

In similarly conclusory terms, the Commission contends that the clause "to provide any interstate or intrastate telecommunications" following "any entity" does not come close to satisfying the *Ashcroft* "plain statement" rule. *Id.* The Commission does not respond to the Petitioners' analysis of the central role of the term "telecommunications service" in the Telecommunications Act's scheme of allocating burdens and benefits, including the benefit of protection from state barriers to entry. Instead, quoting *Commonwealth of Virginia v. EPA*, 108 F.3d 1397, 1410 (D.C. Cir. 1997), the Commission insists "this Court would have to see much clearer language to believe a statute allowed a federal agency to intrude so deeply into state political processes."

The Commission's reliance on *Virginia* is not only misplaced, but that case underscores the shortcomings of the *Texas Opinion*. *Virginia* involved a dispute about the roles of the federal government and the states in administering the Clean Air Act. Under the Act, the federal Environmental Protection Agency ("EPA") has authority to establish national ambient air quality standards, and the states have primary authority to implement the national standards in any way they deem appropriate. If the EPA finds that a state's implementation plan is inadequate, it can require the state to revise the plan "as necessary" to correct its inadequacies. *Virginia* at 1406-10. The dispute arose when the EPA did not merely reject the plans of certain eastern states to meet national air quality standards for ozone but required the states to adopt the same implementation plan that California had adopted. When the states brought suit, the EPA claimed that the term "as necessary" gave it authority to require the states to adopt the California program.

In resolving the dispute, this Court traced the evolution of the Act since its origins more than a quarter of a century ago. The Court found that, throughout this period, states had had the right to adopt whatever mix of emissions limitations best suited their particular situations, so long as the overall result was compliance with the national standards. The Court also found that the portion of

the Act that gave the states this right was still present in the law, and that the term "as necessary" had come into the Act in 1990, through amendments had changed only the syntax, and not the substance, of the Act. *Virginia* at 1408-10. The Court therefore rejected the EPA's interpretation, holding that the term "as necessary" merely gave the EPA the ability to require narrow corrections to specific problems, without having to subject states to wholesale revisions of their implementation plans. *Id.* at 1410. This is the context in which the Court concluded that "We would have to see much clearer language to believe a statute allowed a federal agency to intrude so deeply into state political processes," citing *Ashcroft*. *Id.*

Virginia thus differs from this case in at least three significant respects – (1) in *Virginia*, the relevant statute uses the inherently ambiguous term "as necessary," whereas here the statute uses the expansive, unrestricted term "any entity;" (2) in *Virginia*, the statute gives states primary responsibility and broad discretion in developing their implementation plans, whereas here, the statute provides for shared responsibility among the federal government and the states in other respects but flatly prohibits states from erecting barriers to entry and mandates that the Commission preempt any state measure that has, or may have, such an effect; and (3) in *Virginia*, the EPA's interpretation ran counter to established precedent and would have resulted in an abrupt and fundamental change in the manner in which the federal government and the states had interacted for decades, whereas here the Commission's decision was a matter of first impression, as the Telecommunications Act had only recently re-defined the roles of the federal government and the states, including the significant expansion of federal authority. *Virginia* thus affords no support for the Commission's ruling in the *Texas Order*.⁵

⁵ Southwestern Bell relies on *Virginia* and two other cases that supposedly support the Commission's interpretation of *Ashcroft*. In *Pennsylvania Dep't of Corrections v. Yeskey*,

Next, the Commission claims there is no merit to the Petitioners' argument based on Congress's disparate treatment of public entities in Sections 253(a) and 224 of the Communications Act. *Id.* at 16. According to the Commission, it is "not obvious" that the definition of "utility" in Section 224 has any relevance to the term "entity" in Section 253(a), "nor would Congress's exemption of public utilities from federal pole attachment requirements under Section 224 seem to have anything to do with whether Congress intended Section 253 to authorize the Commission to preempt State laws that regulate municipalities." *Id.* The Commission mischaracterizes and circumvents the Petitioners' argument. The Petitioners do not claim that the substantive requirements of Section 253(a) and Section 224 are important here. Rather, they claim that, at the very time that it enacted Section 253(a), Congress proved through amendments to Section 224 that it knew how to distinguish "political subdivisions" or "instrumentalities" of a state from private entities. As the Petitioners showed in their opening brief, at 31, the Commission itself relies upon such distinctions when it encounters them.

