In summary, in the passages quoted above, which were written at the time that Congress introduced the language that would ultimately become Section 253(a), Congress applied the term "entity" to any person that might provide or facilitate the provision of telecommunications service. Congress expressly set forth its understanding and intent that "State or local governments," whether or not they operated "municipal energy utilities," should be encouraged to participate in building the national Information Superhighway. Congress also made clear that it understood and intended that any public or private entity that chose to cross the line from selling or leasing *facilities* to selling or leasing telecommunications *services* would be subject to both the obligations and the benefits that the Act extended to carriers of telecommunications service. The obligations included, among others, the duty to contribute funds to the universal service program. The benefits included protection from state barriers to entry.

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

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

b. The 104th Congress

On February 8, 1996, the President signed the Telecommunications Act of 1996 into law. As the Supreme Court has observed, the Act "was an unusually important legislative enactment." *Reno v. ACLU*, 117 S.Ct. 1329, 1338 (1997). The new law, in the Commission's words, "fundamentally changes telecommunications regulation" from a paradigm of encouraging monopolies to one of fostering robust competition in all telecommunications markets. *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *First Report and Order*, FCC 96-325, ¶ 1 (rel. August 8, 1996) ("*Interconnection Order*"). In the *Interconnection Order*, the Commission furnished the following succinct summary of the goals of the Act and Congress's vision in enacting it:

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

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

In developing the Act, Congress recognized that strong measures were necessary to encourage and assist potential providers of telecommunications services to enter into competition

with entrenched incumbent local exchange carriers. Thus, according to the Commission, Congress "armed" the Commission with "powerful tools to dismantle the legal, operational and economic barriers that frustrated competitive entry in the past." *Texas Order*, ¶ 2. Recognizing that incumbents could thwart the national policies of the Act at the state and local level, where they have historically had enormous political influence, Congress expressly prohibited state and local governments from impairing the ability of any potential provider to enter any telecommunications market:

> SEC. 253. REMOVAL OF BARRIERS TO ENTRY.
>
> (a) IN GENERAL - No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

As reflected in a colloquy on the Senate floor between Senator Kempthorne (R-ID) and Senator Hollings (D-SC), the sponsor of S.1822, the 104th Congress understood that Section 253(a) originated in S.1822 and had "no problem" with its scope. 141 Cong. Rec. at S8174 (June 12, 1995). Thus, the 104th Congress incorporated the key operative terms of the preemption provision of S.1822 *verbatim* into § 253(a) of the 1996 Act. There was no need for elaborate legislative history, but what there was corroborated that the 104th Congress understood and intended that the term "any entity" apply to municipalities and municipal electric utilities.

In the Joint Explanatory Statement of the Committee of Conference, the conferees noted that electric utilities may "choose" to provide telecommunications services, and they made clear that Congress intended that such choices be unencumbered by state or local barriers to entry:

> New section 253(b) clarifies that nothing in this section shall affect the ability of a State to safeguard the rights of consumers. In addition to consumers of telecommunications services, the conferees intend that this includes the consumers of electric, gas, water or steam utilities, *to the extent such utilities choose to*

> *provide telecommunications services.* Existing State laws or regulations that reasonably condition telecommunications activities of a monopoly utility and are designed to protect captive utility ratepayers from the potential harms caused by such activities are not preempted under this section. However, *explicit prohibitions on entry by a utility into telecommunications are preempted under this section.*

H.R. Rep. No. 104-458, 104th Cong., 2d Sess. 127 (1996). Referring to this passage, its author, Congressman Dan Schaefer (R-CO), subsequently confirmed in a letter to former FCC Chairman Reed Hundt that "Congress recognized that utilities may play a major role in the development of facilities-based local telecommunications competition," that "any prohibition on their provision of this service should be preempted," and that the Commission "must reject any state and local action that prohibits entry into the telecommunications business by any utility, *regardless of the form of ownership or control.*" J.A. 235. In reply, Chairman Hundt assured Congressman Schaefer that the Commission's staff would place his letter in the record of the Texas case and consider it carefully. J.A. 246. The letter was not included in the record, nor was it even mentioned in the Texas decision.[3]

In another letter to Chairman Hundt, Senator J. Robert Kerrey (D-NE) was even more emphatic about Congress's intent in enacting Section 253:

> Anti-competitive laws passed by state and local governments pose a real threat to the development of competition in local telecommunications markets. In the wake of the Telecommunications Act, several states have passed legislation that prohibits or significantly impairs the ability of publicly-owned utilities to provide telecommunications services themselves or to make their facilities available to other potential providers of telecommunications services. I am concerned that these actions are significantly delaying consumers ability to exercise their economic power by choosing between local telecommunications carriers.

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[3] Compare the Commission's initial Certified List of Items in the Record, which it filed on December 11, 1997, with its supplemental list, which it filed on May 7, 1998 at the request of counsel for the petitioners.

> Congress created Section 253 of the Telecommunications Act to address this problem by granting the Federal Communications Commission (FCC) authority to preempt state and local legal requirements that pose a barrier to entry into telecommunications by "any entity." *The law makes no distinction among types of entities or forms of ownership.* Section 253 states, "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." *In using the term "any entity," Congress intended to give entities of all kinds, including publicly-owned utilities, the opportunity to enter these markets.*

J.A. 272 (emphasis added). Senator Kerrey's letter received the same treatment as Congressman Schaefer's -- it was neither included in the administrative record of the Texas case nor mentioned in the Texas decision.

