the compliance process at the State level has been full and fair." *Communications Law Reform: Hearings Before the Subcomm. on Telecomms. and Fin. of the House Comm. on Commerce*, 104th Cong. (1995), *at* WL, A & P Telecom Hearings (16), at *290 (May 11, 1995) (statement of Reed Hundt, Chairman, FCC); *see Communications Law Reform: Hearings Before the Subcomm. on Telecomms. and Fin. of the House Comm. on Commerce*, 104th Cong. (1995), *at* WL, A & P Telecom Hearings (16), at *323 (May 11, 1995) (statement of Rep. Jack Fields, Member, House Comm. on Commerce) (noting that the House "felt it was very important that the States have a role" under Section 271).

[13] *See In re Verizon Pa. Inc. et al. for Authorization to Provide In-Region, InterLATA Services in Pa.*, Memorandum Opinion & Order, 16 F.C.C.R. 17,419 (2001) (same).

adequately achieved in the relevant market. The FCC has also encouraged the States to adopt creative enforcement schemes to ensure that a BOC's activities after entry into the long distance market in a particular state continue to comply with the pro-competitive requirements of the Act. *See In re Application of Verizon N.Y. Inc. et al. for Authorization to Provide In-Region, InterLATA Services in Conn.*, Memorandum Opinion & Order, 16 F.C.C.R. 14,147, 14,181 (¶ 76) (2001) (noting that "Verizon's Performance Assurance Plan (or PAP) for Connecticut provides additional assurance that the local market will remain open after Verizon receives section 271 authorization").

Similarly, with respect to universal service, Congress not only preserved the States' authority to adopt universal service requirements for intrastate services, 47 U.S.C. § 254(f), but also established a "Federal-State Joint Board" on Universal Service, so that the States could participate in the development and adoption of universal service rules for interstate services, *see id.* § 254(a)(1). As noted, Congress made clear that the new support mechanisms established by the States and the FCC must eliminate any subsidization of competitive services. *Id.* § 254(k). In addition, Congress authorized the States to designate which carriers are eligible to receive universal service support under the new mechanisms. *See id.* § 254(e).

Although Congress granted these broad new powers to the States, it recognized—consistent with traditional notions of federalism—that it could not force a state to exercise such authority. *Cf. Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 640, 645 (2002) (discussing voluntary nature of States' participation in the regulatory scheme established under the 1996 Act). Section 252(e)(5) thus requires the FCC to preempt a State's jurisdiction to exercise these powers whenever the State chooses for any reason not to act. *See* 47 U.S.C. § 252(e)(5); *Triennial Review Order,* 2003 FCC LEXIS 4697, at *304 (¶ 190) ("If a state commission fails to perform the granular inquiry we delegate to them, any aggrieved party may petition [the FCC] to step into the state's role.").

Thus, the courts, including the Eighth Circuit, and the FCC have recognized the crucial role of the States in opening local telecommunications markets to competition and protecting against discriminatory and anti-competitive practices. Interpreting Section 253(a) to preempt state authority to control entry by their political subdivisions into these markets, as the Eighth Circuit has done, cannot be reconciled with the powers Congress gave to the States under the 1996 Act.

III. MUNICIPAL ENTRY INTO LOCAL TELECOMMUNICATIONS BUSINESSES CREATES THE SAME RISKS OF CROSS-SUBSIDIZATION AND UNFAIR COMPETITION THAT CONGRESS SOUGHT TO ELIMINATE UNDER THE 1996 ACT.

Since 1996, an increasing number of municipalities and other state political subdivisions have entered the market for telecommunications services, including local phone, cable, and Internet services. *See* Jeffrey A. Eisenach, *Does Government Belong in the Telecom Business?*, at 6-11 & Table 2, *at* http://www.pff.org/POP8.1GovtTelecom011001LOGO.pdf (Jan. 2001) ("*Telecom Business*"). These government forays into telecommunications businesses have created the same risks of cross-subsidization of rates and discriminatory practices that Congress sought to eliminate under the 1996 Act.

A. Government Providers Are Historically Less Efficient Than Private Providers, But Can Undercut Competition Through The Use Of Public Subsidies And Other Inherent Advantages.