Finally, the Commission suggests that Petitioners have turned preemption analysis on its head by asking this Court to read Section 253 as *authorizing* preemption unless Congress has plainly stated

118 S.Ct. 1952 (1998), the Supreme Court affirmed the Third Circuit's determination that state correctional facilities must comply with the federal Americans With Disabilities Act, even though operating prisons is a "core" state function. Notably, the Third Circuit had found that the relevant federal provisions "speak unambiguously of their application to state and local governments and to 'any' or 'all' of their operations. *In light of the clear and all-encompassing language of both statutes, there is no basis for requiring Congress to have detailed which of the many important components of state and local governments were to be included in the terms 'any' and 'all.'*" *Yeskey v. Pennsylvania Dep't of Corrections*, 118 F.3d 168, 173 (3d Cir. 1997) (emphasis added). *Yeskey* thus supports Petitioners' position here. In *Biggs v. Wilson*, 1 F.3d 1537 (9th Cir. 1993), the court held that the Federal Labor Standards Act applies to workers in the California Department of Transportation because it expressly covers "an individual employed by a public agency." *Biggs* sheds no light on whether Congress's use of the term "any entity" here is sufficient under *Ashcroft*.

otherwise. Id. at 16. According to the Commission, the Petitioners' argument is "exactly the opposite" of what *Ashcroft* requires. *Id.* at 16-17. Again, the FCC mischaracterizes the Petitioners' position and attacks an argument that Petitioners are not making. The Petitioners are not seeking to shift to the Commission the burden of proving that Congress did *not* intend to cover municipalities under Section 253(a). Rather, the Petitioners contend that when the language, structure, purposes and legislative history of the statute as well as the Commission's own reports, orders and decisions contradict the Commission's position, the Commission must come forward with something — *anything* — to justify its position other than policy arguments that are not within its authority to make. Petitioners submit that they have amply demonstrated that preemption is required in this case and that the Commission has offered nothing to rebut that demonstration.⁶

III. THE LEGISLATIVE HISTORY OF SECTION 253(a) IS RELEVANT AND CONFIRMS THE PETITIONERS' POSITION

In the *Texas Order*, the Commission considered the legislative history of Section 253(a) to be relevant to its analysis under *Ashcroft*, and it implied the Commission had in fact analyzed that history. *Texas Order*, ¶ 187. Now, the Commission admits that it did not do so, allegedly because no party to the administrative proceeding asked the Commission to consider the legislative history in the context of Abilene's petition. FCC's Brief at 17-18. The Commission asks the Court to disregard the legislative history for three reasons — it was not before the agency in the Abilene

⁶ The State of Texas suggests that, under Abilene's theory, the State could be found to have posed a "barrier to entry" by withholding authority and funds from the PUCT to provide telecommunications services. Brief of Intervenor, State of Texas at 7. The State misunderstands Abilene's theory. Unlike the PUCT, Abilene is a "home rule" city that would have undeniable authority to provide or facilitate the provision of telecommunications services to its residents in the absence of Section 3.251(d). While the Texas legislature may generally withdraw powers from home rule cities, it cannot do so in a manner that would violate fundamental national policies that Congress has declared to be the law of the land, such as those embodied in the Telecommunications Act

proceeding, it is of "highly questionable" relevance under the *Ashcroft* standard, and it does not, in any event, support the Petitioners' arguments insofar as they apply to municipalities that do not operate electric utilities. *Id.* at 18. Brief of Intervenor, State of Texas at 8-9, 12; *see also* Brief of Intervenor, State of Texas at 7; Brief of Intervenor, Southwestern Bell at 10. Each of these arguments is incorrect.

