

**Before the  
United States Department of Commerce  
National Telecommunications and Information Administration  
Washington, D.C. 20230**

<b>In the Matter of:</b>	)	
	)	
<b>Deployment of Broadband Networks and Advanced Telecommunications</b>	)	<b>Docket No. 011109273-1273-01</b>
	)	<b>RIN 0660-XX13</b>
	)	

**COMMENTS OF THE  
AMERICAN PUBLIC POWER ASSOCIATION**

The American Public Power Association (APPA) appreciates this opportunity to comment on the deployment of broadband networks and advanced telecommunications in the United States. As Assistant Commerce Secretary Nancy Victory has recently noted, “the opportunities and innovation offered by high-speed networks are crucial to promoting America’s productivity and our people’s welfare.”<sup>1</sup> Similarly, Federal Communications Commission Chairman Michael Powell has observed that “ubiquitous broadband deployment will bring valuable new services to consumers, stimulate economic activity, improve national productivity, and advance many other worthy objectives – such as improving education and advancing economic opportunity for more Americans.”<sup>2</sup> Likewise, the Rural Utilities Service has suggested “[t]he information revolution holds its greatest promise in rural America, where distance, density and geography have often

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<sup>1</sup> Nancy J. Victory, “Removing Roadblocks to Broadband Deployment,” presented at the Competition Policy Institute’s Conference on Keeping Telecom Competition on Track (December 6, 2006), [http://www.ntia.doc.gov/ntiahome/speeches/2001/cpi\\_120601.htm](http://www.ntia.doc.gov/ntiahome/speeches/2001/cpi_120601.htm).

<sup>2</sup> Michael K. Powell, “Digital Migration Part II,” Press Conference (October 23, 2001), <http://www.fcc.gov/Speeches/Powell/2001/spmcp109.html>.

impeded economic development.”<sup>3</sup> Unfortunately, however, broadband is not being deployed as rapidly as it should be – or could be – outside the Nation’s major populations centers.

In this proceeding, the National Telecommunications and Information Administration (NTIA) has invited the public to comment on numerous issues, including the technical, economic, and regulatory barriers to broadband deployment. APPA will limit its comments to two issues with which it and its members have had substantial first-hand experience.

The first issue concerns incumbent-sponsored state laws that prohibit publicly-owned electric utilities from contributing to the deployment of broadband networks and advanced telecommunications, as Congress intended them to do in enacting the Telecommunications Act of 1996. Such laws plainly violate Section 253(a) of the Telecommunications Act, which states 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.” Regrettably, however, the Federal Communications Commission (FCC) has on two occasions declined to preempt such laws, despite finding they were unwise, unnecessary to fulfill any legitimate state function, and contrary to the purposes of the Telecommunications Act.<sup>4</sup> According to the FCC, the agency lacked authority to preempt these laws because Congress failed to say expressly in Section 253(a) that the term “any entity” covers public entities as well as private entities. *Texas Order*, ¶ 179; *Missouri Order*, ¶ 9.

APPA strongly disagrees with the FCC’s interpretation of Section 253(a) and is currently litigating the meaning of “any entity” before the United States Courts of Appeal for the Fourth and

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<sup>3</sup> *Ex Parte Comments of the Rural Utilities Service* in Docket No. 98-122 (filed September 21, 2000) (Attachment A).

<sup>4</sup> *In the Matter of the Public Utility Commission of Texas*, ¶ 190, 13 F.C.C.R. 3460, 1997 WL 603179 (1997) (“*Texas Order*”); *In the Matter of the Missouri Municipal League*, ¶ 10, 16 F.C.C.R. 1157, 2001 WL 28068, *appeal pending*, *MO Municipal League v. FCC*, No. 01-1379 (8th Cir., filed Feb. 12, 2001) (“*Missouri Order*”).

