IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RECORD NOS. 01-1741(L) and 01-1800

**THE CITY OF BRISTOL, VIRGINIA d/b/a/
BRISTOL VIRGINIA UTILITIES BOARD,**

Plaintiff/Appellee,

v.

RANDOLPH A. BEALES, Attorney General,

Defendant-Appellant,

**VIRGINIA TELECOMMUNICATIONS
INDUSTRY ASSOCIATION,**

Intervenor/Defendant-Appellant.

**On Appeal From the United States District Court
For the Western District of Virginia -- Abingdon Division**

BRIEF OF *AMICI CURIAE* THE AMERICAN PUBLIC POWER ASSOCIATION AND THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS IN SUPPORT OF AFFIRMANCE

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
RICHMOND DIVISION

City of Bristol VA v. Beales and VTIA,
Nos. 01-1741 and 01-1800.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO FRAP 26.1 AND LOCAL RULE 26.1

Pursuant to FRAP 26.1 and Local Rule 26.1, Amicus Curiae the American Public Power Association (APPA) makes the following disclosures:

1. APPA is not a publicly held corporation or other publicly held entity.

2. APPA does not have any parent corporations.

3. APPA has no stock held by any entity.

4. There is no other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation.

5. APPA is a trade association for the purposes of Rule 26.1. Its members are listed in Attachment A.

Steven R. Minor	October 22, 2001
(Signature)	(Date)

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Pursuant to FRAP 26.1 and Local Rule 26.1, Amicus Curiae the National Association of Telecommunications Officers and Advisors (NATOA) makes the following disclosures:

6. NATOA is not a publicly held corporation or other publicly held entity.

7. NATOA does not have any parent corporations.

8. NATOA has no stock held by any entity.

9. There is no other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation.

10. NATOA is a trade association for the purposes of Rule 26.1. Its members are listed in Attachment B.

Steven R. Minor	October 22, 2001
(Signature)	(Date)

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INTEREST OF *AMICI CURIAE*

The American Public Power Association ("APPA") and the National Association of Telecommunications Officers and Advisors ("NATOA") jointly file this brief as *amicus curiae* in support of affirmance of the District Court's decision.

The American Public Power Association ("APPA") is a national service organization that represents the interests of more than 2,000 consumer-owned, not-for-profit electric utilities. Approximately one of every seven Americans receives electricity from these utilities, which are operated by municipalities, counties, authorities, states and public utility districts. Members of APPA are located in every state except Hawaii, and twenty-four are located in Virginia. Although some of APPA's members are located in large cities, three-quarters of APPA's members serve communities with populations of less than 10,000. In more than thirty-three states that do not have barriers to municipal entry, members of APPA have established public communications systems that are contributing greatly to the economic development, educational and occupational opportunity, and quality of life of their communities.

NATOA is a national service organization that represents the interests of local governments throughout the United States on cable, telecommunications, right-of-way management, and related matters. Many of NATOA's members serve communities that are too small or too distant from major population centers

to attract private investment in facilities capable of supporting broadband communications. If these communities are to survive and thrive in the years ahead, they must obtain prompt and affordable access to the same advanced telecommunications and broadband services and capabilities that are widely available in metropolitan areas. They cannot afford to wait for the three, four, five or more years that it will take for profit-maximizing communications providers to saturate demand in densely-populated markets before turning their attention to rural areas. These concerns have become all the more acute over the last two years, as private-sector deployment of advanced telecommunications technologies and capability has slowed or ceased altogether in many communities.

The District Court below found that Congress's unrestricted, expansive use of the term "any entity" in Section 253(a) of the Telecommunications Act of 1996 reflects congressional intent to protect entities of all kinds, including public entities, from state barriers to entry. *City of Bristol v. Earley*, 145 F.Supp.2d 741, 747 (W.D. Va. 2001). While noting that the legislative history also supports an expansive interpretation of Section 253(a), the District Court found that the clear and unambiguous text of the statute rendered resort to legislative history unnecessary in this case. *Id.* at 747. In its brief to this Court, the City of Bristol has also focused on the text of Section 253(a) and has discussed legislative history only to the extent necessary to demonstrate that the appellants cannot make the

"most extraordinary showing of contrary intentions in the legislative history" that the Supreme Court requires to override Congress's unrestricted, expansive use of the modifier "any" in a federal statute. *Salinas v. United States,* 522 U.S. 52, 57-58 (1997), quoting *United States v. Albertini*, 472 U.S. 675, 680 (1985).

