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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

REPLY COMMENTS OF
MISSOURI RIVER ENERGY SERVICES

Missouri River Energy Services (Missouri River), by its attorney and pursuant to the Public Notice, DA 98-1399, released July 14, 1998 in the captioned proceeding, respectfully submits these reply comments concerning the preemption petition filed by the Missouri Municipals listed above. Missouri River supports the Missouri Municipals' position that under Section 253(a) of the Communications Act of 1934, as amended (the Act), states may not prohibit municipalities and municipal utilities from providing telecommunications services. Missouri River wants to bring to the Commission's attention the briefs filed by the City of Abilene, Texas concerning a similar issue that is now on review in the D.C. Circuit.[1/] There, the City of Abilene uses

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1/ City of Abilene, Texas v. FCC, No. 97-1633 (D.C. Cir. filed Oct. 14, 1997).

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the plain meaning of Section 253(a) of the Act and its legislative history to demonstrate that Section 253(a) clearly applies to municipalities. The Commission therefore should reject the oppositions filed by GTE and Southwestern Bell, which inject their fears of competition into a proceeding that should address only the legal question of the applicability of Section 253(a) to municipalities. Similarly, the Commission should reject the comments filed by the Missouri Attorney General which overlook permissible post-entry regulation in favor of preempted entry prohibitions.

These issues are discussed in turn below.

Interest of Missouri River

Missouri River is a municipal joint action agency comprised of 58 municipal electric utility distribution systems located in the states of Iowa, Minnesota, North Dakota and South Dakota. MRES[2/] is organized under Chapter 28E of the Iowa Code and exists under the inter-governmental cooperation acts of Minnesota, North Dakota and South Dakota. Two of Missouri River's members, the town of Hawardan, Iowa and Brookings, South Dakota, operate local telephone exchange service and provide related telecommunications services. Several of Missouri River's other municipal members are investigating the possibility of providing telecommunications services.

[2/] Missouri River Energy Services$_{sm}$ is the trade name of Missouri Basin Municipal Power Agency.

Many of Missouri River's members are small communities with populations of less than five thousand people. Their impetus for considering the possibility of providing telecommunications services comes from their citizens who have complained about both the lack of modern telecommunications services available in larger communities and cities, the poor service of existing service providers, and the lack of competition in telecommunications services. In other words, Missouri River's members' interest in providing telecommunications services responds to a directly expressed need of the local community that is not being met "by the market."

Several of these members have already installed fiber optic cable for their own utility operations which may be also be used to provide other telecommunications services. Missouri River also has increasing need for the use of fiber optic and other communications equipment for the provision of the utility services that it is required to provide on behalf of its members.

As a matter of clarification, Missouri River does not have any members in the state of Missouri. Its interest in this proceeding therefore is not the specific Missouri statute at issue, but the legal question of whether Section 253(a) applies to municipal utilities, such as the members of Missouri River. Missouri River is concerned that a denial of the Missouri Municipals' petition would improperly provide an incentive to incumbent telecommunications providers to seek similar legislation in other states and thereby squelch competition in

spite of the needs of the communities they serve as well as the very evident, pro-competitive purposes underlying the Telecommunications Act of 1996.

Section 253(a) Applies to Municipal Utilities

Section 253(a) plainly states that no state can prohibit entry into telecommunications services by any entity. Thus, no state can prohibit entry by publicly traded cellular companies, privately owned paging companies, cooperatively owned telephone companies, or municipal utilities.

The Commission recently held otherwise in a decision concerning the City of Abilene, Texas. There, the Commission stated that Section 253(a) does not apply to municipalities.[3/] That decision is now on review in the D.C. Circuit in City of Abilene, Texas v. FCC, No. 97-1633 (D.C. Cir. filed Oct. 14, 1997).

In court, the Commission proffers the "plain statement" rule in Gregory v. Ashcroft, 501 U.S. 452 (1991), to justify its decision below.[4/] However, the Commission overlooks the plain meaning of the terms "any entity" in Section 253(a), which clearly include municipalities. The Commission also overlooks the legislative history of Section 253 which states that

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[3/] The Public Utility Commission of Texas (Memorandum Opinion and Order), 9 C.R. 958 para. 184 (1997) [hereinafter Texas Order].