4. Section 703 of The Telecommunications Act

While it was considering Section 253, Congress was also working on major amendments to the pole-attachment requirements in Section 224 of the Communications Act of 1934. The resulting measure -- Section 703 of the Telecommunications Act -- is the exception that proves the rule. In that provision, Congress showed that it knows how to distinguish "political subdivisions" and "instrumentalities" of a state from other entities when it wants to do so.

In Section 703(1), Congress amended the definition of a "utility" in Section 224(a)(1) of the 1934 Act to include "a local exchange carrier or an electric, gas, water, steam, or other public utility, who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications." In Section 703(7), Congress imposed upon all firms meeting the new definition of "utility" an obligation to "provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." Elsewhere, Section 703 authorized the Commission or the states

ATTACHMENT C

BRIEF FOR RESPONDENTS

ORAL ARGUMENT SCHEDULED FOR NOVEMBER 2, 1998

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

NOS. 97-1633 & 97-1634

CITY OF ABILENE, TEXAS, *ET AL.*,

PETITIONERS

V.

FEDERAL COMMUNICATIONS COMMISSION
AND
THE UNITED STATES OF AMERICA,

RESPONDENTS

ON PETITIONS FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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made it clear that judges are included." Ashcroft, 501 U.S. at 467 (emphasis in original). The Court proceeded to find that the ADEA was ambiguous on this issue: "[W]e cannot conclude that the statute plainly covers appointed state judges. Therefore, it does not." Id.

Ashcroft requires this Court to apply the same analysis in this case. The Court's task here is not to search for a plain statement that municipalities are excluded from the term "entity" in section 253. Rather, in accordance with Ashcroft, the Court may not read the term "entity" in section 253 to cover municipalities unless Congress has clearly indicated that municipalities are included. As we have demonstrated, Congressional intent on this question is not "plain to anyone reading the Act." Ashcroft, 501 U.S. at 467. Therefore, the Court, like the Commission, should conclude that the term "entity" in section 253(a) does not include municipalities.

B. The Legislative History Of Section 253 Does Not Clearly Indicate That Congress Intended To Preempt The States' Authority To Limit The Activities Of Their Own Municipalities.

Petitioners complain that the Commission misapplied the Ashcroft standard by failing to consider the legislative history of section 253. According to petitioners, "that history makes it crystal clear ... that Congress intended to encourage municipalities" to help provide competition to telecommunications markets, "and that Congress manifested this intent through the definitions and preemption provisions of the Act." Pet. Br. 32. In the administrative proceeding, however, no party argued to the FCC that the legislative history of section 253 supported Abilene's preemption request. To the contrary, in comments filed with the Commission, Abilene urged the agency to ignore the legislative history: "The goal is to ascertain legislative intent through plain language of the statute without looking to legislative history or other extraneous resources." Abilene Reply Comments at 6 (JA) (emphasis

added). Thus, it is understandable why the FCC did not focus on legislative history when it ruled on Abilene's petition. Because no party asked the FCC to consider the legislative history in this context, and because Abilene itself urged the agency not to look at that history, petitioners cannot now claim that the legislative history justifies a remand in this case. See 47 U.S.C. § 405; Freeman Engineering Associates, Inc. v. FCC, 103 F.3d 169, 182-85 (D.C. Cir. 1997); Busse Broadcasting Corp. v. FCC, 87 F.3d 1456, 1460-62 (D.C. Cir. 1996).

Even if petitioners' legislative history argument were properly before this Court, it is baseless. As an initial matter, it is highly questionable whether legislative history should play any role in the application of Ashcroft's plain statement rule. Under that rule, a court must not construe a federal statute to preempt traditional State powers unless Congress has made "its intention to do so unmistakably clear in the language of the statute." Ashcroft, 501 U.S. at 460 (emphasis added) (quoting Will, 491 U.S. at 65). In this context, the Supreme Court has declared that Congressional intent to preempt "must be plain to anyone reading the Act." Ashcroft, 501 U.S. at 467. The Court's opinion in Ashcroft strongly suggests that if Congress does not make its preemption intentions plain in the text of a statute, the legislative history cannot supply the clarity that the statutory language lacks.

In any event, the 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 provision of telecommunications service by utilities.[8] These materials are not pertinent to this case. In the

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[8] See S. Rep. No. 367, 103d Cong., 2d Sess. 55 (1994) (1994 Senate bill, whose 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 at 127 ("explicit prohibitions on entry by a utility into telecommunications are preempted under" section 253); Letter from Congressman Dan Schaefer to FCC Chairman

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 (JA).[9]

Petitioners do not cite a single passage from the legislative history of the 1996 Act that discusses the provision of telecommunications service by municipalities. Instead, they rely principally on a 1994 Senate report on S. 1822, a bill whose provision for removing entry barriers formed the basis for section 253. Petitioners attach great significance to that report's statement that "State or local governments may sell or lease capacity" on their own telecommunications facilities to carriers providing telecommunications service. S. Rep. No. 367, 103d Cong., 2d Sess. 56 (1994). But that statement did not mean that the sponsors of the bill expected municipalities themselves to provide telecommunications service. To the contrary, the Senate report on S. 1822 emphasized that State or local governments that sell or

---

Reed Hundt, Aug. 5, 1996 (JA) (section 253 requires the Commission to "reject any state or local action that prohibits entry into the telecommunications business by any utility, regardless of the form of ownership or control"); Letter from Senator J. Robert Kerrey to FCC Chairman Reed Hundt, Sept. 9, 1997 (JA) (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").