APPA and NATOA offer the following expanded discussion of the legislative history of Section 253(a) to ensure that the Court will not be left with any possible doubt that the legislative history overwhelmingly supports the District Court's decision. APPA and NATOA have first-hand experience with the legislative history that is relevant to the issues present in this litigation, as they were both directly involved in Congress's consideration of these issues.

DISCUSSION

I. THE LEGISLATIVE HISTORY CONFIRMS THAT CONGRESS INTENDED THE TERM "ANY ENTITY" IN SECTION 253(a) TO APPLY TO UNITS OF STATE AND LOCAL GOVERNMENT

Section 253(a) of the Telecommunications Act, 47 U.S.C. § 253(a), provides that "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" (emphasis added). In enacting the Telecommunications Act, the 104th Congress adopted this provision *verbatim* from Section 230(a) of the 103rd Congress's bill S.1822 and confirmed that Section 253(a) was to have the same scope that Section 230(a) had

in S.1822. Thus, the legislative history of Section 253(a) begins with that of S.1822.[1]

A. The 103rd Congress

1. Congressional Encouragement of Entry By All Utilities

During the 103rd Congress, APPA and other representatives of public power utilities urged Congress to do everything possible to encourage these utilities to participate actively in the development of what was then called the "National Information Infrastructure." APPA advised Congress that some of its members were willing to provide telecommunications services themselves and others were willing to make their telecommunications infrastructure and facilities available to potential competitors of incumbent providers, if doing so would not subject them to the burdensome requirements applicable to telecommunications carriers. APPA appealed to Congress to accommodate both groups.

For example, at a Senate hearing in which representatives of electric utilities of various kinds testified about the role that their utilities could play in assisting the Nation to meet its telecommunications goals, William J. Ray presented APPA's

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[1] In *City of Abilene v. Federal Communications Commission*, 164 F.2d 49 (D.C. Cir. 2000), the Federal Communications Commission (FCC) admitted that the legislative history of Section 253 includes that of S.1822, "whose provision for removing entry barriers formed the basis for Section 253." J.A.91.

written and oral testimony.[2] Mr. Ray's testimony acquainted Congress with the remarkable accomplishments of the municipal electric utility of Glasgow, Kentucky, which had brought its small rural community into the Information Age, far exceeding the achievements of the private sector in many larger communities:

> In the 1980s, Glasgow, a community of 13,000 residents, was served -- but not very well -- by a single, for-profit cable company. The citizens were unhappy with the quality and the price of their cable TV service, so they turned to their municipally owned electric system for help. This plea from the public coincided with the city utility's recognition of the need for an effective demand-side management and load shedding system to avoid huge increases in power costs driven by surges in peak power demand. The Glasgow Electric Plant Board recognized that the same coaxial cable system used to deliver television programming could also be utilized by citizens to manage their power purchases. So our municipally owned electric utility built its coaxial distribution control system which also provides a competing, consumer-owned cable TV system. This new system not only allowed consumers to purchase electricity in real time and lower their peak electrical demand, thus saving money on their electric bills, it provided twice as many television channels as the competing, for-profit cable company at not-for-profit rates -- and delivered better service to boot. Big surprise -- the private company decided to drop its rates by roughly 50 percent and improve its service, too.
>
> But the Glasgow Electric Plant Board didn't stop there. We wired the public schools, providing a two-way, high-speed digital link to every classroom in the city. We are now offering high-speed network services for personal computers that give consumers access to the local schools' educational resources and the local libraries. Soon this service will allow banking and shopping from home, as well as access

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[2] Hearings on S. 1822, The Communications Act of 1994, Before the Senate Committee on Commerce, Science and Transportation, 103d Cong, 2d Sess., A&P Hearings S.1822 (Westlaw) at 351-61 ("*Senate Hearings on S.1822*"), J.A.51-58.

> to all local government information and databases. We are now providing digital telephone service over our system. That's right -- in Glasgow, everyone can now choose to buy their dial tone from either GTE or the Glasgow Electric Plant Board.
>
> The people of Glasgow won't have to wait to be connected to the information superhighway. They're already enjoying the benefits of a two-way, digital, broadband communications system. And it was made possible by the municipally owned electric system.

Senate Hearings on S.1822, at JA.55-56.