[4/] Brief for Respondents at 12, City of Abilene.

"explicit prohibitions on entry by a utility" are preempted.[5] These issues are discussed in the Brief and Reply Brief filed by the City of Abilene in the D.C. Circuit. Excerpts from those briefs are enclosed as Attachments A and B.[6]

Missouri River respectfully requests the Commission to consider these and other arguments made in the City of Abilene's briefs, and hold that Section 253(a) does indeed apply to all entities, including municipal utilities.

The Petition Presents a Purely Legal Question

The preemption issue that is the heart of the Missouri Municipals' petition is a purely legal one. It is not a policy question about whether the Missouri Municipals, in particular, should be permitted to provide any specific telecommunications services. The question is much broader in scope and the Commission's answer could impact all municipalities across the country.

GTE and Southwestern Bell have attempted to cloud the issue with their fears of the competition that they may face in Missouri. GTE does not want municipalities to provide local telephone service,[7] but they do. GTE and Southwestern Bell are concerned about difficulties in obtaining pole attachment rights

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[5] H.R. Conf. Rep. No. 458, 104th Cong. 2d Sess. 127 (1996).

[6] Petitioners' Brief at 1-34, City of Abilene; Petitioners' Reply Brief at 6-17, City of Abilene.

[7] GTE Opposition at 8.

from a city,[8] but they do not explain why they would have more difficulties obtaining pole attachment rights from a municipality than from any other utility pole owner.

GTE also opposes municipal utilities providing telecommunications services due to their "citizens' sense of protecting their own."[9] It must follow that GTE would oppose cooperative ownership of utilities because the cooperative members would support their own companies. But there are great efficiencies to be gained in cooperative and municipal ownership of utilities. Unlike GTE and Southwestern Bell, cooperative and municipal utilities do not need to earn profits for shareholders. Any revenues exceeding their costs can be reinvested in services to be provided to their subscribers.

The Missouri Attorney General attempts to support the Missouri statute by arguing that Missouri municipalities have unfair advantages.[10] But even if that were true, it does not justify the enactment of a state statute that is contrary to federal law. Any concerns that the Missouri Attorney General may have about the entry of municipalities into telecommunications can be addressed through post-entry regulations at the state level.

The Commission's decision on the Missouri Municipals'

8/ Id. at 11; Southwestern Bell Comments at 2-5.

9/ GTE Opposition at 12.

10/ Missouri Attorney General Comments at 3.

petition should be based on the law. And the law is clear that municipalities may provide telecommunications services. Even if the Commission were to consider GTE's and Southwestern Bell's policy arguments, it would need to weigh their fears of competition against the Missouri Municipals' (and Missouri Rivers' members') desire to provide competition. The Commission would have no choice but to rule in favor of competition and grant the petition filed by the Missouri Municipals.

CONCLUSION

In sum, as demonstrated by the City of Abilene in its briefs before the D.C. Circuit, the law is clear -- Section 253(a) applies to municipalities in general, and municipal utilities, in particular. The Missouri Municipals, and other municipalities in other states, may enter telecommunications markets and provide services in competition with existing service providers, in accordance with the pro-competitive goals of Congress. The Commission therefore should grant the petition filed by the Missouri Municipals.

Respectfully submitted,

MISSOURI RIVER ENERGY SERVICES

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August 28, 1998

CERTIFICATE OF SERVICE

I, David P. Yaffe, an attorney with Van Ness Feldman, hereby certify that on this 28th day of August 1998, I have caused to be hand-delivered a copy of the foregoing reply comments to:

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David Yaffe

ATTACHMENT A

ORAL ARGUMENT SCHEDULED FOR NOVEMBER 2, 1998

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ORIGINAL

No. 97-1633 (and consolidated case No. 97-1634)

CITY OF ABILENE, TEXAS, et. al.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION

and

UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of an Order of the
Federal Communications Commission

PETITIONERS' BRIEF

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May 29, 1998

STATEMENT OF THE CASE

Overview and Summary

On February 8, 1996, the President signed the Telecommunications Act of 1996 into law. According to the Commission, the Act "changed the landscape of telecommunications regulation" by comprehensively eliminating the provisions of the Communications Act of 1934 that had for decades encouraged monopolies to dominate telecommunications markets. In place of these provisions, Congress enacted numerous measures intended to induce new providers to bring robust competition to all telecommunications markets. *Texas Order*, ¶ 1. As Senate Majority Leader Trent Lott (R-MS) succinctly summarized these measures on the Senate floor, the new law "constructs a framework where everybody can compete everywhere in everything," and "[t]oward that end, the removal of all barriers to and restrictions from competition is . . . the primary objective [and] accomplishment of this legislation." 141 Congressional Record at S.7906 (June 7, 1995).

