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The Public Sector's Authority to Engage in Telecommunications Activities

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ABSTRACT

In this article, James Baller and Sean Stokes of the Baller Herbst Law Group, Washington, DC, participants in numerous state legislative battles against proposed barriers to municipal telecommunications activities and lead counsel in the *Abilene* and *Missouri* preemption cases, discuss the parallels in the evolution of the electric power and telecommunications industries, examine several recent state telecommunications measures, analyze the leading judicial and administrative cases on state barriers to entry, review the main policy arguments for and against the public sector's role in providing or facilitating the provision of telecommunications services, and suggest a number practical steps that communities can take to combat state barriers to entry.

William Kennard, Chairman of the Federal Communications Commission (FCC), has recently warned Congress that rural and low income communities may soon be left far behind the more lucrative telecommunications markets in obtaining the full benefits of the Information Age:

> Those cut off from these high-speed networks today will find themselves cut off from the economic opportunities of tomorrow. And more importantly, they will be cut off from the most important network that there is -- the network of our national community. ... We must always be looking for ways to remove barriers to investment and to promote competition. I am particularly concerned about deployment in rural areas and in inner cities. Given the early stage of deployment of advanced telecommunications generally, it may seem difficult to discern the extent of the disparity between rural and urban areas. But . . . in the very short term, demand for high bandwidth will really start to take off. My concern in that a geometric increase in demand may be mirrored by a geometric increase in the urban-rural disparity.[1]

During the last century, when faced with similar potential disparities in the electric power area, thousands of communities established their own electric utilities to provide the services that enabled them to survive and thrive. Now, communities across the United States are willing to do the same thing in the telecommunications area. Unfortunately, nine state legislatures, influenced by lavishly-financed lobbying campaigns mounted by incumbent monopolists, have enacted measures that would derail local self- help efforts and further entrench the incumbents' monopolies. Similar measures are currently pending in several other state legislatures.

In this article, we discuss the parallels in the evolution of the electric power and telecommunications industries, examine the telecommunications measures that several states have adopted, analyze the leading judicial and administrative cases on state barriers to entry, review the main policy arguments and counter-arguments concerning the public sector's role in providing or facilitating the provision of telecommunications services, and suggest several practical steps that communities can take to combat state barriers to entry.

Lessons From the History of the Electric Power Industry[2]

When the "Age of Electricity" dawned in the 1880's, it was greeted with as much excitement as the new "Age of Information" generates today:

> When electric power first emerged from the back rooms of inventors such as Charles Brush and Thomas Edison, it hit nineteenth century America with a dazzling impact. What fire had been for early man was a rough draft for the force electricity took on in lighting cities, running hundreds of thousands of industrial motors, engendering extensive networks of trolley car lines, and sparking the birth of mass communications. Even more than the railroads of a few decades before, it quickly outstripped the understanding and control of social institutions.[3]

According to popular myth, the Age of Electricity began in 1882, when Thomas Edison opened the first central electric generating station on Pearl Street in New York City.[4] The development of the electric power industry followed a path that should give pause to those who believe that private profit-maximizing firms can or will provide advanced services to all Americans in the early years of their operations, when the allure of the most profitable markets is most compelling.

Privately owned electric utilities conceptualized the process of electrification as "a series of markets that could best be exploited in a particular sequence" and did not seek to furnish electricity in all markets for half a century.[5] In the 1880s, they focused first on lighting large cities, commercial establishments and the homes of the very wealthy. As a calculated marketing strategy, they "made the new technology synonymous with wealth, power and privilege."[6] After 1888, they emphasized electrifying urban trolley systems, as this enabled them to maximize daytime use of generating capacity built primarily for lighting streets at night. After 1900, they turned to the industrial sector. Only after 1910 did the private utilities begin to electrify the homes of common people living in the cities. Farmers and others in rural settings had to wait until the 1930s.[7]