Mr. Ray also testified that, with appropriate incentives, some public power utilities would follow in Glasgow's footsteps and provide competitive telecommunications services themselves, while other public power utilities would at least make their telecommunications infrastructure available to telecommunications providers:

> While all electric utilities have telecommunications needs, the manner in which these needs are met differs greatly among public power systems. Some public power systems satisfy their communications requirements primarily by leasing capacity from third parties. Other APPA members rely on communications systems built only to satisfy their own needs. Still others have built communications systems using some capacity on those systems for their own internal needs and leasing excess capacity to others (acting as the owner of a conduit rather than a telecommunications or information service provider). Finally, some public power communities have built communications systems to serve their own needs and to provide other telecommunications and information services to community residents and businesses.
>
> It is APPA's desire to ensure that whatever legislation is enacted, the diverse needs of the public power communities can be met. Specifically, this means that for those utilities who are likely to lease space over facilities owned by a third party, reasonable access terms,

> conditions and rates are required. For utilities that will develop and operate communications systems for their own use or to provide conduit but not content service to others, legislation should not saddle them with common carrier obligations. Nor should legislation place obstacles in the path to public ownership of new telecommunications facilities or the public provision of telecommunications services. Indeed, the goals of universal service and vigorous competition can be enhanced if such public ownership and involvement is encouraged.

Senate Hearings on S.1822, J.A.53-54.

Shortly after Mr. Ray completed his testimony, Senator Trent Lott (R-MS), a Senate manager of the Telecommunications Act and now the leader of the Republicans in the Senate, observed "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" (emphasis added).[3]

Congress did indeed develop the "right language." First, in summarizing the major features of the bill, the Senate Report on S.1822 noted:

> 5. Entry by electric and other utilities into telecommunications
>
> S. 1822 allows *all* electric, gas, water, [steam], and other utilities to provide telecommunications (section 302 of S. 1822, new section 230(a)).[4]

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3 *Senate Hearings on S.1822* at *378-79.

4 S. Rep. No. 103-367, 103d Cong., 2d Sess. 22 (1994), 1994 WL 509063, ("*Senate Report on S.1822*").

Section 302 contained various measures to promote competition and the "new Section 230(a)" contained the preemption language that the 104th Congress would later incorporate verbatim into Section 253(a). ***Thus, Congress clearly understood and intended that the preemption language that became Section 253(a) allow "all" utilities to provide telecommunications services***.

This conclusion is further strengthened by Congress's treatment of certain investor-owned electric utilities whose widespread abuses had caused Congress to enact the Public Utility Holding Company Act of 1935 ("PUHCA").[5] Part of that Act had prohibited covered electric utilities from entering into lines of business outside their core electric functions. Now, to ensure that these electric utilities would be treated the same under the Telecommunications Act as electric cooperatives and public power utilities, Congress was willing to remove these PUHCA restrictions. Thus, the Senate Report on S.1822 explained:

> First, electric utilities in general have extensive experience in telecommunications operations. Utilities operate one of the Nation's largest telecommunications systems-much of it using fiber optics.

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[5] PUHCA had been enacted in response to a broad range of abusive practices by investor-owned electric utilities controlled by certain major holding companies. As one commentator has colorfully observed, these utilities had established holding companies that managed "fantastic aggregates of geographically and socially unrelated systems scattered from hell to hallelujah," including real estate companies, water companies, street and railroad ventures, and fuel and engineering firms, ranging from the Philippines to central and southern Europe and South America. R. Rudolph and S. Ridley, *Power Struggle: The Hundred Year War Over Electricity* 52 (1986).

> The existence of this system is an outgrowth of the need for real time control, operation and monitoring of electric generation, transmission and distribution facilities for reliability purposes. Within the utility world, registered holding companies are some of the more prominent owners and operators of telecommunications facilities. For example, one registered holding company, the Southern Co., has approximately 1,700 miles of fiber optics cables in use, with several hundred more miles planned.
>
> Second, electric utilities are likely to provide economically significant, near-term applications such as automatic meter reading, remote turn on/turn off of lighting, improved power distribution control, and most importantly, conservation achieved through real-time pricing.
>
> With real-time pricing, electric customers would be able to reprogram major electricity consuming appliances in their homes (such as refrigerators and dishwashers) to operate according to price signals sent by the local utility over fiber optic connections. Electricity costs the most during peak demand periods. Since consumers tend to avoid higher than normal prices, the result of real-time pricing would be significant "peak shaving"-reduction in peak needs for electric generation. Because electric generation is highly capital intensive, reductions in demand can become a driving force for basic infrastructure investment in local fiber optic connections. Registered holding companies are leaders in the development of real-time pricing technology.
>
> Third, registered holding companies have sufficient size and capital to be effective competitors. Collectively, registered companies serve approximately 16 million customers-nearly one in five customers served by investor-owned utilities. Three registered companies who have been active in the telecommunications field, Central and South West, Entergy, and Southern Co., have contiguous service territories that stretch from west Texas to South Carolina.

