

**THE BALLER HERBST LAW GROUP**

A PROFESSIONAL CORPORATION  
1820 JEFFERSON PLACE, N.W.  
SUITE 200  
WASHINGTON, D.C. 20036  
(202) 833-5300  
FAX: (202) 833-1180

EX PARTE OR LATE FILED

**JAMES BALLER**  
DIRECT DIAL: (202) 833-1144  
FAX: (202) 833-1180  
INTERNET: [JimB@baller.com](mailto:JimB@baller.com)

**MINNEAPOLIS OFFICE:**  
590 INTERNATIONAL CENTRE  
900 SECOND AVENUE SOUTH  
MINNEAPOLIS, MN 55402-3397

January 26, 1999

The Honorable William Kennard  
The Honorable Susan Ness  
The Honorable Harold Furchtgott-Roth  
The Honorable Michael Powell  
The Honorable Gloria Tristani  
Federal Communications Commission  
The Portals  
445 Twelfth Street, N.W.  
Eighth Floor  
Washington, D.C. 20554

RECEIVED  
JAN 28 1999  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C.

*Re: Missouri Petition for Preemption, CC Docket No. 98-122*

Honorable Members of the Commission:

As you are aware, more than 600 municipalities and 63 municipal electric utilities from Missouri (the "Missouri Municipals") have petitioned the Commission to exercise its authority under Section 253 of the Telecommunications Act of 1996 to preempt Section 392.410(7) of the Revised Statutes of Missouri ("HB 620"). That measure, with limited exceptions, prohibits the Missouri Municipals from providing or facilitating the provision of competitive telecommunications services in their communities.

In the period since the pleading cycle for the Missouri petition ended on August 13, 1998, several important developments have occurred. By letters of October 5 and 7, 1998, the Missouri Municipals called some of these developments to the Commission's attention. In this letter, the Missouri Municipals address the following subsequent developments:

- The District of Columbia Circuit's *Abilene* decision<sup>1</sup> upholding the Commission's *Texas Order*,<sup>2</sup>
- The Commission's admission in a recent brief to the Court of Appeals for the 11<sup>th</sup> Circuit that Congress's unqualified use of the modifier "any" precludes a narrow interpretation of the term it modifies;<sup>3</sup>

<sup>1</sup> *City of Abilene, TX, et al v. FCC*, No. 97-1633 (D.C. Cir., Jan. 5, 1999), 1999 WL 1739.

<sup>2</sup> *In the Matter of the Public Utility Commission of Texas*, FCC 97-346, (rel. Oct. 1, 1997).

<sup>3</sup> Brief for Respondents in *Gulf Power Co. v. FCC*, No. 98-6222 (11<sup>th</sup> Cir.) (FCC's "Gulf Power Brief").

No. of Copies  
List A B C D E

Honorable Members of the Commission  
January 26, 1999  
Page 2

- The Iowa Supreme Court's misapplication of the *Texas Order* in a case involving a municipal electric utility;<sup>4</sup> and
- The National Telephone Cooperative Association's (NTCA) inaccurate *ex parte* letter to the Commission in this proceeding.<sup>5</sup>

In paragraph 190 of the *Texas Order*, the Commission urged other states not to do what Texas had done because "[m]unicipal entry can bring significant benefits by making additional facilities available for the provision of competitive services." Unfortunately, the Commission's plea has not only gone unheeded, but its determination that the Commission is powerless to prevent states from banning municipal telecommunications activities has emboldened incumbent providers to redouble their efforts to secure state legislation that reinforces their existing market dominance. Eight states have already enacted legislative barriers to the ability of publicly-owned entities to provide or facilitate the provision of competitive telecommunications service. Now that a new state legislative season has begun, the incumbents are gearing up to add to this number.

A prompt and forceful Commission ruling that Congress intended the term "any entity" in Section 253(a) of Telecommunications Act to apply to publicly-owned entities is vitally necessary to communities across the United States, particularly in rural areas. This proceeding affords the Commission an excellent opportunity to send a clear message that the Commission will act vigorously to remove all unlawful measures that impede publicly-owned entities from serving their communities.

## **I. THE ABILENE DECISION**

In *Abilene*, the United States Court of Appeals for the District of Columbia Circuit upheld the Commission's *Texas Order*, in which the Commission had declined to preempt a Texas law that prohibits municipalities from providing or facilitating the provision of telecommunications service. The Court found that neither the Commission nor the Court could be certain that Congress intended to apply the term "any entity" in Section 253(a) to municipalities, as such, and that the "plain statement" standard of *Gregory v. Ashcroft*, 501 U.S. 452 (1990) therefore required the Commission to deny preemption of the challenged Texas law. *Abilene*, 1999 WL 1749 at \*4.

In paragraph 173 of the *Texas Order*, the Commission had stated that it was not ruling on whether Congress intended to protect publicly-owned utilities from state barriers to entry. The Commission underscored this point in its brief to the D.C. Circuit in *Abilene*,<sup>6</sup> and at oral argument, its counsel assured the Court that the Commission would give that issue full and fair consideration in the Missouri preemption proceeding. In response, the Court declined to decide "whether public utilities are entities within § 253(s)'s meaning." *Abilene*, 1999 WL 1749 at \*3 n.7. The Commission should now resolve the issue.

---

<sup>4</sup> *Iowa Telephone Association v. City of Hawarden*, No. 97-83 (Supreme Court Iowa, Oct. 21, 1998).

<sup>5</sup> NCTA *ex parte* letter in CC Docket No. 98-122, November 25, 1998.

<sup>6</sup> Brief for Respondents at 19.

Honorable Members of the Commission  
January 26, 1999  
Page 3

Turning to the merits, the Missouri Municipals urge the Commission to reaffirm its concessions in the *Abilene* case: (1) that the Commission “did not focus on legislative history when it ruled on Abilene’s petition;” (2) that the legislative history of Section 253(a) includes the history of the preemption provision of S.1822 in the 103<sup>rd</sup> Congress, from which the 104<sup>th</sup> Congress adopted the operative language of Section 253(a) verbatim; and (3) that the legislative history in both the 103<sup>rd</sup> and 104<sup>th</sup> Congresses is replete with evidence that Congress intended the term “any entity” in Section 253(a), at the very least, to cover municipal electric utilities.<sup>7</sup> Specifically, the Commission acknowledged in *Abilene* that:

[T]he legislative history cited by petitioners does not clarify whether Congress intended for Section 253 to preempt State laws that regulate municipalities. See Pet. Br. 10-17. Most of the legislative materials quoted by petitioners focus on the provisions of telecommunications service by utilities<sup>18]</sup> These materials are not pertinent to this case. In the Order challenged by petitioners, the Commission expressly declined to decide “whether section 253 bars the State of Texas from prohibiting the provision of telecommunications services by a municipally-owned electric utility.” Order ¶ 179.

<sup>18]</sup>See S. Rep. No.367, 103d Cong., 2d Sess. 55 (1994 Senate bill, whose preemption provision for removing entry barriers formed the basis for section 253, defined “telecommunications carrier” to include “an electric utility” that “provides telecommunications services”); Conference Report 127 [on the Telecommunications Act] (“explicit prohibitions on entry by a utility into telecommunications are preempted” under Section 253; Letter from Congressman Dan Schaefer to FCC Chairman Reed Hundt (section 253 requires the Commission to “reject any state or local action that prohibits entry by *any utility, regardless of the form of ownership or control*”); Letter from Senator J. Robert Kerry to FCC Chairman Reed Hundt (by using the term “any entity” in section 253, “Congress intended to give entities of all kinds, including publicly-owned utilities, the opportunity to enter these markets”).<sup>8</sup>

The Missouri Municipals disagree with the Commission’s narrow reading of the legislative history.<sup>9</sup> But even if the Commission were correct, its own analysis would still compel the conclusion that Congress intended that Section 253(a) cover publicly-owned electric utilities. At a minimum, the Commission should find that much in this proceeding.