Eighth Circuits. No matter how these cases are ultimately decided, however, APPA submits that it is critically important for the Bush Administration to make a clear, forceful and unambiguous public commitment to ensure free and open competition by eliminating state barriers to public power entry, once and for all. As Senator Trent Lott succinctly summarized Congress's intent during the debates on the Telecommunications Act,

... [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 ....

141 *Cong. Rec.* S7906 (June 7, 1995) (emphasis added). Senator Lott, like most other members of Congress, viewed public power utilities as potentially major participants in the competitive communications market contemplated by the Act. "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).<sup>5</sup> The Bush Administration should now rededicate itself to that vision.

As APPA will show below, state barriers to public power entry are not only premised on inaccurate information, faulty logic and misguided public policy, but they are also unconscionable. NTIA will learn in this proceeding that the private sector will not be able to deploy broadband networks and advanced telecommunications in many areas of the United States for several years – if ever. NTIA will hear many reasons for this, but they all boil down to this – many areas of the country will simply not generate the level of profits that private sector companies have a fiduciary

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<sup>5</sup> *Hearings on S.1822 Before the Senate Committee on Commerce, Science and Transportation*, 103d Cong., 2d Sess. (1994), A&P Hearings S.1822 (Westlaw) at \*378-379.

duty to earn for their shareholders. As Royce Caldwell, Ameritech's president of operations, candidly acknowledged to the *Wall Street Journal*, "There is a large percentage of telephone customers that nobody wants to serve. . . . It is unrealistic to think that every customer is attractive to the marketplace."<sup>6</sup>

In these circumstances, it is impossible to justify laws that deny communities in unserved or underserved areas the ability to take matters into their own hands and provide for their own communications needs. Thousands of communities did this successfully when the private sector ignored their need for electrification, and they can readily do so in the communications area.

The second issue is one that members of APPA that have entered into the communications field share with all other new entrants, including private sector "overbuilders." If the Bush Administration wants competition in the communications area to take hold and flourish, it must protect new entrants from predatory pricing and other anticompetitive activities by the major cable and telecommunications incumbents. Because new entrants cannot afford the time and money necessary for protracted regulatory proceedings or litigation against deep-pocketed incumbents, it is essential for the key federal and state agencies to investigate alleged abuses promptly; to enforce the relevant communications, antitrust and fair competition laws vigorously; and to impose sanctions that will be significant enough to provide economic disincentives for such anticompetitive behavior.

### **INTEREST OF APPA**

APPA is a national service organization that represents the interests of more than 2,000 publicly-owned, not-for-profit electric utilities located in all states except Hawaii. Many of these utilities developed in communities that were literally left in the dark as electric companies in the private sector pursued more lucrative opportunities in larger population centers. Residents of these

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<sup>6</sup> "After Years of Chaotic Competition, Phone Industry Is Ruled By Four Firms," *Interactive Wall Street Journal* (March 8, 1999).

neglected or underserved communities banded together to create their own power systems, in recognition that electrification was critical to their economic development and survival. Public power systems also emerged in several large cities – including Cleveland, Jacksonville, Los Angeles, Memphis, Nashville, San Antonio, Seattle and Tacoma – where residents believed that competition was necessary to obtain lower prices, higher quality of service, or both. Currently, approximately three-fourths of APPA’s members serve communities with less than 10,000 residents. At present, public power systems operated by municipalities, counties, authorities, states and public utility districts provide electricity to approximately 40 million Americans.

The patterns that marked the evolution of the electric power industry are now repeating themselves in the communications industry. As private communications providers focus on establishing or further entrenching themselves in large population centers, many smaller communities are at risk of falling behind in obtaining the full benefits of the Information Age. These benefits include vigorous economic development, educational and occupational opportunity, affordable health care, and quality of life.