Senate Report on S.1822 at 10-11 (emphasis added). Congress was thus very well aware of the contribution that *all* utilities could make to the fulfillment of the goals

of the Telecommunications Act. Furthermore, Congress was also undoubtedly aware that the potential significance of entry by public power utilities was even greater than that of the registered holding companies, as public power utilities served approximately 35 million customers at the time, most of whom were in rural communities that the private sector had ignored or under-served.[6]

The Senate Report on S.1822 also contained numerous passages that appeared to be intended to give public power utilities the encouragement and assurances that APPA had sought through Mr. Ray's testimony. The Report assured public power utilities that were considering becoming providers of telecommunications services themselves that they would be treated like all other providers of such services – i.e., they would be subject to the same burdens and the same benefits as all similarly-situated providers. At the same time, the Report assured public power utilities that wanted to limit their involvement in telecommunications to making their infrastructure and facilities available to telecommunications providers that doing so would not subject the utilities to treatment as telecommunications carriers.

Specifically, the Report stated that S.1822 defined the term "telecommunications service" as "the direct offering of telecommunications for profit to the general public or to such classes of users as to be effectively available

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6 APPA, *Straight Answers to More False Charges Against Public Power*,

to the general public regardless of the facilities used to transmit such telecommunications services."[7] In explaining this definition, the Report used the term "entities" to refer to all potential providers of "telecommunications service," whether public or private:

> 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. . . . [8]

In the following paragraph, the Report illustrated the application of these principles through an example involving electric utilities:

> 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*.[9]

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http://www.appanet.org.

[7] *Senate Report on S. 1822* at 122, J.A.122.

[8] *Senate Report on S.1822* at 56, J.A.62 (emphasis added).

[9] *Senate Report on S.1822* at 54-55, J.A.61 (emphasis added).

This passage did not distinguish between publicly-owned and privately-owned electric utilities, and on the next page, the Report confirmed that no such distinction was intended. There, discussing Section 230(a)(1), the preemption provision of S.1822, the Report made clear that S.1822 applied to public power utilities as well as to other electric utilities. Thus, in explaining one of the exceptions to Section 230, the Report stated:

> 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 [facilities to] telecommunications carriers.[10]

The Report then gave another example that left no room for doubt that Congress had public power utilities in mind at the time that it developed the precursor of Section 253(a):

> 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 a 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 service," the nondiscrimination

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10 *Senate Report on S.1822,* at 56, J.A.62 (emphasis added).

> provisions of this section would not, in any case, apply to the offering of such capacity.[11]

Taken together, and especially when viewed in the context of the issues that APPA had raised with Congress and the competitive purposes of the Act, these passages evidence that (1) Congress unquestionably intended to encourage utilities, including utilities operated by state and local governments, to provide or facilitate the provision of telecommunications services; (2) Congress considered the preemption provision that became Section 253(a) as an important instrument in achieving this objective; (3) Congress used the understood the term "entities" to describe *all* providers of "telecommunications service," whether public or private; (4) Congress intended that, if State or local utilities elected only to make their telecommunications infrastructure available to telecommunications providers, the utilities would not be subjected to regulation as "telecommunications carriers," and (5) Congress intended that those state and local utilities that chose to cross the line from providing infrastructure to providing telecommunications services – as Glasgow, Kentucky, had done – would be subject to the same obligations and benefits as the Act extended to all other telecommunications carriers. One such obligation included the duty to contribute funds to the universal service program, and one such benefit included protection from state barriers to entry.

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[11] *Senate Report on S.1822,* at 56, J.A.62 (emphasis added).