Municipalities and other state political subdivisions are historically less efficient than their private sector counterparts in providing competitive services.[14] In order to compensate for this inefficiency, government market participants often rely on a slate of regulatory and economic advantages that are not available to their private competitors. For example, municipalities are able to cross-subsidize their telecommunications offerings in numerous ways. Revenues generated through local taxes and fees are often used to help fund these "competitive" ventures.[15] Municipalities can also issue tax-free debt to support their operations.[16] In addition to these

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[14] *See, e.g.*, Dennis W. Carlton & Jeffrey M. Perloff, *Modern Industrial Organization* 657 (3d ed. 2000) ("Often, government owned firms are less efficient than privately owned firms. Managers have less of an incentive to maximize profits under public ownership."); 2 Alfred E. Kahn, *The Economics of Regulation: Principles and Institutions* 328 (1998) (discussing the "virtual disappearance" of government ownership as an endorsement of private organization); N. Gregory Mankiw, *Principles of Microeconomics* 333 (2d ed. 2001) ("Put simply, as a way of ensuring that firms are well run, the voting booth is less reliable than the profit motive."); Joseph Stiglitz, *Whither Socialism* 237 (MIT Press 1994) ("[T]he popular prejudice is, by and large, correct: *Private sector activities, while not necessarily more efficient, are on average so*." (emphasis in original)); James Q. Wilson, *Bureaucracy* 227 (Basis Books 1989); *Telecom Business* at 12. The global trend toward privatization in telecommunications services further attests to this broad consensus.

[15] The City of Lebanon, Ohio, for example, charges developers of new houses a "Broadband Connection Fee" of $1,250 to subsidize its deployment of a fiber optic network, regardless of whether the homeowner ever subscribes to the City's broadband services. *See Home Builders Ass'n. of Dayton & Miami Valley v. City of Lebanon, Ohio*, Case No. 02CV59491 (Common Pleas Ct., Warren County, Ohio). Sprint and other private competitors have no ability to raise capital through such "fees" in deploying their networks.

[16] For instance, the City of Bristol, Virginia recently announced a $48 million bond offering, at least $11 million of which is earmarked for its local cable and telecommunications system. *See* Mike Still, *Bristol Virginia City Council Gives Blessing to $48.2 Million Bond Issue Plan, at* http://www.bristolnews.com/servlet/Satellite?pagename=BHC%2FMGArticle%2FBHC_BasicArticle&c=MGArticle&cid=1031768984728&path=!news (Mar. 26, 2003).

direct public subsidies, municipalities enjoy other significant advantages over private competitors. A municipality typically has preferential access to essential public rights-of-way, is exempt from local franchise fees and taxes, and is not subject to the same profit expectations or accounting standards as its private counterparts. *See Telecom Business* at 15.

Government entrants thus lack the normal market incentives to make effective business decisions and are particularly ill-suited to manage competitive operations that involve the kind of advanced technologies and rapid innovations found in the telecommunications industry. *Id.* at 12. Even so, the public subsidies and other advantages available to government entrants enable them to undercut private competitors in the provision of local telecommunications services. *See* Kathryn A. 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). Residential and business subscribers do not benefit from the "lower" rates offered by a government entity, however, since they have already subsidized the costs of providing the services through their local taxes. *See* Paul Guppy, *When Government Enters the Telecom Market: An Assessment of Tacoma's Click! Network*, at 3, Progress & Freedom Foundation, *at* www.pff.org/publications/pop9.7guppyclick.pdf (Feb. 2002) ("*Government Entry*"). Private carriers like Sprint, who have spent billions of dollars in building their local networks, are similarly forced to subsidize these "competitive" government operations through the payment of property taxes on their facilities, as well as various franchise fees, pole attachment fees, and rights-of-way fees.

The inequities created by government entry into local telecommunications markets reduce the incentives for Sprint and other private carriers to invest in new infrastructure and technologies. Government entry likewise deters other private sector companies from attempting to compete in local markets. These private companies often have legitimate competitive advantages, such as technological advances or greater efficiencies, but cannot compete with the publicly-funded government provider. This problem is particularly acute in telecommunications, where attaining sufficient scale is key to any competitor's survival. Government entry into these local markets, therefore, creates an "uneven playing field" and impedes the deployment of advanced telecommunications and information services by the private sector, thus undermining a primary objective of the 1996 Act. *See* 47 U.S.C. § 157(a).

