

Proceeding: Missouri Petition for Preemption of Section 392-410(7) of the Revised Statutes of Missouri Record 1 of 1

Applicant Name: UTC

Proceeding Name: 98-122 Author Name: Sean Stokes

Lawfirm Name:

Contact Name: applicant\_name Contact Email: sstokes@utc.org

Address Line 1: 1140 Connecticut Ave, N.W.

Address Line 2: Suite 1140

City: Washington

State: DC

Zip Code: 20036 Postal Code:

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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

<b>In the Matter of</b>	)	
	)	
<b>The Missouri Municipal League;</b>	)	
<b>The Missouri Association of Municipal Utilities;</b>	)	
<b>City Utilities of Springfield;</b>	)	<b>CC Docket No. 98-122</b>
<b>City of Columbia Water &amp; Light;</b>	)	
<b>City of Sikeston Board of Utilities</b>	)	
	)	
<b>Petition for Preemption of</b>	)	
<b>Section 392.410(7) of the</b>	)	
<b>Revised Statutes of Missouri</b>	)	

**COMMENTS OF  
UTC, THE TELECOMMUNICATIONS ASSOCIATION**

**Jeffrey L. Sheldon  
Sean A. Stokes  
UTC, The Telecommunications  
Association  
1140 Connecticut Avenue, N.W.  
Suite 1140  
Washington, D.C. 20036  
(202) 872-0030**

**August 13, 1998**

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## Summary

Section 392.410(7) of the Revised Statutes of Missouri is contrary to the national policy of advancing competition to all consumers that Congress envisioned in enacting the Telecommunications Act and should therefore be preempted as an impermissible “barrier to entry.” The FCC should invoke a traditional preemption analysis standard in examining the application of Section 253 to the Missouri law with respect to municipally-owned electric utilities. In any event, the FCC should conclude that municipalities generally, and municipal utilities specifically, are within the scope of the term “any entity” of Section 253 in the Telecommunications Act. Such an interpretation is consistent with the “plain meaning” of Section 253(a) as informed by the actual text of the statute, the overall goals of the Act and the relevant legislative history.

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<b>Section 392.410(7) of the</b>	)	
<b>Revised Statutes of Missouri</b>	)	

**COMMENTS OF  
UTC, THE TELECOMMUNICATIONS ASSOCIATION**

Pursuant to Section 1.415 of the Commission's Rules, UTC, The Telecommunications Association (UTC),<sup>1</sup> hereby respectfully submits the following comments in support of the above -captioned "petition for preemption" filed by the Missouri Municipals filed on July 8, 1998.<sup>2</sup> As explained herein, UTC urges the FCC to promptly issue a ruling that Section 392.410(7) of the Revised Statutes of Missouri acts as an impermissible barrier to entry into telecommunications by municipal utilities, or others who would seek to provide telecommunications service using municipal utility infrastructure .

**I. Introduction**

UTC is the national representative on telecommunications matters for the nation's electric, gas and water utilities, and natural gas pipelines. Over 1,000 such entities are members of UTC, ranging in size from large combination electric and gas utilities serving millions of

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<sup>1</sup> UTC was formerly known as the Utilities Telecommunications Council.

<sup>2</sup> By Public Notice, DA 98-1399, released July 14, 1998, the FCC requested comments and reply comments on this

customers to smaller rural municipally-owned utilities serving only a few thousand customers each. All utilities depend upon reliable and secure communications to assist them in carrying out their public service obligations, and as a result, many operate extensive internal communications systems consisting of fiber optic networks and other broadband media that could be utilized in fostering competition in telecommunications. As an organization that took a lead role in ensuring that the Telecommunications Act of 1996 allowed for and promoted entrance into telecommunications by all utilities, UTC is pleased to offer the following comments.

## **II. Background**

In its petition the Missouri Municipals, on behalf of more than 600 municipalities and 63 municipal electric utilities located in Missouri, have requested the FCC to exercise its preemption authority contained in Section 253 of the Telecommunications Act and overturn Section 392.410(7) of the Revised Statutes of Missouri as constituting an illegal “barrier to entry.” Section 392.410(7) prohibits Missouri municipalities and municipal electric utilities from either providing telecommunications services themselves, or providing telecommunications infrastructure to other persons for use in competing against the incumbent telecommunications carrier.

