SUPREME COURT OF THE UNITED STATES

Nos. 02–1238, 02–1386, and 02–1405

JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL OF MISSOURI, PETITIONER
02–1238 *v.*
MISSOURI MUNICIPAL LEAGUE ET AL.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES, PETITIONERS
02–1386 *v.*
MISSOURI MUNICIPAL LEAGUE ET AL.

SOUTHWESTERN BELL TELEPHONE, L. P., FKA SOUTHWESTERN BELL TELEPHONE COMPANY, PETITIONER
02–1405 *v.*
MISSOURI MUNICIPAL LEAGUE ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[March 24, 2004]

JUSTICE STEVENS, dissenting.

In the Telecommunications Act of 1996 (1996 Act), Congress created "a new telecommunications regime designed to foster competition in local telephone markets." *Verizon Md. Inc.* v. *Public Serv. Comm'n of Md.,* 535 U. S. 635, 638 (2002). Reasonable minds have differed as to whether municipalities' participation in telecommunications markets serves or disserves the statute's procompetitive goals. On the one hand, some have argued that municipally owned utilities enjoy unfair competitive advantages that will deter entry by private firms and impair the normal

development of healthy, competitive markets.[1] On the other hand, members of the Federal Communications Commission, the regulatory agency charged with implementation of the 1996 Act, have taken the view that municipal entry "would further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities in which municipally-owned utilities have great competitive potential."[2] The answer to the question presented in these cases does not, of course, turn on which side has the better view in this policy debate. It turns on whether Congress itself intended to take sides when it passed the 1996 Act.

In §253 of the Communications Act of 1934, as added by §101 of the 1996 Act, Congress provided that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," unless the State or local law is "competitively neutral" and "necessary to . . . protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." 47 U. S. C. §§253(a), (b). It is common ground among the parties that Congress intended to include utilities in the category of "entities" protected by

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[1] See, *e.g.,* Note, Municipal Entry into the Broadband Cable Market: Recognizing the Inequities Inherent in Allowing Publicly Owned Cable Systems to Compete Directly against Private Providers, 95 Nw. U. L. Rev. 1099 (2001).

[2] *In re Missouri Municipal League,* 16 FCC Rcd. 1157, 1172 (2001). Three Commissioners wrote separately to underscore this point. *Ibid.* (statement of Chairman Kennard and Commissioner Tristani) (describing municipally owned utilities as a "promising class of local telecommunications competitors"); *id.,* at 1173 (statement of Commissioner Ness) (noting that "municipal utilities can serve as key players in the effort to bring competition to communities across the country, especially those in rural areas").

§253. See, *e.g.,* Reply Brief for Federal Petitioners in No. 02–1238 et al., p. 16 ("Congress clearly did intend to pre-empt state laws that closed the telecommunications market, including those that closed the market to electric or other utilities"). The legislative history of §253 confirms the point: Congress clearly meant for §253 to pre-empt "explicit prohibitions on entry by a utility into telecommunications." S. Rep. No. 104–230, p. 127 (1996).

But while petitioners acknowledge the unmistakable clarity of Congress' intent to protect utilities' ability to enter local telephone markets, they contend that Congress' intent to protect the subset of utilities that are owned and operated by municipalities is somehow less than clear. The assertion that Congress could have used the term "any entity" to include utilities generally, but not *municipally owned* utilities, must rest on one of two assumptions: Either Congress was unaware that such utilities exist, or it deliberately ignored their existence when drafting §253. Both propositions are manifestly implausible, given the sheer number of public utilities in the United States.[3] Indeed, elsewhere in the 1996 Act, Congress narrowed the definition of the word "utility," as used in the Pole Attachments Act, 47 U. S. C. §224, to exclude utilities "owned by . . . any State," including its political subdivisions—a clear indication that Congress was aware that many utilities are in fact owned by States and their political subdivisions. §§224(a)(1), (a)(3). Moreover, the question of municipal participation in local telephone markets was clearly brought to Congress' attention. In hearings on a predecessor bill, Congress heard from a representative of the American Public Power Association who described

[3] For example, as of 2001, there were more than 2,000 publicly owned electric utilities in the United States, compared to just over 230 investor-owned utilities. Am. Public Power Assn., 2003 Annual Directory & Statistical Report 13.

public utilities' unique potential to promote competition, particularly in small cities, towns, and rural communities underserved by private companies. Hearings on S. 1822 before the Senate Committee on Commerce, Science, and Transportation, 103d Cong., 2d Sess., 351–360 (1994) (statement of William J. Ray, General Manager, Glasgow Electric Plant Board).[4] In short, there is every reason to suppose that Congress meant precisely what it said: No State or local law shall prohibit or have the effect of prohibiting the ability of *any* entity, public or private, from entering the telecommunications market.

The question that remains is whether reading the statute to give effect to Congress' intent necessarily will produce the absurd results that the Court suggests. *Ante,* at 7–9. "As in all cases[,] our task is to interpret the words of [the statute] in light of the purposes Congress sought to serve." *Chapman* v. *Houston Welfare Rights Organization,* 441 U. S. 600, 608 (1979). Before nullifying Congress' evident purpose in an effort to avoid hypothetical absurd results, I would first decide whether the statute can reasonably be read so as to avoid such absurdities, without casting aside congressional intent.

