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STATE RESTRICTIONS ON COMMUNITY BROADBAND SERVICES OR OTHER PUBLIC COMMUNICATIONS INITIATIVES (as of June 1, 2014)

1. Alabama authorizes municipalities to provide telecommunications, cable, and broadband services, but it imposes numerous restrictions that collectively make it very difficult for municipalities to take advantage of this authority. For example, Alabama prohibits municipalities from using local taxes or other funds to pay for the start-up expenses that any capital intensive project must pay until the project is constructed and revenues become sufficient to cover ongoing expenses and debt service; requires each municipal communications service to be self-sustaining, thus impairing bundling and other common industry marketing practices; and requires municipalities to conduct a referendum before providing cable services.[1] (*Alabama Code § 11-50B-1 et seq.*)

2. Arkansas allows municipalities that operate electric utilities to provide communications services, except that it expressly prohibits them from providing local exchange services. Arkansas does not permit other municipalities to provide communications services. (*Ark. Code § 23-17-409*)

3. California generally allows public entities to provide communications services. Community Service Districts, however, have authority to provide communications services only as long as no private person is willing to do so. If such a private person emerges, the CSD must then sell or lease its system to that person at "fair market value" – which could well be below cost. Few, if any, funding sources are likely to be willing to fund projects burdened by such conditions. *Calif. Government Code § 61100(af)*

4. Colorado requires municipalities wishing to provide cable, telecommunications, or broadband services to hold a referendum before doing so, unless the community is unserved and the

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[1] While municipalities sometimes prevail in such referenda, they are time-consuming and burdensome, making public communications initiatives much more cumbersome than private initiatives. Moreover, in most cases, the incumbent communications providers vastly outspend municipalities and dominate the local news through their control of the local cable system. For example, in a referendum on a public fiber-to-the-home initiative in Batavia, Geneva, and St. Charles, Illinois, the incumbents acknowledged spending more than $300,000 in opposition to the initiative, whereas the cities were not permitted to spend any funds to support the project, and the local citizen advocates had less than $5,000 available to do so.

incumbents have refused to provide the services in question in response to a request by the community. (*Colo. Rev. Stat. Ann. § 29-27-201 et seq.*)

5. Florida by imposes price-raising *ad valorem* taxes on municipal telecommunications services, in contrast to its treatment of all other municipal services sold to the public. (*Florida Statutes §§ 125.421. 166.047, 196.012, 199.183 and 212.08*). In addition, since 2005, Florida has subjected municipalities to requirements that make it difficult for capital intensive communications initiatives, such as fiber-to-the-home projects, to go forward. For example, Florida requires municipalities that wish to provide communications services to conduct at least two public hearings at which they must consider a variety of factors, including "a plan to ensure that revenues exceed operating expenses and payment of principal and interest on debt within four years." Since fiber-to-the-home (FTTH) projects, whether public or private, often require longer than four years to become cash-flow positive, this requirement either precludes municipalities from proposing FTTH projects or invites endless disputes over whether or not a municipality's plan is viable. (*Florida Statutes § 350.81*)

6. Louisiana requires municipalities to hold a referendum before providing any communications services and requires municipalities impute to themselves various costs that a private provider might pay if it were providing comparable services. If a municipality does not hold a referendum, it must forgo any incumbent provider's franchise and other obligations (e.g., franchise fees, PEG access, institutional networks, etc.) as soon as a municipality announces that it is ready to serve even a single customer of the service in question.[2] The suspension remains in force until the monetary value of the municipality's obligations equal the monetary amount value of the obligations incurred by the private operators for the previous ten years. (*La. Rev. Stat. Ann. § 45:484.41 et seq.*)

7. Michigan permits public entities to provide telecommunications services only if they have first requested bids for the services at issue, have received less than three qualified bids from private entities to provide such services, and have subjected themselves to the same terms and conditions as those specified in their request for proposals. (*Mich. Comp. Laws Ann. § 484.2252*)

8. Minnesota requires municipalities to obtain a super-majority of 65% of the voters before providing local exchange services or facilities used to support communications services. (*Minn. Stat. Ann. § 237.19*)

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[2] Municipalities typically have lower costs than private entities and do not seek the high short-term profits that shareholders and investors expect of private entities. As a result, municipalities can sometimes serve areas that private entities shun and can often provide more robust and less expensive services than private entities are willing to offer. Imputed cost requirements – a form legislatively-sanctioned price fixing – have the purpose and effect of driving municipal rates up to the uncompetitive levels that private entities would charge if they were willing to provide the services at issue. Imputing costs is also difficult, time-consuming, inexact, and highly subjective. As a result, imputed cost requirements give opponents of public communications initiatives virtually unlimited opportunities to raise objections that significantly delay and add to the costs of such initiatives.

9. Missouri bars municipalities and municipal electric utilities from selling or leasing telecommunications services to the public or telecommunications facilities to other communications providers, except for services used for internal purposes; services for educational, emergency and health care uses; and "Internet-type" services. (*Mo. Rev. Stat. § 392.410(7)*).

10. Montana allows a city or town to act as an internet services provider only if no private internet services provider is available within the city or town's jurisdiction; if the city or town provided services prior to July 1, 2001; or when providing advanced services that are not otherwise available from a private internet services provider within the city or town's jurisdiction. If a private internet services provider elects to provide internet services in a jurisdiction where a city or town is providing internet services, the private internet services provider must inform the city or town in writing at least 30 days in advance of offering internet services. Upon receiving notice, the city or town must notify its subscribers within 30 days, and may choose to discontinue providing internet services within 180 days of the notice. (*Mon. Code Ann. § 2-17-603*).