Section 253(a) of the Telecommunications Act emphatically states that “No state or local statute, regulation or other legal requirement may prohibit or have the effect of prohibiting the ability of *any entity* to provide any interstate or intrastate telecommunications service” (emphasis added). Section 253(b) and (c) establish limited areas of permissible state and local regulation in areas confined to protection of public safety and consumer welfare and the management of

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petition by August 13 and 28 respectively.

rights-of-way. Significantly, Section 253(d) indicates that the Commission's preemption authority is mandatory.

In 1997 faced with a petition to preempt a similar state law in Texas barring municipal and municipal utility provision of telecommunications the FCC declined to act.<sup>3</sup> The *Texas Order* involved a review of Section 3.251(d) of the Texas Public Utility Regulatory Act of 1995, which prohibits Texas municipalities and municipal electric utilities from providing telecommunications services directly or indirectly. The origins of the *Texas Order* arose out of two separate Section 253 petitions for preemption of PURA95's Section 3.251(d). The first petition was filed by IntelCom Group (USA), Inc. and ICG Access Services, Inc. (collectively "ICG"), a competitive local exchange carrier that wanted to utilize fiber optic capacity that it leased from the municipally-owned electric utility in San Antonio, Texas, in conjunction with switches and other equipment that ICG would own and install, to provide competitive telecommunications services in the San Antonio Area. The second petition was filed by the City of Abilene, Texas, a city which does not operate an electric utility but which decided to build its own, or contract with new competitive entrants to build, a telecommunications network. Both ICG and the City of Abilene were prevented from moving forward with their plans because of Section 3.251(d) of PURA95.

Unfortunately, by August of 1997 the anti-competitive damage had already been done. After waiting more than a year for a decision from the FCC, ICG withdrew its petition and terminated its agreement with San Antonio's municipal electric utility and abandoned its plan to

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<sup>3</sup> *In the matter of the Public Utility Commission of Texas*, FCC 97-346, (rel. Oct. 1, 1997) ("*Texas Order*"), petition for review pending in *City of Abilene, TX, and the American Public Power Association v. Federal Communications Commission*, Case Nos. 97-1633 and -1634 (D.C. Cir).

compete with Southwestern Bell in San Antonio. As a result, the Commission limited its holding in the *Texas Order* to the facts presented by the City of Abilene.

Based upon its analysis the FCC concluded in its *Texas Order* that that the City of Abilene is not an “entity” separate and apart from the state of Texas for the purpose of applying section 253(a) of the Act. Significantly, the FCC stated “we do not decide at this time whether section 253 bars the state of Texas from prohibiting the provision of telecommunications services by a municipally-owned electric utility.” *Texas Order*, ¶ 179. Now however, in the Missouri Municipal’s preemption request, the FCC has the issue of the application of Section 253 to municipally-owned electric utilities squarely before it.

### **III. Section 392.410(7) Must Be Preempted As An Impermissible “Barrier To Entry”**

**The opening paragraph of the Conference Report that accompanied the Telecommunications Act of 1996 states that the rapid “deployment of advanced telecommunications and information technologies and services to all Americans ” is the central goal of the Act, and the principle means by which this was to be accomplished was by “opening all markets to competition.” Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 104-458, 104<sup>th</sup> Cong., 2d Sess. (1996). As is**

**discussed below, Congress was well aware of the potential role that utilities of all kinds could play in promoting facilities-based telecommunications competition and deliberately crafted the language of the Act to ensure that as broad an array of entities as possible could enter into the telecommunications market.**