---

<sup>7</sup> Brief for Respondents at 17-19.

<sup>8</sup> Brief for Respondents at 18 and 18 n.8 (*emphasis added*).

<sup>9</sup> As the Missouri Municipals have shown, Missouri Petition, at 6-15, the legislative history includes statements reflecting congressional intent to encourage “state and local governments” to become involved in telecommunications activities, whether or not they operate electric utilities. That the examples given focus on municipal electric utilities does not limit the force or effect of these statements.

Honorable Members of the Commission  
January 26, 1999  
Page 4

The Missouri Municipals also submit that the *Abilene* decision is incorrect, even as to municipalities that do not operate electric utilities.<sup>10</sup> Like the Commission in the *Texas Order*, the D.C. Circuit did not present a thorough, substantive analysis of the language, structure, purposes or history of the Telecommunications Act, as required by *Bell Atlantic Telephone Companies v. Federal Communications Comm.*, 131 F.3d 1044, 1047 (D.C. Cir. 1997). The Court ignored the Abilene petitioners' leading authority, *Salinas v. United States*, 118 S.Ct. 469, 473 (1997) (analyzed at page 30 of the Missouri Petition), in which the Supreme Court of the United States held that Congress's use of the modifier "any" in an "expansive, unqualified" way "undercuts the attempt to impose [a] narrowing construction," creates no ambiguity about congressional intent, and satisfies *Ashcroft's* "plain statement" standard. The Court also did not address the many inconsistencies between the *Texas Order* and subsequent agency rulings and interpretations.

The Missouri Municipals urge the Commission to conduct a thorough review of its rationale in the *Texas Order*, applying all of the traditional tools to statutory construction and taking account all of the important developments that have occurred since the *Texas Order* was issued. In its brief to the D.C. Circuit in *Abilene*, the Commission argued that the Court should not consider the Commission's subsequent interpretations and rulings because "the Commission can hardly be faulted for ignoring 'precedents' that did not precede."<sup>11</sup> Rather, the Commission maintained that it would be "more appropriate for the parties to later cases to contest the inconsistency" of previous cases.<sup>12</sup> The Commission should now honor its implied commitment to reconcile the inconsistencies between the *Texas Order* and its subsequent pronouncements.

## II. THE COMMISSION'S ADMISSIONS TO THE 11<sup>TH</sup> CIRCUIT

Just before the D.C. Circuit released its *Abilene* decision, the Commission filed a brief with the Court of Appeals for the 11<sup>th</sup> Circuit that forcefully corroborates two of the Abilene petitioners' main arguments in the *Abilene* case.<sup>13</sup> Had the D.C. Circuit been aware of these admissions, it may well have reached a different decision.<sup>14</sup>

In its brief to the 11<sup>th</sup> Circuit, the Commission insisted that Congress's use of the term "any" in the various sections of Telecommunications Act precludes the Commission from making distinctions that Congress itself did not make.<sup>15</sup> The Commission also admitted that when Congress draws a distinction in

---

<sup>10</sup> The Abilene petitioners are currently evaluating options for seeking further review.

<sup>11</sup> Brief for Respondents at 23.

<sup>12</sup> *Id.*

<sup>13</sup> Brief for Respondents in *Gulf Power Co. v. Federal Communications Comm'n*, No. 98-6222 et al. (11<sup>th</sup> Cir.) ("FCC's *Gulf Power* Brief") (Attachment A hereto).

<sup>14</sup> The Abilene petitioners had prepared a supplemental brief for filing on January 5, 1999, to call the D.C. Circuit's attention to the Commission's admissions to the 11<sup>th</sup> Circuit. That very morning, however, the D.C. Circuit released its *Abilene* decision.

<sup>15</sup> FCC's *Gulf Power* Brief at 38-40.

**THE BALLER HERBST LAW GROUP**  
A PROFESSIONAL CORPORATION

Honorable Members of the Commission  
January 26, 1999  
Page 5

one section of the Act but fails to do so in another section, this “argues forcefully” that Congress intended *not* to draw the distinction in the latter section.<sup>16</sup>

The specific issue that the Commission addressed in its brief to the 11<sup>th</sup> Circuit was whether the pole-attachment provisions of Section 224 of the Communications Act, as amended by Section 703 of the Telecommunications Act, cover attachments by carriers of wireless telecommunications services. The Commission had answered that question in the affirmative in its post-2001 pole attachment rate order, finding that Congress’s “use of the word ‘any’ precludes a position that Congress intended to distinguish between wire and wireless attachments.”<sup>17</sup> In its brief to the 11<sup>th</sup> Circuit, the Commission sought to defend that decision against the claim of certain utility pole owners that Section 224 should be read to cover only attachments by carriers of wireline telecommunications services. According to the Commission,

[*Gulf Power*] Petitioners challenge the Commission’s determination that Section 224 applies to wireless carriers, despite the fact that Section 224(f) expressly states that a utility must provide “any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit or right-of-way” and Section 224(d) prescribes an interim pole attachment rate formula for “any telecommunications service” [FCC’s emphasis]. 47 U.S.C. § 224(d)(3) & (f). Petitioners efforts to invent a wireline limitation on the scope of Section 224 *is flatly at odds with its plain language*.<sup>18</sup>

Noting that the Commission had found further support for its “plain-language interpretation” in Congress’s use of the term “any” in Sections 224(a)(4) and (d)(3) of the Act, the Commission went on to say in its *Gulf Power* Brief that “[t]he Commission recognized that ‘[i]n both sections, the use of the word ‘any’ precludes a position that Congress intended to distinguish between wire and wireless attachments.”<sup>19</sup>

Later in its brief, the Commission insisted even more emphatically that Congress’s unqualified use of the term “any” requires an expansive interpretation of the word it modifies:

By granting attachment rights to “any telecommunications carrier,” Congress expressed clearly its intent that wireless telecommunications carriers receive the protection of Section 224. *United States v. Gonzales*, 117 S.Ct. 1032, 1035 (1997) (“Read naturally, the word ‘any’ has an expansive meaning, that is, one or some indiscriminately of

---

<sup>16</sup> FCC’s *Gulf Power* Brief at 41.

<sup>17</sup> *Implementation of Section 703(e) of the Telecommunications Act of 1996: Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, 13 FCC Rcd 6777, ¶ 40 (February 6, 1998).

<sup>18</sup> FCC’s *Gulf Power* Brief at 37 (Missouri Municipals’ italics).

<sup>19</sup> FCC’s *Gulf Power* Brief at 38.

Honorable Members of the Commission  
January 26, 1999  
Page 6

whatever kind.”) (internal quotation marks and citation omitted); *accord Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1186 (11<sup>th</sup> Cir. 1997) (“any” means “all”).<sup>20 21</sup>

Accepting the *Gulf Power* Petitioners’ “implied limitation” on Section 224, the Commission continued, “would violate not only the *express* terms of the Act but also four basic rules of statutory construction.”<sup>22</sup> These rules include the following:

[W]hen Congress uses express words of limitation in one part of a statute, the failure to do so elsewhere suggests that no such limitation was intended. Congress knew how to exclude wireless carriers or services when that was its intent. *See* 47 U.S.C. §§ 153(26), 253(f)(2), & 274(i)(2)(B). The omission of any such language of limitation in Section 224 “argues forcefully” that Congress did not wish to deny any attachment rights to wireless carriers. *Omni Capital Int’l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 106 (1987).<sup>23</sup>

The fundamental, time-honored principles of statutory construction upon which the Commission insisted in its brief to the 11<sup>th</sup> Circuit firmly support a decision in the Missouri Municipals’ favor in this proceeding. First, in Section 253(a), Congress used the term “any” without restriction, and nothing elsewhere in the Act or its legislative history suggests that Congress intended to afford that word anything other than its natural, expansive meaning. By the Commission’s own rationale, this alone should have precluded the Commission from interpreting the term “any entity” in Section 253(a) as though Congress had impliedly injected the word “private” between “any” and “entity.” Moreover, if Congress’s use of the term “any” in Section 224 constitutes an “express” statement of congressional intent to cover “all” providers of telecommunications service, as the Commission maintained at pages 39-40 of its *Gulf Power* brief, then Congress’s use of “any” in Section 253(a) similarly constitutes an “express” statement that *more* than satisfies the “plain statement” required by *Gregory v. Ashcroft*.<sup>24</sup>

Second, as the Missouri Municipals have shown, Missouri Petition at 15-16, Congress conspicuously declined to distinguish between public and private entities in Section 253(a) at the same time that it did draw such a distinction in Section 224. According to the Commission own analysis, this “argues forcefully” that Congress intended to *reject* such a distinction in Section 253(a).

