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KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

1301 K STREET, N.W.
SUITE 1000 WEST
WASHINGTON, D.C. 20005-3317

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
AUSTIN C. SCHLICK
STEVEN F. BENZ
NEIL M. GORSUCH
GEOFFREY M. KLINEBERG

(202) 326-7900
FACSIMILE
(202) 326-7999

1 COMMERCE SQUARE
2005 MARKET STREET
SUITE 2340
PHILADELPHIA, PA 19103
(215) 864-7270
FACSIMILE: (215) 864-7280

August 13, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Magalie R. Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

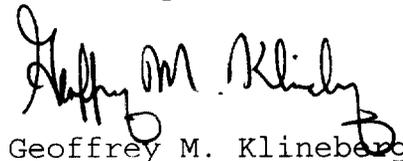
Re: Petition for Preemption of Section 392.410(7)
of the Revised Statutes of Missouri
CC Docket No. 98-122

Dear Ms. Salas:

Enclosed for filing are an original and 12 copies of the
Comments of Southwestern Bell Telephone Company.

Please call me at 202-326-7928 with any questions. Thank
you for your assistance in this matter.

Sincerely,


Geoffrey M. Klineberg

Enclosures

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matter of

Petition for Preemption of Section 392.410(7)
of the Revised Statutes of Missouri Under
Section 253 of the Communications Act of
1934, As Amended

CC Docket No. 98-122

COMMENTS OF SOUTHWESTERN BELL
TELEPHONE COMPANY

PAUL G. LANE
One Bell Center, Room 3520
St. Louis, Missouri 63101
(314) 235-4300

DURWARD D. DUPRE
MICHAEL J. ZPEVAK
SBC Communications Inc.
One Bell Plaza, Room 3008
Dallas, Texas 75202
(214) 464-5610

MICHAEL K. KELLOGG
GEOFFREY M. KLINEBERG
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005
(202) 326-7900

Attorneys for Southwestern Bell Telephone Company

August 13, 1998

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SUMMARY

Municipalities in Missouri regulate private telecommunications providers in a variety of ways: they control access to public rights-of-way; they regularly obtain access to commercially sensitive information; and they impose various taxes on gross receipts. If these municipalities were also in the business of competing with these private companies in the provision of telecommunications services, a serious conflict of interest would arise. In 1997, the Missouri General Assembly decided that it would avoid this conflict of interest by prohibiting, with some exceptions, its own political subdivisions from competing with private companies in the market for telecommunications services.

Missouri municipalities are political subdivisions of the State, from which they take all their powers. Furthermore, publicly owned utilities have no legal identity separate and apart from the municipality that owns them. There is nothing in the federal Communications Act that would require a State to permit its own political subdivisions to provide telecommunications services. Petitioners have asked the Commission to interfere with the core of state governance and override Missouri's decision that the State should not, through its municipalities, compete with private telecommunications providers.

The Communications Act preempts certain barriers to entry imposed by a State or local authority on private telecommunications providers. Congress clearly intended for the Telecommunications Act of 1996 to promote private sector development of telecommunications technologies, and it intended to preempt state and local regulations that have the effect of prohibiting private carriers from providing telecommunications services. Municipalities, however, are nothing but agencies of the State, from which their entire authority is derived. And

the Communications Act does not prohibit a State from limiting its own authority to provide telecommunications services in competition with private carriers. Moreover, under Missouri law, a municipally owned utility is indistinguishable from the municipality itself. Although the legislative history of the Telecommunications Act of 1996 indicates that Congress wanted to ensure that States not categorically prohibit utilities from becoming competitive telecommunications providers, there is no indication that Congress intended to prohibit States from limiting the role that publicly owned utilities can play.

In any case, where Congress intends to intrude on state governmental functions — such as whether a State’s own political subdivisions will be authorized to compete with private telecommunications carriers — it must make its intention clear. This plain statement rule has been applied in a variety of statutory contexts to ensure that courts do not casually presume that Congress intended to interfere with a State’s exercise of its sovereign powers. In contrast to those situations where courts have found Congress’s intent to be “plain,” there is nothing in the Communications Act to support the argument that Congress unambiguously extended the reach of its preemption provision to cover municipalities and municipally owned utilities. Because it is not unmistakably clear in the language of the statute itself that Congress intended to prohibit States from limiting the ability of their own political subdivisions to compete with the private carriers that they also regulate, this Commission must interpret the preemption provision so as not to interfere with this sovereign authority. The Commission should deny the petition and respect Missouri’s right to determine what activities its own political subdivisions will undertake.