First, the Commission is simply wrong in saying that no party to Abilene's administrative proceeding asked the Commission to consider legislative history. In its comments in the Abilene case, APPA argued that the Abilene and ICG cases present essentially the same issues, even though the facts differ slightly. J.A.162. APPA also attached and adopted its comments from the ICG case, which discussed the relationship between, and the legislative histories of, both the preemption provision and the key definitions in the Telecommunications Act. J.A.162. In any event, an administrative agency cannot deny independent knowledge of the legislative history of its enabling legislation.

The Commission's second reason for disregarding the legislative history is also without merit. To be sure, *Ashcroft* required that congressional intent be "plain to anyone reading the Act," 501 U.S. at 467. It does not follow, however, that a court cannot look to the legislative history to confirm its reading of the Act. Indeed, the Court did just that in *Salinas*, 118 U.S. at 473. Furthermore, in *Beli Atlantic*, 131 F.3d at 1047, this Court noted that the goal of the first stage of the *Chevron* process is to determine "whether Congress has spoken to the precise question at issue." For that purpose, legislative history has always been one of the "traditional tools of statutory construction." *Id.* (emphasis added). If the reviewing court must be "absolutely certain" of congressional intent to preempt, *Ashcroft*, 501 U.S. at 467, it makes no sense for the court to deny itself access to one of the most significant and commonly used indicia of congressional intent.

On the merits, the Commission's interpretation of the legislative history is plainly incorrect. First, as the Petitioners maintained in their opening brief, the legislative history makes it crystal clear that Congress intended to encourage municipal electric utilities to provide or facilitate the provision of telecommunications services in their communities. Petitioners' Brief at 10-15. The Commission does not disagree -- to the contrary, it quotes several of the relevant portions of the legislative history in its brief and attempts to distinguish municipalities from municipal electric utilities on that basis. FCC's Brief at 18, 18.n.8 and 19 n.9. This attempted distinction, however, is not supported by the legislative history, and if accepted, would fundamentally undermine Congress's intent. As the Petitioners pointed out in their opening brief, at 13, municipal electric utilities usually derive their authority from, and operate as departments or offices of, their municipal governments. It therefore follows that Congress intended to include municipalities, as such, among the entities that Section 253 protects from state barriers to entry, for it could not otherwise have given effect its intent to encourage municipal electric utilities to participate in development of the Information Superhighway. The Commission ignores this point in its brief.

The Commission has also misapplied the legislative history to the facts that Abilene presented in its petition for preemption. Abilene has never had any intention of offering "local telephone service," as the Commission suggests. FCC's Brief at 3. Nor has it ever sought to become a "local telephone company," as the State of Texas contends. Brief of Intervenor, the State of Texas at 7. Rather, it is undisputed in the record that, after Southwestern Bell refused to upgrade its facilities in Abilene to support the City's economic development plans, the City explored the possibility of developing a municipal telecommunications network, primarily to enable the City to attract new providers of telecommunications service to compete with Southwestern Bell. J.A.240,261,266. In the Senate Report on S.1822, Congress expressly encouraged municipalities to do what Abilene

wanted to do, by making clear that engaging in such activities would not subject them to the regulatory burdens applicable to telecommunications carriers: "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. . . . State or local governments may sell or lease capacity on these facilities to some entities and not others without violating the principal of nondiscrimination. . . ." Senate Report on S.1822 at 56.

