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September 14, 1999

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RECEIVED  
AUG 15 2000  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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

Dear Ms. Donovan-May:

This responds to your request of September 7, 1999, for additional information about the communications services that public power utilities are offering, particularly in rural areas, in states that do not have barriers to municipal entry. We also respond to the *ex parte* submissions that SBC Communications made in three meetings with Commission staff on September 7, as reflected in a letter from B. Jeannie Fry to Magalie R. Salas dated September 8, 1999.

**I. COMMUNICATIONS SERVICES OFFERED BY PUBLIC POWER UTILITIES IN RURAL AREAS**

The American Public Power Association represents the interests of approximately 2,000 public power utilities located in all states except Hawaii.<sup>1</sup> Approximately three-fourths of these utilities serve rural communities that have less than 10,000 residents. Many such utilities have stepped forward to fill voids in communications services left by the private sector, just as they stepped forward to provide electric power decades ago when privately-owned electric utilities literally left their communities in the dark while focusing on more lucrative urban markets. In the absence of state barriers to entry, many additional public power utilities could help our Nation overcome the growing "Digital Divide" between urban and rural areas.

<sup>1</sup> Public power utilities include electric power systems owned and operated by municipalities, counties, state and regional power authorities, public power districts, irrigation districts and various other government entities.

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We do not have comprehensive data on all of the communications services that public power utilities are currently providing. Instead, we offer you (1) a partial list of municipal cable systems, identifying 75 separate communities in 24 states, primarily located in rural or small markets (Attachment A); (2) website addresses of ten representative public power utilities (Attachment B); (3) detailed descriptions of three communications networks built by public power systems (Glasgow, KY; Harlan, IA; and Vineland, NJ); and (4) a description of the Municipal Electric Authority of Georgia (MEAG), which, if freed of State barriers to entry, could furnish telecommunications support to public and private communications providers throughout the state of Georgia.

**II. RESPONSE TO SBC's EX PARTE SUBMISSION**

In its *ex parte* submission of September 7, SBC makes six main arguments: (1) that this case is "controlled" by *City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999); (2) that the rationale of *Gregory v. Ashcroft*, 501 U.S. 452 (1991), applies to municipal electric utilities as well as to municipalities because municipal electric utilities and municipalities are indistinguishable under Missouri law; (3) that the text of Section 253(a) contains no clear and unmistakable language compelling preemption in this case; (4) that the Commission cannot consider the legislative history of Section 253; (5) that the legislative history does not, in any event, support preemption in this case; (6) that HB 620 is a limited, reasonable response to a perceived conflict of interest; and (7) that SBC has now lost 17 percent of the business access lines to competitors in Missouri. None of these claims has merit.

First, this case is plainly not "controlled" by *Abilene*. To the contrary, the Commission expressly stated in paragraph 179 of the *Texas Order* that "we do not decide at this time whether section 253 bars the state of Texas from prohibiting the provision of telecommunications services by a municipally-owned electric utility." Similarly, the D.C. Circuit made clear in footnote 7 of its *Abilene* opinion that it was not deciding "whether public utilities are entities within § 253(a)'s meaning." As the Commission assured the D.C. Circuit during oral argument in the *Abilene* case, that issue would be decided for the first time in this case.

Second, SBC's contention that municipal electric utilities are indistinguishable from municipalities under Missouri law is both incorrect and irrelevant. First, as *City of Springfield's* Charter shows, several of SBC's factual assertions are simply wrong. According to SBC, "[i]t is well settled under Missouri law that publicly owned utilities are run by the municipality's city council;" that a municipal electric utility "may even be abolished ... by the City Council;" and that "[m]unicipally owned utilities do not pay franchise taxes; instead, they may make voluntary payments to the city." SBC Submission at 2, 3, 4. Under the *Springfield Charter*, however, *Springfield's* municipal electric utility is run by the Board of Public Utilities rather than the City Council; the City Council cannot unilaterally abolish the Board;<sup>2</sup> and the municipal electric utility has a mandatory, not a voluntary, obligation to

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<sup>2</sup> Under Section 19.21 of the Charter, the Board may be abolished by a 2/3 vote of the total membership of the City Council and the Board. If all nine members of the City Council

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make payments “in lieu of taxes.” Charter, Article XVI, §§ 16.2(1), 19.21 and 16.15, Attachment Q to Missouri Petition.

In any event, even if municipal electric utilities and municipalities were indeed indistinguishable for the purposes that SBC discusses, it does not follow that the holding of *Abilene* as to municipalities necessarily applies to municipal electric utilities. The key question in preemption analysis is whether Congress intended that result. *Gregory v. Ashcroft* does not change that question but merely imposes an elevated standard of certainty in cases involving fundamental or traditional areas of state sovereignty. Here, whatever Congress may have intended with respect to municipalities, as such, it made the necessary “plain statement” with respect to municipal electric utilities. That is all that matters.

Third, it is true that Section 253(a) does not expressly mention “municipal electric utilities.” *Ashcroft* does not require an express statement, however, but merely a “plain” statement of congressional intent. *Ashcroft*, 502 U.S. at 467. Relying on *Salinas v. United States*, 118 S.Ct. 469 (1997), which the *Abilene* court did not consider, we continue to submit that Congress satisfied the *Ashcroft* standard by using the modifier “any” before “entity” in Section 253(a). In *Salinas*, the Supreme Court held that Congress’s expansive, unqualified use of the modifier “any” precludes efforts to impose narrowing interpretations, introduces no ambiguity, and satisfies *Ashcroft*’s “plain statement” standard. *Id.* at 473. We urge the Commission to apply the same rationale here.