Apart from the public subsidies and other advantages available to government entrants, their companion role as regulators affords numerous opportunities to discriminate against private competitors. *See Telecom Business* at 15. For example, municipalities have the authority to grant licenses and franchises. This puts the government provider in a position to forestall the entrance of new competitors. Even if access to inputs is ultimately granted, local franchising authorities routinely exact significant fees for use of public rights-of-way. While federal law may set a cap on these "access" fees, many local governments bypass these limits by demanding that carriers also contribute conduit or other facilities for the city's use.[17] The private new entrant is thus forced to build network facilities for and subsidize its potential competitor, the city, by regulatory fiat, providing yet another advantage to the government entrant. Further, within

[17] Some local franchising authorities, for instance, require cable operators to provide the local government with extra conduit, a dedicated network, and, in some cases, a public programming channel as conditions of the franchise. *See, e.g.*, License Agreement between Cablevision One of Boston, Inc. and Thomas M. Menino §§ 6.2, 6.5, 6.7, 6.8, 6.12, *at* http://www.cityofboston.gov/cable/pdfs/agreement.pdf; First Amendment to License Agreement between Media One of New York, Inc. and Thomas M. Menino § 6.11, *at* http://www.cityofboston.gov/cable/pdfs/amend.pdf.

certain bounds, local governments have the authority to terminate licenses and franchises, which provides considerable leverage when dealing with private competitors. *See also* David E.M. Sappington & J. Gregory Sidak, *Incentives for Anticompetitive Behavior by Public Enterprises* (Working Paper 99-11), at 1-2 (AEI-Brookings Institute Joint Center for Regulatory Studies Nov. 1999) (generally finding that public enterprises "have stronger incentives than profit-maximizing firms to pursue activities that disadvantage competitors").

A similar advantage exists in the ability of local governments to favor their own telecommunications businesses by subjecting them to fewer, or more favorable, regulations. The City of Bristol, which offers local telecommunications services as the Bristol Virginia Utilities Board ("BVUB"), provides a prime example. Unlike Sprint and other private sector ILECs, BVUB has no "carrier of last resort" duties, which obligate a carrier to serve any customer within a specified territory who requests local telecommunications services.[18] BVUB can thus choose to serve only the more profitable government, business, and high volume residential customers, leaving to Sprint the burden of providing services to high cost, low volume (often rural) customers. Exempting government providers from the "carrier of last resort" obligations imposed on private sector companies is indeed ironic. Government, which usually occupies the role of providing services where competitive markets fail, here takes the role of the competitor "cherry picking" the best customers while the private providers must serve all customers who request service, no matter the cost of such service.

[18] *See* Letter from BVUB Counsel to Virginia State Corporation Commission of July 8, 2002 (amending BVUB's Application for Certificate in Case No. PUC-2002-00126); Order Granting Certificate, Case No. PUC-2002-00126 (Va. State Corp. Comm'n Nov. 26, 2002).

B. Most Government Entry Into Competitive Local Telecommunications Markets Fails, At Significant Cost To Private Entrants And Consumers.

Despite the inherent advantages enjoyed by government entrants, experience to date shows that government-run telecommunications businesses have failed to provide the promised public benefits and economic efficiencies. *See, e.g.,* Ronald J. Rizzuto & Michael O. Wirth, *Costs, Benefits, and Long-Term Sustainability of Municipal Cable Television Overbuilds* (GSA Press 1998); *Government Entry* at 5-10; *Telecom Business* at 12-14. Most of these public systems have operated at significant losses, subsidized by local taxpayers, while failing to keep pace with new and cheaper technologies for providing the services. *See Government Entry* at 9-10. In a truly competitive environment, operating at a loss and failing to keep pace with technological advances would drive the inefficient competitor out of the marketplace. But in the case of the government provider, the natural market dynamics are distorted because of the cross-subsidies and other inherent advantages it enjoys.

Ultimately, taxpayers are forced to bear the risks of these ventures rather than private investors. The recent turmoil in the telecommunications industry underscores these potential risks. Over the past two years, there have been over eighty bankruptcy filings by private sector telecommunications companies and a market capitalization loss of over two trillion dollars. Yuki Noguchi, *Firm Offers One-Stop Telecom Shopping*, Wash. Post, May 13, 2003; Bob Fernandez, *Telecom Industry Devastated by the Boom that Never Was*, Phila. Inquirer, June 30, 2002.

