

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

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
The Missouri Municipal League;)
The Missouri Association of Municipal Utilities;)
City Utilities of Springfield;)
City of Columbia Water & Light;)
City of Sikeston Board of Utilities)
)
Petition for Preemption of)
Section 392.410(7) of the)
Revised Statutes of Missouri)

CC Docket No. 98-122

OPPOSITION OF GTE

Dated: August 13, 1998

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telecommunications companies

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SUMMARY

GTE opposes the Missouri Municipalities' petition that seeks preemption of a decision by the Missouri legislature that neither the state of Missouri itself, nor its political subdivisions, should engage in the provision of telecommunications service. Specifically, Missouri law (HB 620) prohibits municipalities and municipal owned electric utilities from providing telecommunications services. The Missouri Municipalities base their petition on the mistaken belief that the Commission, pursuant to Section 253(a) of the 1996 Act, is permitted to preempt state statutes which govern the relationship between a state and its political subdivisions.

Initially, the request for Section 253 preemption is a procedurally improper petition for reconsideration. Specifically, the Commission has already declined to preempt a virtually identical statute in Texas, and petitioners make no showing that the Commission ought to reconsider this decision. For this, and other, reasons, the petition fails to meet the procedural prerequisites for reconsideration set forth in Commission Rules.

On the merits, the Section 253 preemption request is clearly contrary to principles of federalism. Specifically, Section 253 does not authorize or permit the Commission to insert itself into the relationship between a state and its political subdivisions. The state of Missouri clearly retains the right to determine for itself and its political subdivisions whether, or under what circumstances, to enter the telecommunications business.

From a policy perspective, granting the preemption request would be poor public policy. Specifically, as the Missouri Municipalities would not only provide

telecommunications service but be empowered to regulate their private competitors, the preemption of HB 620 would be anti-competitive. Government entities cannot act in an unbiased fashion when permitted to compete with private corporations over which they have regulatory control.

Finally, the preemption of HB 620 could create a new government monopoly for telecommunications services. Municipalities have a number of competitive advantages over private corporations and would utilize those advantages to reduce competition, rather than to increase it.

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OPPOSITION OF GTE

GTE Service Corporation and its affiliated telecommunications companies¹ (collectively, "GTE") respectfully submit these comments in opposition to the Petition for Preemption of Section 392.410(7) of the Revised Statutes of Missouri, CC Docket No. 98-122 (the "Petition") filed on July 8, 1998, by The Missouri Municipal League, The Missouri Association of Municipal Utilities, City Utilities of Springfield, City of Columbia Water & Light, and City of Sikeston Board of Utilities (the "Missouri Municipalities").

I. INTRODUCTION.

The Missouri Municipalities seek preemption of Section 392.410(7) ("HB 620") of the revised statutes of Missouri which prohibits Missouri municipalities and municipal-

¹ These companies include: GTE Alaska Incorporated; GTE Arkansas Incorporated; GTE California Incorporated; GTE Florida Incorporated; GTE Hawaiian Telephone Company Incorporated; The Micronesia Telecommunications Corporation; GTE Midwest Incorporated; GTE North Incorporated; GTE Northwest Incorporated; GTE South Incorporated; GTE Southwest Incorporated; Contel of Minnesota, Inc.; and Contel of the South, Inc.; GTE Communications Corporation.

owned electric utilities from providing telecommunications services or making telecommunications infrastructure available to providers of telecommunications services. Petition at 1. The Missouri Municipalities base their petition on the mistaken belief that the Commission, pursuant to Section 253(a) of the 1996 Act,² is permitted to preempt state statutes, lawfully enacted under the auspices of state constitutions, which govern the relationship between a state and its political subdivisions.

The Missouri Municipalities admit, as they must, that the Commission has previously declined to preempt a virtually identical statute in Texas.³ However, arguing that four new Commissioners have replaced the previous Commission, they offer three reasons for the new Commission to reconsider the previous decision:

1. The previous ruling did not address the major issues discussed here.
 2. The previous ruling did not consider several important new developments.
- and
3. The previous ruling did not properly analyze congressional intent.

Petition at 3.

GTE opposes the Missouri Municipalities' petition. As a threshold matter, the petition is little more than a request for reconsideration of the Texas Order, and on that basis is procedurally improper. On the merits, the Petition is simply wrong in that Section 253(a) does not confer unto the Commission the authority to insert itself

² The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 83 (Feb. 8, 1996) (the "1996"). All references to the "Act" are to the Communications Act of 1934, as amended by the 1996 Act.