In order to achieve the goal of opening markets to robust competition Congress adopted strong measures to encourage and assist potential providers of telecommunications services to enter into competition with entrenched incumbent local exchange carriers. While telecommunications regulation has historically embodied a dual Federal/state approach, Congress recognized that in order to effectuate the national policy of competition it would have to re-adjust the power of the FCC vis-à-vis the states to ensure that incumbent local telephone companies were not able to erect barriers to entry at the state and local level. To this end, Congress adopted Section 253 of the Act in order to expressly prohibit state and local governments from impairing the ability of any potential provider to enter any telecommunications market. The all encompassing invasive nature of this preemption provision is hard to avoid. In addition to its broad sweep with regard to the types of laws and regulations it supercedes, it extends the FCC's jurisdiction for the first time into purely to intrastate telecommunications. Moreover, Sections 253(b) and (c) confine permissible state and local regulation to areas related to protection of public safety and consumer welfare and the management of rights-of-way. There can be no doubt

that the FCC recognizes the broad authority that 253 gives to the Commission to remove barriers to entry. In the *Texas Order* itself the FCC stated:

[S]ection 253 expressly empowers -- indeed, obligates -- the Commission to remove any state or local legal mandate that "prohibit[s] or has the effect of prohibiting" a firm from providing any interstate or intrastate telecommunications service. *We believe that this provision commands us to sweep away not only those state or local requirements that explicitly and directly bar an entity from providing any telecommunications service, but also those state or local requirements that have the practical effect of prohibiting an entity from providing service.*

*Texas Order*, ¶ 22 (emphasis added).

As an initial matter, there can be no doubt that Section 392.410(7) of the Revised Statutes of Missouri impose an absolute barrier on the provision of most telecommunications services by municipalities and municipal electric utilities in Missouri. The Missouri law explicitly prohibits municipalities and municipal electric utilities from providing telecommunications services or facilities. In the *Texas Order*, the Commission essentially conceded that a similar prohibition contained in Texas law is contrary to the purposes of the Telecommunications Act and entreated other states not to do what Texas had done, finding that municipalities can bring "significant benefits" by accelerating facilities-based competition. *Texas Order* ¶ 190.

Accordingly, the only issue before the FCC is whether the Commission's Section 253 preemption authority encompasses state laws that act as barriers to municipal and municipal utility provision of telecommunications.

**A. The FCC Should Use A Traditional Preemption Analysis**

As the FCC indicated in the *Texas Order* "the ultimate question underlying any preemption analysis is 'whether Congress intended that federal regulation supersede state law.'" *Texas Order*, ¶ 51, quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986).

However, there is some question as to the proper standard to employ in making this analysis. In the *Texas Order* the FCC assumed that state laws directed at the state's own political subdivisions constituted an exercise of state sovereignty of the "fundamental" or "traditional" kind "with which Congress does not readily interfere absent a clear indication of intent." *Texas Order*, ¶ 181. However, in reaching this conclusion the FCC did not consider whether the Texas law implicated non-governmental activities in which home rule municipalities would otherwise be authorized to engage. In reviewing Section 392.410(7) of the Revised Statutes of Missouri UTC urges the FCC not to jump to the same conclusion.

Preemption of Section 392.410(7) would not impermissibly interfere with the sovereignty of the State of Missouri. "Home rule" municipalities, and in particular municipally-owned electric utilities, are frequently distinguished from states and other political subdivisions in other areas of the law and in terms of the independent authority that they possess. For example, and as the petition demonstrates, home rule municipalities and municipal utilities, such as City Utilities of Springfield, have an independent corporate existence and a variety of non-governmental functions, that absent Section 392.410(7)'s prohibition, would allow them to offer telecommunications services and infrastructure. Similarly, the FCC itself has considered public corporations to be separate entities from the "state" in other contexts. In *IT&E Overseas, Inc. and PCI Communications, Inc.*, 7 FCC Rcd 4023 (1992), the FCC held that the Guam Telephone Authority, a public corporation owned by the government of Guam, is a "corporation" and a "person" separate from the government of Guam within the meaning of the Communications Act.