Furthermore, the recent economic downturn and the shakeout in the communications industry have significantly slowed or stopped private-sector deployment of broadband networks and advanced telecommunications in most areas. Numerous competitive local exchange carriers have either cut back on their plans to compete with incumbent telecommunications providers or have gone out of business altogether.<sup>7</sup> The same misfortune has befallen many of the “broadband overbuilders” that had intended to build sophisticated new communications networks to compete

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<sup>7</sup> Goodman, “A Hot Sector Burns Out As Investors Stop Calling, Companies Search for Answers,” *The Washington Post* at G01 (February 28, 2001), <http://www.washingtonpost.com/ac2/wp-dyn/A59646-2001Feb26?language=printer>; Kane, “Rhythms Looks For a Way Out,” *CNET News.com* (April 2, 2001), <http://news.cnet.com/news/0-1004-200-5419260.html?tag=lh>.

simultaneously with providers of voice, video, data and other advanced communications services.<sup>8</sup> According to the National Telephone Cooperative Association, small telephone companies have curtailed investments in broadband infrastructure in rural areas to such an extent that “few additional customers will gain access over the next few years.”<sup>9</sup> Even the major incumbent providers of cable and telecommunications services have retreated from their promises to extend their services aggressively outside their traditional markets.<sup>10</sup>

In this environment, it could well be many years before the private sector is willing or able to offer rural and other underserved communities the same services and prices that are available in the lucrative sections of major population centers. Thus, many of APPA’s members have concluded that they must rely on themselves again if they are to continue to survive and thrive. They believe that advanced telecommunications are as basic to modern life as electricity, water and roads, and that they must develop their own facilities to ensure that their residents will not be left behind in obtaining the benefits of the Information Age. In this proceeding, APPA seeks to help its members achieve these goals.

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<sup>8</sup> Estrella, “Digital Access Pulls The Plug,” *MultichannelNews* (March 1, 2001), [http://www.tvinsite.com/multichannelnews/index.asp?layout=print\\_page&publication=Multichannel+News&webzine=tv&doc\\_id=17868&articleID=&pub\\_id=MCN](http://www.tvinsite.com/multichannelnews/index.asp?layout=print_page&publication=Multichannel+News&webzine=tv&doc_id=17868&articleID=&pub_id=MCN); Gerstein, “No Hand-Wringing Allowed – Focus on the Future,” *The TelecomAnalyst* (January 9, 2001), <http://www.thetelecommanalyst.com/individual/010109sections/pan4gold.asp>.

<sup>9</sup> “Telcos: Low Demand Slows Rural Broadband Deployment,” *Telecommunications Reports* (December 17, 2001), <http://www.tr.com/online/tr/2001/tr121701/Tr121701-25.htm#TopOfPage>.

<sup>10</sup> See Borland, “Local Phone Giants In a Squeeze,” *CNET News.com* (March 20, 2001), <http://news.cnet.com/news/0-1004-200-5193605.html>; “SBC Reports Third Quarter Results,” [http://www.sbc.com/News\\_Center/1,3950,31,00.html?query=20011022-1](http://www.sbc.com/News_Center/1,3950,31,00.html?query=20011022-1); Estrella, “Time Warner Puts 100K Subs on Block,” *Multichannel News* (September 17, 2001).

## **ORGANIZATION OF THESE COMMENTS**

In states in which barriers to public power entry do not exist, scores of public power systems are filling service gaps or providing essential competition to incumbent communications providers, as Congress intended in enacting the Telecommunications Act of 1996. In part I below, we present a number of representative examples. These examples show what many other public power systems could do for their communities if freed from state barriers to entry. In part II, we summarize the various kinds of state barriers to public power entry that exist today, discuss the arguments that incumbents have used to persuade state legislatures to enact these barriers, and set forth the steps that APPA urges the Administration to take to eliminate barriers to entry. In part III, we discuss the anticompetitive practices by incumbents that the Bush Administration must stop if it wants ubiquitous broadband deployment to become a reality in America.