[9] There is no basis for petitioners' assertion that the FCC should have given more weight to letters submitted by Representative Schaefer and Senator Kerrey during this proceeding. See Pet. Br. 15-17. Those letters asserted only that the term "entity" in section 253 includes municipally owned utilities; they took no position on whether the term encompasses municipalities themselves. Since the letters did not address the issue raised by Abilene's petition, there was no reason for the Commission to consider those letters when it ruled on that petition. In any event, the letters are merely "post-passage remarks" that "represent only the personal views of" two legislators. Regional Rail Reorganization Cases, 419 U.S. 102, 132 (1974) (internal quotations omitted). Such "post hoc observations by [individual] member[s] of Congress carry little if any weight." Bread Political Action Committee v. FEC, 455 U.S. 577, 582 n.3 (1982) (quoting Quern v. Mandley, 436 U.S. 725, 736 n.10 (1978)).

lease telecommunications capacity are not providing telecommunications service: "[T]he offering of [such] capacity alone is not a 'telecommunications service[].'" Id.

In short, nothing in the legislative history cited by petitioners indicates that Congress even contemplated that municipalities themselves would provide telecommunications service. Obviously, if it is uncertain whether Congress considered this possibility, it is even less clear that Congress intended to preempt State laws that prohibit municipalities from providing telecommunications service.

In sum, neither the language nor the legislative history of section 253 clearly indicates that Congress intended to preempt the States' authority to prohibit their own municipalities from providing telecommunications service. In the absence of any plain statement that Congress authorized such preemption, the Commission properly applied the Ashcroft standard when it denied Abilene's request to preempt PURA95 section 3.251(d).

II. THE COMMISSION'S DENIAL OF ABILENE'S PREEMPTION REQUEST IS NOT INCONSISTENT WITH OTHER FCC DECISIONS.

In addition to asserting that the FCC misapplied the Ashcroft standard, petitioners claim that the Commission's denial of Abilene's petition is inconsistent with other FCC decisions. Pet. Br. 34-38. The second claim has no more merit than the first. The supposedly "inconsistent" decisions that petitioners cite are clearly distinguishable from the Commission's decision to deny Abilene's petition.

For example, the Commission's refusal to preempt PURA95 section 3.251(d) was not inconsistent with its previous preemption of the decisions of two Kansas municipalities to deny telephone franchise applications in Classic Telephone, Inc., 11 FCC Rcd 13082 (1996). The Commission's different resolution of these two cases was justified by the different factual

ATTACHMENT D

Calendar No. 610

103D CONGRESS
2d Session

SENATE

REPORT
103–367

COMMUNICATIONS ACT OF 1994

Mr. HOLLINGS, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

OF THE

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

together with

ADDITIONAL AND MINORITY VIEWS

ON

S. 1822

SEPTEMBER 14 (legislative day, SEPTEMBER 12), 1994.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE

82–939

WASHINGTON : 1994

DEFINITIONS

SEC. 3. For the purposes of this Act, unless the context otherwise requires—

(a) "Wire communication" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(b) "Radio communication" or "communication by radio" means the transmission by radio of wiring, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

* * * * * * *

(ee) "Construction permit" or "permit for construction" means that instrument of authorization required by this Act or the rules and regulations of the Commission made pursuant to this Act for the construction of a station, or the installation of apparatus, for the transmission of energy, or communications, or signals by radio, by whatever name the instrument may be designated by the Commission.

(ff) "Great Lakes Agreement" means the Agreement for the Promotion of Safety on the Great Lakes by Means of Radio in force and the regulations referred to therein.

(gg) [Repealed]

(hh) "Local exchange carrier" means a provider of telephone exchange service that the Commission determines has market power. Such term does not include a person engaged in the provision of a commercial mobile service under section 332(c), except to the extent that the Commission finds that such service as provided by such person in a State is a replacement for a substantial portion of the wireline telephone exchange service within such State.

(ii) "Telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, including voice, data, image, graphics, or video, without change in the form or content of the information, as sent and received, by means of electromagnetic transmission, with or without benefit of any closed transmission medium.

(jj) "Telecommunications service" means the direct offering of telecommunications for profit to the general public or to such classes of users as to be effectively available to the general public regardless of the facilities used to transmit such telecommunications services. Such term does not include information services or cable services as defined under section 602.

(kk) "Telecommunications carrier" means any provider of telecommunications services, except that such term does not include hotels, motels, hospitals, and other aggregators of telecommunications services.

(ll) "Telecommunications number portability" means the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another.

(mm) "Information service" means the offering of services which employ computer processing applications that act on the format, content, code, protocol, or similar aspects of the subscriber's transmitted information, provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information.