³ *In the Matter of the Public Utility Commission of Texas*, FCC 97-346, (rel. Oct. 1, 1997) (the "Texas Order"), petition for review pending *sub nom. City of Abilene v. Federal Communications Commission*, Nos. 97-1633 and 97-1634 (D.C. Cir.).

between a state and its political subdivisions – which are nothing more than creatures of the state – by preempting HB 620. As sovereign entities, states retain the power under the Tenth Amendment to alter, limit or even abolish their political subdivisions. This power is a quintessential state function.

There is absolutely no expression in the 1996 Act that Congress intended to interfere with a state's sovereign jurisdiction over its political subdivisions. Such an attempt by federal regulators to interfere with the state-municipality relationship would be an unlawful intrusion into state affairs. Simply stated, Congress never intended to upset the traditional spheres of state and federal authority by granting some freestanding authority to state political subdivisions. Despite the claims of the Missouri Municipalities to the contrary, the Commission cannot – under the guise of its Section 253 preemption authority – do what Congress has not done.

As a practical matter, irrespective of principles of federalism, it would simply be poor public policy to permit any governmental entity that has regulatory oversight responsibilities over a private company to also compete directly with that private enterprise in the provision of the same products and services. Simply stated, it is not appropriate for municipalities to provide telecommunications services in competition with private companies. This is particularly true since municipalities have the power to tax and to control the use of the public rights-of-way, which could be used to gain an unfair advantage in the competitive market. It was for these reasons that the Missouri legislature properly enacted HB 620.

The Missouri Municipalities are also wrong in their contention that HB 620 is not intended to promote competition. Indeed, petitioners assert that "[t]here is virtually no

competition in local markets in Missouri today, and HB 620 was intended to keep things that way." Petition at 21 Quite to the contrary, HB 620 is designed to promote competition and investment in state-of-the-art telecommunications for rural Missouri. Based on the fundamental guarantees of the universal service provisions of the Missouri legislature's 1996 reform bill, HB 620 brings certainty and predictability to the investment marketplace. This, in turn, stimulates competition throughout the entire state of Missouri by incenting potential providers to invest and compete in both urban and rural areas.

II. THE PETITION IS PROCEDURALLY IMPROPER.

In the face of the Texas Order, the petition is little more than a second bite at the apple. As such, it raises no new public policy issues which were not dealt with in the Texas Order. The fundamental issue raised by the petition, and already resolved in the Texas Order – whether states may decide for themselves and their political subdivisions not to become telecommunications providers – are identical. The petition therefore seeks only reconsideration of the Texas Order, and thus fails to meet the procedural prerequisites set forth for such requests in the Commission's Rules.

Section 1.106 of the Commission's Rules⁴ establishes the procedural requirements for a party to challenge a final order of the Commission. These requirements were established, at least in part, so that collateral attacks on Commission orders might be avoided. The instant petition is nothing more than such a collateral attack on the Texas Order and should, therefore, be treated as a defective petition for reconsideration. Since the Missouri Municipalities have not even attempted to make the

⁴ 47 C.F.R. § 1.106.

showings required by Section 1.1.06, nor to do so within the timeframe required by the Rules, the instant petition could be dismissed on this ground alone.

III. ON THE MERITS, SECTION 253 WAS NOT INTENDED TO, AND DOES NOT PERMIT THE COMMISSION TO, INTERFERE WITH THE SOVEREIGN AUTHORITY EXERCISED BY STATES OVER THEIR POLITICAL SUBDIVISIONS.

Section 253(a) bars states and their political subdivisions from enforcing statutes, regulations and other legal requirements which prohibit, or have the effect of prohibiting, the ability of a putative carrier to provide any interstate or intrastate telecommunications service. As Section 253 petitioners, the Missouri Municipalities bear both the burden of proof and the burden of production to establish that Section 253(a)'s test is met, and must present a fully developed factual record to the Commission.

With respect to a particular ordinance or other legal requirement, it is up to those seeking preemption to demonstrate to the Commission that the challenged ordinance or legal requirement prohibits or has the effect of prohibiting potential providers ability to provide interstate or intrastate telecommunications service under section 253(a). Parties seeking preemption of a local legal requirement... must supply us with credible and probative evidence that the challenged requirement falls within the proscription of section 253(a) without meeting the requirements of section 253(b) and/or (c). We will exercise our authority only upon such fully developed factual records.

TCI CableVision of Oakland County, Inc., Docket No. CSR-4790, Memorandum Opinion and Order, FCC 97-331 (released September 19, 1997), at para. 101.

Petitioners have met neither of their burdens in the instant case. Petitioners' real request of the Commission is that it rewrite Missouri law. The Commission should decline such an invitation that is clearly contrary to Section 253 and inconsistent with principles of federalism.