---

<sup>20</sup> FCC’s *Gulf Power* Brief at 39-40 (FCC’s emphasis).

<sup>21</sup> In *Gonzales*, 117 S.Ct. 1032 at 1035, the Supreme Court cited *Webster’s Third New International Dictionary* 97 (1976) in support of the language quoted in the FCC’s *Gulf Power* Brief. The Court then stated in the next sentence: “Congress did not add any language limiting the breadth of that word [“any”], and so we must read § 924(c) as referring to all ‘term[s] of imprisonment,’ including those imposed by state courts.” *Id.*

<sup>22</sup> *Id.* at 40 (Missouri Municipals’ italics).

<sup>23</sup> FCC’s *Gulf Power* Brief at 41.

<sup>24</sup> As the Missouri Municipals have noted, Missouri Petition at 26, the Supreme Court held in *Gregory v. Ashcroft* that the requisite statement of congressional intent “need not be express.” 501 U.S. at 467.

Honorable Members of the Commission  
January 26, 1999  
Page 7

## II. THE HAWARDEN DECISION

On December 28, 1998, *U.S. News & World Report* published a profile of Chairman Kennard that included the following: "*Proudest accomplishment*: Giving a voice to the disenfranchised in telecommunications policy. *Goal*: Making the technological revolution inclusive."<sup>25</sup> Recent developments in Iowa graphically illustrate how the *Texas Order* disenfranchises communities and undermines the ability of rural Americans to achieve the same levels of economic development, educational opportunity, and quality of life as their counterparts in more lucrative telecommunications markets. Reconsidering and reversing the *Texas Order* would advance not only Chairman Kennard's main goal for the Commission, but also one of Congress's main goals in enacting the Telecommunications Act.

Specifically, on October 18, 1994, 96 percent of the voters in Hawarden, IA, approved a measure allowing the City to establish a municipal utility to provide cable, telephone and other communications services.<sup>26</sup> The Iowa Telephone Association (ITA) promptly brought suit in a state district court, alleging, among other things, Iowa law prohibits the public sector from competing with the private sector. The court dismissed the action, ruling that if ITA's interpretation of Iowa law were correct, it would be preempted by Section 253 of the Telecommunications Act:

The Act states that no state or local law may prevent "any entity" from providing telecommunications services. The Court finds that cities at least were not exempted from section 253(a), if not clearly contemplated by Congress as being included in the phrase "any entity." Generally, the word "any" is used in its fullest and all inclusive sense meaning all or every, but its use is still restricted and limited by the context of the statute. This Court finds that the goals and context of the Telecommunications Act -- universal service, openness of entry, and deregulation -- will be served best by applying the word in its fullest sense, and this usage includes municipalities and cities. Also, in construing statutes, courts must ascribe to statutory terms their ordinary meaning unless the

---

<sup>25</sup> A copy of the profile is appended as Attachment B.

<sup>26</sup> Similar measures were approved by Iowa voters in Harlan in 1995 by 71%, Grundy Center in 1996 by 93%, Coon Rapids in 1996 by 87%, Manning in 1996 by 86%, New London in 1996 by 77%, Laurens in 1997 by 99% (1 "no" vote), Spencer in 1997 by 91%, Alta in 1997 by 88%, Muscatine in 1997 by 94%, Lake View on 9/23/97 by 84%, Algona on 11/4/97 by 74%, Danbury on 11/4/97 by 90%, Denison on 11/4/97 by 54%, Hartley on 11/4/97 by 86%, Independence on 11/4/97 by 57%, Indianola on 11/4/97 by 58%, Mount Pleasant on 11/4/97 by 64%, Orange City on 11/4/97 by 84%, Primghar on 11/4/97 by 90%, Sac City in 11/4/97 by 77%, Sanborn on 11/4/97 by 92%, Tipton on 11/4/97 by 86%, Westwood on 11/4/97 by 91%, Carroll on 2/17/98 by 83%, Emmetsburg on 5/5/98 by 63%, Storm Lake on 5/5/98 by 67%, Webster City on 5/12/98 by 84%, Mapleton on 6/23/98 by 72%, Paullina on 8/11/98 by 86%, Woodbine on 12/8/98 by 80%, and Traer on 12/16/98 by 81%. Information furnished by the Iowa Municipal Electric Association.

**THE BALLER HERBST LAW GROUP**

A PROFESSIONAL CORPORATION

Honorable Members of the Commission

January 26, 1999

Page 8

legislature otherwise defines them. Because "entity" was otherwise left undefined in the Telecommunications Act, this Court must presume that Cities, as utility providers, are considered to be included within its reach.<sup>27</sup>

While this decision was on appeal, the Iowa legislature, by unanimous vote of both houses, enacted a new law that expressly authorized the Iowa Utilities Board to award certificates of convenience and necessity to municipalities that had voted to provide telecommunications services to themselves through municipal utilities.<sup>28</sup> Hawarden duly obtained such a certificate and began to provide competitive telephone service on October 20, 1998.

One day later, the Iowa Supreme Court reversed the lower court's decision and stopped Hawarden in its tracks.<sup>29</sup> The Supreme Court offered no independent analysis of the language, structure, purposes or legislative history of the Telecommunications Act. Rather, finding that it was required to afford "considerable weight ... to an executive department's construction of a statutory scheme it is entrusted to administer," the Court ruled that the *Texas Order* had disposed of the issues before the Court. Notably, the Court ignored the explicit statement in the *Texas Order* that the Commission was not ruling on the rights of municipal utilities.<sup>30</sup>

Had the Commission reached a different decision in the *Texas Order*, the statutory goal of facilities-based competition in all telecommunications markets would now be well on its way to fulfillment in Iowa. The same is true in Missouri and other states that have enacted barriers to municipal telecommunications activities. The Commission can go a long way toward eliminating such impediments to competition and consumer choice by granting the Missouri Municipals' petition.

---

<sup>27</sup> *Iowa Telephone Ass'n v. City of Hawarden*, No. 18320 (Dist. Ct. for Sioux Cty., Dec. 12, 1996) at 10 (citations omitted), Attachment C hereto.

<sup>28</sup> House File 596, signed into law in April 1997, amended several sections of Iowa Code chapter 476--Public Utility Regulation. See 1997 Iowa Acts ch. 81. The Act was entitled "AN ACT authorizing the utilities board to issue certificates of public convenience and necessity to municipal telecommunications utilities, regulating certain municipal utilities as competitive local exchange service providers, and including effective date and retroactive applicability provisions."

<sup>29</sup> *Iowa Telephone Ass'n v. City of Hawarden*, No. 97-83, 1998 WL 734321 (Iowa), petition for rehearing pending.

<sup>30</sup> The Iowa Supreme Court also declined to hold that the appeal was moot in view of the new Iowa law authorizing the Iowa Utilities Board to award certificates of convenience and necessity, finding that the new law did not *authorize* municipal utilities to provide telecommunications service but merely ensured that any such services would be regulated by the Board. 1998 WL 734321 at 3.