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

In the Matter of

Petition for Preemption of Section 392.410(7)
of the Revised Statutes of Missouri Under
Section 253 of the Communications Act of
1934, As Amended

CC Docket No. 98-122

**COMMENTS OF SOUTHWESTERN BELL
TELEPHONE COMPANY**

Southwestern Bell Telephone Company ("Southwestern Bell") submits these comments in response to the petition of the Missouri Municipal League, the Missouri Association of Municipal Utilities, City Utilities of Springfield, Columbia Water & Light, and the Sikeston Board of Utilities seeking an order that House Bill 620, codified in section 392.410(7) of the Revised Statutes of Missouri ("HB 620"), is preempted by section 253 of the Communications Act of 1934, as amended, 47 U.S.C. § 253. HB 620 prohibits Missouri municipalities from offering telecommunications services to the public either directly or indirectly by leasing its facilities to a telecommunications provider.

The Commission has already considered a virtually identical challenge to a provision of Texas law. It concluded in that case that a municipality is not an "entity" separate and apart from the State for purposes of applying section 253(a) and that preempting the enforcement of a law like this one would "insert the Commission into the relationship between the state . . . and its

political subdivisions in a manner that was not intended by section 253."¹ Petitioners essentially argue that the Commission should reconsider the conclusions reached in the Texas Order because it was "decided shortly before four of the five current commissioners took office" (Pet. 2) and because it was wrong in any case. Although the Commission could justify deferring any decision on the petition until after the D.C. Circuit rules on the petition for review of the Texas Order,² the petition is so clearly meritless that it should be denied expeditiously.

BACKGROUND

Beginning before Congress passed the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, cities throughout Missouri proposed various methods through which they could become competitive providers of telecommunications services. But, as regulators of private telecommunications companies, these cities have exercised their control over access to public rights-of-way and their right to gain access to sensitive information as a means to attain an unfair competitive advantage over private telecommunications providers.

For example, a proposed telecommunications franchise code for the City of St. Peters would have required any user of a public right-of-way, in the course of any work installing, repairing, replacing, or upgrading its own telecommunications facilities, to "install and dedicate to the City either a state of the art telecommunications compatible conduit . . . or at least four

¹ Memorandum Opinion and Order, Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995, 13 FCC Rcd 3460, 3467 [¶ 16] (1997) ("Texas Order"), petition for review pending sub nom. City of Abilene v. FCC, Nos. 97-1633, 97-1634 (D.C. Cir. Oct. 14, 1997).

² The final briefs will be filed on September 3, 1998, and oral argument is scheduled for November 2.

optic fibers, at the City's option, . . . [to] be used by the City for whatever purposes it may deem appropriate, including rental to the Franchisee or other applicants."³ The City would have had these free facilities available to compete directly with the carrier that installed them or indirectly by leasing the facilities to a competitor. Either way, the City would have exploited its unique position as the gatekeeper for the public rights-of-way to obtain an unfair competitive advantage.

A similar ordinance was proposed in Kansas City: "As part of the total compensation paid to the City for the right of an operator to occupy public property and conduct its business, the City shall require as part of a franchise or license agreement access to the system for transmission of video, audio, data or other signals. . . . The City may interconnect other systems, including its own, using appropriate technology that will not impair the operators' systems."⁴ And the City of Kirksville developed a preliminary right-of-way management ordinance that would have reserved to the City the right to lay its own cables and conduits, even if that meant forcing private users to relocate their own facilities: "the City shall not be liable to user for the costs of utility relocation or for any other damage, nor shall the City be liable to user for any damages arising out of the performance by the City or its contractors or subcontractors, not willfully and unnecessarily occasioned."⁵

³ City of St. Peters Proposed Ordinance, Telecommunications Franchise Regulatory Code, § 25.8-5(a)(5) (July 11, 1995) [Exhibit A].

⁴ Kansas City Draft Ordinance No. 960656, Chapter 25, Code of Ordinances — Communications Transmission Systems, § 25-71 (May 23, 1996) [Exhibit B].

⁵ City of Kirksville Preliminary Draft Public Right-of-Way Management Ordinance, § 7(a) (Jan. 14, 1998) [Exhibit C].