Consistent with the above discussion, UTC believes that Section 392.410(7) of the Revised Statutes of Missouri should be reviewed under a traditional preemption analysis. Under

such an analysis, the Missouri law clearly constitutes an illegal barrier to entry into telecommunications by municipalities and municipally-owned electric utilities and should be preempted. As the Commission noted in the *Texas Order*, quoting the seminal FCC preemption case *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 368-69:

“Preemption occurs when Congress, in enacting a federal statute, *expresses a clear intent to preempt state law*, when there is *outright or actual conflict between federal and state law*, . . . or *where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress*.”

*Texas Order*, ¶ 33 (emphasis added). The Missouri law qualifies for preemption under these criteria. There is no question that Section 392.410(7) imposes an absolute barrier on the provision of telecommunications by municipalities and municipal electric utilities in Missouri and should be preempted as a *per se* violation of Section 253.

**B. Even If Considered A “Traditional” Function PURA 95 Should Be Preempted Under A Proper *Ashcroft* Analysis**

Even assuming that Section 392.410(7) of the Revised Statutes of Missouri involves an exercise of Missouri’s “fundamental” or “traditional sovereign” powers, the FCC is still compelled by Section 253 to preempt it. It is well established that Congress has the authority to preempt “traditional” or “fundamental” state activities: the only issue is whether Congress intended to exercise such authority. The Supreme Court case *Gregory v. Ashcroft*, 501 U.S. 452 (1990), established the relevant standard for addressing this question – Congress must have made a “plain statement” that it intended to preempt the subject matter in question. However, this standard does not require that the subject to be preempted must be mentioned explicitly but instead that the intent of Congress is “plain to anyone reading the Act.” *Ashcroft*, at 467. Further, Congress is not required to enumerate each issue or subject that a statute covers. If “clear and all-encompassing language [is used in a statute] there is no basis for requiring

Congress to have detailed [the list of preempted subjects].” *Yeskey v. Commonwealth of Pennsylvania Dept. of Corrections*, 118 F.3d 168 (3d Cir. 1997) affirmed 66 USLW 4481 (1998). Similarly, in *Salinas v. U.S.*, 118 S.Ct. 469, 475 (1997), the Supreme Court indicated that a statute can be unambiguous without addressing every interpretive theory offered by a party. It is difficult to conceive of language evidencing Congressional intent that is more clear and all-encompassing than Section 253(a)’s use of the phrase “any entity.”

In attempting to determine the plain meaning of the Telecommunications Act, the FCC is obliged to evaluate all other traditional indicia of Congressional intent. *Bell Atlantic Telecommunications Cos. v. Federal Communications Commission*, 131 F.3d 1044, 1047 (D.C. Cir. 1997). Under this standard the FCC is compelled to carefully review the language, legislative history, structure and purposes of the Telecommunications Act in order to determine the intent of Congress in drafting Section 253.

### **1. Use of the Term “Any Entity”**

At the heart of the FCC’s statutory analysis is the scope of Section 253’s phrase “any entity” and whether it encompasses municipalities and municipal utilities. The Telecommunications Act does not contain a definition of the term “entity” as used in Section 253(a) and therefore it must be given its ordinary meaning. *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995). The term “entity” in its ordinary meaning is broad enough to encompass municipalities and municipal electric utilities.

The D.C. Circuit Court recently rejected an unduly restrictive Commission interpretation of the term “entity” in the context of a separate provision of the Telecommunications Act. In *Alarm Industry Communications Council v. Federal Communications Comm’n*, 131 F.3d 1066 (D.C. Cir. 1997), the Court found that the term “entity” contained in Section 275 of the Act

should ordinarily be given its broad, common meaning. *Alarm Industry*, 131 F.3d at 1069. As in the *Alarm* case, the Commission should not adopt an unduly restrictive interpretation of the term “entity” absent evidence of congressional intent to do so. This is particularly true given the FCC’s understanding of Congressional desire to give Section 253 of the Act broad effect and application.