Many smaller communities, literally left in the dark by the private utilities, formed electric utilities of their own.[8] By 1890, more than 150 towns were operating lighting and power utilities,

and in the next decade, that number multiplied at a rapid pace.[9] Because these public power utilities typically charged prices that were half the rates charged by private utilities, "common people gained access to the miracle of electric lights, while in other cities only the wealthy could afford to switch from traditional gas or kerosene lamps, [and] commercial businesses faced higher prices."[10]

Public power utilities also filled gaps left by private utilities and introduced much-needed competition in many larger cities. For example, despite stiff resistance from the competing private utility, the City of Detroit established a municipally owned power system that reduced prices by fifty percent within seven years and extended service to the stores and homes of common people. Similar experiences elsewhere caused the popularity of public power to soar in the decade between 1897 and 1907, resulting in the formation of between 60 and 120 new systems each year.[11]

At the same time, the private sector also continued to expand and consolidate. By the middle of the 1920's, sixteen holding company leaders controlled 85 percent of the nation's electricity and seemingly had every advantage over public power utilities ------ a vertically and horizontally integrated industry, the ability to operate economically on a regional scale, ineffective regulation by state commissions, vast financial support from Wall Street, and dominance of public relations.[12] Public power suffered, declining from a peak of 3,066 systems in 1923 to 2,320 systems within four years.[13] Still, enough public power utilities remained to raise "troubling questions about fair rates, democratic control, and public service that would be widely debated again in the 1930s."[14]

In 1928, as public concern rose about the size, prices and practices of the private electric utilities, the Federal Trade Commission launched a four-year investigation of the so-called "Power Trust" of the major private utilities and their far-flung empires. In a scathing report that ran to eighty-four volumes, the FTC copiously documented a broad range of abuses, including financial manipulation, stock watering, padding of operating expenses, overpayment of executives, questionable transactions with subsidiaries, milking of operating companies, and massive lobbying and propaganda misdeeds.[15]

In the 1932 presidential election campaign, electric power became the "dominant" issue. On one side, President Hoover argued that "[t]he majority of men who dominate and control electric utilities belong to a new school of public understanding as to the responsibilities of big business to the people."[16] On the other side, Franklin D. Roosevelt maintained that:

> [W]here a community, or a city, or a county, or a district, is not satisfied with the service rendered or the rates charged by the private utility, it has the undeniable right as one of its functions of government ... to set up ... its own governmentally owned and operated service ... the very fact that a community can, by vote of the electorate, create a yardstick of its own, will, in most cases, guarantee good service and low rates to its pop-ulation. I might call the right of the people to own and operate their own utility a birch rod in the cupboard, to be taken out and used only when the child gets beyond the point where more scolding does any good.[17]

Over the last six decades, public power utilities have repeatedly proven that Roosevelt's "yardstick" and "birchrod" concepts work well in practice. As a result, public power utilities now

provide electricity to approximately one out of every seven Americans and gener-ate annual revenues exceeding $32 billion.

As in the early years of the electric power industry, the major telecommunications providers are pouring vast amounts of capital into the most lucrative urban population centers and are largely ignoring rural and low-income communities. Not only do their notices to shareholders and filings with the FCC reflect this,[18] but some of their senior officers have openly acknowledged that they have little interest in serving rural and low income communities. For example, Royce Caldwell, president of operations at SBC Communications, one of the Nation's largest and most aggressive telecommunications companies, recently told the *Wall Street Journal* that "[t]here 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."[19]

In this environment, communities across the United States have come to believe that they must take matters into their own hands if they are to secure prompt access to the full benefits of the Information Age, including economic development, educational opportunity, affordable health care and high quality of life. These communities believe that telecommunications are as basic to modern life as electricity, water and roads. Communities that already operate their own electric utilities are particularly well-situated to succeed in these endeavors.

In recent years, many public power utilities have upgraded their communications infrastructure to support their core business of providing electric service. Hundreds more will do so in the next few years. That is so because electric utilities need sophisticated communications facilities to meet ever-increasing demands for efficient and reliable electric service.

The communications facilities to which public power utilities have upgraded, or will upgrade, can readily support the provision of video, voice, data and other advanced telecommunications services, either by the public power utilities themselves or by other providers of such services. Public power utilities therefore can simultaneously help accelerate the pace of deployment of our national information infrastructure, facilitate local competition, advance universal service, and minimize wasteful, costly and duplicative burdens on streets, poles, ducts, conduits and rights of way.