2. Public Access

NATOA's experience further confirms that Congress understood the term "entity" in its broadest sense. Not only did the 103rd Congress use that term indiscriminately to cover a wide range of non-public organizations, but it also expressly used that term to describe units of state and local government.[12]

For example, as originally introduced, S.1822 included a "public access" provision that required telecommunications carriers to afford preferential rates to various "public entities," including "local and State governments." As shown below, in the ensuring hearings on this and other provisions of S.1822, several prominent members of the Senate and the Administration confirmed that they understood the term "entity" to include "state and local governments." Although Congress did not ultimately adopt the public access provision in the form in which it was originally introduced – in part because NATOA and others testified that there were better ways to achieve the goal of public access – Congress never retreated from its understanding that the term "entity" applies to state and local governments.

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[12] *See, e.g., Senate Hearings on S.1822* at *2 (educational institutions, health-care institutions, local and state governments, public broadcast stations, public libraries, other public entities, community newspapers, and broadcasters") (emphasis added); *71 (Bell Operating Companies and their affiliates; at 138 (electronic publishing competitors to Bell Operating Companies); at *198 (equipment manufacturers); *392 (the Rural Electric

Specifically, as originally introduced, S.1822 included the following provision (with NATOA's emphasis added):

> Section 103 PUBLIC ACCESS
>
> (a) AMENDMENT - Section 202 of the Communications Act of 1934 (47 U.S.C. 202) is amended by adding at the end the following new subsection:
>
> `(d)(1) Notwithstanding subsections (a) through (c), it shall be the duty of all telecommunications carriers that use public rights of way to permit educational institutions, health-care institutions, *local and State governments*, public broadcast stations, public libraries, *other public entities*, community newspapers, and broadcasters in the smallest markets to obtain access to intrastate and interstate services provided by such carriers at preferential rates. *Entities* that obtain services under this provision may not resell such services, except to *other entities* that are eligible for preferential rates under this subsection.

During the hearings on S.1822, Section 103(a) was the subject of considerable discussion. For example, Senator Ernest Hollings (D-SC), the primary sponsor of S.1822 and the chairman of the hearings, observed that, under S.1822, "[h]ospitals, schools, *State, and local government offices*, public broadcasters, *and other public entities* must receive access to the national information superhighway at preferential rates." *Senate Hearings on S.1822* at *2 (emphasis added). Secretary of Commerce Ronald Brown noted that S.1822 imposes a duty on all telecommunications carriers "to make services available at

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Administration and public power utilities; *491 (electric utilities); and *536 (local governments).

preferential rates to *a wide variety of entities – including state and local governments*, many public and not-for-profit entities, and others." *Id*. at *23 (emphasis added). Senator John McCain added that "the bill mandates services at preferential rates be extended to libraries, hospitals, schools, and other public entities. I believe such services should be extended to Native American government entities." *Id*. at *29.

Senator Slade Gorton questioned the potential scope of Section 103:

> Now I have a question on a quite different subject. Senator McCain brought it up, on the opposite side of the coin, asking the justified question as to why preferential rates for State and local governments should not be extended to the governments of Indian tribes and nations.
>
> My question, I guess, is more basic. And that is why, on God's green Earth, should *local and State governments and other public entities*, which I assume includes everything including huge entities like the Bonneville Power Administration or TVA, be granted preferential rates over those being granted to the private sector, to small businesses and the like in telecommunications services?

Id. at *48 (emphasis added). Notably, even while voicing concerns about the substance of Section 103, Senator Gorton used language indicating that he understood the term "entities" to include "local and State governments."

NATOA was also concerned about the substance of Section 103, but for a different reason. On behalf of NATOA, the United States Conference of Mayors, the National League of Cities, and the National Association of Counties, William Squadron testified that

> Section 103 of S.1822 would require “preferential rates” for, among others, governmental users of a telecommunications system that uses public rights-of-way. While we support the objective of facilitating usage of telecommunications networks for public benefit, the best way to achieve this access to a community’s infrastructure is through the franchise process. This process allows a local government to identify particular needs and negotiate a reasonable arrangement with the telecommunications provider, it has operated successfully in the cable environment as municipalities have received commitments that have jumpstarted governmental, public and educational cable channels and institutional broadband networks.

Senate Hearings on S.1822 at *105.

Congress ultimately eliminated the mechanism that Section 103 had provided for awarding preferential rates local and state governments. Instead, Congress moved preferential rates for schools, libraries, and rural health care providers into the Universal Service Program under Section 254 of the Telecommunications Act. In making these changes, however, no one suggested that state and local governments were suddenly no longer “entities” as that term had been commonly understood and used throughout the legislative debates.