C. State Control Over Local Government Entry Is Essential To Effective Competition.

Given the adverse risks to competition, consumers, and taxpayers created by government entry, many states have enacted laws that restrict or prohibit their political subdivisions from providing local telecommunications services.[19] These laws enable a state to allocate its resources to more traditional means of promoting the deployment of advanced telecommunications services within its borders, such as removing regulatory barriers and providing other incentives for private entrants to invest in local communities. *Telecom Business* at 16-17 (citing examples). Mississippi, for example, recently enacted a law that provides income and franchise tax credits for investments in broadband equipment. S. 2979, 2003 Reg. Sess. (Miss. Apr. 19, 2003). Such tailored governmental actions provide incentives for private competitors to invest in new telecommunications technology and to deploy their networks in rural communities. And instead of competing against private enterprise, this type of approach stimulates effective competition while reducing the need for state regulation of the services.

States that have permitted market entry by their political subdivisions, on the other hand, have been compelled to enact level playing field laws and regulations designed to deter anti-competitive behavior and to protect consumers.[20] These laws are often similar in design and purpose to many provisions of the 1996 Act. Virginia, for example, has enacted level playing field requirements to regulate municipal entry

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[19] *See, e.g.,* Mo. Ann. Stat. § 392.410.7 (West Supp. 2003); Tex. Util. Code §§ 54.001, 54.201-.202 (Vernon 2002); Ala. Code §§ 11-50B-1 *et seq.* (Supp. 2002); Ark. Code Ann. § 23-17-409 (Michie Supp. 2002); Neb. Rev. Stat. Ann. §§ 86-128(1)(b), 86-575(2) (Michie Supp. 2002); Nev. Rev. Stat. Ann. § 268.086 (Michie Supp. 2001); Tenn. Code Ann. § 7-52-601 *et seq.* (Supp. 2001).

[20] *See, e.g.,* Fla. Stat. Ann. §§ 125.421, 166.047, 196.012(6), 199.183(1)(b), 212.08(6) (2000 & Supp. 2003); Iowa Code Ann. § 388.10 (West 2002); Minn. Stat. Ann. § 237.19 (West 2002); S.C. Code Ann. § 58-9-2620 (2002); Utah Code Ann. §§ 10-8-14, 10-18-101-106, 10-18-201-204, 10-18-301-306 (2003); Va. Code Ann. §§ 15.2-1500, 56-265.4:4 (Michie Supp. 2002).

into local telecommunications markets. *See* Va. Code Ann. §§ 15.2-2160, 56-265.4:4 (Michie Supp. 2002). The Virginia State Corporation Commission recently issued administrative rules to implement the Commonwealth's level playing field mandates. The new rules require, among other things, that municipal entrants submit data, on an annual basis, demonstrating that they are not offering telecommunications services below the incremental cost of providing them, and maintain separate books and records for their telecommunications businesses. *See* Order Adopting Rules, Case No. PUC-2002-00115, 20 VAC 5-417-40 (Va. State Corp. Comm'n Apr. 9, 2003). These requirements are similar to some of the restrictions imposed on BOC entry into long distance markets under Section 271 of the 1996 Act, as previously shown.

Development of such level playing field laws requires extensive efforts by state and local legislative and regulatory officials, as well as private industry. Administration and enforcement of the laws has also proven to be difficult. In the case of Virginia, for instance, Sprint has been participating in costly, months-long regulatory proceedings in which BVUB must demonstrate that it has complied with the Commonwealth's level playing field requirements. The proceedings involve a review of complicated cost studies and other information by the Virginia State Corporation Commission and interested private parties, to ensure that BVUB is not subsidizing its telecommunications services with public funds or revenues and is complying with other requirements that protect against anti-competitive conduct. *See* Order, Case No. PUC-2002-00231 (Va. State Corp. Comm'n Dec. 19, 2002).

Even with comprehensive level playing field laws and regular state administrative oversight, it is virtually impossible to account for all of the potential hidden subsidies and advantages that a municipality or other public entity may enjoy in "competing" for local telecommunications services.

See Telecom Business at 15 (because most of these subsidies and other advantages are "hidden from view and difficult or impossible to quantify, the one thing public utilities never do is provide an accurate gauge of the true costs of providing any service"). It is thus highly unlikely that state regulatory attempts to replicate a level playing field will ever result in efficient competition. The only certainty is that government entry requires *increased* state regulation of local telecommunications services, rather than reduced state regulation as envisioned by Congress.