Honorable Members of the Commission

January 26, 1999

Page 9

#### **IV. NTCA's *EX PARTE* LETTER**

In their letter to the Commission dated October 5, 1997, the Missouri Municipals called the Commission's attention to the comments that the National Telephone Cooperative Association (NTCA), GTE and SBC had filed on September 14, 1998, in response to the Commission's Notice of Inquiry on the Deployment of Advanced Telecommunications to All Americans, CC Docket No. 98-146. The Missouri Municipals argued that these comments and a survey that NTCA had conducted of its members seriously undermined NTCA's, GTE's and SBC's claims in this proceeding that the private sector alone can satisfy Missouri's needs for advanced telecommunications services, including in rural areas.

On November 25, 1998, NTCA responded with a letter to the Commission suggesting that the Missouri Municipals had mischaracterized NTCA's comments and survey results. NTCA claimed that it had neither stated nor implied in its comments that the private sector cannot satisfy demand for advanced telecommunications services in rural areas. NTCA also claimed that the Missouri Municipals had understated the number of NTCA's members that plan to deploy advanced telecommunications services within five years.

The Missouri Municipals do not wish to quarrel with NTCA about what it said in its comments -- the comments speak for themselves. As for NTCA's survey, it is not the Missouri Municipals, but NTCA itself that urged the Commission not to read too much into the reported "plans" of its members to deploy advanced telecommunications services, as "[m]any responding companies may provide such service to just a few select subscribers, i.e., schools and businesses." NTCA Comments at 3.n.5.

Most important, NTCA's letter of November 25 not only fails to challenge, but actually *confirms*, the Missouri Municipals' main point that there is a pressing need for advanced telecommunications service in rural areas and that the private sector cannot make such services universally available in rural areas without substantial federal subsidies. By contrast, the Missouri Municipals and their counterparts in other states can in many cases achieve the same results without such subsidies.

#### **V. CONCLUSION**

In an extensive interview published in current issue of *Government Technology*, Chairman Kennard gave the following succinct summary of his understanding of the proper role of the Commission in implementing the Telecommunications Act:

At the FCC, our job is to fire the starting gun and let the race begin. We should not micromanage the race. *We simply need to make sure that the race is fair and open to all who want to compete*, because competition always beats regulation as the way to bring consumers more services, better quality, and the lowest prices.

**THE BALLER HERBST LAW GROUP**  
A PROFESSIONAL CORPORATION

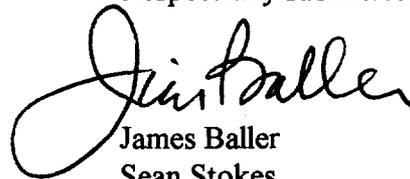
Honorable Members of the Commission  
January 26, 1999  
Page 10

So our job is to ensure that these bandwidth technologies that can improve the lives of American consumers are deployed in a pro-competitive manner. I believe that this is what Congress intended the FCC to do.<sup>31</sup>

The Missouri Municipals believe that Chairman Kennard's and Congress's vision of the FCC's role, if followed to its logical conclusion, requires a decision in the Missouri Municipals' favor. Without such a decision, the "race" in Missouri will not be "fair and open to all who want to compete," and it will not result in "more services, better quality, and the lowest prices" for Missouri's consumers, particularly in rural areas. The Missouri Municipals ask the Commission to "fire the starting gun and let the race begin" in Missouri by preempting HB 620.

Finally, as the Commission knows, the Supreme Court yesterday overturned the Eighth Circuit's determination that nothing in the Telecommunications Act was clear enough to overcome a long-standing presumption in favor of state jurisdiction over intrastate communications. The Supreme Court noted that "the Eighth Circuit had described this presumption "as a fence that is 'hog tight, horse high, and bull strong, preventing the FCC from intruding on states' intrastate turf.'" *AT&T Corp. v. Iowa Utilities Board*, 1999 WL 24568 (page cites unavailable) (U.S., January 25, 1999), quoting *Iowa Utilities Board v. FCC*, 120 F.3d 753, 800 (8<sup>th</sup> Cir. 1997). The Supreme Court had no qualms about enforcing the pro-competitive purposes of the Act, even though it found the Act "a model of ambiguity or indeed even self-contradiction." Here, under the Supreme Court's rationale in *Salinas*, 18 S.Ct. at 473, no ambiguity exists in view of Congress's unqualified use of the modifier "any." The Commission should therefore similarly have no qualms in giving effect to Congress's pro-competitive intent.

Respectfully submitted,



James Baller  
Sean Stokes  
Lana Meller  
The Baller Herbst Law Group  
1820 Jefferson Place, N.W.  
Suite 200  
Washington, D.C. 20036  
(202) 833-5300  
(202) 833-1180 (FAX)

Attorneys for the Missouri Municipals

Attachments

---

<sup>31</sup> V. Rivero, "Giving the Telecom a Brave New Whirl," *Government Technology* at 14-15 (January 1999) (emphasis added), Attachment D hereto.

**ATTACHMENT A**

**In The  
UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

---

**Case No. 98-6222 *et al.***

---

**Gulf Power Company *et al.*  
*Petitioners***

**v.**

**FEDERAL COMMUNICATIONS COMMISSION  
and UNITED STATES OF AMERICA  
*Respondents***

---

**BRIEF FOR RESPONDENTS**

---

**STATEMENT OF JURISDICTION**

This Court has jurisdiction pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342.

**STATEMENT OF ISSUES**

1. Whether a statutory scheme of mandatory attachments to the property of a public utility is a taking under the Fifth Amendment, and if so, whether the measure of compensation for the taking is just and reasonable.

**V. THE FCC REASONABLY CONSTRUED THE STATUTE IN HOLDING THAT WIRELESS CARRIERS ARE "TELECOMMUNICATIONS CARRIERS" WITH ATTENDANT RIGHTS.**

Petitioners challenge the Commission's determination that Section 224 applies to wireless carriers, despite the fact that Section 224(f) expressly states that a utility must provide "any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way" and Section 224(d)(3) prescribes an interim pole attachment rate formula for "any telecommunications carrier" providing "any telecommunications service" (emphasis added). 47 U.S.C. § 224(d)(3) & (f). Petitioners' efforts to invent a wireline limitation on the scope of Section 224 is flatly at odds with its plain language. But even if Section 224 admitted of any ambiguity on this point -- and it does not -- the Commission's construction is a reasonable one that promotes the Act's procompetitive purposes and reflects congressional concern about the scarcity of sites for wireless antennas and other equipment, thus warranting judicial deference. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984).

**A. The Pole Attachment Act Applies to All Telecommunication Carriers Other than Incumbent Local Exchange Carriers.**

Section 224(e)(1) of the Act directs the Commission to "prescribe regulations . . . to govern the charges for pole attachments used by

telecommunications carriers to provide telecommunications services." 47 U.S.C. § 224(e)(1). The Commission held that by its "plain[]" terms "[t]his language encompasses wireless attachments," and thus "[w]ireless carriers are entitled to the benefits and protection of Section 224." Order at 6798.

Clear as Section 224(e)(1) is, the Commission did not reach its conclusion as to wireless carriers by focusing only on "a single sentence or member of a sentence" in the statute, as petitioners suggest. AEPSC br. at 26 (quoting Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 222 (1986)). Rather, the Commission found support for its plain-language interpretation of subsection (e)(1) in five separate provisions of the Act. First, subsection (a)(4) defines the term "pole attachment" as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit or right-of-way owned or controlled by a utility." 47 U.S.C. § 224(a)(4) (emphasis added). Second, in subsection (d)(3), "Congress applied the current pole attachment rules as interim rules for 'any telecommunications carrier . . . to provide any telecommunications service.'" Order at 6798 (quoting 47 U.S.C. § 224(d)(3)). The Commission recognized that "[i]n both sections, the use of the word 'any' precludes a position that Congress intended to distinguish between wire and wireless attachments." Order at 6799.