Furthermore, for many public power utilities and the communities they serve, this is a time of dramatic change as the electric power industry undergoes restructuring and deregulation. Congress and many states are now struggling to develop approaches that would preserve the competitive balance in the electric power industry. Protected by Section 253 of the Telecommunications Act of 1996 from state and local barriers to entry, investor-owned and cooperatively-owned electric utilities are entering into new lines of business, forming alliances with telecommunications providers of their choice, and offering consumers "one-stop shopping" for energy, communications and other services. If they are to survive in the new competitive environment, public power utilities must similarly be free of state barriers to entry.

State Laws Affecting Municipal Authorigy to Engage in Telecommunications Activities

Federal law encourages municipal telecommunications activities but does not affirmatively grant

municipalities authority to engage in such activities. To do so, they must have authority under state law. In this section, we discuss examples of state laws that affect the ability of municipalities to engage in telecommunications activities.

Dillon's Rule States vs. Home Rule States

Generally, states fall into one of two categories: "Dillon's Rule" states and "Home Rule" states. Dillion's Rule is named for John Dillon, the chief judge of the Iowa Supreme Court who first articulated it in 1868.[20] Under the rule, the authority of a municipality is strictly construed to include only those powers that the state's constitution or legislature have expressly granted to it or that are necessarily implied or incidental to powers expressly granted. In some states the rule is purely judge-made; in others it is also codified.

By contrast, in Home Rule states, municipalities are generally deemed to be able to exercise any powers, and perform any functions, that are not expressly denied by the state's constitution or statutes or by the municipality's own Home Rule Charter. Many states -- including Iowa itself -- have wholly or partially repudiated Dillon's Rule. In such states, municipalities have a great degree of autonomy and are often able to act in both a sovereign and a proprietary capacity.

If a state's constitution or statutes do not specifically authorize municipalities to engage in telecommunications activities, one must first determine whether the state is a Dillon's Rule state or a Home Rule state. If the state is a Dillon's Rule state, one must determine whether the specific activity in question can be justified as a reasonable extension of a power otherwise granted.[21] If the state is a Home Rule state, one must determine precisely how the relevant Home Rule provision works. If satisfied that the Home Rule provision would generally allow municipalities to engage in telecommunications activities of the kind in issue, one must ensure that the municipality's charter, local ordinances, franchise agreements, contracts, etc., are consistent with the exercise of this authority.[22]

Specific State Measures

Over the last few years, numerous state laws affecting municipal authority to engage in telecommunications activities have emerged. Not only do these laws form a crazy-quilt pattern when viewed from a national perspective, but even on a state level they often defy rational analysis.

Some states grant municipalities broad authority to engage in telecommunications activities. For example, in 1995, the Georgia legislature enacted the Telecommunications and Competition Development Act for the purpose of promoting "the investment in telecommunications infrastructure required to further economic growth in Georgia and to meet the growing demands of Georgia's consumers through competition; and the removal of any legislative obstacles to competition for local exchange services."[23] Under the Act, any "telecommunications company" that can demonstrate to the Georgia Public Service Commission that it has the necessary financial ability and technical expertise to offer telecommunications services to the public for hire can obtain a certificate of authority to do so.[24] The definition of "telecommunications company" includes "any . . . corporation . . . or municipal, county, or local governmental entity."[25] The Georgia Public Service Commission has held that the Act authorizes municipalities to offer telecommunications services without having to comply with various imputed-cost

requirements that Bell South and the Cable Television Association of Georgia claimed to be necessary to create a "level playing field."[26] The Commission has also held, however, that the term "any . . . corporation" does not cover the Municipal Electric Authority of Georgia, even though the MEAG is a "public corporation" under Georgia law.[27] Oregon,[28] California,[29] and numerous other states similarly grant municipalities broad authority to engage in telecommunications activities.[30]