B. The 104th Congress

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 effect of the Act’s preemption provisions on the ability of local governments to manage their rights-of-way. But Congress’s work on what was to become Section 253(a) of the

Telecommunications Act was essentially done. As a result, there was not much additional legislative history on this issue. What there was, however, corroborated that the 104th Congress understood and intended that the term "any entity" apply to local governments, particularly those that operate their own municipal electric utilities.

For example, during the floor debates in the Senate on June 7, 1995, Senator Lott rose to summarize the major features of the Act. Two of his statements are particularly relevant here. First, Senator Lott explained that PUHCA was being amended "to allow registered electric utilities to join with *all other utilities* in providing telecommunications services, providing the consumer with smart homes, as well as smart highways." 141 Cong. Rec. S7906 (June 7, 1995), J.A. 68 (emphasis added). Second, Senator Lott observed,

> In short, [the Act] constructs a framework where *everybody* can compete *everywhere* in *everything*. It limits the role of Government and increases role of the market. It moves from the monopoly policies of the 1930s to the market policy of the future.
>
> Toward that end, the removal of all barriers to and restrictions from competition is extremely important, and it is the primary objective, and I believe, the accomplishment of this legislation ....

Id (emphasis added). As a key sponsor and floor manager of the Telecommunications Act, Mr. Lott's statements are entitled to substantial weight.[13]

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[13] *Lewis v. United States*, 445 U.S. 55, 63 (1980) ("Inasmuch as Senator Long was the sponsor and floor manager of the bill, his statements are entitled to

In a colloquy on the Senate floor one week later, Senator Kempthorne (R-ID) and Senator Hollings (D-SC), the sponsor of S.1822, clarified for the record that the 104th Congress understood that Section 253(a) originated in S.1822 and had "no problem" with affording Section 253(a) the same scope as its predecessor in S.1822. 141 Cong. Rec. at S8174 (June 12, 1995), J.A.70-71.

The 104th Congress's understanding that Section 253(a) applied indiscriminately to utilities of all kinds is also reflected in the final Joint Explanatory Statement of the Committee of Conference on the bills that became the Telecommunications Act:

> 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

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weight."); *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) ("Senator Millikin himself stated without contradiction that the Amendment authorized the President... As a statement of one of the legislation's sponsors, this explanation deserves to be accorded substantial weight in interpreting the statute"); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951) ("The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt.").

section. However, *explicit prohibitions on entry by a utility into telecommunications are preempted under this section.*[14]

Referring to this passage, its author, Congressman Dan Schaefer (R-CO) subsequently confirmed in a letter to the FCC 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 FCC "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.77. Many other members of Congress also made the same point to the FCC. J.A.80-87.[15]

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[14] H.R. Rep. No. 104-230, 104th Cong., 2d Sess. (1996), J.A.74 (emphasis added).

[15] Citing a sentence from the Joint Explanatory Statement Committee and floor statements of Senators John Kerry and Robert Dole, the Virginia Telecommunications Industry Association (VTIA) suggests that Congress intended to encourage rapid deployment of advanced telecommunications technologies and services by only the private sector. VTIA Br. at 30. As Bristol correctly responds, there is no inconsistency between having a preference for private-sector deployment and encouraging involvement by both the private and public sectors, in recognition of the inability of the private sector alone to fulfill our nation's telecommunications goals. The statements in the record by many Members of Congress, including Senator Kerry himself, confirm this. J.A.80-87.

II. CONCLUSION

For the reasons discussed above as well as those in the District Court's decision and the brief of the City of Bristol, this Court should affirm the District Court's decision.

Respectfully submitted,

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October 22, 2001

CERTIFICATE OF COMPLIANCE

This Brief of Amici Curiae the American Public Power Association and the National Association of Telecommunications Officers and Advisors has been prepared using Microsoft Word 2000, Times Roman, 14 Point typeface.

Exclusive of the Corporate Disclosure Statement, Table of Contents, Table of Authorities, Statement Regarding Oral Argument, Certificate of Service, and Addendum, this Brief contains 5025 words.

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CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2001, I caused two true copies of the foregoing Brief of Amici Curiae the American Public Power Association and the National Association of Telecommunications Officers and Advisors to be sent by U.S. Post Office Priority Mail, postage prepaid, to the following:

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