Moreover, the three statutory definitions relevant to establishing eligibility for Section 224's protection -- "telecommunications," "telecommunications carrier," and "telecommunications service" -- all encompass wireless services or carriers. Id. Section 3(43) of the Act defines "telecommunications" without qualification as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). Section 3(46) defines "telecommunications service" as the "offering of telecommunications for a fee directly to the public . . . regardless of the facilities used," id. § 153(46) (emphasis added), a term the Commission has consistently interpreted to encompass wireless services. Order at 6798-99; Local Competition Order, 11 FCC Rcd 15499, 15997 (1996)(subsequent history omitted). Finally, Section 3(44) defines "telecommunications carrier" as "any provider of telecommunications services," id. § 153(44) (emphasis added), thus "preclud[ing] limiting telecommunications carriers to wireline providers." Order at 6799.

By granting attachment rights to "any telecommunications carrier," Congress expressed clearly its intent that wireless telecommunication carriers receive the protection of Section 224. United States v. Gonzales, 117 S.Ct. 1032, 1035 (1997) ("Read naturally, the word 'any' has an expansive meaning,

that is, one or some indiscriminately of whatever kind.") (internal quotation marks and citation omitted); accord Merritt v. Dillard Paper Co., 120 F.3d 1181, 1186 (11th Cir. 1997) ("'any' means all").

Petitioners urge this Court to import from other parts of Section 224 an implied limitation of attachment rights to wireline carriers only, but to do so would violate not only the express terms of the Act but also four basic rules of statutory construction. First, where Congress has specifically defined terms like "telecommunications carrier" or "telecommunications service," courts may not substitute a different meaning. Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 111 (1960).

Second, Congress stated that the term "telecommunications carrier" in Section 224 shall have the same meaning it has in Section 3 of the Act, except that it shall exclude any "incumbent local exchange carrier." 47 U.S.C. § 224(a)(5). Under the doctrine of expressio unius est exclusio alterius, "the expression of one exception indicates that no other exceptions apply," Horner v. Andrzejewski, 811 F.2d 571, 574 (Fed. Cir. 1987), and thus wireless carriers are among the "telecommunications carriers" covered by Section 224.

Third, the terms "telecommunications carrier" and "telecommunications service" are used elsewhere in the 1996 Act without exclusion of wireless carriers or services, see, e.g., 47 U.S.C. §§ 251(a) & (b)(4), 253(a), 254(d),

and "the normal rule of statutory construction assumes that identical words used in different parts of the same act are intended to have the same meaning." See, e.g., Sorenson v. Secretary of the Treasury, 475 U.S. 851, 860 (1986)(internal quotation marks omitted).

Fourth, when Congress uses express words of limitation in one part of a statute, the failure to do so elsewhere suggests that no such limitation was intended. Congress knew how to exclude wireless carriers or services when that was its intent. See 47 U.S.C. §§ 153(26), 253(f)(2), & 274(i)(2)(B). The omission of any such language of limitation in Section 224 "argues forcefully" that Congress did not wish to deny attachment rights to wireless carriers. Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 106 (1987).

In any event, none of the statutory provisions upon which petitioners rely even suggests the wireline limitation they propose. Petitioners rely foremost on subsection (a)(1), which defines the utilities subject to Section 224 as those "who own[] or control[] poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications." 47 U.S.C. § 224(a)(1) (emphasis added). But the underscored phrase does not purport to be a limitation on carriers or attachments; as the history of Section 224 makes clear, it simply establishes the basis for the Commission's jurisdiction. Defining who must provide access by reference to wire communications says nothing about who

may obtain access or what equipment may be used for such access. This is especially so given that Congress in 1978 affirmatively rejected a definition of "pole attachment" as "any attachment for wire communications," adopting instead the Commission's suggestion that the Act define the attachments covered by the specific entities to be protected (namely, cable television systems). Texas Util. Elect. Co. v. FCC, 997 F.2d 925, 930 (D.C. Cir. 1993).

There is simply no basis for petitioners' transformation of the unamended, strictly jurisdictional provision of subsection (a)(1) into a new substantive limitation on the types of attachments or carriers covered by Section 224 as a whole. In 1977, the Commission had determined that it lacked jurisdiction under the Communications Act of 1934 to regulate pole-space rental arrangements because such arrangements were not "communication by wire or radio." California Water & Telephone Co., *supra*, 64 F.C.C.2d 753 at ¶ 12. Congress enacted subsection (a)(1) to "resolve this jurisdictional impasse" without giving the Commission broad power over noncommunications utilities. Sen. Rep. No. 95-580, at 14 (1977) (AEPSC br. at Tab 1).

Federal involvement in pole attachment matters occur only where space on a utility pole has been designated and is actually being used for communications services by wire or cable. Thus, regardless of whether the owner or controller of the pole is an entity engaging in the provision of communications service by wire, if provision has been made for wire communications a

communications nexus is established sufficient to justify, in a jurisdictional sense, the intervention of the Commission.

Id. at 15. The phrase "for wire communications" reflected the fact that "telephone companies usually control[led] the connection space set aside for communication services," H.R. Rep. No. 95-721 at 2 (1977) (AEPSC br. at Tab 1), and was not intended to distinguish "wireless" telecommunication. Cf. U.S. Dep't of Commerce, NTIA Telecomm 2000, at 285-86 (1988) (wireless telephone industry did not emerge until the 1980's).

In the 1996 Act, Congress did not amend the existing phrase "used, in whole or part, for wire communications" for the simple reason that the Commission's jurisdiction over utilities was not at issue. Furthermore, Congress had no practical reason to amend the jurisdictional provision to account for utilities that dedicate space to wireless communications because "wireless carriers have not historically affixed their equipment to utility poles," Order at 6796-97, and there are few if any utilities that make their poles available for wireless carriers but not for wireline carriers. Congress's decision not to amend the jurisdictional provision of Section 224 cannot be read to indicate any intent to limit the carriers or attachments protected, when Congress placed no such limitation in the relevant substantive provisions of the statute.

Petitioners rely on two other provisions of Section 224, also to no avail. First, they point out that the term "usable space" is defined as "the space above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment." 47 U.S.C. § 224(d)(2); AEPSC br. at 32. This term, which is used to set rates and not to define the attachments covered by the Act, is unamended from the 1978 Act. See 47 U.S.C. § 224(d)(2) (1995) (AEPSC br. at Tab 4). In any event, the definition of "usable space" is meant to identify specific physical space on the pole, and thus speaks in terms of what "can be used" for wireline attachments. Once that space is identified, nothing in Section 224(d)(1) or (2) says that the space may only be used for such purposes. Second, petitioners argue that the term "any attachment by a cable television system" in the 1978 Act referred only to wireline attachments, so the 1996 version must as well. AEPSC br. at 33. But that misses the point; both in 1978 and now, the attachments covered are determined with reference to the attaching entity. Because the Act now covers "any attachment by . . . a provider of telecommunications service," without limitation, it now must be read to cover wireless attachments.

---

**ATTACHMENT B**

# William Kennard

*A consumer champion in the digital world*

BY RICHARD FOLKERS

own school, Boston University, through its Community Technology Fund). The avowed goal: industrial genomics. For three years, Cantor has consulted closely with the company's CEO, Hubert Köster of the University of Hamburg, and other officers to develop machines that determine the exact structure of genes at mind-numbing speed.

DNA is made of molecular units called base pairs. The human genome—all its DNA—has 3 billion base pairs. The Human Genome Project aims, within the next five years or so, to map one "typical" genome. But, as Cantor says, in the genetic book of mankind, "there are 6 billion different editions." A new drug may cure one fellow and leave another helplessly ill from the ostensibly identical ailment. A single cancer gene may have 6,000 versions. Sequenom's machines can read a million base pairs on 40,000 different genes, and get answers the same day a person's blood is drawn.

Using mass spectrometry technologies invented in part by Cantor and Köster, the \$500,000 machines put hundreds of tiny beads of purified DNA at a time on silicon chips, blast them with bursts of laser light, and electrically accelerate the clouds of gene fragments. Their response is an exquisitely accurate measure of their weight and, by inference, precise composition. "The whole thing is automated; it takes hardly any time or labor," Cantor exults.