A number of states have adopted measures that authorize municipalities to provide some services but not others. For example, Missouri bars municipalities and municipal electric utilities from providing telecommunications services or telecommunications facilities, with certain limited exceptions enumerated in the statute.[31] Tennessee allows municipal entities to provide telecommunications services but prohibits them from offering the lucrative communications services that could make their provision of telecommunications services economically viable -- cable television, paging, security services and Internet services.[32] Virginia authorizes only the Town of Abingdon, the home of a prominent member of Congress, to provide telecommunications service. All other Virginia localities are prohibited from offering telecommunications services, equipment or infrastructure and are allowed only to sell their physical assets in place as of September 1, 1998.[33]

Some states have enacted outright prohibitions on municipal telecommunications activities. Texas bars municipalities and municipal electric utilities from offering telecommunications services or facilities directly or indirectly through private telecommunications providers.[34] Arkansas prohibits municipalities from providing local exchange services.[35] Nevada flatly prohibits cities with populations of 25,000 or more from selling any telecommunications services, as defined in the federal Telecommunications Act.[36]

Key Administrative and Judicial Cases

Section 253(a) of the Telecommunications Act of 1996 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" (emphasis added). According to the Federal Communications Commission (FCC), "this provision commands us to sweep away not only those state or local requirements that explicitly and directly bar an entity from providing any telecommunications service, but also those state or local requirements that have the practical effect of prohibiting an entity from providing service."[37] Unfortunately, the FCC has ruled that the term "any entity" in Section 253(a) does not cover municipalities that do not operate electric utilities,[38] and the United States Court of Appeals for the District of Columbia Circuit has recently upheld that determination.[39]

The FCC made this ruling in a preemption proceeding involving the Texas law mentioned in Section B above. The proceeding originally involved two challenges to the Texas law as applied to municipal entities. The first was brought by ICG Telecom, a private provider of telecommunications services that wanted to lease telecommunications facilities from San Antonio's municipal electric utility to jump-start competition with Southwestern Bell in that city. The second was brought be the City of Abilene, which did not operate its own electric utility but wanted to ensure that it had the authority to build its own telecommunications network to attract potential competitors to Southwestern Bell, as Southwestern Bell had refused to upgrade its

infrastructure to accommodate the City's economic development plans. After waiting well over a year for a decision, ICG withdrew its petition, terminated its agreement with San Antonio's municipal electric utility, abandoned its plan to compete with Southwestern Bell in San Antonio, and turned its attention to other markets. In response, the Commission limited its holding in the *Texas Order* to Abilene's facts, stating that "we do not decide at this time whether section 253 bars the state of Texas from prohibiting the provision of telecommunications services by a municipally-owned electric utility."[40]

The FCC went on to rule that the Texas prohibition on municipal telecommunications activities was an exercise of state sovereignty of the "fundamental" or "traditional" kind "'with which Congress does not readily interfere' absent a clear indication of intent."[41] Finding that Section 253(a) is not plain enough to satisfy the "plain statement" standard that the Supreme Court articulated in *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991), the FCC concluded that Texas municipalities are not "entities" separate and apart from the State for the purposes of Section 253(a) and that preempting the Texas statute "would insert the Commission into the relationship between the state of Texas and its political subdivisions in a manner that was not intended by section 253."[42] At the same time, however, the FCC urged other states not to do what Texas had done, because "[m]unicipal entry can bring significant benefits by making additional facilities available for the provision of competitive services."[43]

Abilene and the American Public Power Association (APPA) appealed the FCC's ruling to the United States Court of Appeals for the District of Columbia Circuit.[44] In the course of the appeal, the FCC admitted that it had not considered the legislative history of Section 253 in deciding the *Texas Order* and that this history is replete with evidence that Congress intended Section 253 to apply to municipal electric utilities.[45] The FCC insisted, however, that the rights of municipal electric utilities under Section 253 were not before the Court.[46] At oral argument, the Commission also assured the Court that the rights of municipal electric utilities would be considered fully and fairly in a preemption proceeding before the FCC involving the Missouri law discussed above. Thus assured, the Court upheld the *Texas Order*, finding that it was not deciding "whether public utilities are entities within § 253(a)'s meaning."[47] On March 11, 1999, the Court denied a petition for rehearing and suggestion that the rehearing be *in banc*.