To accelerate the arrival of meaningful competition, the Act gives the Commission "powerful tools to dismantle the legal, operational and economic barriers that frustrated competitive entry in the past." *Texas Order*, ¶ 2. Among the most important of these are the preemption provisions in Section 253 of the Act. By enacting these provisions, the Commission has noted, "Congress sought to ensure that its national competition policy for the telecommunications industry would indeed be the law of the land and could not be frustrated by the isolated actions of individual municipal authorities or states, including . . . the actions of state legislatures." *Id.*, ¶ 4.

Section 253(a) declares 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) sets forth four limited areas

of permissible state regulation, and Section 253(d) *mandates* that the Commission preempt all state and local barriers except those preserved by Section 253(b). This scheme gives the Commission extraordinarily broad authority to remove barriers to entry:

> [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.* As to this latter category of indirect, effective prohibitions, we consider whether they materially inhibit or limit the ability of *any competitor or potential competitor* to compete in a fair and balanced legal and regulatory environment.

Texas Order, ¶ 22 (emphasis added).

In the Memorandum Opinion and Order under review in this proceeding, the Commission declined to preempt a Texas law that explicitly bars Texas municipalities and municipal electric utilities from providing telecommunications services or making communications facilities available to potential competitors of incumbent monopolists, Section 3.251(d) of PURA95. The Texas case originally involved two petitions for preemption of Section 3.251(d). The first was brought by privately-owned IntelCom Group (USA), Inc. and ICG Access Services, Inc. (collectively "ICG"), which wanted to use fiber optic cable leased from San Antonio's municipal electric utility to compete with the monopoly local exchange carrier in that city, Southwestern Bell Telephone Company.[1] The second petition was brought by the City of Abilene, which does not operate an electric utility. After Southwestern Bell refused to upgrade its infrastructure in Abilene to support the City's economic

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[1] For the purposes of this brief, the terms "municipal electric utilities" or "public power systems" include all consumer-owned, not-for-profit electric utilities operated in all states except Hawaii by municipalities, counties, states and public utility districts. APPA is the national service organization serving the interests of more than 2,000 of these utilities.

development plans, the City investigated the possibility of building its own, or contracting with others to build, a telecommunications network. The City would use the network to induce new providers to come to Abilene to compete with Southwestern Bell or, if necessary, to provide essential telecommunications services itself. Section 3.251(d) of PURA95 derailed the City's plans.

In August 1996, after waiting more than a year for a decision, ICG withdrew its petition, terminated its agreement with San Antonio's municipal electric utility, abandoned its plan to compete with Southwestern Bell in San Antonio, and turned its attention to other markets. (J.A. ___). In response, the Commission limited its holding in the *Texas Order* to the facts presented by the City of Abilene, stating that "we do not decide at this time whether section 253 bars the state of Texas from prohibiting the provision of telecommunications services by a municipally-owned electric utility." *Texas Order*, ¶ 179. The Commission also responded only to the arguments in the ICG proceeding that it believed to be "relevant to the facts of the Abilene petition and the proper interpretation of section 253." *Texas Order*, ¶ 179.

With respect to municipalities in the City of Abilene's position, the Commission held that Section 3.251(d) was 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, quoting *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). Finding no *express* statement of such intent, the Commission concluded that Texas municipalities are not "entities" separate and apart from the State for the purposes of Section 253(a) and that preempting the Texas statute "would insert the Commission into the relationship between the state of Texas and its political subdivisions in a manner that was not intended by section 253." *Texas Order*, ¶ 173.