It takes about a second to look at a variable section of one gene—less time than it takes to explain the name of the process, MALDI-TOF. That stands for matrix-assisted laser desorption/ionization time-of-flight mass spectrometry. Other companies have their eyes on the same business of individual gene analysis, and each has its own proprietary technical strategy to do so: It is a race to see which will dominate the market. Cantor is banking on the hope that Sequenom's strategy will make so much money (the market is pharmaceutical companies, and hospitals) that he and his fellow professor-entrepreneurs can then spend some of it doing what they like best—learning about the origin, evolution, and nature of life.

he Federal Communications Commission does not exactly evoke images of high-tech visionaries, but Chairman William Kennard aims to shed the FCC's reputation as a stodgy bureaucracy. In the year ahead, Kennard may well determine how the FCC grapples with the burgeoning digital revolution. It is digital technology that creates

a home's information links, competing with cable and satellite to deliver Internet and on-demand video services. Kennard's goal is to ensure that consumers get more choices—and face fewer monopolies.

Most consumers think the FCC's mission is to manage arcane TV regulations and to fine radio loudmouths like Howard Stern. Kennard wants to convert the FCC to a consumer advocate. Among the

services government can perform: Simplify telephone bills. Crack down on shady phone companies that surreptitiously switch long-distance service. Allow the Internet to grow, without regulation, while supporting parental controls on online porn. Bring competition to local phone service.

Just how Kennard, a Democrat with the good looks and elegant style of a TV anchorman, plans to curb monopolies isn't always clear. The former FCC general counsel favors both free markets and regulation, and that balancing act will be tested when the FCC's authority to regulate cable rates expires March 31, 1999. Rates have been rising faster than inflation, and consumers have few alternatives to cable. Kennard's solution is to curb cable monopolies by having Congress empower direct broadcast satellite companies to rebroadcast local stations, as cable now does.

As the first African-American chair of the FCC, Kennard is passionate about racial and economic diversity. He supports new low-powered "micro-radio" stations—which may reach only part of a city but could prove to be a "local force of expression," operated by churches or community groups. He wants to avoid a "digital divide," where the new technology bypasses poor neighborhoods. To achieve his goals, Kennard will have to make the hidebound FCC not only consumer friendly but limber as well.



**Born:** Jan. 19, 1957, Los Angeles. **Education:** B.A., Stanford University, Yale Law School. **Model public official:** Nelson Mandela. **Proudest accomplishment:** Giving a voice to the disenfranchised in telecommunications policy. **Goal:** Making the technological revolution inclusive. **Favorite book:** *The Plague* by Albert Camus.

the crystalline pictures and CD-quality sound of high-definition television, which went on sale for the first time this fall. Only a few films, sporting events, and documentaries have been broadcast in high definition, but their numbers will rise markedly in the years ahead. One day, most cable TV and telephone lines will rely on digital transmission. In a few years, a telephone line will be just one of

ATTACHMENT C

---

IN THE IOWA DISTRICT COURT FOR SIOUX COUNTY

IOWA TELEPHONE ASSOCIATION,

Plaintiff,

vs.

CITY OF HAWARDEN,

Defendant.

No.18320  
RULING RE: SUMMARY JUDGMENT  
MOTIONS MADE BY BOTH PLAINTIFF  
AND DEFENDANT

CLERK OF COURT

96 DEC 12 AM 9 58

SIOUX COUNTY IOWA

FILED

On October 29, 1996, the Motions for Summary Judgment by both the Iowa Telephone Association (ITA) and the City of Hawarden came on for hearing before this Court. Steven Nelson appeared for Plaintiff ITA and Ivan Webber appeared on behalf of Hawarden. A hearing was held and the matter submitted. After considering the record and the written and oral arguments of counsel, the Court now rules as follows.

CASE STATEMENT

This Ruling and Order stems from an April 11, 1996, Petition for Declaratory Judgment filed by the Iowa Telephone Association asking the Court to declare that Hawarden is statutorily prohibited from providing land-line local telephone services to customers in the State of Iowa. ITA is an association whose members are companies that provide land-line local telephone service to customers in the State of Iowa. This request followed an election that took place in Hawarden where, by a vote of 588 for to 27 against, the citizens answered the following question in the affirmative: "Shall the City of Hawarden Iowa establish a Municipal Cable Communication System as a City Utility?" The city has proposed that this utility will offer Internet access, cable television, and land-line local telephone services. The desire to provide the telephone services has spawned the current litigation.

197).

The Act broadly states that no state or local law may prevent "any entity" from providing telecommunications services. The Court finds that cities at least were not exempted from section 253 (a), if not clearly contemplated by Congress as being included in the phrase "any entity." Generally, the word "any" is used in its fullest and all inclusive sense meaning all or every, State v. Bishop, 132 N.W.2d 455, 458 (Iowa 1965), but its use is still restricted and limited by the context of the statute. U.S. v. Weil, 46 F.Supp. 323, 325 (E.D. Ark. 1942). This Court finds that the goals and context of the Telecommunications Act - universal service, openness of entry, and deregulation - will be served best by applying the word in its fullest sense, and this usage includes municipalities and cities. Also, in construing statutes, courts must ascribe to statutory terms their ordinary meaning unless the legislature otherwise defines them. State v. White, 319 N.W.2d 213, 215 (Iowa 1982). Because "entity" was otherwise left undefined in the Telecommunications Act this Court must presume that cities, as utility providers, are considered to be included within its reach.

As this Court holds that the Telecommunications Act of 1996 preempts state laws regarding barriers to entry and prohibitions on the provision of phone services, any Iowa law that would so operate is inapplicable. Therefore, federal law rules this area bringing with it a policy of openness in the provision of telecommunications services. As such, this analysis need not reach the remainder of Plaintiff's arguments. Accordingly, Iowa Telephone Association's Motion for Summary Judgment is Denied and Hawarden's is Granted. Plaintiff's Petition for Declaratory Judgment is Denied with costs assessed to ITA.

**ATTACHMENT D**

# Telecosm a Brave New Whirl

Despite calls  
to abolish the  
Federal Com-  
munications  
Commission,  
its chair looks  
to make a big  
bang in the  
21st century.

By Victor Rivero

Special to Government Technology

## William E. Kennard

William E. Kennard, the chair of the Federal Communications Commission, has a reputation for being a tough negotiator. In 1997, he led the FCC's fight against the proposed merger of Time Warner and Turner Broadcasting, a move that would have created a media giant. Kennard's leadership was instrumental in the FCC's decision to block the merger, citing concerns over the potential for increased market power and reduced competition. His actions have earned him a reputation as a defender of the public interest in the telecommunications industry. In 1998, he was named chair of the FCC, a position of significant importance in the industry. Under his leadership, the FCC has been instrumental in shaping the regulatory landscape for the telecommunications industry, particularly in the areas of broadband and digital services. Kennard's tenure has been marked by a series of high-profile decisions and a commitment to transparency and public participation in the regulatory process. His leadership has been a key factor in the FCC's ability to navigate the complex and rapidly changing landscape of the telecommunications industry in the 21st century.

Photos by [unreadable]

**Q:** Until 1996, the telecosm has been governed largely by laws half a century old and telephone industry rules dating back to 1887. The Telecommunications Act of 1996 is perhaps the most important piece of economic legislation of the 20th century. Describe this historic legislation and some of its ramifications from your vantage point in the middle of it all.

**A:** When Congress passed the Telecommunications Act of 1996, we all thought we were setting the stage for competition in the local market for plain old telephone service over the old public

switched telephone network. The principle debate about the telecom act was about how to promote competition on the analog telephone network — local and long distance. Cable, long-distance and local telephone companies all said that they were going to enter each other's businesses. Entry turned out to be harder and more costly than expected.