(nn) "Rural telephone company" means a telecommunications carrier operating entity to the extent that such entity provides telephone exchange service, including access service subject to part 69 of the Commission's rules (47 C.F.R. 69.1 et seq.), to—

(1) any service area that does not include either—

(A) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recent population statistics of the Bureau of the Census; or

(B) any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993; or

(2) fewer than 100,000 access lines within a State.

(oo) "Service Area" means a geographic area established by the Commission and the States for the purpose of determining universal service obligations and support mechanisms. In establishing a service area, the Commission and the States shall at a minimum consider—

(1) the principles and requirements of section 201A;

(2) the nature of Federal and State universal service support mechanisms;

(3) the historic area of service by a company and the economics of such company's operations; and

(4) the interest of consumers and competition in such area.

In the case of an area served by a rural telephone company, "service area" shall mean such company's "study area" unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board instituted under section 410(c), establish a different definition of service area for such company.

* * * * * * *

SEC. 201A. UNIVERSAL SERVICE PROTECTION AND ADVANCEMENT.

(a) UNIVERSAL SERVICE PRINCIPLES.—The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles:

(1) Quality services are to be provided at just, reasonable, and affordable rates.

(2) Access to advanced telecommunications and information services should be provided in all regions of the Nation.

(3) Consumers in rural and high cost areas should have access to telecommunications and information services, including interexchange services, reasonably comparable to those services provided in urban areas.

(4) Consumers in rural and high cost areas should have access to telecommunications and information services at rates that are reasonably comparable to rates charged for similar services in urban areas.

movement, manipulation, speech, or interpretation of information, unless the cost of making the services accessible and usable would result in an undue burden or adverse competitive impact. The carrier shall seek to permit the use of both standard and special equipment, and seek to minimize the need of individuals to acquire additional devices beyond those used by the general public to obtain such access.

(2) INQUIRY.—The Commission shall, within 2 years after the date of enactment of the Communications Act of 1994, complete an inquiry into policies, practices, and regulations which address the access needs of individuals with speech disabilities, including those who use electronic speechmaking devices and those who use telephone relay services. The inquiry will develop recommendations for more effective ways to incorporate current specialized consumer product equipment devices into the nation's telecommunications infrastructure in addition to addressing the speech-to-speech translation needs of individuals with significant voice disabilities.

(3) COMPATIBILITY.—Whenever an undue burden or adverse competitive impact would result from the requirements in paragraphs (1) and (2), the manufacturer that designs, develops, or fabricates the equipment or network service shall ensure that such equipment or service is compatible with existing peripheral devices or specialized customer premises equipment commonly used by persons with disabilities to achieve access, unless doing so would result in an undue burden or adverse competitive impact.

(4) DEFINITIONS.—As used in this section—

(A) UNDUE BURDEN.—The term "undue burden" means significant difficulty or expense. In determining whether the activity necessary to comply with the requirements of paragraphs (1), (2), and (3) would result in an undue burden, the factors to be considered include:

(i) The nature and cost of the activity.

(ii) The impact on the operation of the facility involved in the manufacture of the equipment or the deployment of the network service.

(iii) The financial resources of the telecommunications equipment manufacturer or telecommunications carrier;

(iv) The financial resources of the manufacturing affiliate of a Bell operating company in the case of manufacturing of equipment, as long as applicable regulatory rules prohibit cross-subsidization of equipment manufacturing with revenues from regulated telecommunications service or when the manufacturing activities are conducted in a separate subsidiary.

(v) The type of operations of the telecommunications equipment manufacturer or telecommunications carrier.

(B) ADVERSE COMPETITIVE IMPACT.—In determining whether the activity necessary to comply with the requirements of paragraphs (1), (2), and (3) would result in adverse competitive impact, the following factors shall be considered:

(i) Whether such activity would raise the cost of the equipment or network service in question beyond the level at which there would be sufficient consumer demand by the general population to make the equipment or network service profitable.

(ii) Whether such activity would, with respect to the equipment or network service in question, put the telecommunications equipment manufacturer or telecommunications carrier at a competitive disadvantage. This factor may be considered so long as competing telecommunications equipment manufacturers and telecommunications carriers are not held to the same obligation with respect to access by persons with disabilities.

(C) ACTIVITY.—For the purposes of this paragraph, the term "activity" includes—

(i) the research, design, development, deployment, and fabrication activities necessary to comply with the requirements of this section; and

(ii) the acquisition of the related materials and equipment components.

(5) COORDINATION IN DEVELOPING REGULATIONS.—Throughout the process of developing regulations required by this paragraph, the Commission shall coordinate and consult with representatives of individuals with disabilities and interested equipment and service providers to ensure their concerns and interests are given full consideration in such process.

(6) EFFECTIVE DATE.—The regulations required by this subsection shall become effective 18 months after the date of enactment of the Communications Act of 1994.

(e) ANNUAL SURVEY.—The Commission shall collect information regarding the deployment of technologies on a State-by-State basis and make such information available to the public.

(f) COST ALLOCATION REGULATIONS.—Notwithstanding any other time period, the Commission shall within 6 months adopt regulations, consistent with the need to protect universal service, to allocate a local exchange carrier's costs of deploying broadband telecommunications facilities between local exchange service and competitive services.

