

APPA Annual Conference

Seattle, WA

June 22, 2004

State Barriers To Entry: *Missouri* and Beyond

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Thanks!

State Barriers to Entry – The Context

- Federal law encourages, does not authorize, public entry
- Public entities must have state/local authority for each service and activity
 - State laws, interpretations differ widely
 - Must also consider local charters, ordinances, franchises, bond instruments, contracts, etc.
- Does federal law prohibit state barriers or silence?

The *Missouri* Case

- Telecom Act § 253 preempts state laws that prohibit “any entity” from providing any telecom service
- In *Nixon v. MML*, Supreme Court held that “any entity” is not clear enough to cover public entities, BUT stated:
 - Decision not a ruling on merits of public entry
 - Public entities have “respectable position” on merits
 - FCC “denounced” policies underlying Missouri law
 - Ten *amici curiae* filed briefs supporting public entry

Implications of *Missouri* Decision

- Most states currently do not have barriers
- Existing barriers stay in effect – but read them carefully!
 - AR, FL, GA, MN, MO, NE, NV, SC, TX, UT, VA, WA, WI
- Battles before legislatures and PSC's in 2004
 - FL, GA, IA, LA, NE, UT, VA, WA, WI
- Vicious local campaigns (see www.tricitybroadband.com)
 - Palo Alto, CA; Concord, MA; Lafayette, LA; etc.
- New federal legislation in 2005-2006?

Louisiana SB 877

“ALEC” Model → compromise → SB 877

Burdens on retail only – wholesale exempt

Same

Feasibility study (FS) – impossible standards and time-consuming, burdensome, costly, and dangerous procedures

FS – achievable standards and workable procedures

Louisiana SB 877 (continued)

FS must show, for each communications service separately, and for both first year and projected 5-year period, that annual revenues will exceed annual costs by amount sufficient to cover bond obligations

FS must show, for all communications services as a group, that revenues will exceed costs over the life of the bonds, in an amount sufficient to cover bond obligations

Louisiana SB 877 (continued)

No provision for protecting municipality's commercially sensitive information

Exempts such information from disclosure

Municipalities "may" hold referenda under the cumbersome procedures in the bill

Municipalities to follow their existing referendum procedures; if none, use procedures in SB 877

Louisiana SB 877 (continued)

Must use self-sufficient enterprise fund for each service, and cannot import funds from other sources

One enterprise fund for all communications services

Municipalities can fund “startup costs” from other sources, subject to repayment with interest if project goes forward (Startup = up to bond closing)

Municipalities can make inter-utility loans similar to private-sector inter-affiliate transfers, under new rules that LPSC will develop

Louisiana SB 877 (continued)

Municipalities can secure and pay bond obligations associated with a particular communications service only from revenues from sales of that service

Municipalities can pledge the resources of electric, water, gas and other municipal utilities to obtain the best interest rates, terms and conditions

Municipalities can use revenues from sales of all communications services to pay bond obligations

Louisiana SB 877 (continued)

To avoid cross-subsidies, municipalities must set prices high enough to cover actual direct and indirect costs and also imputed costs of taxes, fees and other assessments that similarly-situated private providers would pay

Municipalities must set prices high enough to cover direct, indirect and imputed costs, but:

- can use PILOT to offset imputing obligations
- for income taxes, can use lowest rate that any private provider actually paid in prior year, or zero, which ever is higher

Louisiana SB 877 (continued)

Could be read to prohibit municipalities from “bundling” or using promotions and other common business practices

SB 877 explicitly says that municipalities can bundle and use any other business practice that a private provider could lawfully employ, provided that the municipalities set prices at levels that will, in the aggregate, over the useful life of the facilities used to provide communications services, recover the direct, indirect and imputed costs involved.

Louisiana SB 877 (continued)

Municipalities must comply with all applicable federal, state and local requirements

Same, except that

- the LaPSC will continue to regulate municipalities only as CLECs, on the same terms and conditions as it regulates private-sector CLECs
- the LaPSC will write municipal cost-allocation and inter-affiliate transfer rules, to be enforced through an independent auditing process set forth in SB 877

Louisiana SB 877 (continued)

Prohibits municipalities from providing services outside their geographic limits

Allows statewide municipal service

Bars municipalities from state universal service funds

No such restrictions

Requires 5-day public notice before price moves

Strikes this requirement and affords municipalities the same protections as private providers have for confidential information