While the litigation involving the Texas law was proceeding, the courts of Iowa were considering a challenge brought by the Iowa Telephone Association (ITA) to the City of Hawarden's plans to provide competitive telephone service. Among other things, ITA claimed that Hawarden's provision of telephone service would violate an Iowa law that prohibited the public sector from doing what the private sector could do. The lower court found that, if ITA's interpretation of the Iowa law were correct, the law would be preempted by the federal Telecommunications Act:

> The [Telecommunications] Act states that no state or local law may prevent "any entity" from providing telecommunications services. The Court finds that cities at least were not exempted from section 253(a), if not clearly contemplated by Congress as being included in the phrase "any entity." Generally, the word "any" is used in its fullest and all inclusive sense meaning all or every, but its use is still restricted and limited by the context of the statute. This Court finds that the goals and context of the Telecommunications Act -- universal service, openness of entry, and deregulation -- will be served best by applying the word in its fullest sense, and this usage includes municipalities and cities. Also, in

> construing statutes, courts must ascribe to statutory terms their ordinary meaning unless the legislature otherwise defines them. Because "entity" was otherwise left undefined in the Telecommunications Act, this Court must presume that Cities, as utility providers, are considered to be included within its reach.[48]

On appeal, the Iowa Supreme Court disagreed with the lower court's interpretation of Section 253 but found a different way to reach the same result. As to Section 253, the Court found that it was required to afford "considerable weight ... to an executive department's construction of a statutory scheme it is entrusted to administer" and that the FCC had authoritatively ruled in the *Texas Order* that the term "any entity" in Section 253(a) does not apply to municipalities. The Court noted, however, that 47 U.S.C. § 541(b)(3)(B) states that "[a] franchising authority may not impose any requirement under this chapter that has the purpose or effect of prohibiting . . . the provision of telecommunications service by a cable operator . . ." Since the State of Iowa is a "franchising authority" under 47 U.S.C. § 510(22) and Hawarden is a "cable operator" as defined in 47 U.S.C. §§ 510(5) and (15), the Court concluded that the State cannot prohibit Hawarden from providing telephone service over its cable system.

The Missouri preemption proceeding before the FCC is likely to produce the next major decision involving state barriers to entry.[49] As indicated above, that case squarely presents the question that the *Texas Order* and the *Abilene* decision left undecided -- whether the term "any entity" in Section 253(a) covers municipal electric utilities. In the Missouri case, the FCC will at last have to confront the legislative history of Section 253. It will have to address numerous subsequent agency rulings, orders, interpretations and arguments in litigation that are inconsistent with the agency's narrow construction of the term "any entity" the *Texas Order*.[50] For example, in one such ruling, the FCC held that the term "entity" should be interpreted expansively when necessary to achieve the pro-competitive purposes of the Act; that such an interpretation is "consistent with the idea that 'entity' is 'the broadest of all definitions which relate to bodies or units,' which is recognized by the D.C. Circuit and reflected in judicial and statutory definitions of 'entity' in other contexts;" and that "'[e]ntity' has been statutorily defined to include . . . a division of a government bureau...."[51] Similarly, in a brief to the United States Court of Appeals for the Eleventh Circuit filed just before the D.C. Circuit decided the *Abilene* case, the FCC insisted that "[r]ead naturally, the word 'any' has an expansive meaning, that is, one or some indiscriminately of whatever kind" and that "any" means "all."[52]

The FCC will also have to address the strong policy reasons for reading Section 253 to cover public power utilities. FCC Commissioner William Kennard recognized these considerations in recent testimony to the Senate Judiciary Committee's subcommittee on Antitrust, Business Rights and Competition: "I am discouraged that there have been some problems in the courts that haven't allowed some of these municipal utilities to provide these services. But I think that we ought to continue to work hard to open up every competitive avenue we can, including from this industry."[53]

Most important, the FCC will have to deal with *Salinas v. United States,* 118 S.Ct. 469 (1997), in which the Supreme Court expressly held that Congress's expansive, unqualified use of the modifier "any" precludes efforts to impose narrowing interpretations, introduces no ambiguity, and satisfies *Ashcroft's* "plain statement" standard.