Other cities proposed to require private companies to permit examination of property and records, including "all books, records, maps, plans, financial statements, service complaint logs, performance test results, records of request for service, and other like materials of a Permit or Licensee."⁶ This information is only marginally relevant to a city in regulating use of its rights-of-way, but such sensitive information could provide an enormous competitive advantage for a city intent on competing with the private telecommunications carriers from whom this information is obtained.

Perhaps the most egregious abuse of regulatory power has occurred in the City of Springfield. It took Brooks Fiber more than seven months to negotiate a pole attachment agreement with the City of Springfield's municipally owned utility ("City Utilities"), apparently because City Utilities was simultaneously demanding that Brooks Fiber lease excess fiber capacity from the City.⁷ And after City Utilities under-bid Southwestern Bell for a fiber-optics

⁶ City of Joplin Draft Ordinance Enacting Appendix 29-C, Telecommunications Regulations, Council Bill No. 97-060, § 14(C) (Aug. 18, 1997) [Exhibit D]; *see id.* § 14(E) (requiring licensee to make available upon request copies of "all petitions, applications, communications and reports submitted . . . to the Federal Communications Commission, Securities and Exchange Commission, or any other federal or state regulatory commission or agency having jurisdiction with respect to any matters affecting a Permitted or Licensed Telecommunications System or Open Video System"); *see also* City of Springfield Draft Telecommunications Ordinance, § 8.4 (Nov. 11, 1996) [Exhibit E] (requiring licensee to submit detailed reports of operations, finances, and any other information that materially affects the operation of the telecommunications system).

⁷ *See* Deborah Barnes, CU Restraining Trade, Firm Alleges, Springfield News-Leader, Dec. 30, 1996, at 1 [Exhibit F]; *see also* Letter from Springfield Mayor Leland L. Gannaway to State Senator Morris Westfall 1 (Apr. 8, 1997) [Exhibit G] ("It is so very difficult for private companies to maintain an interest in competing with a company which owns the right-of-way in which it must locate the skeleton of its infra-structure and the poles for which it must negotiate 'pole attachment agreements.' . . . [Brooks Fiber's] local representatives were so discouraged by the delay tactics of City Utilities that, had it been left to their decision, they would have given up

project, City of Springfield's own mayor accused City Utilities of using its control of public utility poles to learn details, including the prices, of Southwestern Bell's proposal.⁸

Although the City of Springfield asserts in the petition that it "has no desire to become a telephone or cable company itself" (Pet. 22), it has applied to the Missouri Public Service Commission ("PSC") for a certificate of service authority "to provide to business and commercial customers within the state of Missouri: (a) local exchange telecommunications service, specifically, non-switched, dedicated point-to-point and point-to-multipoint private line telecommunications services, which both originate and terminate within an exchange; and (b) intrastate interexchange telecommunications service."⁹ Never before had a city applied to the Missouri PSC for the standard non-switched local exchange/intrastate interexchange certificate of service authority; all previous applicants had been private or publicly held companies seeking to enter the market as new competitors.¹⁰

and left Springfield.").

⁸ Tamiya Kallaos & Ron Sylvester, CU Abusing Power, Mayor Says, Springfield News-Leader, Mar. 13, 1997, at 1 [Exhibit H] ("[City Utilities] 'has been privy to all these negotiations,' [Mayor] Gannaway said. 'They knew every detail about it — what Bell was charging. All they had to do was undercut them on the price.'").

⁹ Application of City of Springfield, Missouri for a Certificate of Service Authority To Provide Non-Switched Local Exchange and Intrastate Interexchange Telecommunications Services to the Public Within the State of Missouri and for Competitive Classification, Case No. TA-97-313, at 2 (Mo. PSC Feb. 11, 1997) [Exhibit I].

¹⁰ See Southwestern Bell Telephone Company's Reply to City of Springfield's Objections to Intervention, Application of City of Springfield, Missouri for a Certificate of Service Authority To Provide Non-Switched Local Exchange and Intrastate Interexchange Telecommunications Services to the Public Within the State of Missouri and for Competitive Classification, Case No. TA-97-313 (Mo. PSC Mar. 20, 1997) [Exhibit J].