The ability of States to prohibit market entry by their political subdivisions, therefore, is critically important to the viability and growth of competition for local telecommunications services. As shown, in many cases, states have concluded that market entry by municipalities would distort the marketplace, impede effective competition, and harm consumers. In other cases, states may conclude that the costs of enacting and enforcing level playing field laws are too high, and the continuing risks of cross-subsidization and discriminatory practices despite such laws are too great, to justify municipal entry. In all cases, however, such regulatory decisions are consistent with the central role that Congress intended for the States to play under the 1996 Act in helping to ensure a level playing field for competition in their local markets.

IV. SECTION 253(a) SHOULD BE CONSTRUED TO PRESERVE STATE AUTHORITY OVER MUNICIPAL ENTRY INTO LOCAL TELECOMMUNICATIONS MARKETS.

The Eighth Circuit has construed Section 253(a) of the 1996 Act, 47 U.S.C. § 253(a), to preempt state laws that prohibit municipalities and other political subdivisions from providing intrastate telecommunications services. (FCC Pet. App. at 6a, 7a). The court found that the words "any entity" in the statute encompass municipalities and evince an unambiguous intent by Congress to preempt state authority in this area, thus satisfying the "plain statement" rule of *Gregory v. Ashcroft*, 501 U.S. 452 (1991). Accordingly, the court struck a Missouri statute that precluded market entry by municipalities.

The Eighth Circuit's decision strains the statutory language and cannot be squared with the powers that Congress gave to the States under the 1996 Act. As shown, Congress expected the States to play a primary role in ensuring that local markets were opened to competition, that discriminatory and other anti-competitive practices were eliminated, and that rates for services were market-based and free of any cross-subsidization. There is no basis to presume that Congress intended to give such authority to the States over private entrants, while at the same time preempting the States' authority to control market entry by their own municipalities to protect against the same risks and harms. Such a result would not only undermine the pro-competitive purposes of the Act, but, as Petitioners have fully addressed, would significantly intrude on the traditional sovereign authority of the States over their political subdivisions.

Yet, that is precisely the effect of the Eighth Circuit's construction of Section 253(a). The Eighth Circuit's decision mandates that the States allow the entry of individual municipalities and other state instrumentalities into local telecommunications markets. The States are powerless to prohibit municipal competition with private enterprise, even when they have concluded that such entry will distort the marketplace, deter new entrants, and ultimately harm consumers. The decision similarly prevents the States from prohibiting municipal entry based on any statewide policies or goals for promoting fair and effective competition or the deployment of advanced telecommunications and information technologies or services.

By mandating municipal entry, the Eighth Circuit's decision also effectively conscripts the States into developing and enforcing level playing field laws, in an attempt to prevent cross-subsidization and other discriminatory practices by municipal entrants. Thus, unlike the 1996 Act, which invited, but did not compel, the States to assume regulatory authority over private entrants, the Eighth Circuit's construction of Section 253(a) virtually requires the States to engage in costly, time-consuming regulatory proceedings, even if a state believes such efforts will not adequately eliminate the public subsidies and other inherent advantages enjoyed by municipal entrants. At the same time, the Eighth Circuit's decision opens the door for municipalities and other local subdivisions to resist, under the guise of "federal preemption," legitimate efforts by the States to impose such level playing field conditions on market entry to prevent anti-competitive conduct. Local government entrants can be expected to argue that such state legislative curbs are "barriers to entry" that have the effect of prohibiting their ability to compete with private companies, thus running afoul of Section 253(a)'s mandates. These disputes will undoubtedly generate additional litigation and will increase the costs and burdens to states and private competitors.

The D.C. Circuit and the FCC, in contrast, have correctly held that Section 253(a) does not preempt the authority of the States to prohibit their political subdivisions from providing telecommunications services. Both the court and the agency found that the words "any entity" in Section 253(a) are properly read only to prohibit state or local statutes or regulations that impose restrictions on market entry by private entities, and do not evince a plain and unmistakable intent by Congress to intrude on the sovereign power of a state to control market entry by its own political units. Accordingly, the D.C. Circuit affirmed the FCC's determination that Section 253(a) did not preempt a Texas statute which generally prohibits municipalities from providing telecommunications services. *City of Abilene, Tex. v. FCC*, 164 F.3d 49, 52-54 (D.C. Cir. 1999).