Section 253 does not grant the Commission the authority to *require* a state to permit its political subdivisions and other governmental entities that are creatures of the

state legislature to enter the telecommunications business. Nothing in the 1996 Act even remotely suggests that Section 253 may be utilized by subordinate state governmental entities to override the dictates of the a state legislature regarding creatures of its own creation. The state of Missouri clearly retains the right to determine for itself whether to enter the telecommunications business, and it may authorize all, some or none of its subordinate governmental entities to do so. Quite obviously, grave Constitutional concerns would be raised if a federal agency, acting under color of federal statute, sought to require a state to permit particular subordinate governmental entities to perform functions which the state chose not to authorize for those entities.

Petitioners do not, and cannot, deny that they – as municipalities and municipal-owned utilities – are creatures of state law and political subdivisions of the state of Missouri, subject to the limitations set forth in the Missouri Constitution and those that are imposed by the Missouri legislature.⁵ Even as to charter cities, their actions are specifically subject to the dictates of the Missouri legislature. Such cities may only exercise powers which “are consistent with the constitution of this state and are not limited or denied either by the charter so adopted or by statute.” Missouri Const. § 19(a) (emphasis added).

The fact that an entity -- whether governmental or corporate - is limited with respect to the functions that it may perform or the businesses which it may conduct is hardly a surprising aspect of law. Virtually every state permits the creation of corporate

⁵ Under Missouri law, municipal-owned utilities have no identity separate from that of the municipality that owns them; they are merely creatures of city government (as a city is a creature of the state). *Glidewell v. Hughey*, 314 S.W.2d 749 (Mo. 1958); *State ex rel. Board of Public Utilities v. Crow*, 592 S.W.2d 285 (Mo. App. 1979).

entities for limited purposes, and such limitations are usually set forth in their articles of incorporation. Similarly, virtually every state permits the creation of private trusts for limited (most often, charitable) purposes, and the limitations are usually set forth in the trust documents. The logical implication of Petitioners' preemption claim is that the Commission, under the color of Section 253, could require states to allow all limited corporations and charitable trusts to engage in a business venture -- the provision of telecommunications services - which is otherwise *ultra vires*. Nothing in the language or the legislative history of Section 253 supports such an absurd result. Simply stated, the fact that a state permits the creation of an entity -- governmental or corporate -- which is established for limited purposes, and such purposes do not include the provision of telecommunications services, patently does *not* mean that the state has erected an unlawful barrier to entry under Section 253.

The Commission has already, and correctly, ruled on this issue in the Texas Order. The Missouri Municipalities propose that since the Commission ruled 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" (Petition at 3), there is still an open issue relating to Section 253 and the Commission's exercise of its preemption authority. In reality, the Texas Order's declination to rule on this issue provides no basis for any suggestion that a different result is ordained. Section 253 does not authorize or permit the Commission to insert itself into the relationship between a state and its political subdivisions. The Petition must be denied on this basis alone.

IV. A GOVERNMENT ENTITY SHOULD NOT BE PERMITTED TO COMPETE DIRECTLY OR INDIRECTLY WITH PRIVATE CORPORATIONS OVER WHICH IT HAS REGULATORY CONTROL.

Notwithstanding Section 253's inapplicability to the relations between a state and its political subdivisions, there are equally important practical reasons why such action would be poor public policy. Were the Commission to determine that Section 253 does, in fact, permit it to preempt HB 620, the Commission would be substantially undercutting the fundamental purpose of the 1996 Act -- the promotion of competition in local markets.

Due to its inextricable affiliation with the municipality, a municipal utility would effectively serve as competitor and regulator of a non-city utility. Because of this, a municipal utility would have an inherent and unlawful advantage over other local exchange carriers operating in the city limits. As a competitor, the municipal utility has instant name recognition and brand loyalty which can be exploited unfairly. Additionally, municipalities have regulatory authority through the exercise of their police powers that can work to the advantage of the municipal utility and to the disadvantage of other competitors. A municipality, through its permit process, can delay a competitor's ability to use the public rights-of-way or place unreasonable restrictions upon such use. Similarly, a municipality may attempt to impose improper or illegal user fees or other charges for the use of the municipal rights-of-way. The municipality is also empowered to impose penalties for noncompliance of any ordinances that it chooses to arbitrarily enforce in order to disadvantage competitors.

GTE is therefore opposed to the entry of any government agency, whether federal, state or local, into the telecommunications market. GTE firmly believes that government agencies are intended to serve the needs of citizens where private industry

will not or cannot meet those needs. Roads and highways, military protection, sewer systems, law enforcement, and fire protection are examples of the types of services government is properly suited to provide. These types of services differ markedly from the telecommunications services the Missouri Municipalities want to provide because there is no competitive marketplace to provide them. Quite obviously, it would be imprudent and inefficient to have two or more competing sewer services providers. Government should be restrained from competing against its citizens where the services are being provided by private industry in accordance with the principles of a market-driven environment.