### **BROADBAND DEPLOYMENT BY PUBLIC POWER UTILITIES**

To perform their core function of providing electric power safely, reliably and efficiently in the 21<sup>st</sup> Century, public power utilities must have highly sophisticated communications capabilities. As a result, hundreds of public power utilities have already upgraded their communications networks and facilities, and hundreds more will do so during the next few years for their own use and for other government needs. These upgraded facilities can readily support the provision of video, voice, data and other advanced telecommunications services, either by the utilities themselves or by third-party providers of such services.

Public power utilities also have many other skills and assets that are well suited to deploying broadband networks and advanced telecommunications. They have workforces and equipment that are geared toward providing technologically challenging products and services. They reach most, if not all, of the addresses in the communities they serve. They have experience with all aspects of customer relations, including billing and technical support. They have access to poles, ducts,

conduits and rights of way. They also have an ethic of universal service. Thus, as the Federal Communications Commission (FCC) recently observed:

[M]unicipally-owned utilities and other utilities have the potential to become major competitors in the telecommunications industry. *In particular, we believe that the entry of municipally-owned utilities can 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.* We emphasized this fact in our August 2000 report on the deployment of advanced services. In that report, we presented a case study detailing advanced services deployment in Muscatine, Iowa where the municipal utility competes with other carriers to provide advanced services to residential customers....Our case study is consistent with APPA's statements in the record here that municipally-owned utilities are well positioned to compete in rural areas, particularly for advanced telecommunications services, because they have facilities in place now that can support the provision of voice, video, and data services either by the utilities, themselves, or by other providers that can lease the facilities.

*Missouri Order*, ¶ 10.

Where state barriers to entry do not exist, at least 91 members of APPA now provide cable television service, and at least 108 provide Internet access service.<sup>11</sup> The following are some representative examples.

In Glasgow, Kentucky, a rural community of approximately 14,000 residents, the public power utility has been providing competitive communications services since the late 1980's – long before the advent of private sector “overbuilders.” Today, the public utility provides Glasgow residents cable and telephone service as well as well high speed Internet access at speeds of over 4 Mbps.

In Muscatine, Iowa, the public power utility was the first provider of broadband service in the City. As a result, both the incumbent cable provider and the incumbent telephone company promptly launched their own high speed offerings, giving the residents of the City the benefit of three-way competition. In its second annual report on broadband deployment, the FCC pointed to

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<sup>11</sup> A list of APPA's current providers of cable and/or Internet services is appended as Attachment B.

the Muscatine's experience as a model of how a municipal electric utility can contribute to the fulfillment of the Telecommunications Act's pro-competitive goals.<sup>12</sup>

Public power utilities may also lead the way to the next generation of advanced telecommunications services – those offered through fiber to the home. For example, while major broadband providers claim that they have yet to find a business model that would justify offering fiber-to-the-home,<sup>13</sup> the Public Utility District of Grant County, Washington, has already installed over 7,000 fiber miles and is building out an open-access fiber-to-the-home system that will make advanced telecommunications services available at gigabit speeds to approximately 40,000 homes and businesses by 2006.<sup>14</sup>

Similarly, the public power utility of Bristol, Virginia, a community of 18,000 on the border of Virginia and Tennessee, is building a world class fiber-to-the-home/business network that will enable customers to obtain speeds of 1 Gbps or more. The City is not only providing some advanced telecommunications services itself, but it is also making its network available to any communications provider that wants to provide service in the City.<sup>15</sup> By providing “open access” to its system, the City hopes to promote economic development by attracting providers that would otherwise be unwilling to invest in the City.

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<sup>12</sup> *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, *Second Report*, ¶¶ 139-51, FCC 00-290 (rel. Aug. 21, 2000)

<sup>13</sup> Brown, “New Technology, Old Rules?,” *Broadband Week* (May 21, 2001), [http://www.broadbandweek.com/news/010521/010521\\_news\\_regs.htm](http://www.broadbandweek.com/news/010521/010521_news_regs.htm); Estrella, “RCN Quietly Testing FTTH Deployment,” *MultichannelNews* (June 13, 2001), [http://www.tvinsite.com/multichannelnews/index.asp?layout=story\\_stocks&articleid=CA89798&display=archives](http://www.tvinsite.com/multichannelnews/index.asp?layout=story_stocks&articleid=CA89798&display=archives)

<sup>14</sup> [http://www.gcpud.org/zipp/press\\_3\\_20\\_01.htm](http://www.gcpud.org/zipp/press_3_20_01.htm).