But the rise of the Internet has changed business plans again. Companies can now compete to sell high-speed Internet access. At the same time, all communications products are becoming digital bits. Whether audio, video, voice or Internet data, they are all computer codes — ones

and zeros. This brings down the cost of competition. Internet and digital technology have the potential to renew the promise of the telecom act. Circuit switches are giving way to packet switches. Instead of keeping an entire circuit open and dedicated to a single conversation for the length of the phone call, packet switching breaks the spoken words into tiny data packets that are disassembled, then transmitted separately over the most efficient routes possible and then reassembled at the other end of the call in microseconds. The same technique can be used to handle other types of traffic, such as data, image, and even video.

It is an amazing technological advance that greatly expands the capacity and functionality of the network. It's no coincidence that while the market for voice service is growing at around 5 percent annually, packet-switched data business is growing at an annual clip of 300 percent. America

**Q:** What does this mean for the average American sitting at a computer with all the hype, today's Internet is often much too slow for maximum productivity. Should the public be concerned about the potential for an explosion in data transmission and expansion in bandwidth capacity?

**A:** You bet they should. When we can harness this new technology and put it to work in living rooms across the country, we will open up exciting new horizons for the American people — new horizons for entertainment, information, and communications services for all Americans. It means that the same high-speed Internet access that many Americans enjoy in the workplace will be available at home. It means that the same copper wire that allows families to connect over the phone will permit them not just to talk to each other, but to see each other as well. So instead of gathering around a telephone to sing happy birthday to a relative on the other side of the country, the family will gather around a computer and see their relatives in realtime video coast to coast. The technology is here. We just need to get it to America's homes.

It will mean having the ability to download a feature-length movie in a matter of minutes, and then watch it when you want to, rather than having to consult the TV guide or worry about late fees at the video rental store. The technology is here. We just need to get it to America's homes.

It means that we'll be able to hop from Web page to Web page on the Net as quickly as we can change channels on the television with the remote. People will no longer have to take a break from their home computer while they wait for it to download data. This is what home computer users call the World Wide Wait on the World Wide Web. The technology is here. We just need to get it to America's homes.

It also means opening a whole new world of electronic commerce — doing business over the Internet. Expanding bandwidth to the home will make shopping from home easier than shopping from a catalogue, with even glossier photos. This type of home shopping is just the tip of the iceberg when it comes to e-commerce. The technology is here. We just need to get it to America's homes.

A recent edition of *Business Week* had a column on e-commerce that's entitled "You Ain't Seen Nothin' Yet." That title hits the nail on the head. This year, revenues from e-commerce are expected to be around \$20 billion. That



number is expected to grow to \$350 billion in four years. E-commerce is so much more efficient. It can cut retailing costs by up to 10 percent. That means more jobs and billions of dollars added to the nation's economic output.

**Q:** *So if the technology is here, why aren't Americans seeing these benefits in their homes?*

**A:** The problem is bandwidth to the home. Imagine trying to fill a backyard swimming pool with a garden hose. There's plenty of water in the city reservoir to fill the pool, and there are huge water mains that can deliver the water down your street. But when you get to the final link in the chain — the garden hose — suddenly the water starts flowing a lot slower, because the hose is too small compared to the amount of water

you are trying to pump through it to fill the swimming pool. The hose — the pipe — is just too small. It's the same way with high-speed data transmission. The Internet backbone is a network of networks that has plenty of capacity to pump data all over the country very quickly. But when it reaches that last mile, the copper phone line that runs into your house is a lot like that garden hose. It can't handle the amount of data that needs to be pumped through it to fill up your computer screen quickly.

**Q:** *The World Wide Wait is well known and felt. Limited bandwidth is a major stop to excitement about the Internet ...*

**A:** But all that is changing. Last year, the pundits were saying that all the bandwidth in the world wouldn't help if

the major entertainment companies didn't change their perceptions of the Web. Well, guess what? Entertainment companies are converging on the Internet and buying the Web directories that we rely on to surf the Net. They see the Web as another distribution channel for their entertainment programming. That's why, NBC and Disney [recently] bought Internet portals.

We recognize that convergence is upon us, and so the FCC is working hard to promote deployment of high-speed transmission across all the media. Cable companies are using their cable lines and high-speed cable modems to deliver data to the home at lightning speed. The FCC has adopted new rules so that soon Americans won't have to rent their cable modems from the local cable operator, but will be able to buy a standard cable modem from a number of sources, just like you buy a computer, modem or a telephone. We also are seeing changes in wireless technologies.

We just issued the first set of high-capacity wireless licenses for local multi-point distribution services, or LMDS. We will auction more spectrum in the future that can be used for these types of fixed services, such as our upcoming 39GHz auction. And [soon] wireless cable operators will be able to offer high-speed data. And broadcast television, for the first time, will be able to use its huge amounts of bandwidth for one-way digital transmission, including data and Internet access, as well as stunning high resolution video and CD-quality audio.

Now we are confronting another issue with serious implications for broadband delivery over cable and broadcast: must-carry for broadcasters' second digital channel over cable. And phone companies and others are investing in ways to transform the copper phone line to work similar wonders for the American consumer. Many companies are chomping at the bit to provide their services to residential customers.

At the FCC, our job is to fire the starting gun and let the race begin. We should not micromanage the race. We simply need to make sure that the race is fair and open to all who want to compete, because competition always beats regulation as the way to bring consumers

*"In a fully realized competitive future, I also see a changed FCC. The commission can be smarter and leaner. Where we can be smaller, we should be, but we should not reduce size if it means undermining enforcement of rules necessary to protect competition, consumers and the public interest."*

more services, better quality, and the lowest prices.

So our job is to ensure that these bandwidth technologies that can improve the lives of American consumers are deployed in a pro-competitive manner. I believe that this is what Congress intended the FCC to do.

**Q:** *By your term's end in 2001 and beyond, what new ideas will converging technologies spawn? What are your thoughts on such rapid change?*

**A:** Trying to predict the future in the telecom world is always dangerous. By 2002 there may be advances in technology that we can't even imagine now. But I can tell you what I hope to accomplish at the FCC in the next few years. One thing I am sure of is that the future of the FCC and the telecom industry will be driven by competition, digitization and convergence. The FCC's immediate job is to foster and encourage the transition of the communications industry from a regulated to a competitive environment and clear the way for enormous technical innovation. A decade ago, few would have predicted the influence that Bill Gates and Microsoft would have on the communications marketplace. It's certainly a fast-changing landscape.

Consider the debate on the Telecommunications Act of 1996 that took place at a time when the Internet was only just beginning to emerge as a phenomenon in telecommunications. Most anyone who connected to a commercial online service did so at a mere 9,600 bits per second. Building Web pages for a living seemed a risky proposition.

**Q:** *And now, in the wake of the 1996 telecom act, the FCC is in a historic new era, and ironically "growing larger to get smaller." How is this transition going; what lies ahead; what is the ideal scene for the shape and role of the FCC?*

**A:** When I became chairman, I said my tenure would be guided by the three Cs — competition, community and common sense. My vision of the

FCC in the future is one in which there is competition in all segments of the telecom marketplace, the telecom infrastructure serves to create a national and global community in which information is easily shared, and regulation, where necessary, is governed by common sense and is applied only when needed and is constantly refined to address changing conditions. In a fully realized competitive future, I also see a changed FCC. The commission can be smarter and leaner. Where we can be smaller, we should be, but we should not reduce size if it means undermining enforcement of rules necessary to protect competition, consumers and the public interest. As competition begins to develop, we can eliminate rules that become unnecessary. But the FCC must still referee the competitive marketplace. There are some areas, such as public safety, equal opportunity and consumer protection issues, that cannot always be left to marketplace forces. In these areas government regulation is and will continue to be appropriate.

**Q:** *How do you respond to those who go so far as to say common law should rule telecommunications and the FCC could be abolished?*

**A:** It shouldn't be a surprise that government can play a role in eliminating the digital divide. After all, the Information Revolution was started by public leadership and investment. Government scientists invented the Internet, which was the catalyst for Silicon Valley and other high tech corridors around the country. ...