The Commission and the petitioners agree that even measures that result from a state's exercise of its "fundamental" or "traditional" powers are subject to preemption if they violate national policies that Congress has clearly declared to be the law of the land. If Section 3.251(d) is such a measure -- which the petitioners are willing to assume, without conceding -- the key issue in this proceeding boils down to a simple question of statutory construction. On that question, the petitioners submit that Commission applied the wrong standard in determining congressional intent and reached an erroneous conclusion.

First, the Commission erred in searching for an *express* statement of congressional intent.[2] Indeed, in the key case on which the Commission relied, the Supreme Court flatly rejected an "express statement" standard and embraced a "plain statement" standard. *Ashcroft*, 501 U.S. at 467. The latter standard requires more than a cursory scan for particular words but demands exhaustion of all the traditional tools of statutory construction, including a careful review of the language, legislative history, structure and purposes of the Act. *Bell Atlantic Telecommunications. Cos. v. Federal Communications Comm'n*, 131 F.3d 1044, 1047 (D.C.Cir. 1997).

Second, as the Court will immediately observe when it examines the *Texas Order*, the Commission spent a good deal of time discussing generalities about federalism, but it conspicuously failed to present even one word of substantive analysis of the particular language, structure or legislative history of the statute at issue in this litigation. Because much of the relevant history of Section 253 pertains to municipal electric utilities, it is possible that the Commission believed that such an analysis was unnecessary in view of its decision to defer consideration of their status under

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2 In a recent letter to Congress, Chairman William Kennard, who was general counsel of the Commission at the time that it issued the *Texas Order*, confirmed that the Commission had looked for an "express" statement of legislative intent. Attachment A hereto.

Section 253. Whatever the reason, the Commission's failure to perform the required analysis led it to miss the compelling proof, discussed below, that Congress did indeed intend that Section 253 cover all municipalities, including those that do not operate electric utilities. The Commission would even have found *express* statements to that effect in the Senate report discussing the preemption provision that ultimately became Section 253(a).

Third, in paragraph 190 of *Texas Order*, the Commission essentially conceded that Section 3.251(d) is contrary to the purposes of the Telecommunications Act. There, the Commission urged other states not to do what Texas had done, finding that municipalities can bring "significant benefits" by accelerating facilities-based competition. The Commission also found that considerations of the kind that the Texas legislature cited in support of Section 3.251(d) could be addressed adequately through means that stop short of an outright prohibition on municipal telecommunications activities. These considerations, standing alone, would have justified preemption of Section 3.251(d), as preemption is appropriate where a state measure "stands as an obstacle to the accomplishment and execution of the full objectives of Congress." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-69 (1986).

Finally, for many public power systems, this is a time of dramatic change as the electric power industry is undergoing restructuring and deregulation. Privately-owned electric utilities are free to enter into new lines of business, form alliances with telecommunications providers of their choice, and offer consumers "one-stop shopping" for energy, communications and other services. Public power systems, which serve one in every seven users of electric power in the United States, must have equal flexibility to remain competitive. Aware that the competitive balance between public and private providers of electric power has served the Nation well for more than a century, Congress has been

struggling to develop approaches to preserve that balance. Thus, it is not only implausible, but inconceivable, that Congress could have intended to afford states free reign to erect barriers that could decisively tip the scales in favor of private providers of electric power and frustrate Congress's pro-competitive goals for the electric power industry. APPA repeatedly raised these points in its comments and lawful *ex parte* contacts, but the Commission ignored them in the *Texas Order*.

Statement of Facts

1. The Role of Municipalities and Municipal Electric Utilities in the Field of Telecommunications

As APPA discussed in its opening comments in the ICG proceeding, municipal electric utilities began to emerge more than a century ago in communities that were not large enough or profitable enough to attract private power companies. Residents of these communities banded together to create their own electric utilities, recognizing that electrification was critical to their economic development and survival. Public power systems also emerged in several large cities, where residents believed that competition was necessary to lower prices, raise the quality of service, or both. Public power systems currently serve approximately one in every seven users of electricity in the United States. Joint Appendix (hereinafter "J.A.") ____ [Attachment B to Comments of APPA in Support of Abilene, Texas Petition, CCB Pol 96-19, (filed October 11, 1996)]; *see also* Testimony of William J. Ray on behalf of APPA, Hearings on S.1822 Before the Senate Committee on Commerce, Science and Transportation, 103d Cong., 2d Sess. 351 (1994).

