

MAYER, BROWN, ROWE & MAW LLP'S
SUPREME COURT DOCKET REPORT
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Today the Supreme Court granted certiorari in and consolidated three cases of potential interest to the business community. Amicus briefs in support of the petitioners are due on Thursday, August 7, 2003, and amicus briefs in support of the respondents are due on Thursday, September 11, 2003. Any questions about these cases should be directed to Miriam Nemetz (202-263-3253) or Robert Bronston (202-263-3244) in our Washington office.

Telecommunications Act of 1996 — Preemption. Under Section 101(a) of the Telecommunications Act of 1996 (the “Act”), no state or local statute or regulation “may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” 47 U.S.C. § 253(a). The Supreme Court granted certiorari in *FCC v. Missouri Municipal League*, 02-1386, *Nixon v. Missouri Municipal League*, 02-1238, and *Southwestern Bell Telephone, L.P. v. Missouri Municipal League*, 02-1405, to decide whether Section 101 preempts a state statute that forbids municipalities from offering telecommunications services.

The Act authorizes the Federal Communications Commission (“FCC”) to preempt the enforcement of any statute that violates Section 101(a). See 47 U.S.C. § 253(d). On July 8, 1998, the Missouri Municipal League, along with several municipal utilities and public power companies, petitioned the FCC to preempt enforcement of a Missouri statute that barred the State’s political subdivisions from providing or offering for sale “telecommunications service[s] for which a certificate of service authority is required.” Mo. Ann. Stat. § 392.410(7).

The FCC refused to preempt Missouri’s statute. *In re Missouri Municipal League*, 16 F.C.C. Rcd 1157 (2001). Relying heavily on an earlier decision in which it had found that political subdivisions of a State are not “entities” under Section 101 of the Act, see *id.* at 1159 (citing *In re Public Utility Commission*, 13 F.C.C. Rcd 3460 (1997)), and observing that the D.C. Circuit had affirmed this decision (see *City of Abilene v. FCC*, 164 F.3d 49 (1999)), the FCC extended its application to all municipally-owned utilities that do not have a corporate identity separate from the State. See 16 F.C.C. Rcd at 1160, 1166–1170. Relying on *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the FCC also reasoned that a federal statute may not be construed to preempt “traditional state powers” unless Congress makes its intention to do so “unmistakably clear.” 16 F.C.C. Rcd at 1160. Section 101 of the Act, the Commission concluded, does not indicate clear congressional intent to intervene in the relationship between states and their political subdivisions. See *id.*

The Eighth Circuit vacated the order and remanded to the FCC for further consideration, holding that municipalities and municipally-owned utilities fall within the plain meaning of the phrase “any entity.” See *Missouri Municipal League v. FCC*, 299 F.3d 949 (2002). The court of

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appeals noted that the dictionary definition of “entity” includes a “governmental entity” and that “read naturally, the word ‘any’ has an expansive meaning.” *Id.* at 953–954. The Eighth Circuit expressly rejected the D.C. Circuit’s decision in *City of Abilene*, thus creating a circuit split over the interpretation of Section 101. See *id.* at 954–955.

Because of the fairness concerns and other issues that are raised when municipalities seek to compete with private telecommunications companies, many states have prohibited their political subdivisions from providing local telephone service. Because the Supreme Court will determine the validity of such prohibitions, this case is of interest to all providers of local telecommunications services. More generally, the Supreme Court is likely to elucidate how explicitly Congress must express its intention to preempt state laws pertaining to matters within the traditional sovereignty of the States.

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