Fourth, SBC’s suggestion that the Commission cannot consider legislative intent in applying the *Ashcroft* standard is simply wrong. *Ashcroft* does not require an agency or court to ignore any of the traditional tools of statutory construction, including the language, structure, legislative history and purposes of the statute. *Bell Atlantic Telephone Companies v. Federal Communications Comm’n*, 131 F.3d 1044 (D.C. Cir. 1997). *Ashcroft* simply requires that the agency or court deny preemption if it has any doubts after exhausting these tools. Thus, the Commission itself observed in the *Texas Order* that it is appropriate to search for the meaning of Section 253(a) “in the statute or its legislative history.” *Texas Order*, ¶ 187. The Supreme Court considered legislative intent in *Salinas*, 118 S.Ct. at 475, and the D.C. Circuit considered legislative history in *Abilene*, finding that it does not apply to municipalities, as such, 164 F.3d at 53 n.7.

Fifth, as Missouri Municipals showed in their Petition, at 6-11, the legislative history of Section 253(a), especially the history in the 103<sup>rd</sup> Congress, is replete with proof that Congress understood and intended that the Commission protect public power utilities from state barriers to entry. As the Missouri Municipals pointed out, the American Public Power Association and others advised Congress that there were many kinds of public power utilities that could contribute to the rapid development of the National Information Infrastructure, and Congress responded favorably by crafting the key definitions and preemption provisions of the Telecommunications Act so as to encourage as many of these utilities to step forward as possible. Indeed, in its brief to the D.C. Circuit in the *Abilene* case, the Commission

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supported such a vote, they would still have to be joined by at least five of the Board’s eleven members.

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itself acknowledged that the legislative history of Section 253(a) includes that of the 103<sup>rd</sup> Congress and that both the 103<sup>rd</sup> and 104<sup>th</sup> Congresses frequently referred to public power utilities, as distinguished from municipalities.

In arguing that the legislative history does not support preemption in this case, SBC makes two main points. First, it contends that Congress was not thinking about publicly owned utilities when it stated in the Joint Conference Report accompanying the Telecommunications Act that “explicit prohibitions on entry by a utility into telecommunications are prohibited under [Section 253].” SBC Submission at 6, quoting S. Conf. Rep. 104-230 at 127. Second, SBC maintains that the Missouri Municipals’ reliance on post-enactment letters from Members of Congress is equally unavailing because such statements carry little weight. SBC Submission at 6-7.

Notably, SBC addresses only a single statement in the legislative history of the 104<sup>th</sup> Congress and studiously ignores the history of the 103<sup>rd</sup> Congress, which makes clear that Congress most assuredly had municipal electric utilities in mind when it drafted the operative language of Section 253(a). SBC’s unsupported speculation that Congress did not mean what it said in its statement in the Joint Conference Report was also flatly refuted by its author, Rep. Dan Shaefer (R-CO), who explained in a letter to Chairman Reed Hundt dated August 5, 1996, that his language was intended to cover utilities of all kinds, regardless of the form of ownership or control. Attachment I to the Missouri Petition for Preemption. As to the other letters from Members of Congress, the Missouri Municipals do not rely on them to fill a gap in the record but merely to add further weight to the many pre-enactment statements already present. Furthermore, the Commission itself relies on post-enactment statements of knowledgeable legislators when they have useful clarifications to give, as the Commission recently did in its Universal Service litigation.

Sixth, SBC’s effort to justify HB 620 as a limited, reasonable legislative response to a perceived conflict of interest must fail for several reasons. First, Section 253(a) does not authorize a state to allow entities to provide some telecommunications services but not others -- it prohibits states from enacting measures that may have the effect of prohibiting the provision of “any interstate or intrastate telecommunications service” (emphasis added). Second, the supposed “perceived conflict of interest” simply does not exist, as telecommunications providers, including municipal providers, are regulated by the Missouri Public Service Commission rather than by local governments. Third, and most important, the Commission rejected this very argument in paragraph 190 of the *Texas Order*, finding that

[W]e recognize that entry by municipalities into telecommunications may raise issues regarding taxpayer protection from the economic risks of entry, as well as questions concerning possible regulatory bias when separate arms of a municipality act as both a regulator and a competitor. We believe, however, that these issues can be dealt with successfully through measures that are much less restrictive than an outright ban on entry, permitting consumers to reap the benefits of increased competition.

Finally, we are not in a position to challenge the “estimated lines served by CLECs” and “Percentage of business lines lost to competitors” in SBC’s chart entitled “Missouri Competition

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Numbers.” We note, however, that even if SBC’s figures were correct, they would be of minimal value here because: (1) they include resold lines and thus do not reflect the true extent of facilities-based competition in Missouri, even for business access lines; (2) they include only business access lines and thus say nothing about competition in the residential market; and (3) they do not separate urban and rural access lines and thus do nothing to disprove the existence of a Digital Divide in Missouri.

A few months ago, the Attorney General of Missouri found, based on SBC’s own data, that competition is totally lacking in Missouri’s residential market. Attachment to Letter from James Baller to Magalie Roman Salas dated April 26, 1999. SBC has offered nothing to show that anything has changed.

If you have additional questions or would like more information, please let me know.

Sincerely,

/s/

James Baller

Enclosures

cc: Mr. Christopher Wright  
Mr. James Carr  
Ms. Aliza Katz  
Mr. Bill Bailey  
Ms. Margaret Egler  
Mr. Kyle Dixon  
Ms. Sarah Whitesell  
Individuals on the Attached Lists