After conducting hearings and reviewing the history of efforts by municipalities to gain unfair competitive advantages through abuse of their regulatory authority, the Missouri General Assembly enacted HB 620 in August 1997. As codified in section 392.410(7) of the Missouri Revised Statutes, the statute provides as follows:

No political subdivision of this state shall provide or offer for sale, either to the public or to a telecommunications provider, a telecommunications service or telecommunications facility used to provide a telecommunications service for which a certificate of service authority is required pursuant to this section. Nothing in this subsection shall be construed to restrict a political subdivision from allowing the nondiscriminatory use of its rights-of-way including its poles, conduits, ducts and similar support structures by telecommunications providers or from providing telecommunications services or facilities:

- (1) For its own use;
- (2) For 911, E-911 or other emergency services;
- (3) For medical or educational purposes;
- (4) To students by an educational institution; or
- (5) Internet type services.

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

Mo. Rev. Stat. § 392.410(7) (1997).

ARGUMENT

HB 620 was designed to address the conflict of interest that a municipality would face were it allowed to assume the dual roles of regulator and provider of local telecommunications services. Instead of prohibiting political subdivisions of the State from providing any telecommunications service — as the Texas statute upheld by this Commission in the Texas Order had done — HB 620 permits municipalities to provide a range of telecommunications

services that are arguably appropriate for a public agency. Moreover, the statute sunsets in four years, requiring the Missouri General Assembly to reconsider its policy judgment at that time. Even though this Commission rejected efforts to preempt the Texas statute, it did encourage States to avoid imposing “absolute prohibitions on municipal entry into telecommunications” and urged instead the adoption of “measures that are much less restrictive than an outright ban on entry.” Texas Order, 13 FCC Rcd at 3549 [¶ 190] (emphasis added). This is precisely what the Missouri General Assembly has done.

Petitioners have challenged HB 620 on the ground that it “prohibit[s] or ha[s] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” 47 U.S.C. § 253(a). Petitioners argue that Congress intended in section 253 to authorize this Commission to interfere with a State’s allocation of duties and responsibilities to its own “political subdivisions.” The argument is unfounded. Section 253 applies only to private entities that are subject to regulation by state or local authorities, not to municipalities or municipally owned public utilities that are indistinguishable from the State itself. But even if “any entity” might be interpreted to include municipalities, the application of the plain statement rule of Gregory v. Ashcroft, 501 U.S. 452 (1991), compels the conclusion that section 253 must not be read to preempt HB 620.

I. SECTION 253 PREEMPTS ONLY BARRIERS TO ENTRY ON PRIVATE TELECOMMUNICATIONS PROVIDERS

Preemption under section 253 is intended to prohibit barriers to entry imposed by States on private telecommunications providers. Section 253 is directed at state “statute[s],” “regulation[s],” and “legal requirement[s]” that “prohibit or have the effect of prohibiting the

ability of any entity” to provide telecommunications services. 47 U.S.C. § 253(a). This language indicates that Congress intended to end prohibitions on market entry by parties subject to state regulation — that is, to stop such practices as the granting of exclusive franchises to local telephone companies.¹¹ There is no suggestion in the text of the Act that Congress meant to go further and intrude upon the States’ decisions whether to become participants themselves in telecommunications markets. Indeed, it simply makes no sense to read the phrase “any entity” other than as referring to an entity separate and apart from the State that regulates the entity.

The Conference Report for the Telecommunications Act in fact makes clear that Congress’s purpose was to eliminate barriers to private entry into telecommunications markets. The Report explains that the legislation was intended “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.”¹²

¹¹ See, e.g., H.R. Rep. No. 104-204, pt. 1, at 48 (1995) (“Technological advances would be more rapid and services would be more widely available and at lower prices if telecommunications markets were competitive rather than regulated monopolies.”); S. Rep. No. 104-23, at 19 (1995) (“[T]he Committee recognizes that minimum requirements for interconnection are necessary for opening the local exchange market to competition.”).

¹² S. Conf. Rep. No. 104-230, at 1, 113 (1996) (emphasis added); see also 141 Cong. Rec. S8173 (daily ed. June 12, 1995) (The preemption provision “is a deregulatory bill to allow companies to enter and to compete without barriers. If this section were allowed to fall, it could mean that certain requirements would be placed on companies . . .”) (statement of Sen. Pressler) (emphasis added).