Despite the clarity of congressional intent on this point, Section 3.251(d) would preclude Abilene from engaging in even these limited activities. That is so because Section 3.251(d) not only bars municipalities and municipal electric utilities from offering telecommunications services directly to the public, but also from doing so "indirectly through a telecommunications provider." According to the Texas Attorney General, the latter clause is violated when a municipality or municipal electric utility sells or leases telecommunications infrastructure to a private telecommunications provider that wants to use them to compete with Southwestern Bell. FCC's Brief at 4.

At the very least, the Commission should therefore have held that, as applied to municipalities that do not operate electric utilities, Section 3.251(d) violates Section 253 of the Telecommunications Act by prohibiting them from selling or leasing telecommunications facilities to telecommunications providers.⁷ But the Commission and the State of Texas dispute even this. They say that Section 253(a) only protects providers of "telecommunications service" from barriers to entry, and the legislative history makes clear that selling or leasing telecommunications facilities does not qualify as a "telecommunications service." FCC's Brief at 19-20; Brief of Intervenor, State of Texas at 12.

⁷ Even though Abilene has no intention of directly providing telecommunications services, except as a last resort, certain APPA members are providing such services or would be interested in providing such services.

The Commission and the State fail to appreciate that, in circumstances such as those presented in Abilene's - and ICG's - petitions for preemption, Section 3.251(d) has the effect of precluding the potential competitive *telecommunications provider* from providing the telecommunications service in question. In other words, Section 253(a) requires preemption because the *telecommunications provider* is an "entity" that is effectively being prohibited from providing telecommunications service.

Furthermore, the Commission is also incorrect in suggesting that there is nothing in the legislative history to support the Petitioners' contention that Congress contemplated that municipalities would provide telecommunications services themselves. FCC's Brief at 20. The passage quoted below starts with a general statement that would apply to all municipalities and then goes on to give an example that expressly refutes the FCC's point as to municipalities that operate electric utilities:

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.*

Senate Report on S1822 at 54-55 (emphasis added). Nothing in this passage suggests that the example was intended to limit the general statement that precedes it.

As the Petitioners also showed in their opening brief, at 10-13, the legislative history confirms that Congress carefully drafted both the key definitions and preemption provisions of the Act in order to encourage municipalities of all kinds to contribute to the development of the National Information Superhighway, in the manner that best suited their circumstances. For those that might be induced

only to sell or lease telecommunications facilities, Congress made clear that doing so would not subject them to the burdens applicable to telecommunications carriers. For those that were willing to cross the line and provide telecommunications services themselves, Congress made clear that they would have to bear all of the burdens applicable to telecommunications carriers, but would also be entitled to the corresponding benefits – including protection from barriers to entry under Section 253(a).⁸

In summary, neither the Commission nor the Intervenors supporting its position have successfully refuted the Petitioners' argument that the legislative history is relevant and confirms the Petitioners' position in this appeal. Although the Court can readily reverse the Commission's denial of Abilene's petition for preemption without resort to the legislative history, the Court has ample authority to consult the legislative history if it so desires.

IV. THE INTERVENORS' EFFORTS TO SHORE UP THE LEGISLATURE'S RATIONALE FOR ENACTING SECTION 3.251(d) ARE WITHOUT MERIT

Both Southwestern Bell and the State of Texas attempt to lend credence to the rationale on which the Texas legislature enacted Section 3.251(d). Southwestern Bell suggests that it was appropriate for the legislature 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."

Brief of Intervenor Southwestern Bell at 5-6. The State of Texas concedes that municipalities do

⁸ Relying on a fragment of a sentence in a Senate report, and ignoring the legislative history that the Petitioners and the Commission discuss, Southwestern Bell maintains Congress intended that Section 253(a) apply only to barriers to entry by the private sector. Brief of Intervenor, Southwestern Bell at 3-6. When Southwestern Bell originally made this argument to the Commission, APPA showed that it was flawed for many reasons, including that it would thwart Congressional intent to retain a competitive balance in the electric power industry. J.A.178-181. The Commission did not adopt Southwestern Bell's argument in the *Texas Order* and does not advance it in this proceeding.