<sup>15</sup> [http://www.bvunet.net/rp\\_internet.asp](http://www.bvunet.net/rp_internet.asp).

While most of the communications systems operated by members of APPA are relatively small, there are also some sizable ones. For example, in Georgia, a new statewide public communications entity, Georgia Public Web, Inc. (GPW), is using telecommunications capacity leased from the Municipal Electric Authority of Georgia to bridge the state's digital divide. GPW has recently obtained a CLEC license from the Georgia Public Service Commission to offer cost-effective, state-of-the-art telecommunications, Internet and web solutions to communities throughout Georgia.<sup>16</sup>

One of the largest public communications network will be a \$100 million fiber network that is currently under development in Memphis, Tennessee. This network will furnish wholesale high-speed communications services on an “open access” basis to telecommunications and data providers and resellers. These providers, in turn, will offer cable TV, video on-demand, high-speed data connections, telephone services and other advanced communications services throughout the city in competition with incumbent providers.<sup>17</sup>

In summary, public power utilities have had great success in deploying broadband networks and advanced telecommunications in states that do not have barriers to entry. If freed from such barriers elsewhere, numerous other public power utilities could turn virtually at once to providing the same kinds of services as their counterparts highlighted above.

### **STATE BARRIERS TO PUBLIC POWER ENTRY**

Most states expressly authorize public power utilities to provide communications services or give local governments “Home Rule” powers to decide for themselves whether to provide such services. At least seven states, however, explicitly bar municipalities and/or public power utilities

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<sup>16</sup> <http://www.townware.com/exec/site/?mid=327&fid=1459>.

<sup>17</sup> Flessner, “Memphis Utility Forms Joint Venture For Fiber Network,” Times & Free Press (November 22, 2000), <http://www.timesfreepress.com/2000/nov/22nov00/memphis-utility.html>.

from providing one or more telecommunications services. These states include Arkansas,<sup>18</sup> Missouri,<sup>19</sup> Nebraska,<sup>20</sup> Nevada,<sup>21</sup> Tennessee,<sup>22</sup> Texas<sup>23</sup> and Virginia.<sup>24</sup> In addition, several other states have enacted laws that do not expressly prohibit public power utilities from providing

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<sup>18</sup> Arkansas prohibits governmental entities from providing “basic local exchange service.” Ark. Code Ann. § 23-17-409(b)(1).

<sup>19</sup> Missouri bars political subdivisions of the state from providing all but certain excepted telecommunications services and facilities. R. S. Mo. § 392.410(7). The exceptions include telecommunications services for the political subdivision’s own use, services for emergency, educational and medical purposes, and “Internet-type” services. This law was upheld in the *Missouri Order* and is now under review before the Eighth Circuit.

<sup>20</sup> Nebraska prohibits governmental entities from providing telecommunications services but allows them to lease dark fiber under certain conditions. Neb. Rev. Stat. § 86-2301 *et seq.*

<sup>21</sup> Nevada bans all cities with populations of 25,000 or more from providing telecommunications services. Nev. Rev. Stat. § 268.086(1)(a). Such a city can, however, “purchase or construct facilities for providing telecommunications that intersect with public rights-of-way, if the governing body: (1) conducts a study to evaluate the costs and benefits associated with purchasing or constructing the facility; and (2) determines from the results of the study that the purchase or construction is in the interests of the general public.” Nev. Rev. Stat. § 268.086(1)(b).