(g) NONDISCRIMINATORY ACCESS.—In considering any application under section 214, the Commission shall ensure that access to such applicant's telecommunications services is not denied to any group of potential subscribers because of their race, gender, national origin, income, age, or residence in a rural or high-cost area.

SEC. 230. TELECOMMUNICATIONS COMPETITION.

(a) REMOVAL OF BARRIERS TO ENTRY.—

(1) Except as provided in subsection (k), one year after the date of enactment of the Communications Act of 1994, no State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications services.

(2) No local government may, after 1 year after the date of enactment of the Communications Act of 1994, impose or collect any franchise, license, permit, or right-of-way fee or any assessment, rental, or any other charge or equivalent thereof as a condition for operating in the locality or for obtaining access to, occupying, or crossing public rights-of-way from any telecommunications carrier that distinguishes between or among telecommunications carriers, including the local exchange carrier. For purposes of this paragraph, a franchise, license, permit, or right-of-way fee or an assessment, rental, or any other charge or equivalent thereof does not include any imposition of general applicability which does not distinguish between or among telecommunications carriers, or any tax.

(3) Nothing in this subsection shall affect the application of section 332(c)(3) to commercial mobile services providers.

(4) If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates or is inconsistent with this subsection, the Commission shall immediately preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

(5) Nothing in this section restricts the ability of any State or local government entity to make its telecommunications facilities available to carriers so long as making such facilities available is not a telecommunications service.

(b) REGULATORY AUTHORITY.—Nothing in this section shall affect the ability of State officials to impose, on a competitively neutral basis and consistent with section 201A, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) OBLIGATIONS OF TELECOMMUNICATIONS CARRIERS.—

(1) To the extent that they provide telecommunications services, telecommunications carriers shall be deemed common carriers under this Act. The Commission shall prescribe regulations consistent with its determinations under subsection (g)(1) to require all telecommunications carriers, upon bona fide request, to provide to any provider of telecommunications equipment or any entity seeking to provide telecommunications services or information services, on reasonable terms and conditions and at rates that are just and reasonable and not unjustly or unreasonably discriminatory—

(A) interconnection to the carrier's telecommunications facilities and services at any technically and economically feasible point within the carrier's network;

(B) nondiscriminatory access on an unbundled basis where technically and economically feasible to any of the carrier's telecommunications facilities and information, including databases and signaling, necessary to the transmission and routing of any telecommunications service or information service and the interoperability of both carriers' networks;

(C) nondiscriminatory access, where technically and economically feasible, to the poles, ducts, conduits, and rights of way owned or controlled by the carrier;

(D) nondiscriminatory access where technically and economically feasible to the network functions and services of the carrier's telecommunications network, which shall be offered on an unbundled basis;

(E) telecommunications services and network functions on an unbundled basis without any unreasonable conditions or restrictions on the resale or sharing of those services or functions, including both origination and termination of telecommunications services (for purposes of this subparagraph, it shall not be deemed an unreasonable condition for a telecommunications carrier, consistent with the Commission's rules and State regulations, to limit the resale of services included in the definition of universal service to another telecommunications carrier who intends to resell that service to a category of customers different from the category of customers being offered that universal service by such carrier, nor shall it be deemed unreasonable to provide services included in the definition of universal service to another telecommunications carrier for resale at rates which reflect the actual cost of providing such services, exclusive of any universal service support received by such carrier in accordance with regulations promulgated under section 201A);

(F) local dialing parity, as soon as technically and economically feasible, in a manner that permits consumers to be able to dial the same number of digits when using any telecommunications carrier providing telephone exchange service or exchange access service through resale in a market, and in a manner that permits all such carriers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, directory listing, and no unreasonable dialing delays; and

(G) telecommunications number portability, as administered by an impartial entity, as soon as technically and economically feasible.

(2) A State may not, with respect to the provision of any intrastate telecommunications service, impose upon any telecommunications carrier any regulatory requirement concerning the provision of intrastate services inconsistent with the requirements imposed by the Commission on such carrier with respect to the provision of interstate services. Nothing in this subsection precludes a State from imposing requirements on a carrier for intrastate services that are necessary to further competition for local exchange or exchange access services, including intraLATA toll dialing parity, as long as the State's actions are not inconsistent with the Commission's regulations.

(d) CONSUMER INFORMATION.—As competition for telecommunications services develops, the Commission and State regulatory authorities shall ensure that consumers are given the information necessary to make informed choices among their telecommunications alternatives. Any telecommunications carrier that provides billing

New subsection (hh) defines a "local exchange carrier" to mean a provider of telephone exchange service that the FCC determines has market power. Such term does not include providers of commercial mobile services except to the extent that such a service is a replacement for a substantial portion of wireline telephone exchange service within a State. The statement regarding providers of commercial mobile service is intended to be consistent with language in section 332 of the 1934 Act. The definition of local exchange carrier is intended to cover a provider of telephone service that the FCC determines has market power *with respect to local exchange service.*

The definition of "telecommunications" in new subsection (ii) is expanded from the version is S. 1822 as introduced to cover all forms of information sent by means of electromagnetic transmission, without regard for the facilities used to provide such service. This definition excludes interactive games or shopping services and other services involving interaction with stored information that qualify as information services. The underlying transport and switching capabilities on which these interactive services are based, however, are "telecommunications services."