A. Municipalities Are Indistinguishable from the State Itself

The Supreme Court has long recognized that “local governmental units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them . . . in [its] absolute discretion.” Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 607-08 (1991) (quoting Sailors v. Board of Educ., 387 U.S. 105, 108 (1967); Reynolds v. Sims, 377 U.S. 533, 575 (1964); Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907)) (internal quotation marks omitted). Thus, in Mortier, the Court concluded that the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), 7 U.S.C. §§ 136 et seq., which explicitly authorizes a State to regulate the sale or use of pesticides but makes no similar exception for local governments, see 7 U.S.C. § 136v(a), should not be read to preempt a local town ordinance regulating the use of pesticides. Because “political subdivisions are components of the very entity the statute empowers [i.e., the State] . . . the more plausible reading of FIFRA’s authorization to the States leaves the allocation of regulatory authority to the ‘absolute discretion’ of the States themselves, including the option of leaving local regulation of pesticides in the hands of local authorities.” 501 U.S. at 608.

Municipalities are “merely . . . political subdivision[s] of the State from which [their] authority derives.” United Bldg. & Constr. Trades Council v. Mayor & Council of Camden, 465 U.S. 208, 215 (1984); see Century 21-Mabel O. Pettus, Inc. v. City of Jennings, 700 S.W.2d 809, 811 (Mo. 1985) (under Missouri law, “[a] municipality derives its governmental powers from the state and exercises generally only such governmental functions as are expressly and impliedly granted it by the state”). According to the Missouri Constitution, cities with populations of more than 5,000 inhabitants may adopt city charters, allowing them to function with a certain degree of

independence from state control. See Mo. Const. art. VI, § 19. But even charter cities such as the City of Springfield take their powers from the state Constitution and subject to restrictions imposed by State law. As the constitutional provision granting authority to charter cities makes clear, “[a]ny city which adopts or has adopted a charter for its own government, shall have all powers which the general assembly of the state of Missouri has authority to confer upon any city, provided such powers are consistent with the constitution of this state and are not limited or denied either by the charter so adopted or by statute.” Id. § 19(a) (emphasis added). The Missouri General Assembly may restrict the powers of charter cities; “[a] municipal ordinance that conflicts with the general law of the state is void.” City of Dellwood v. Twyford, 912 S.W.2d 58, 59 (Mo. 1995).

Section 253(a) clearly does not authorize the Commission to interfere with a State’s allocation of power to its own municipalities. To the extent petitioners believe that the public interest would be served if they were able to provide telecommunications services in competition with private companies, their remedy is to seek repeal of HB 620 by the Missouri General Assembly; nothing in the federal Communications Act requires States to permit their own political subdivisions to become telecommunications providers.¹³

¹³ Petitioners assert that there is “virtually no competition in local markets in Missouri today.” Pet. 21. As evidence for this statement, they claim that Southwestern Bell’s own data confirm that Southwestern Bell serves all but 435 residential lines in Missouri. Id. Petitioners fail to cite any source for this data — the Attachment O to which they refer is entirely irrelevant — and their facts are wrong. As of July 20, 1998, Southwestern Bell provided for resale 13,935 residential lines, 8,532 business lines, and 52 private coin lines, for a total of 22,519 lines. Although Southwestern Bell does not have sufficient information to assess fully the extent of facilities-based competition, facilities-based competitors (such as eSpire and Brooks Fiber) have purchased more than 1,600 unbundled loops. Southwestern Bell processed more than 47,000 orders from competitive local exchange carriers (“CLECs”) between February and June 1998,

B. Municipally Owned Utilities Are No Different from the Municipalities Themselves

Although this Commission explicitly indicated in the Texas Order that it was not deciding “whether section 253 bars the state of Texas from prohibiting the provision of telecommunications services by a municipally-owned electric utility,” Texas Order, 13 FCC Rcd at 3544 [¶ 179], the same analysis applies. Under Missouri law, “[m]unicipal utilities are governed [either] by a Board of Public Works . . . or as established by City Charter.” State ex rel. City of Springfield v. Public Serv. Comm’n, 812 S.W.2d 827 (Mo. Ct. App. 1991). In the case of charter cities, municipally owned utilities are generally operated by a board of public utilities which answers to the city council.

The relationship between the City of Springfield and its City Utilities is typical. The members of the Board of Public Utilities (“Board”) are appointed by the city council.¹⁴ Although the Board exercises control over every public utility owned by the City and has the right to operate parks and recreation areas subject to council approval, it may not adopt a budget or dispose of any net income without first seeking the approval of the city council.¹⁵

and more than 43 million minutes of local and exchange-access traffic have been exchanged between Southwestern Bell and CLECs since January 1997; approximately 10 million minutes were exchanged in June 1998 alone. As of July 20, 1998, a total of 41 CLECs have been certified by the Missouri PSC, and 17 more await approval. Southwestern Bell has entered into 45 interconnection agreements in Missouri. Contrary to petitioners’ unsupported claim, local competition in Missouri is growing dramatically.