<sup>22</sup> Tennessee allows public power utilities to provide cable service, two-way video transmission, video programming, Internet services, or any other like system or service. Tenn. Code Ann. § 7-52-601. However, it prohibits them from providing paging and security services. Tenn. Code Ann. § 7-52-406.

<sup>23</sup> Texas prohibits its municipalities and municipal electric utilities from providing telecommunications services either directly or indirectly through a private telecommunications provider. Tex. Util. Code § 54.202. The FCC declined to preempt this prohibition in its *Texas Order*, and the D.C. Circuit upheld this decision in *City of Abilene, Texas v. Federal Communications Comm’n*, 164 F.3d 49 (D.C. Cir. 1999). Subsequently, the Texas legislature amended the prohibition to clarify that municipalities and at least some municipal electric systems are authorized to lease excess dark fiber on a nondiscriminatory, nonpreferential basis. Tex. Util. Code § 54.2025.

<sup>24</sup> Virginia precludes its localities from providing telecommunications services or facilities, but it allows them to lease dark fiber under certain onerous conditions. Va. Code Ann. § 15.2-1500(B). This provision was declared unconstitutional under the Supremacy Clause of the United States Constitution and Section 253(a) of the Telecommunications Act in *City of Bristol, Virginia v. Earley*, 145 F.Supp.2d (W.D. Va. 2001), *appeal pending sub nom, Virginia Beales v. City of Bristol*, Nos. 01-17041(L) and 01-1800 (4<sup>th</sup> Cir.). The Virginia legislature subsequently enacted a dark fiber exception, Va. Code Ann. § 56-487.7:1, that contained so many onerous conditions, that the *Bristol* court found that the exception was itself a barrier to entry.

telecommunications services but seek to discourage entry by imposing special burdens on potential governmental providers. These states include Florida,<sup>25</sup> Minnesota<sup>26</sup> and Utah.<sup>27</sup>

Also, a number of states adhere to Dillon's Rule of statutory construction, under which a local government's authority is strictly construed to include only those powers that the state's constitution or legislature have expressly granted or that are necessarily implied or incidental to powers expressly granted. In these states, to thwart competition from public power utilities, incumbent communications providers need only prevent state legislatures from doing anything at all.<sup>28</sup>

In addition to the states that have already enacted barriers to entry, a number of additional states are currently considering the adoption of new barriers. Thus, prompt action by the Bush Administration is not merely necessary to remove existing barriers but also to prevent new ones from being enacted.

### **FLAWS IN THE INCUMBENTS' ARGUMENTS IN SUPPORT OF BARRIERS TO PUBLIC POWER ENTRY**

When arguing for state barriers to public power entry, lobbyists for incumbent cable and telecommunications providers typically rely upon various arguments that have a long and tiresome history. Precisely the same arguments have been made and repeatedly refuted in the electric power industry for nearly a hundred years.

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<sup>25</sup> Florida imposes various extraordinary accounting and tax burdens on municipalities that seek to provide telecommunications services. Fla. Stat. Ch. XII, § 166.047.

<sup>26</sup> Minnesota requires municipalities to obtain a super-majority of 65% of municipal electors before becoming providers of telecommunications services. Minn. Stat. § 237.19.

<sup>27</sup> Utah Code Annotated § 10-18-201 *et seq.* imposes burdensome procedural and accounting requirements on prospective municipal communications providers.

<sup>28</sup> Dillion's Rule is named for John Dillon, the chief judge of the Iowa Supreme Court who first articulated the rule in *Merriam v. Moody's Executors*, 25 Iowa 163, 170 (1868). APPA has not conducted a survey to determine the number of states that follow Dillon's Rule in the telecommunications area.

First, incumbents often contend that firms in the private sector should not have to compete with the government entities that regulate them. This argument is specious. Telecommunications providers are not regulated by local governments or their public power utilities but by the FCC and state public service or public utility commissions. Even if such regulatory authority existed at the local level – which is rarely, if ever, the case – it would be exercised by a regulatory agency or office of the local government, not by the public power utility.