GTE also believes that the entry of government into the telecommunications market is antithetical to the concept of a level playing field. A municipality, which has the power to levy taxes and issue construction permits for expansion and modernization of the network, cannot possibly remain unbiased towards its competitors. Not only would it be extremely simple to delay construction permits and inspections in order to frustrate competitors, it would be outrageously expensive for private providers to constantly track down and document proof that municipalities are engaging in such anti-competitive practices.

The raw power of a municipality to levy taxes on its corporate competitors cannot be overstated. The simple fact is that competing, private telecommunications services providers will be forced to pay taxes to the municipality. The municipality, on the other

hand, may not have commensurate expenses.⁶ It is certainly not clear that the Missouri Municipalities will share the same tax liabilities.

V. PREEMPTION OF HB 620 IS NOT ONLY ANTI-COMPETITIVE, BUT IT COULD CREATE A NEW GOVERNMENT MONOPOLY FOR TELECOMMUNICATIONS SERVICES.

GTE has supported the opening of local markets to competition and is willing and able to meet the challenges brought by the 1996 Act. However, the entry of municipalities as competitors signals a new era of government-owned telecommunications monopolies. In the provision of telecommunications services or infrastructure, municipalities bring a number of competitive advantages to the table. They have a labor force that could be paid for by tax revenues acquired from all citizens, even those that do not subscribe to or use the services being offered. They may not contribute any taxes in support of their business processes. They have absolute control over public rights-of-way. They have absolute control over the approval and issuance of construction permits. They have control over inspections of new construction.

If municipalities are allowed to exercise these considerable advantages, even if they do not provide telecommunications services directly, they will be able to lease their excess capacity to other service providers at prices that are artificially below market levels. Municipalities will create a market situation where private investment will be diminished, if not eliminated. As investment opportunities become more and more

⁶ As an example, in 1996, the city of Columbia, Missouri assessed GTE \$752,556 in property taxes and \$559,985 in gross receipts taxes. And this total will escalate each year depending on tax rates set by the city and inflation, neither of which is controlled by GTE.

unattractive to private corporations, the citizens will be forced to turn to the municipality-owned service provider for its telecommunications needs. Not only will the municipality simply become a substitute for the incumbent as a service provider, its own citizens who work for the incumbent local exchange carrier will be displaced, further reducing the city's tax base.

GTE's concern regarding the exercise of considerable power by municipalities is well-founded. For example, consider the situation that confronted Brooks Fiber.⁷ In July 1996, Brooks Fiber announced its intentions to enter the telecommunications business in Springfield, Missouri. The city of Springfield delayed reaching a pole attachment agreement with Brooks until February, 1997, a period of seven months. Because the city of Springfield chose to keep Brooks at bay, the citizens of Springfield nearly lost a \$20 million community investment and all of the associated economic activity. Tactics of this type by cities and towns across Missouri would simply be incited by the preemption which petitioners seek.

Competition is beginning to flourish in Missouri.⁸ Many private companies have applied for and been granted certificates to provide local telephone service. Many more companies have reached interconnection agreements with existing local telephone companies. In light of this emerging competition, Petitioners' premise that HB 620 is

⁷ *E.g.* letter from Leland J. Gannaway, member Springfield City Council, to Senator

anti-competitive is simply false. HB 620 does not increase the cost and difficulty for competitors to bring competition to Missouri. The bill specifically authorizes a city to permit the nondiscriminatory use of public rights-of-way, which includes poles, conduits and similar support structures by any telecommunications provider. In addition, a municipality could still provide telecommunications services for use by itself and for the internal use by its departments, schools, students and emergency service divisions.

Finally, there is one additional advantage that is inherent in all municipalities and would be difficult, if not impossible, to avoid. The residents of towns like Columbia, Springfield, and Sikeston are going to know which telephone utility is the municipal utility regardless of its name. There is unquestionably a strong sense of civic pride and recognition that will exist in every municipality. Although GTE does not concede a level playing field to any municipality, even if the taxes, rights-of-way, construction permits, and the like somehow could be managed in an equitable manner, there is no way for any private corporate entity to overcome the citizens' sense of protecting their own. The Missouri legislature properly recognizes all of these competitive obstacles for private companies and has taken the proper course in adopting HB 620. The Commission should not, and may not, interfere with the state's right to manage its affairs accordingly.

VI. CONCLUSION.

The Missouri Municipalities' petition is procedurally improper, substantively without merit, contrary to law, and invites the Commission to make poor public policy. It should be expeditiously denied.

Dated: August 13, 1998

Respectfully submitted,

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Certificate of Service

I, Ann D. Berkowitz, hereby certify that copies of the foregoing "Opposition of GTE" have been mailed by first class United States mail, postage prepaid, on August 13, 1998 to the following parties of record.

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