¹⁴ See Springfield City Charter, Art. XVI, § 16.3 (relevant excerpts included as Attachment Q to the Petition).

¹⁵ Id. §§ 16.6, 16.8, 16.19.

The relationship between the City of Springfield and its municipally owned utilities has been the subject of considerable litigation in Missouri:

[T]hese utilities and the employees engaged therein are clearly subject to and regulated by the exercise of the legislative powers of the City. Not only does the City Council have the final decision on the utilities budget, rates and disbursements but the Board may even be abolished and its facilities, powers and duties transferred to a department either then existing or to be established by the City Council. . . . [T]he Board is only an administrative body or department of the City Government, with certain legislative powers delegated to it by the Charter with reference to employees (as hereinafter shown) and with its members being part of the legislative department of the City for certain purposes. It may be noted also that the Board has functions concerning and control over establishment and operation of parks and recreation areas, which has to some extent been held to be a governmental function.

Glidewell v. Hughey, 314 S.W.2d 749, 754-55 (Mo. 1958) (en banc) (emphasis added); see also Lightfoot v. City of Springfield, 236 S.W.2d 348, 353 (Mo. 1951); State ex rel. Board of Pub. Utils. v. Crow, 592 S.W.2d 285, 288 (Mo. Ct. App. 1979).

Furthermore, it makes no difference that the functions being performed by City Utilities are often characterized as proprietary as opposed to governmental. "By virtue of §§ 16.6 and 16.7 of the Springfield City Charter, [the members of the Board] hold all the public utilities of the city in trust for the citizens of Springfield and operate those utilities for their benefit. [The Board's] emphasis on the distinction between 'governmental' and 'proprietary' activities is important in tort cases, but here it has no significance." Crow, 592 S.W.2d at 288; see also Missouri Mun. League v. State, 932 S.W.2d 400, 402-03 (Mo. 1996) ("the distinction between

governmental and proprietary functions has little, if any, application outside of the tort liability of municipalities" (internal quotation marks and citation omitted)).¹⁶

Finally, petitioners contend that certain phrases contained in the legislative history of the Telecommunications Act support their argument that Congress intended that municipal electric utilities be permitted to provide telecommunications services. See Pet. 13 (quoting from Conference Report). As discussed below, had Congress in fact intended to authorize this Commission to require States to permit their own municipalities and municipally owned utilities to provide telecommunications services in competition with the private companies that they also regulate, the law requires a far clearer statement of such intent than a few stray remarks in a conference report. But, in any case, those remarks do not even support petitioners' argument.

In their report, the Senate and House conferees sought to clarify a potential ambiguity in subsection (b) of section 253. In that subsection, Congress preserved state authority to impose,

¹⁶ Moreover, Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), provides absolutely no basis for distinguishing between municipal corporations and the municipalities themselves. Garcia concerned the extent to which the City's Transit Authority ("SAMTA") could be subjected to the minimum-wage and overtime requirements of the Fair Labor Standards Act of 1938 ("FLSA"). The FLSA drew no distinction between state and local government employees and employees of municipal corporations; indeed, the Court assumed that the SAMTA employees at issue in Garcia were public employees. The Court went on to hold that nothing in the application of the FLSA requirements to state employees was "destructive of state sovereignty or violative of any constitutional provision. SAMTA faces nothing more than the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet." Id. at 554. The contrast to this case is striking: there is little that would be more "destructive of state sovereignty" than forcing a State to accept a role for its subordinate political subdivisions that the State's own legislature has decreed they should not have. Moreover, Congress was absolutely clear in its intention to apply the FLSA requirements to state and local-government employees, whereas evidence that Congress intended to force States to permit their own municipalities to become providers of telecommunications services is completely lacking.