To be sure, local governments play significant roles in cable franchising and right-of-way management. These roles, however, are sharply circumscribed by Title VI and Section 253 of the Communications Act of 1934, as amended. Title VI sets forth comprehensive standards and procedures that local governments must follow in the cable franchising process, and Section 253 prohibits local governments from erecting barriers to entry or discriminating unduly against telecommunications providers. Moreover, at least 17 states have now enacted right-of-way management laws that specify in further detail what local governments can and cannot do in managing their rights of way.

In any event, even if biased municipal actions against private sector communications providers were more than a theoretical possibility, this would not justify outright barriers to entry. The FCC made this very point in its *Texas* and *Missouri* orders:

We continue to recognize, as the Commission did in the *Texas Preemption Order*, that municipal entry into telecommunications could raise issues regarding taxpayer protection from economic risks of entry, as well as questions concerning possible regulatory bias when a municipality acts as both a regulator and a competitor. While some parties maintain that these types of advantages make it unfair to allow municipalities and municipally- owned utilities to compete with private carriers, we believe these issues can be dealt with successfully through measures that are much less restrictive than an outright ban on entry, such as through non-discrimination requirements that require the municipal entity to operate in a manner that is separate from the municipality, thereby permitting consumers to reap the benefits of increased competition.

*Missouri Order*, ¶ 11 (footnotes omitted), citing *Texas Order*, ¶ 190.

Second, incumbent communications providers often complain that government utilities have insurmountable competitive advantages because they do not have to pay franchise fees or taxes. Again, such complaints are baseless. While federal law exempts public entities from cable franchising requirements, 47 U.S.C. § 541(f)(2), public power utilities typically seek to forestall “level playing field” arguments by subjecting themselves to standards that are at least equivalent to those specified in the incumbent’s cable franchise. In particular, public power utilities usually make payments in lieu of taxes that are either equal to or greater than the taxes paid by firms in the private sector. Public power utilities usually do not pay federal or state income taxes, but that is simply so because they are non-profit entities that do not earn taxable income.

Third, incumbent cable and telecommunications providers frequently assert that the access that public power utilities have to tax-free or tax-preferred financing gives them a significant advantage over firms in the private sector. This is yet another industry argument that is belied by the facts. For one thing, in financing their telecommunications systems, public power systems must be careful to comply with tax restrictions that can make the prospect of no-cost or low-cost financing illusory. At the same time, private sector communications firms have benefited greatly from billions of dollars of tax incentives that far exceed any tax benefits that are available to public power utilities.<sup>29</sup> Furthermore, the incumbents now seek even more massive tax benefits.<sup>30</sup>

Fourth, to give weight to their anticompetitive views, incumbent communications providers sometimes cite articles by a handful of “experts” whose opinions conveniently mirror their own.<sup>31</sup>

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<sup>29</sup> MSB Energy Associates, “Major Tax Breaks for Investor-Owned Telephone Companies in the Year 2000” (December 2001) (Attachment C hereto).

<sup>30</sup> Press Release, “Verizon Co-CEO Ivan Seidenberg Urges Congress To Approve Stimulus Package, Broadband Bill To Revive Economy”, <http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=66474>

<sup>31</sup> There is nothing new in this practice. This was one of the many abuses by investor-owned electric utilities in the 1920s that caused Congress to enact the Public Utility Holding

A recent example is a “study” by Jeffrey Eisenach,<sup>32</sup> whose work on behalf of the Progress and Freedom Foundation is heavily subsidized by incumbent telecommunications providers.<sup>33</sup> Although the only research that Mr. Eisenach performed was to document the rapid growth of public communications systems over the last decade, incumbents have relied heavily on his report for its ideological attack on municipal involvement in telecommunications.