The Court begins its analysis by asking us to imagine how §253 might apply to "a state statute authorizing municipalities to operate specified utilities, to provide water and electricity but nothing else," or to a State's failure to provide the necessary capital to a state-run utility "raring" to enter the telecommunications market. *Ante,* at 8–9. Certainly one might plausibly interpret

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[4] This testimony prompted the Senate manager of the bill to remark: "I think the rural electric associations, the municipalities, and the investor-owned utilities, are all positioned to make a real contribution in this telecommunications area, and I do think it is important that we make sure we have got the right language to accomplish what we wish accomplished here." Hearings, at 379 (statement of Sen. Lott).

§253, as the Court does, to forbid States' refusals to provide broader authorization or to provide necessary capital as impermissible prohibitions on entry. And as the Court observes, such an interpretation would undeniably produce absurd results; it would leave covered entities in a kind of legal limbo, armed with a federal-law freedom to enter the market but lacking the state-law power to do so. But we need not—and in my opinion, should not—interpret §253 in this fashion. We should instead read the statute's reference to state and local laws that "prohibit or have the effect of prohibiting the *ability* of any entity," §253(a), to enter the telecommunications business to embody an implicit understanding that the only "entities" covered by §253 are entities otherwise able to enter the business—*i.e.,* entities both authorized to provide telecommunications services and capable of providing such services without the State's direct assistance. In other words, §253 prohibits States from withdrawing municipalities' pre-existing authority to enter the telecommunications business, but does not command that States affirmatively grant either that authority or the means with which to carry it out.

Of course, the Court asserts that still other absurd results would follow from application of §253 pre-emption to state laws that withdraw a municipality's pre-existing authority to enter the telecommunications business. But these results are, on closer examination, perhaps not so absurd after all. The Court first contends that reading §253 in this manner will produce a "national crazy quilt" of public telecommunications authority, where the possibility of municipal participation in the telecommunications market turns on the scope of the authority each State has already granted to its subdivisions. *Ante,* at 9. But as the Court acknowledges, permitting States such as Missouri to prohibit municipalities from providing telecommunications services hardly will help the cause of national consis-

tency. *Ibid*. That the "crazy quilt" the Court describes is the product of political choices made by Congress rather than state legislatures, see *ante,* at 9–10, renders it no more absurd than the "crazy quilt" that will result from leaving the matter of municipal entry entirely to individual States' discretion.

The Court also contends that applying §253 pre-emption to bar withdrawal of authority to enter the telecommunications market will result in "the federal creation of a one-way ratchet": "A State or municipality could give the power, but it could not take it away later." *Ante,* at 10. But nothing in §253 prohibits States from scaling back municipalities' authority in a general way. A State may withdraw comprehensive authorization in favor of enumerating specific municipal powers, or even abolish municipalities altogether. Such general withdrawals of authority may very well "have the effect of prohibiting" municipalities' ability to enter the telecommunications market, see *ante,* at 13, just as enforcement of corporate governance and tax laws might "have the effect of prohibiting" other entities' ability to enter. §253(a). But §253 clearly does not pre-empt every state law that "has the effect" of restraining entry. It pre-empts only those that constitute *nonneutral* restraints on entry. §253(b). A general redefinition of municipal authority no more constitutes a prohibited nonneutral restraint on entry than enforcement of other laws of general applicability that, practically speaking, may make it more difficult for certain entities to enter the telecommunications business.

As I read the statute, the one thing a State may not do is enact a statute or regulation specifically aimed at preventing municipalities or other entities from providing telecommunications services. This prohibition would certainly apply to a law like Missouri's, which "advertise[s] [its] prohibitory agenda on [its] fac[e]." *Ante,* at 13. But it would also apply to a law that accomplished a

similar result by other means—for example, a law that permitted only private telecommunications carriers to receive federal universal service support or access to unbundled network elements.[5] As the Court notes, there is little reason to think that legislation that targets municipalities' ability to provide telecommunications services is "'neutral' in any sense of the word," or that it is designed to do anything other than impede competition, rather than enhance it. *Ante,* at 11. To the extent that reading §253 to forbid such protectionist legislation creates a "one-way ratchet," it is one perfectly consistent with the goal of promoting competition in the telecommunications market, while otherwise preserving States' ability to define the scope of authority held by their political subdivisions.[6]

The Court's concern about hypothetical absurd results is particularly inappropriate because the pre-emptive effect of §253 is not automatic, but requires the FCC's intervention. §253(d). Rather than assume that the FCC will

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[5] The operative distinction for §253 purposes is thus not between implicit and explicit repeals of authority. See *ante,* at 13. It is, rather, the distinction between laws that generally redefine the scope of municipal authority and laws that specifically target municipal authority to enter the telecommunications business, whether by direct prohibition or indirect barriers to entry.

[6] The goal of striking a balance between promoting competition and preserving States' general regulatory authority surely supplies a sufficient justification for "preempting only those laws that self-consciously interfere with the delivery of telecommunications services," rather than all generally applicable laws that might have the practical effect of restraining entry. *Ibid.* But even if, as the Court asserts, there were "no justification" for drawing the line at laws that "self-consciously" interfere with entities' ability to provide telecommunications services, *ibid.,* that surely would not be a valid reason for refusing to allow the FCC to pre-empt those that do create such an interference. We generally do not refuse to give effect to a statute simply because it "might have gone farther than it did." *Roschen* v. *Ward,* 279 U. S. 337, 339 (1929).

apply the statute improperly, and rather than stretch our imaginations to identify possible problems in cases not before the Court, we should confront the problem presented by the cases at hand and endorse the most reasonable interpretation of the statute that both fulfills Congress' purpose and avoids unnecessary infringement on state prerogatives. I would accordingly affirm the judgment of the Court of Appeals.