“on a competitively neutral basis and consistent with section 254 of this [title], requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.” 47 U.S.C. § 253(b) (emphasis added). The conferees wished to make clear that, “[i]n addition to consumers of telecommunications services, . . . this includes the consumers of electric, gas, water or steam utilities, to the extent such utilities choose to provide telecommunications services.” S. Conf. Rep. 104-230, at 127. The conferees wished simply to clarify that States could “reasonably condition telecommunications activities of a monopoly utility” in order to “protect captive utility ratepayers from the potential harms caused by such activities.” *Id.* But “explicit prohibitions on entry by a utility into telecommunications” would not be considered “reasonabl[e] condition[s].” *Id.*

Nothing in this passage of the Conference Report suggests that the conferees were thinking about publicly owned utilities. Indeed, the very notion of a utility’s choosing to provide telecommunications services, subject to state restrictions imposed to protect captive utility ratepayers, implies that the utilities in question are independent of the direct control of the State’s legislature. The most that can be derived from this passage of the Conference Report is that Congress recognized the potential advantages of having private utilities become competitors in local telecommunications markets and that States may not, under the guise of protecting captive ratepayers, prohibit such utilities from entering those markets.

II. THE ASHCROFT PLAIN STATEMENT REQUIREMENT HAS NOT BEEN SATISFIED

Even if the words “any entity” could be read to apply to municipalities and municipally owned utilities — and they cannot — Ashcroft stands for the proposition that section 253(a) must not be read this way. Because the Communications Act contains nothing like the plain statement on which courts have consistently relied in other statutory contexts, the Commission has no choice but to read section 253 narrowly so as not to interfere with the State of Missouri’s sovereign allocation of authority to its political subdivisions.

The Court in Ashcroft made clear that, had Congress wanted to include state judges among those employees covered by the 1974 amendments to the Age Discrimination in Employment Act of 1967, as amended (“ADEA”), 29 U.S.C. §§ 621 et seq., it would have had to do so explicitly. In the face of “ambiguity, [the Court] will not attribute to Congress an intent to intrude on state governmental functions.” Ashcroft, 501 U.S. at 470. Although it was certainly arguable that state judges were within the scope of ADEA’s protections — indeed, the Court acknowledged that excluding “appointee[s] on the policymaking level” would have been “an odd way for Congress to exclude judges” — the Court was “not looking for a plain statement that judges are excluded.” Id. at 467 (internal quotation marks omitted; emphasis added). Rather, the Court required a plain statement that judges were included, for such a rule “is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.” Id. at 461. This requires the Court to apply a presumption that Congress does not intend to override traditional exercises of state sovereignty unless it is “plain to anyone reading the Act” that it is to have such an effect.

Id. at 467. Because it was “at least ambiguous whether a state judge is an ‘appointee on the policymaking level,’” id., the Court declined to preempt Missouri law.

This plain statement requirement is not easily satisfied. The Supreme Court recently applied Ashcroft when considering whether the Americans with Disabilities Act of 1990 (“ADA”), 42 U.S.C. §§ 12131 et seq., covers inmates in state prisons. Pennsylvania Dep’t of Corrections v. Yeskey, 118 S. Ct. 1952 (1998). The ADA prohibits a “public entity” from denying to a qualified individual by reason of a disability the benefits of the services, programs, or activities provided by that public entity. 42 U.S.C. § 12132. The Court assumed without deciding “that the plain-statement rule does govern application of the ADA to the administration of state prisons.” 118 S. Ct. at 1954. But the Court had no trouble concluding that the plain statement requirement was satisfied in this particular case for the simple reason that “[s]tate prisons fall squarely within the statutory definition of ‘public entity,’ which includes ‘any department, agency, special purpose district, or other instrumentality of a State or States or local government.’” Id. at 1954-55 (quoting 42 U.S.C. § 12131(1)(B)).

In marked contrast (and as petitioners concede), the Communications Act contains no definition of the term “entity.” See Pet. 28. Whereas the Court in Yeskey could conclude that “the plain text . . . of the ADA unambiguously extends to state prison inmates,” 118 S. Ct. at 1956, it is simply not possible to conclude that section 253 “unambiguously extends” to Missouri’s own municipalities.

Similarly, the Ninth Circuit has found a plain statement in the Fair Labor Standards Act of 1938 (“FLSA”), 29 U.S.C. §§ 201 et seq., that satisfies the Ashcroft standard and that underscores once again how far from plain is the language of section 253. In Biggs v. Wilson, 1

F.3d 1537 (9th Cir. 1993), the court considered whether California had violated the FLSA's minimum wage provisions by paying certain state employees two weeks late. The FLSA provides that "[e]very employer shall pay to each of his employees . . . who in any workweek is engaged in commerce or in the production of goods for commerce . . . not less than the minimum wage." 29 U.S.C. § 206(b). State officials had argued that applying FLSA's requirements to highway maintenance workers employed by the California Department of Transportation would interfere with the state budgetary process and lead to a "serious infringement of state sovereignty." 1 F.3d at 1543.