The main thrust of Mr. Eisenach’s argument is that municipal utilities are less efficient than their private sector counterparts and can survive only by undercutting competitors through “a plethora of tax and regulatory advantages that are not available to the private sector.”<sup>34</sup> As APPA has shown in detail in Attachment C, however, every point that Mr. Eisenach makes is either unsupported or flatly refuted by direct, relevant evidence.<sup>35</sup>

In short, the incumbents’ arguments against public power entry do not withstand analysis. APPA urges the Bush Administration to examine them carefully and then reject them as baseless.

### **ANTICOMPETITIVE PRACTICES BY INCUMBENTS**

If the Bush Administration is serious about ensuring that the major incumbent cable and telecommunications providers will face meaningful competition, it must act vigorously to protect new entrants from predatory pricing and other anticompetitive conduct by the incumbent cable and telecommunication providers. This applies to new providers from both the public and the private sectors.

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Company Act of 1935. R. Rudolph and S. Ridley, *Power Struggle: The Hundred Year War Over Electricity* at 48-49 (1986).

<sup>32</sup> Jeffrey A. Eisenach, “Does Government Belong in the Telecom Business?”, Progress on Point 8:1, Progress & Freedom Foundation (January 2001).

<sup>33</sup> A list of the Progress and Freedom Foundation’s supporters is available at <http://www.pff.org/supporters.htm>.

<sup>34</sup> Eisenach, at 15.

For example, in the FCC’s Docket No. 01-129, Scottsboro (Alabama) Electric Power Board (SEPB), a public power utility, and Knology, Inc., a private sector “overbuilder,” have both filed comments showing that Charter Communications, Inc. is pricing its services far below cost in order to drive them out of business. Charter’s anticompetitive conduct is particularly egregious in Scottsboro. There, Charter is not only charging \$19.95-\$24.95 for the services that it is selling for more than \$70 dollars in three nearby communities where it has no competition, but it also offering SEPB’s customers a bounty of up to \$400 to switch their cable and Internet accounts to Charter.<sup>36</sup> As SEPB has demonstrated to the FCC, there is no way that Charter can recover its losses as long as SEPB stays in business. By sustaining these losses, Charter apparently also wishes to send potential entrants in other markets the message that it has the resources and the will to price its services at a loss as long as necessary to destroy their ability to compete.

In situations such as these, new entrants cannot survive for long in the market, nor can they afford to spend substantial amounts of time and money in protracted agency or court litigation against deep-pocketed giants such as Charter. It is thus essential for the Federal Communications Commission, the Department of Justice, the Federal Trade Commission and their state counterparts to investigate alleged abuses promptly and to enforce the relevant communications, antitrust and fair competition laws vigorously. They should also impose sanctions in amounts large enough to deter such anticompetitive behavior.

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<sup>35</sup> John Kelly, “Old Snake Oil in New Bottles: Ideological Attacks on Local Public Enterprises in the Telecommunications Industry” (October 2001) (Attachment D). Also available at: <http://www.appanet.org/general/issues/telecom/RevisedPFF.pdf>.

<sup>36</sup> Scottsboro’s and Knology’s submissions are available at [http://gullfoss2.fcc.gov/cgi-bin/websql/prod/ecfs/comsrch\\_v2.hts?ws\\_mode=retrieve\\_list&id\\_proceeding=01-129&start=1&end=45&first\\_time=N](http://gullfoss2.fcc.gov/cgi-bin/websql/prod/ecfs/comsrch_v2.hts?ws_mode=retrieve_list&id_proceeding=01-129&start=1&end=45&first_time=N).

## CONCLUSION

APPA applauds NTIA and the Bush Administration for its desire to make broadband capabilities and advanced telecommunications available promptly, at affordable rates, to all Americans, including those in the communities that APPA services. For more than a century, public power utilities have played an essential role in filling service gaps and bringing competition to the electric power industry, and they are well-poised to do the same in the communications area. This process has already begun in the states that do not have barriers to public power entry. With a firm commitment by Bush Administration, it can go forward in many other states. APPA calls on the Bush Administration to make that commitment now.

Respectfully submitted,

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