These decisions are better reasoned and adhere more faithfully to the "plain statement" rule of *Gregory*. The term "entity" can mean different things depending upon the context. *See Southern Co. Servs., Inc. v. FCC*, 313 F.3d 574, 580 (D.C. Cir. 2002) (finding use of term "entity" ambiguous in 47 U.S.C. § 224); *Alarm Indus. Communications Comm. v. FCC*, 131 F.3d 1066, 1068-72 (D.C. Cir. 1997) (finding use of term "entity" ambiguous in 47 U.S.C. § 275(a)(2)). And this Court recently found that use of a modifier like "any" in a statute is insufficient evidence of congressional intent to interfere with the sovereign relationship between a state and its political subdivisions. *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 542-46 (2002) (interpreting terms "any claim" in determining whether tolling provisions of 28 U.S.C. § 1367(d) applied to state claim dismissed on Eleventh Amendment grounds). In contrast to the ambiguous language used in Section 253(a), Congress has spoken with "unmistakable clarity" in other statutes when it intended to intrude on a state's traditional sovereign authority. For example, in *Nevada Department of Human Resources v. Hibbs*, 123 S. Ct. 1972 (2003), this Court held that Congress made its intent to abrogate state immunity in federal court "unmistakably clear" in the language of the Family and Medical Leave Act's family-leave provision, by enabling employees to seek damages "'against any employer (including a public agency) in any Federal or State court of competent jurisdiction.'" *Id.* at 1976 (citation omitted). Congress defined "public agency," in turn, to include both "'the government of a State or political subdivision thereof' and 'any agency of . . . a State, or a political subdivision of a State.'" *Id.* at 1977 (citation omitted). *See also Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 72-73 (2000) (holding that identical language in Age Discrimination in Employment Act of 1967 similarly satisfied the "clear statement rule").

The statutory structure of the 1996 Act also evinces an intent by Congress to preserve and expand the authority of the States in order to help implement local competition. *See Raygor*, 534 U.S. at 545-46 ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") (internal quotation marks omitted). As shown, the 1996 Act contains numerous provisions that enlist the aid of the States in establishing the terms and conditions under which private entrants compete for local telecommunications services, preventing discriminatory or other anti-competitive practices, and eliminating any cross-subsidization of rates. The central role given to the States under the 1996 Act in these vital areas supports the conclusion that Congress did not intend to preclude them from exercising authority over their own instrumentalities to protect against the same harms and to help ensure a level playing field for competition in their local markets.

Moreover, as discussed above, the 1996 Act expressly preserved the States' traditional authority over significant intrastate activities. This authority includes the establishment of additional regulations governing access and interconnection obligations, 47 U.S.C. § 251(d)(3), service quality standards and requirements, *id.* § 252(e)(3), and other important state policies, *id.* § 253(b)-(c). The careful preservation of state authority under these provisions, including other subparts of Section 253, further suggests that Congress did not intend to preempt the States' ability to control the activities of their own instrumentalities under Section 253(a). *See Sailors v. Board of Educ. of Kent County*, 387 U.S. 105, 107-08 (1967) (discussing the States' long-standing, "absolute discretion" in determining the powers conferred on their political subdivisions).[21]

Even apart from the inherent ambiguity of the terms "any entity," therefore, the statutory structure and purposes of the 1996 Act fully support the view that Congress did not intend by Section 253(a) to interfere with the States' sovereign authority over their political subdivisions. Against the full statutory backdrop, the mere use of the words "any entity" in Section 253(a) does not evince the type of unmistakable intent by Congress to intrude on the internal structure of state governments that *Gregory* requires. 501 U.S. at 464 (a court must be "absolutely certain that Congress intended" to intrude on the power of the States). And, given the potential harms created by municipal entry into local telecommunications markets, it is indisputable that construing Section 253(a) to preserve state authority in this important area will promote, rather than undermine, the pro-competitive goals of the 1996 Act.

CONCLUSION

For the foregoing reasons, Sprint respectfully requests that this Court hold that Section 253(a) does not preempt the States' sovereign authority to prohibit their political subdivisions from offering telecommunications services to the public.

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[21] This conclusion is further strengthened by Section 601(c) of the 1996 Act, in which Congress more generally provided that the "Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." 47 U.S.C. § 152(c)(1).

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