Today, the patterns that marked the evolution of the electric power industry are repeating themselves in the telecommunications industry. As private telecommunications providers focus on large, lucrative markets, many smaller communities are at risk of falling behind in obtaining the full

benefits that access to advanced telecommunications services can bring in the Information Age. These benefits include the ability to attract new businesses and hold on to existing ones, the ability to provide progressive educational and employment opportunities, the ability to improve the quality and reduce the costs of health care, and the ability to achieve a high quality of life.

As the administrative record demonstrates, many communities in Texas believe that they must rely on themselves if they are to survive and thrive in the next century. (J.A.___, __,___). [Petition of Abilene, Texas for Expedited Declaratory Ruling, CCBPol 96-19, (filed August 15, 1996); Comments of City of Garland, Texas in Support of Petition of Abilene, Texas, CCBPol 96-19 (filed October 11, 1996); Comments of Cities of La Grange, Texas, Brenham, Texas, Georgetown, Texas, and Fredricksburg, Texas, CCBPol 96-14, (filed July 3, 1996)] These communities believe that telecommunications are as basic to modern life as electricity, water and roads. As the City of Abilene noted in its petition for preemption, telecommunications networks have become the "modern pathway for technological commerce" and have joined the "conventional paths of commerce, such as highways, streets and alleys" as the "cornerstones of growth of a city." (J.A.___).

The facts underlying the City of Abilene petition show that communities in Texas cannot rely on the private sector alone to meet their telecommunications requirements. In early 1995, the mayor of the City convened a broad-based task force to explore the City's technological needs. The task force concluded that the City's well-being depended largely on obtaining advanced two-way, video and data transmission capabilities for all of its businesses and residents. To satisfy this need, the task force turned first to the City's monopoly local exchange carrier, Southwestern Bell. Southwestern Bell acknowledged that its current and planned facilities would not meet the City requirements, and it refused to invest in the upgrades necessary to do so. The City therefore concluded that it had to

construct or obtain its own telecommunications infrastructure to attract telecommunications providers that would be willing to compete with Southwestern Bell or, if necessary, to provide essential telecommunications services itself. (J.A ___).

Communities that already operate electric utilities are particularly well-poised to help themselves in the telecommunications area. In recent years, many public power systems have upgraded their communications infrastructure to support their core business of providing electric service. Hundreds more will do so in the next few years. That is so because electric utilities need sophisticated communications facilities to meet ever-increasing demands for efficient and reliable electric service. The communications facilities to which public power systems have upgraded, or will upgrade, can readily support the provision of video, voice, data and other advanced telecommunications services, either by the public power systems themselves or by other providers of such services. Public power systems can therefore simultaneously help accelerate the pace of deployment of our national information infrastructure, facilitate local competition, advance universal service, and minimize wasteful, costly and duplicative burdens on streets, poles, ducts, conduits and rights of way. (J.A ___). [Comments of APPA in Support of Abilene, Texas Petition, CCB Pol 96-19, (filed October 11, 1996)].

2. PURA95

In May 1995, the Texas legislature enacted PURA95 for the stated purpose of "promot[ing] diversity of providers and interconnectivity and to encourage a fully competitive telecommunications marketplace while protecting and maintaining the wide availability of high quality, interoperable, standards-based telecommunications services at affordable rates." Section 3.001, (J.A. __). [Attachment 1 to Petition of IntelCom Group (USA) Inc. and ICG for Expedited Declaratory Ruling,

CCBPol 96-13 (filed May 21, 1996)]. Nevertheless, under strong pressure from incumbent telecommunications providers, the Texas legislature explicitly barred municipalities and municipally-owned electric utilities from engaging in telecommunications activities:

> (c) A person may not provide local exchange telephone service, basic local telecommunications service, or switched access service without a certificate of convenience and necessity, a certificate of operating authority, or a service provider certificate of operating authority.
>
> (d) A municipality or municipal electric system may not receive a certificate of convenience or necessity, certificate of operating authority, or service provider certificate of operating authority under this Act. In addition, a municipality or municipal electric system many not offer for sale to the public, either directly or indirectly through a telecommunications provider, a service for which a certificate is required or any non-switched telecommunications service to be used to provide connections between customers' premises within the exchange or between a customer's premises and a long distance provider serving the exchange.