Further, in attempting to analyze Congressional intent in the use of a particular word it is essential that the term be viewed in the context of the words around it. As the Supreme Court observed in *Bailey v. United States*, 516 U.S. 137, 145 (1995), “[w]e consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme. The meaning of the statutory language, plain or not, depends on context.” The term “entity” in Section 253(a) is modified by the adjective “any” that immediately precedes it. This modifier provides significant insight regarding Congressional intent. The choice of the adjective “any” demonstrates that Congress intended that the term “entity” be given an expansive interpretation that would include both public and private entities. In *Salinas v. U.S.*, 118 S.Ct. 469 (1997), the Supreme Court held that “[u]se of the term “any” in the statute” “undercuts the attempt to impose [a] narrowing construction.”

Given the overriding goal of the Act to open all markets to competition, its use of the phrase “any entity” should be given the broadest possible interpretation to effectuate the Congressional intent. If Congress had indeed intended to restrict the scope of Section 253(a) it is far more likely that it would have inserted the term “private” in between the words “any” and entity.”

## **2. Legislative History**

In attempting to determine the plain meaning of a statute the reviewing agency “must first exhaust the ‘*traditional tools of statutory construction*’ to determine whether Congress has spoken to the precise question at issue...The *traditional tools* include the examination of the statute’s text, *legislative history*, and structure.” *Bell Atlantic*, at p. 1047 (internal cites omitted)(*emphasis added*).

As the FCC is well aware, the development of legislation is an iterative process that often relies and builds upon earlier bills that may span Congressional sessions. This is certainly the situation with the Telecommunications Act of 1996 which can trace the origins of many of its provisions, including Section 253(a), directly to the 103<sup>rd</sup> Congress. The 104<sup>th</sup> Congress incorporated the key operative terms of Senate bill S.1822’s preemptive provision § 230(a)(1) *verbatim* into § 253(a) of the 1996 Act, and as such, the analysis of Section 253(a) must necessarily be informed by the legislative history of S.1822.<sup>4</sup>

As discussed in the Missouri Municipal’s petition, in drafting S.1822, the 103<sup>rd</sup> Congress adopted a series of definitions and provisions aimed at encouraging utility entry into telecommunications, and the accompanying legislative history clearly indicates that there was no intention to distinguish between municipally-owned utilities and privately-owned utilities. For example, in explaining S.1822’s definition for telecommunications service, the accompanying report used the term “entities” to refer to *all* potential providers of telecommunications service and specifically referenced utilities by way of an illustration of the definition. S. Rep. No. 103-367, 103d Cong., 2d Sess. at 56, (1994). This language did not distinguish between publicly-owned and privately-owned electric utilities, and in a subsequent paragraph the report made clear that no such distinction was intended. Section 230(a)(1) the preemption provision of

S.1822 whose key operative terms would later be incorporated *verbatim* into Section 253(a) of the Telecommunications Act stated: “[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.” (emphasis added.) The report to S.1822 clarified that the definitions and preemption provisions of S.1822 were intended to encourage “State or local governments”-- including, but not limited to, those that operated “municipal energy utilities” -- to participate in developing the National Information Infrastructure.

As the above referenced passages reveal, at the time that the 103<sup>rd</sup> Congress introduced the language that would ultimately become Section 253(a), Congress intended that the term “entity” be applied to any person that might provide or facilitate the provision of telecommunications service. In addition, Congress expressly set forth its understanding and intent that “State or local governments,” whether or not they operated “municipal energy utilities,” should be encouraged to participate in building the national Information Superhighway – i.e., assist in the “deployment of advanced telecommunications and information technologies to all Americans.” Significantly, as the petition points out Congress also made clear that it understood and intended that any public or private entity that chose to cross the line from selling or leasing *facilities* to selling or leasing telecommunications *services* would be subject to both the obligations and the benefits that the Act extended to carriers of telecommunications service. The obligations included, among others, the duty to contribute funds to the universal service program. The benefits included protection from state barriers to entry. While S.1822 was ultimately not

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<sup>4</sup> The FCC specifically recognized this fact in its Respondents Brief filed on July 15, 1998, at p. 19, in the pending review of *City of Abilene v. FCC*, Case Nos. 97-1633 and 97-1634 (D.C. Cir.).

adopted the operative terms of its preemption provision were enacted into law as Section 253(a) in the Telecommunications Act of 1996.