11. Nebraska generally prohibits agencies or political subdivisions of the state, other than public power utilities, from providing wholesale or retail broadband, Internet, telecommunications or cable service. Public power utilities are permanently prohibited from providing such services on a retail basis, and they can sell or lease dark fiber on a wholesale basis only under severely limited conditions. For example, a public power utility cannot sell or lease dark fiber at rates lower than the rates that incumbents are charging in the market in question. (*Neb. Rev. Stat. Ann. § 86-575, § 86-594*)

12. Nevada prohibits municipalities with populations of 25,000 or more and counties with populations of 50,000 or more from providing "telecommunications services," as defined by federal law. (*Nevada Statutes § 268.086, § 710.147*)

13. North Carolina imposes numerous requirements that collectively have the practical effect of prohibiting public communications initiatives. For example, public entities must comply with unspecified legal requirements, impute phantom costs into their rates, conduct a referendum before providing service, forego popular financing mechanisms, refrain from using typical industry pricing mechanisms, and make their commercially sensitive information available to their incumbent competitors. Some, but not, all existing public providers are partially grandfathered. (*NC Statutes Chapter 160A, Article 16A*)

14. Pennsylvania prohibits municipalities from providing broadband services to the public for a fee unless such services are not provided by the local telephone company and the local telephone company refuses to provide such services within 14 months of a request by the political subdivision. In determining whether the local telephone company is providing, or will provide, broadband service in the community, the only relevant consideration is data speed. That is, if the company is willing to provide the data speed that the community seeks, no other factor can be considered, including price, quality of service, coverage, mobility, etc. (*66 Pa. Cons. Stat. Ann. § 3014(h)*)

15. South Carolina imposes significant restrictions and burdensome procedural requirements on governmental providers of telecommunications, cable, and broadband services "to the public for

hire." Among other things, South Carolina requires governmental providers to comply with all legal requirements that would apply to private service providers, to impute phantom costs into their prices, including funds contributed to stimulus projects, taxes that unspecified private entities would incur, and other unspecified costs. These requirements significantly detract from the feasibility of public projects and are so vaguely worded that they invite endless disagreements and costly, protracted challenges by the incumbents. (*S.C. Code Ann. § 58-9-2600* et seq.)

16. Tennessee allows municipalities that operate their own electric utilities to provide cable, two-way video, video programming, Internet access, and other "like" services (not including paging or security services), but only within their electric service areas and only upon complying with various public disclosure, hearing, voting and other requirements that a private provider would not have to meet. (*Tennessee Code Ann. § 7-52-601 et seq.*) Municipalities that do not operate electric utilities can provide services only in "historically unserved areas," and only through joint ventures with the private sector. (*Tennessee Code Ann. § 7-59-316*)

17. Texas prohibits municipalities and municipal electric utilities from offering telecommunications services to the public either directly or indirectly through a private telecommunications provider. (*Texas Utilities Code, § 54.201 et seq.*)

18. Utah imposes numerous burdensome procedural and accounting requirements on municipalities that wish to provide services directly to retail customers. Most of these requirements are impossible for *any* provider of retail services to meet, whether public or private. Utah exempts municipal providers of wholesale services from some of these requirements, but experience has shown that a forced wholesale-only model is extremely difficult, or in some cases, impossible to make successful. (*Utah Code Ann. § 10-18-201 et seq.*) Legislation enacted in 2013 imposes additional restrictions on the use of municipal bonds. (*Utah Code Ann. § 11-14-103(4)*)

19. Virginia allows municipal electric utilities to become certificated municipal local exchange carriers and to offer all communications services that their systems are capable of supporting (except for cable services), provided that they do not subsidize services, that they impute private-sector costs into their rates, that they do not charge rates lower than the incumbents, and that comply with numerous procedural, financing, reporting and other requirements that do not apply to the private sector. (*VA Code §§ 56-265.4:4, 56-484.7:1*). Virginia also effectively prohibits municipalities from providing the "triple-play" of voice, video, and data services by effectively banning municipal cable service (except by Bristol, which was grandfathered). For example, in order to provide cable service, a municipality must first obtain a report from an independent feasibility consultant demonstrating that average annual revenues from cable service alone will exceed average annual costs *in the first year of operation*, as well as over the first five years of operation. (*VA Code § 15.2-2108.6*) This requirement, without more, makes it impossible for any Virginia municipality other than Bristol (which is exempt) to provide cable service, as no public or private cable system can cover all of its costs in its first year of operation. Moreover, Virginia also requires a referendum before municipalities can provide cable service. (*Id.*)

20. Washington authorizes some municipalities to provide communications services but prohibits public utility districts from providing communications services directly to customers. (*Wash. Rev. Code Ann. §54.16.330*)

21. Wisconsin generally prohibits non-subscribers of the cable television services from paying any cable costs. Further, it requires municipalities to conduct a feasibility study and hold a public hearing prior to providing telecom, cable or internet services. It also prohibits "subsidization" of most cable and telecom services and prescribes minimum prices for telecommunications services. (*Wis. Stat. Ann. § 66.0422*)