The phrase "between or among points specified by the user" is not intended to limit the definition of "telecommunications" to transmission between or among specific fixed points in a carrier's network predetermined or preselected by a user. The definition covers transmission and transport in a carrier's network involving origination and termination points. The definition is intended to include network services employing "virtual" numbers used in 900, 800, 700, and 500 services, for example, and may involve changes in termination. The intention of the phrase is to distinguish between traditional point-to-point common carrier services and broadcast services.

The definition of "telecommunication service" in new subsection (jj) was broadened from the version in S. 1822 as introduced to ensure that all entities providing service equivalent to the telephone exchange services provided by the existing telephone companies are brought under title II of the 1934 Act. This expanded definition ensures that these competitors will make contributions to universal service. This definition is intended to include commercial mobile services, competitive access services, and alternative local telecommunications services to the extent that they are offered to the public or to such classes of users as to be effectively available to the public. The Committee does not intend any distinction between the term "general public" and "public."

The term "telecommunications service" does not include information services, cable services, or "wireless" cable services. While the line of distinction between telecommunications services and information services cannot be drawn with scientific certainty, experience has demonstrated the need to draw such a distinction to enable the FCC to tailor its regulations appropriately.

The term "telecommunications service" is not intended to include the offering of telecommunications facilities for lease or resale by others for the provision of telecommunications services. For instance, the offering by an electric utility of bulk fiber optic capacity

(i.e., "dark fiber") does not fall within the definition of telecommunications service.

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.

The definition of "number portability" is clarified from the version in S. 1822 as introduced to make clear that number portability does not allow consumers to travel across the country or across the street and retain their existing telephone number. Number portability allows consumers to retain their existing telephone numbers when switching from one telecommunications carrier to another at the same location.

New subsection (mm) defines "information service" as the FCC has defined it. The definition is intended to provide the FCC with sufficient flexibility to amend its notion of what is and what is not an information service over time as technologies develop.

New subsection (nn) adds a definition of "rural telephone company" that includes companies that either serve a rural area or have fewer than 100,000 access lines within a State.

New subsection (oo) adds a definition of "service area." "Service area" means a geographic area established by the FCC and the States for the purpose of determining universal service obligations and support mechanisms. The FCC and the States shall define the boundaries of each "service area" for both urban and rural areas, consistent with the guidelines, if any, set forth in the statutory language.

Sec. 302.—Regulatory reform

Section 302 of S. 1822 as reported establishes the principles for permitting competition for local telephone service. It adds a new section 230 to the 1934 Act entitled "Telecommunications Competition."

New section 230(a)(1) preempts State and local statutes and regulations, and other State and local legal requirements, that may prohibit or have the effect of prohibiting interstate or intrastate competition for telecommunications services. The preemption is effective 1 year after enactment (except for rural markets described in subsection (k) of new section 230).

Paragraph (2) of new section 230(a) prevents any local government from distinguishing among local exchange carriers and other telecommunications carriers in imposing any franchise or other fee. The creation of a level playing field for the deployment of competitive telecommunications networks and services is of overriding na-

tional concern. Currently, one barrier to the deployment of competitive networks has been the unequal treatment by certain local governments of incumbent network providers and new entrants in the assessment and collection of local franchise fees in connection with the use of public rights-of-way. Some cities have imposed fees on competitors and not telephone companies; others have imposed fees on telephone companies but not competitors. This provision does not limit the authority of local governments to impose franchise or other fees on telecommunications carriers; it simply states that all providers of telecommunications service must be subject to the same franchise fee requirements as traditional local exchange carriers, and vice versa.

Paragraph (2) also states that States or local governments may make their own telecommunications facilities available to certain carriers and not others so long as making such facilities available is not a telecommunications service. This provision essentially allows a State or local government to discriminate not in the regulations it imposes, but in its offering of State-owned or local-owned telecommunications carriers. For instance, some State or local governments own and operate municipal energy utilities with excess fiber optic capacity that they make available to telecommunications carriers. Such municipal utility may not have sufficient capacity to make it available to all carriers in the market. This provision clarifies that State or local governments may sell or lease capacity on these facilities to some entities and not others without violating the principle of nondiscrimination. Since the offering of telecommunications capacity alone is not a "telecommunications services," the nondiscrimination provisions of this section would not, in any case, apply to the offering of such capacity.

The FCC shall, under paragraph (4) of new section 230(a), preempt any State or local government provision that violates section 230(a). This paragraph does not cast any presumption as to the legality of any State or local provision. A State or local government regulation or provision can only be preempted if the FCC determines, after notice and an opportunity for public comment, that such statute, regulation, or other legal requirement violates or is inconsistent with section 230(a). The public comment period will allow all parties, including competitors and Government officials, to present their positions to the FCC for consideration. The FCC must base any decision under this paragraph on the record before it.