The Joint Explanatory Statement of the Committee of Conference to the Telecommunications Act of 1996 provides further and more explicit evidence that Congress intended that all utilities may “choose” to provide telecommunications services, and that such choices are not to be hindered by state or local barriers to entry:

New section 253(b) clarifies that nothing in this section shall affect the ability of a State to safeguard the rights of consumers. In addition to consumers of telecommunications services, the conferees intend that this includes the consumers of electric, gas, water or steam utilities, *to the extent such utilities choose to provide telecommunications services*. Existing State laws or regulations that reasonably condition telecommunications activities of a monopoly utility and are designed to protect captive utility ratepayers from the potential harms caused by such activities are not preempted under this section. However, *explicit prohibitions on entry by a utility into telecommunications are preempted under this section*.

H.R. Rep. No. 104-458, 104th Cong., 2d Sess. 127 (1996). As with the 103<sup>rd</sup> Congress there is no intention to distinguish between public and privately-owned utilities in this passage; instead, the focus is the choices available to consumers of utility services irrespective of the type of ownership of the individual utility.

Referring to this passage in the Joint Explanatory Statement, its author, Congressman Dan Schaefer (R-CO), subsequently confirmed in a letter to the FCC that “Congress recognized that utilities may play a major role in the development of facilities-based local telecommunications competition,” that “any prohibition on their provision of this service should be preempted,” and that the Commission “must reject any state and local action that prohibits entry into the telecommunications business by any utility, *regardless of the form of ownership or control*.” Senator Robert Kerry (D-NE) submitted a similar letter emphasizing that “[i]n using

the term “any entity,” Congress intended to give entities of all kinds, including publicly-owned utilities, the opportunity to enter these markets.”

In the Commission’s recent Brief in defense of its *Texas Order*,<sup>5</sup> the FCC conceded the accuracy of the legislative materials and history cited above, but argued that these materials focus on the provision of telecommunications service by utilities and therefore were not pertinent to the specific facts raised by the City of Abilene in its court challenge. However, in the current petition the issue of the application of Section 253 to municipally-owned electric utilities is squarely before the FCC and therefore it cannot side-step the legislative history.

### **3. The Purposes of the Act**

In the Telecommunications Act Congress emphatically prohibited states from erecting barriers to entry by “any entity,” and in Section 253(d) Congress mandated the FCC to overturn any such measures that the state could not show to be “necessary” to achieve one or more of the four public purposes expressly set forth in Section 253(b). The FCC acknowledged in the *Texas Order* that this scheme gives the Commission extraordinarily broad authority to remove barriers to entry. Given the breadth and mandatory nature of the FCC’s authority in Section 253 the Commission must act to preempt Section 392.410(7) of the Revised Statutes of Missouri.

### **IV. Conclusion**

Section 392.410(7) of the Revised Statutes of Missouri is contrary to the national policy of advancing competition to all consumers that Congress envisioned in enacting the Telecommunications Act and should be preempted as an impermissible “barrier to entry.” The FCC should invoke a traditional preemption analysis standard in examining the application of Section 253 to the Missouri law with respect to municipally-owned electric utilities. In any

event, the FCC should conclude that municipalities generally, and municipal utilities specifically, are within the scope of the term “any entity” of Section 253 in the Telecommunications Act. Such an interpretation is consistent with the “plain meaning” of Section 253(a) as informed by the actual text of the statute, the overall goals of the Act and the relevant legislative history.

**WHEREFORE, THE PREMISES CONSIDERED,** UTC respectfully urges the Commission to take action on this “petition for preemption” in accordance with the views expressed in these comments.

Respectfully submitted,

By: \_\_\_\_\_  
Jeffrey L. Sheldon  
General Counsel

By: \_\_\_\_\_  
Sean A. Stokes  
Associate General Counsel

**UTC, The Telecommunications  
Association**

1140 Connecticut Avenue, N.W.  
Suite 1140  
Washington, D.C. 20036  
(202) 872-0030

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No. 98-122