(J.A ___).

The legislative history of Section 3.251(d) indicates that the Texas legislature did not enact this measure to achieve any of the public-interest purposes enumerated in Section 253(b) of the Telecommunications Act -- preserving and advancing universal service, protecting the public safety and welfare, ensuring the continued quality of telecommunications services or safeguarding the rights of consumers. Rather, the entire legislative history consists of the following explanation by the sponsor of Section 3.251(d), state senator David Sibley:

> Members, right now, cities are in the business of regulating these utilities. They own the rights-of-way. Franchise fees are paid to them. We don't think it fair . . . for them to be able to also enter into the business.

Debates on H.B. 2128 on the Floor of the Senate, 74th Leg., R.S. (May 12, 1995), quoted in Letter of May 13, 1996, from Attorney General Dan Morales to Senator David Sibley, at 2145, (J.A. ___).

[Attachment 3 to Petition of IntelCom Group (USA) Inc. and ICG for Expedited Declaratory Ruling, CCBPol 96-13 (filed May 21, 1996)]

3. The Relevant History of § 253 of the Telecommunications Act

a. The 103rd Congress

The term "any entity" in Section 253(a) originated in the 103rd Congress, in Section 230(a)(1) of the Senate bill entitled S.1822. During that Congress, APPA and the Utilities Telecommunications Council (now known as "UTC, the Telecommunications Association") urged Congress to define the key definitions of the Act in a way that would encourage public power systems to participate actively in the development of what was then called the "National Information Infrastructure." APPA and UTC advised Congress that some of their members were willing to provide telecommunications services themselves and take on the obligations of telecommunications carriers, while others would be willing to make facilities available to potential competitors of incumbent providers if doing so would not subject them to the requirements applicable to telecommunications carriers. APPA and UTC appealed to Congress to accommodate both groups.

As reflected in the Senate's report on S.1822, APPA's and UTC's appeals met with favorable responses. Specifically, in S.1822, the term "telecommunications service" was defined as "the direct offering of telecommunications for profit to the general public or to such classes of users as to be effectively available to the general public regardless of the facilities used to transmit such telecommunications services. . . ." S. Rep. No. 103-367, 103d Cong., 2d Sess. 122 (1994). In explaining this definition, the report used the term "entities" to refer to *all* potential providers of telecommunications service:

> The definition of "telecommunication service" in new subsection (jj) was broadened from the version in S.1822 as introduced to ensure that *all entities* providing service equivalent to the telephone exchange services provided by the existing telephone companies are brought under title II of the 1934 Act. This expanded definition ensures that these competitors will make contributions to universal service. . . .
>
> . . . The term "telecommunications service" is not intended to include the offering of telecommunications facilities for lease or resale by others for the provision of telecommunications services. For instance, the offering by an electric utility of bulk fiber optic capacity (i.e., "dark fiber") does not fall within the definition of telecommunications service.

Senate Report on S.1822, at 56 (emphasis added). In the following paragraph, the report illustrated the application of this activity-based definition of entity through an example involving an electric utility:

> New subsection (kk) provides a definition of "telecommunications carrier" as *any* provider of telecommunications services, except for hotels, motels, hospitals, and other aggregators of telecommunications services. *For instance, an electric utility that is engaged solely in the wholesale provision of bulk transmission capacity to carriers is not a telecommunications carrier. A carrier that purchases or leases the bulk capacity, however, is a telecommunications carrier to the extent it uses that capacity, or any other capacity, to provide telecommunications services.* Similarly, a provider of information services or cable services is not a telecommunications carrier to the extent it provides such services. *If an electric utility*, a cable company, or an information services company *also provides telecommunications services, however, it will be considered a telecommunications carrier for those services.*

Id. at 54-55 (emphasis added). This language did not distinguish between publicly-owned and privately-owned electric utilities, and on the next page, the report made clear that no such distinction was intended. There the report turned to Section 230(a)(1), the preemption provision of S.1822, whose key operative terms the 104th Congress would later incorporate *verbatim* into Section 253(a) of the Telecommunications Act -- "[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." The report 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. Thus, in explaining one of the exceptions to § 230, the report stated:

> Paragraph (2) also states that *State or local governments* may make their own telecommunications facilities available to certain carriers and not others so long as making such facilities available is not a telecommunications service. This provision essentially allows a *State or local government* to discriminate not in the regulations it imposes, but in its offering of State-owned or local-owned [facilities to] telecommunications carriers.