Subsection (b) of new section 230 recognizes, consistent with the provisions of subsection (a), that States may impose, on a competitively neutral basis and consistent with the universal service directives of new section 201A of the 1934 Act, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers. For instance, States, and local authorities to the extent they are authorized by such State, continue to have the authority to impose competitively neutral universal service charges on all telecommunications carriers, to govern the use of rights-of-way, or to require telecommunications carriers to register with State or local business offices. States may not exercise this authority in a way that has the effect of imposing entry barriers or other prohibitions preempted by new

section 230(a). Subsection (b) is not intended to confer any additional authority to impose universal service requirements; all such authority is contained in new section 201A.

Subsection (c) of new section 230 sets forth the basic obligations of all telecommunications carriers to open and unbundle their networks in order to permit competition to develop. All telecommunications carriers shall be deemed common carriers, which makes them subject to Title II of the 1934 Act.

The intention of the Committee is that, in general, and except for rural markets, competition should be allowed to develop for local telecommunications services using certain of the facilities and services of existing and competitive carriers. It is unrealistic at this point to expect that competitors will be able to build their own stand-alone networks completely separate from the facilities of the existing local telephone companies. If access to a carrier's existing network and services is not made available to potential competitors, information providers, and providers of equipment, competition for local telecommunications service will be unlikely to become a reality for the vast majority of consumers. The Committee expects that competition will provide consumers substantial benefits in terms of technological innovation and lower prices.

This subsection, however, allows the FCC significant flexibility in the enforcement of these requirements. First of all, the FCC may forbear from applying most of these provisions to particular carriers or classes of carriers, or services or classes of services, if it determines that the carrier or service meets the criteria set forth under subsection (g) of new section 230. Second, carriers must comply with the unbundling and other obligations of subsection (c) only "upon bona fide request." Third, the FCC's regulations direct the carriers to comply on "reasonable terms and conditions." The Committee expects, for instance, that it is only reasonable for the carriers who provide such interconnection to be compensated for their costs of complying with these obligations by those who benefit from them. Fourth, the interconnection and unbundling requirements generally apply only where "technically and economically feasible," which was the standard suggested by Mr. Cullen, President of Bell Atlantic, in his testimony before the Committee on behalf of the RBOS. Fifth, subsection (1) of new section 230 requires the FCC to modify these obligations for rural telephone companies and allows the FCC to waive or modify these obligations for any carrier with less than 2 percent of the Nation's access lines. Finally, subsection (k) recognizes that States may adopt rules to protect against competition in certain rural markets.

Thus, the legislation provides the FCC with flexibility to tailor its regulations to implement these obligations to the needs and resources of the existing carrier and the potential competitors. The Committee expects, however, that the FCC will develop regulations to implement the requirements of subsection (c)(1) that will allow competition to have the opportunity to develop in most markets around the country.

Subsection (c) of new section 230 requires all telecommunications carriers to provide interconnection to their networks upon request. Section 332(c)(1)(B) of the 1934 Act permits the FCC to order a common carrier to establish physical connections, upon request,

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104th Congress Report
SENATE

2d Session 104-230

TELECOMMUNICATIONS ACT OF 1996

February 1, 1996.--Ordered to be printed

. . .

new section 253--removal of barriers to entry

Senate bill

Section 20(a) adds a new section 254 to the Communications Act and is intended to remove all barriers to entry in the provision of telecommunications services.

Subsection (a) of new section 254 preempts any State and local statutes and regulations, or other State and local legal requirements, that may prohibit or have the effect of prohibiting any entity from providing interstate or intrastate telecommunications services.

Subsection (b) of section 254 preserves a State's authority to impose, on a competitively neutral basis and consistent with universal service provisions, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers. States may not exercise this authority in a way that has the effect of imposing entry barriers or other prohibitions preempted by new section 254(a).

Subsection (c) of new section 254 provides that nothing in new section 254 affects the authority of States or local governments to manage the public rights-of-way or to require, on a competitively neutral and nondiscriminatory basis, fair and reasonable compensation for the use of public rights-of-way, on a nondiscriminatory basis, provided any compensation required is publicly disclosed.

Subsection (d) requires the Commission, after notice and an opportunity for public comment, to preempt the enforcement

of any State or local statutes, regulations or legal requirements that violate or are inconsistent with the prohibition on entry barriers contained in subsections (a) or (b) of section 254.

Subsection (e) of new section 254 simply clarifies that new section 254 does not affect the application of section 332(c)(3) of the Communications Act to CMS providers.

Section 309 adds a new section 263 to the Communications Act and is intended to permit States to adopt certain statutes or regulations regarding the provision of service by competing telecommunications carriers in rural markets. Such statutes or regulations may be no more restrictive than the criteria set forth in section 309. The Commission is authorized to preempt any State statute or regulation that is inconsistent with the Commission's regulations implementing this section.

House amendment

The House provisions are identical or similar to subsections 254(a), (b) and (c). The House amendment does not have a similar provision (d) requiring the Commission to preempt State or local barriers to entry, if it makes a determination that they have been erected.

Conference agreement

The conference agreement adopts the Senate provisions.

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

The rural markets provision in section 309 of the Senate bill is simplified and moved to this section. The modification clarifies that, without violating the prohibition on barriers to entry, a State may require a competitor seeking to provide service in a rural market to meet the requirements for designation as an eligible telecommunications carrier. That is, the State may require the competitor to offer service and advertise throughout the service area served by a rural telephone company. The provision would not apply if the rural

telephone company has obtained an exemption, suspension, or modification under new section 251(f) that effectively prevents a competitor from meeting the eligible telecommunications carrier requirements. In addition, the provision would not apply to providers of CMS.