The Ninth Circuit rejected California's argument, concluding that the "plain statement rule is satisfied here since the FLSA clearly applies to state employees such as [plaintiff]." *Id.* at 1544. And the reason that the FLSA "clearly applies to state employees" is found in the definitional section of the statute: the term "employee" is defined explicitly to include "an individual employed by a public agency," *see* 29 U.S.C. § 203(e)(2), which in turn is defined to include "a State, political subdivision of a State, or an interstate governmental agency," *id.* § 203(e)(2)(C). The absence of anything similar in the Communications Act that would make it "unmistakably clear in the language of the statute" (*Ashcroft*, 501 U.S. at 460) that Congress intended to have section 253 apply to public entities is dispositive of petitioners' claim.

In a different context, the D.C. Circuit has required substantially more than what is contained in section 253 to satisfy the plain statement rule. In *Virginia v. EPA*, 108 F.3d 1397, modified on other grounds, 116 F.3d 499 (D.C. Cir. 1997), the question was whether the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401 *et seq.*, authorized the EPA to require all of the northeastern States to reduce the emissions from new cars to the "Low Emission Vehicle" standards

established in California. Section 110 provides that the EPA may require a State to revise its national ambient air quality standards “as necessary” to correct any inadequacies identified by the Administrator, 42 U.S.C. § 7410(k)(5), but it nowhere provides that the EPA may “require states to insert in their plans control measures EPA has selected.” Virginia, 108 F.3d at 1409.

The D.C. Circuit invoked the Seventh Circuit’s description of the CAA as “an experiment in federalism” in which “the EPA may not run roughshod over the procedural prerogatives that the Act has reserved to the states, . . . especially when, as in this case, the agency is overriding state policy.” Id. at 1408 (quoting Bethlehem Steel Corp. v. Gorsuch, 742 F.2d 1028, 1036-37 (7th Cir. 1984)). According to the court, the EPA’s attempt to require States to include particular control measures constituted an interference with state sovereignty sufficient to justify the application of the Ashcroft standard:

Congress did not give EPA authority to choose the control measures or mix of measures states would put in their implementation plans. And we can think of no reason why Congress, merely by inserting the words “as necessary,” would have meant to hand over that authority to EPA when it calls upon states to revise their implementation plans. We would have to see much clearer language to believe a statute allowed a federal agency to intrude so deeply into state political processes.

Id. at 1410 (footnote omitted) (citing Ashcroft, 501 U.S. at 463).

As Virginia v. EPA suggests, the D.C. Circuit requires “much clearer language” than that provided in section 253 before it will believe that Congress allowed the Commission “to intrude so deeply into state political processes” as to order Missouri to permit its own political subdivisions to compete with private telecommunications providers. Id. Like the “as necessary” language in section 110 of the CAA, the words “any entity” in section 253 do not provide the

Commission with an unambiguous authorization to interfere with exercises of sovereign state authority as reflected in HB 620.

In sum, courts have applied Ashcroft in a variety of substantive legal contexts; when they have found the plain statement rule to be satisfied, they have invariably identified clear and unambiguous statutory texts that made Congress's intent unmistakable. But where any ambiguity exists — such as whether the EPA's authority to require revisions in state plans "as necessary" includes the authority to require particular control measures or, as here, whether "any entity" includes political subdivisions of a State — the plain statement rule is not satisfied. Under such circumstances, courts will not presume that Congress intended to "upset the usual constitutional balance of federal and state powers." Ashcroft, 501 U.S. at 460.

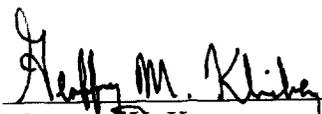
CONCLUSION

For the foregoing reasons, the Commission should deny the petition for preemption.

Respectfully submitted,

PAUL G. LANE
One Bell Center, Room 3520
St. Louis, Missouri 63101
(314) 235-4300

DURWARD D. DUPRE
MICHAEL J. ZPEVAK
SBC Communications Inc.
One Bell Plaza, Room 3008
Dallas, Texas 75202
(214) 464-5610


MICHAEL B. KELLOGG
GEOFFREY M. KLINEBERG
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005
(202) 326-7900

Attorneys for Southwestern Bell Telephone Company

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