Senate Report on S.1822, at 56 (emphasis added). The report then went on to give an example that explicitly mentioned "municipal energy utilities:"

> For instance, some State or local governments own and operate municipal energy utilities with excess fiber optic capacity that they make available to telecommunications carriers. Such a municipal utility may not have sufficient capacity to make it available to all carriers in the market. This provision clarifies that *State or local governments may sell or lease capacity* on these facilities to some entities and not others without violating the principle of nondiscrimination. Since the offering of telecommunications capacity alone is not a "telecommunications service," the nondiscrimination provisions of this section would not, in any case, apply to the offering of such capacity.

Id., at 56 (emphasis added). Notably, the report treated "State or local governments," rather than the electric utilities they operated, as the persons that performed the relevant selling or leasing activities.

In summary, in the passages quoted above, which were written at the time that Congress introduced the language that would ultimately become Section 253(a), Congress applied the term "entity" to any person that might provide or facilitate the provision of telecommunications service. 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. 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.

Moreover, municipal electric utilities generally derive their authority through, and operate as departments or offices of, municipal governments. Protecting municipalities, as such, from state barriers to entry was therefore necessary to ensure fulfillment of Congress's unquestionable intent to encourage and enable most municipal electric utilities to participate in the development of the national Information Superhighway.

The 103rd Congress ended without passage of new telecommunications legislation. Congress still had much to do in drafting other areas of the law, and significant issues remained to be resolved concerning the preemption issues affecting the ability of local governments to manage their rights-of-way. As will be seen in the next section, however, Congress's work on what was to become § 253(a) of the Telecommunications Act was essentially done.

b. The 104th Congress

On February 8, 1996, the President signed the Telecommunications Act of 1996 into law. As the Supreme Court has observed, the Act "was an unusually important legislative enactment." *Reno v. ACLU*, 117 S.Ct. 1329, 1338 (1997). The new law, in the Commission's words, "fundamentally changes telecommunications regulation" from a paradigm of encouraging monopolies to one of

fostering robust competition in all telecommunications markets. *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *First Report and Order*, FCC 96-325, ¶ 1 (rel. August 8, 1996) ("*Interconnection Order*"). In the *Interconnection Order*, the Commission furnished the following succinct summary of the goals of the Act and Congress's vision in enacting it:

> In this rulemaking and related proceedings, we are taking the steps that will achieve the pro-competitive, deregulatory goals of the 1996 Act. The Act directs us and our state colleagues to remove not only statutory and regulatory impediments to competition, but economic and operational impediments as well. We are directed to remove these impediments to competition in *all* telecommunications markets, while also preserving and advancing universal service in a manner fully consistent with competition.. . .
>
> [U]nder the 1996 Act, the opening of one of the last monopoly bottleneck strongholds in telecommunications -- the local exchange and exchange access markets -- to competition is intended to pave the way for enhanced competition in *all* telecommunications markets, *by allowing all providers to enter all markets*. The opening of *all telecommunications markets to all providers* will blur traditional industry distinctions and bring new packages of services, lower prices and increased innovation to American consumers. *The world envisioned by the 1996 Act is one in which all providers will have new competitive opportunities as well as new competitive challenges*.

Interconnection Order, ¶¶ 3, 4 (emphasis added).

In developing the Act, Congress recognized that strong measures were necessary to encourage and assist potential providers of telecommunications services to enter into competition with entrenched incumbent local exchange carriers. Thus, according to the Commission, Congress "armed" the Commission with "powerful tools to dismantle the legal, operational and economic barriers that frustrated competitive entry in the past." *Texas Order*, ¶ 2. Recognizing that incumbents could thwart the national policies of the Act at the state and local level, where they have historically