Can we really tolerate leaving our poorest communities behind, stranding poor kids in our most distressed inner city and rural areas in a technological desert? In this era of retrenchment in affirmative action, where the number of African Americans and Hispanics at the University of California at Berkeley and the University of Texas is the lowest in decades, can we really tolerate going down a path where the information haves become have-mores, while the information have-nots become have-nones? We can't do that.

We must continue to help open the doors of opportunity...

**Q:** *Such opportunities can be created in part by fair competition. Specifically, what is your vision of how a competitive environment will be achieved?*

**A:** I see the FCC as having six key responsibilities as we move to a competitive environment:

1. Eliminate or mitigate bottlenecks and maintain a competitive market structure. The key to a "pro-competitive, deregulatory" communications policy is competition rather than monopoly. We must act to remove bottlenecks where the exercise of market power permits them to appear, and we must maintain a competitive market structure. This means establishing interconnection standards for telecommunications technologies where warranted, overseeing compatibility standards, and establishing the obligations, where necessary, of firms to extend services to others.

2. Deregulating communications services when consumers can choose the best combination of price, service and quality for their needs. This means writing fair rules of competition, eliminating and discarding regulations no longer necessary and finding sensible ways to regulate noncompetitive services that remain — and having the wisdom to distinguish between the two.

3. Protecting consumers. As we move toward a competitive marketplace and encourage wider entry, we need to acknowledge that not all competitors are scrupulous, and not all means of garnering competitive advantages are fair to consumers, especially those consumers who are used to obtaining telecommunications services from regulated monopolists.

4. Promoting efficient use of the electromagnetic spectrum. Assuring that the spectrum is used efficiently and flexibly, and that those licensed to use it can do so free of unwarranted interference. Promoting efficient use does not, however, mean micromanaging that use. Experience has shown us that broad flexibility for licensees enhances efficient use of the spectrum and permits

licensees and the marketplace to develop the products that consumers want.

5. Strengthening the community. Our communications laws have never reflected only economic efficiency. They have always embraced more: that communications services should be widespread, tie our communities together and help us build a stronger, more prosperous, and safer world with greater opportunity for all and opportunities for a wide range of voices to be expressed publicly. We must ensure that communications embodies the American values in the law: universal service to promote ubiquitous phone service and economic opportunity for all Americans, including rural areas, classrooms and rural health centers; access for people with disabilities; spectrum for public safety needs; elimination of market-entry barriers for small business and new entrants; and diversity of ownership and employment.

6. Advancing our guiding principles worldwide. Even when it established the FCC in 1934, Congress recognized that we needed worldwide communications services. The communications industry is truly global today. As the world leader in communications services and innovation, the U.S. sets the standard for promoting open and competitive markets.

**Q:** *Looking at the changes going on that have led to a smaller, more connected world, what do you see as vital to keep in mind as we move forward into a new era?*

**A:** Without a doubt, the main thing we must always keep in mind in formulating telecom policy is to ensure that everyone has an equal opportunity to participate in the exciting new telecom world that we'll see in the 21st century. We must never become a nation of information haves and have-nots, and the decisions being made in the next months at the FCC and on Capitol Hill will determine whether our country and world are separated by a digital divide or not. We can't let that happen.

Victor Rivero is a writer based in Boston and Burlington, Vt. E-mail: <VRRivero@aol.com>

## **CERTIFICATE OF SERVICE**

I, James Baller, hereby certify that on this 26th day of January 1999, I caused copies of the foregoing letter to be served on the parties on the attached Service List, by hand delivery, where indicated, and by first-class, U.S. Mail, where indicated.

### By Hand Delivery:

Honorable William E. Kennard, Chairman  
Federal Communications Commission  
445 Twelfth Street, S.W., TW-A325  
Washington, D.C. 20554

Honorable Susan Ness, Commissioner  
Federal Communications Commission  
445 Twelfth Street, S.W., TW-A325  
Washington, D.C. 20554

Honorable Harold W. Furchtgott-Roth,  
Commissioner  
Federal Communications Commission  
445 Twelfth Street, S.W., TW-A325  
Washington, D.C. 20554

Honorable Michael K. Powell, Commissioner  
Federal Communications Commission  
445 Twelfth Street, S.W., TW-A325  
Washington, D.C. 20554

Honorable Gloria Tristani, Commissioner  
Federal Communications Commission  
445 Twelfth Street, S.W., TW-A325  
Washington, D.C. 20554

Thomas Powers  
Legal Advisor to Commissioner Kennard  
Federal Communications Commission  
445 Twelfth Street, S.W., TW-A325  
Washington, D.C. 20554

Anita Walgren  
Legal Advisor to Commissioner Ness  
Federal Communications Commission  
445 Twelfth Street, S.W., TW-A325  
Washington, D.C. 20554

ITS, Inc.  
1231 20th Street, N.W.  
Washington, D.C. 20036

Paul Misener  
Legal Advisor to  
Commissioner Furchtgott-Roth-F.C.C.  
445 Twelfth Street, S.W., TW-A325  
Washington, D.C. 20554

Kyle Dixon  
Legal Advisor to Commissioner Powell  
Federal Communications Commission  
445 Twelfth Street, S.W., TW-A325  
Washington, D.C. 20554

Paul Gallant  
Legal Advisor to Commissioner Tristani  
Federal Communications Commission  
445 Twelfth Street, S.W., TW-A325  
Washington, D.C. 20554

Christopher J. Wright, General Counsel  
Federal Communications Commission  
445 Twelfth Street, S.W., TW-A325  
Washington, D.C. 20554

Ms. Kathryn Brown, Chief of Staff  
Federal Communications Commission  
445 Twelfth Street, S.W., TW-A325  
Washington, D.C. 20554

Janice M. Myles  
Federal Communications Commission  
Common Carrier Bureau, Room 544  
1919 M Street, N.W.  
Washington, D.C. 20554

By U.S. Mail:

Kecia Boney  
R. Dale Dixon, Jr.  
Lisa Smith  
Jodie Kelly  
MCI Telecommunications Corporation  
1801 Pennsylvania Avenue  
Washington, D.C. 20006

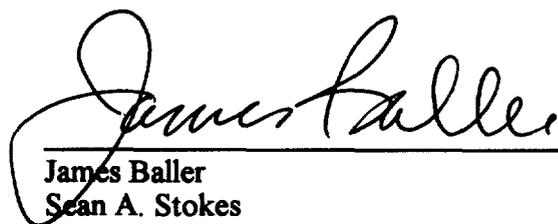
Jeremiah W. (Jay) Nixon  
Ronald Molteni  
Office of the Attorney General  
Supreme Court Building  
P.O. Box 899  
207 W. High Street  
Jefferson City, MO 65102

L. Marie Guillory  
Jill Canfield  
National Telephone Cooperative Association  
2626 Pennsylvania Avenue, N.W.  
Washington, D.C. 20037

Michael K. Kellogg  
Geoffrey M. Klineberg  
Paul G. Lane  
Durward D. Dupre  
Michael J. Zpevak  
Kellogg, Huber, Hansen,  
Todd & Evans, P.L.L.C.  
1301 K Street, N.W.  
Suite 1000 West  
Washington, D.C. 20005

Jeffrey L. Sheldon  
UTC, The Telecommunications Association  
1140 Connecticut Avenue, N.W.  
Suite 1140  
Washington, D.C. 20036

Gail L. Polivy  
John F. Rapoza  
GTE Service Corporation  
1850 M Street, N.W., Suite 1200  
Washington, D.C. 20036



James Baller  
Sean A. Stokes  
Lana L. Meller  
THE BALLER HERBST LAW GROUP, P.C.  
1820 Jefferson Place, N.W.  
Suite 200  
Washington, D.C. 20036  
(202) 833-5300 (phone)  
(202)833-1180 (fax)  
[jimb@baller.com](mailto:jimb@baller.com) (Internet)

Attorneys for the  
Missouri Municipals

January 26, 1999