DAN SCHAEFER
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EDUCATION, TRAINING, EMPLOYMENT AND HOUSING

Congress of the United States
House of Representatives
Washington, D.C.

August 5, 1996

The Honorable Reed H. Hundt
Chairman
Federal Communications Commision
1919 M Street N.W.
Washington, D.C. 20554

Re: CC Docket No. 96-98 and CCBPol 96-14

Dear Chairman Hundt:

One of the fundementals of free market competition is the ability of firms to enter a business easily and rapidly. It is for that reason that we include a provision in the Telecommunications Act of 1996 -- section 253(a) -- prohibiting state or local governments from imposing barriers to the provision of telecommunications service by any entity. The Commission is considering the implementation of this section in numerous proceedings, including the major docket implementing sections 251 and 252 (CC Docket No. 96-98) and the proceeding considering the preemption of the Texas telecommunications law (CCBPol 96-14).

It is especially important for the Commission to note the fact that section 253(a) prohibits the imposition of barriers on "any entity". In other words, state and local governments are prohibited from adopting laws or regulations that permit some entities to enter the market while excluding others. Such discrimination is simply unlawful.

More specifically, it is clear from the report language in the Conference Agreement that Congress recognized that utilities may play a major role in the development of facilities-based local telecommunications competition and that any prohibition on their provision of service should be preempted. This language states: "[E]xplicit prohibitions on entry by a utility into telecommunications are preempted under this section." The Commission thus must reject any state or local action that prohibits entry into the telecommunications business by any utility, regardless of the form of ownership or control. In addition, the Commission should ensure its interconnection and access regulations treat utilities the same as other entities.

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Thank you for your attention to this matter. We look forward to hearing from you and seeing the Commission's decisions implementing this critical provision.

Sincerely,

DAN SCHAEFER
Member of Congress

J. ROBERT KERREY
NEBRASKA

United States Senate

WASHINGTON, DC 20510-2704

September 9, 1997

The Honorable Reed Hundt
Chairman
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Dear ~~Mr. Chairman:~~ Reed,

Anti-competitive laws passed by state and local governments pose a real threat to the development of competition in local telecommunications markets. In the wake of the Telecommunications Act, several states have passed legislation that prohibits or significantly impairs the ability of publicly-owned utilities to provide telecommunications services themselves or to make their facilities available to other potential providers of telecommunications services. I am concerned that these actions are significantly delaying consumers ability to excercise their economic power by choosing between local telecommunications carriers.

Congress created Section 253 of the Telecommunications Act to address this problem by granting the Federal Communications Commission (FCC) authority to preempt state and local legal requirements that pose a barrier to entry into telecommunications by "any entity". The law makes no distinction among types of entities or forms of ownership. Section 253 states, "No state or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service". In using the term "any entity", Congress intended to give entities of all kinds, including publicly-owned utilities, the opportunity to enter these markets.

I understand that preemption proceedings are pending before the FCC concerning a Texas law that explicitly bars municipalities and municipal utilities from participating directly or indirectly in the provision of telecommunications services. The FCC should issue a prompt and decisive decision about this case that makes it clear that this law and others like it will not stand contrary to the wishes of Congress. I encourage the Commission to act on these proceedings without further delay.

Thank you for your careful consideration of my concerns.

Sincerely,

J. Robert Kerrey

VIRGIL H. GOODE, JR.
5TH DISTRICT, VIRGINIA

Congress of the United States
House of Representatives
Washington, DC 20515–4605

February 12, 1999

The Honorable William Kennard
Chairman
Federal Communications Commission
1919 M Street, NW
Washington, D.C. 20554-0001

Dear Mr. Kennard,

The Federal Communications Commission (FCC) now has pending before it a very important petition regarding the ability of municipal utilities to provide telecommunications services. The petition, filed by municipally-owned utilities in Missouri (CC Docket No. 98-122) asks that the FCC take action under Section 253 of the Telecommunications Act of 1996. This case has national implications because of similar laws in other states (Texas, Arkansas, Tennessee, Nevada, Minnesota, and Virginia) which restrict municipal utility entry into the telecommunications market.

State prohibitions on telecommunications activities by municipal utilities clearly conflict with the language and intent of Section 253 (a) of the Telecommunications Act of 1996 — which was designed to ensure that "*any entity*" could provide communications services in a newly competitive marketplace.

Approximately 75% of municipal power systems in the U.S. serve cities with populations of less than 10,000 residents. These utilities, just as they brought electrical service to traditionally underserved areas of the country, are now prepared to bring new telecommunications services to their communities. Barring municipal utilities from utilizing their communications infrastructure to provide the telecommunications services will undermine the benefits of local control - and unfairly restrict the availability of services and the development of competition in rural communities throughout the U.S.

I ask that you show every consideration to approve the petition for preemption filed by the municipally-owned utilities in Missouri because of its impact in jurisdictions like Virginia. Thank you again for your consideration and with kind regards, I am

Sincerely yours,

Virgil H. Goode

bcc: Mr. Duane S. Dahlquist

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