Point and Counterpoint: Policy Arguments For and Against Municipal Telecommunications Activities

The main policy arguments that opponents of municipal telecommunications activities are now making to the FCC, state legislators, public service commissions, city councils and the public are not new -- they have been made in the electric power industry since its inception more than a century ago. In this section we summarize and respond to these arguments.

First, the opponents contend that municipalities have unfair advantages in providing or facilitating the delivery of telecommunications services. Among these advantages are the ability to regulate the private entities with which they compete, the ability to avoid fees and taxes that private entities must pay, the ability to obtain low cost financing and the ability to draw on public work forces and facilities. GTE added a new dimension to this argument in its comments opposing the Missouri petition for preemption:

> Finally, there is one additional advantage that is inherent in all municipalities and would be difficult, if not impossible, to avoid. The residents of towns like Columbia, Springfield, and Sikeston are going to know which telephone utility is the municipal utility regardless of its name. There is unquestionably a strong sense of civic pride and recognition that will exist in every municipality. Although GTE does not concede a level playing field to any municipality, even if the taxes, rights- of-way, construction permits, and the like somehow could be managed in an equitable manner, there is no way for any private corporate entity to overcome the citizens' sense of protecting their own.[54]

At the outset, these "level playing field" arguments are not only incorrect, as we show below, but they are absurd when made by the giant local exchange carriers (LECs) whose monopolies in local markets Congress sought to break down by enacting the Telecommunications Act. As the FCC observed in its *Interconnection Order,* it is the LEC's that have overwhelming advantages that must be offset to achieve meaningful competition:

> As we pointed out in our Notice of Proposed Rulemaking in this docket, the removal of statutory and regulatory barriers to entry into the local exchange and exchange access markets, while a necessary precondition to competition, is not sufficient to ensure that competition will supplant monopolies. An incumbent LEC's existing infrastructure enables it to serve new customers at a much lower incremental cost than a facilities-based entrant that must install its own switches, trunking and loops to serve its customers. Furthermore, absent interconnection between the incumbent LEC and the entrant, the customer of the entrant would be unable to complete calls to subscribers served by the incumbent LEC's network. Because an incumbent LEC currently serves virtually all subscribers in its local serving area, an incumbent LEC has little economic incentive to assist new entrants in their efforts to secure a greater share of that market. An incumbent LEC also has the ability to act on its incentive to discourage entry and robust competition by not interconnecting its network with the new entrant's network or by insisting on supracompetitive prices or other unreasonable conditions for terminating calls from the entrant's customers to the incumbent LEC's subscribers.
>
> Congress addressed these problems in the 1996 Act by mandating that the most

> significant economic impediments to efficient entry into the monopolized local market *must* be removed. The incumbent LECs have economies of density, connectivity, and scale; traditionally, these have been viewed as creating a natural monopoly. As we pointed out in our NPRM, the local competition provisions of the Act *require* that these economies be shared with entrants. We believe they should be shared in a way that permits the incumbent LECs to maintain operating efficiency to further fair competition, and to enable the entrants to share the economic benefits of that efficiency in the form of cost-based prices.[55]

On the merits, the incumbents' "level playing field" arguments do not withstand analysis. For one thing, municipalities generally have no regulatory authority over telecommunications providers -- that authority usually exists at the state level and is exercised by state public service commissions. Insofar as management of public rights of way are concerned, both Section 253(c) of the Telecommunications Act and similar state laws allow municipalities to do so only in a manner that is reasonable, fair, competitively- neutral and non-discriminatory to telecommunications providers.[56] Municipalities often do have authority to grant, renew and manage cable franchises, but they must comply with the detailed federal standards set forth in Title VI of Communications Act, and any perceived violations are subject to judicial review under 47 U.S.C. § 555.

The arguments about taxes, fees and low cost financing are also incorrect and misleading. Municipal utilities are routinely required to make payments in lieu of taxes, which are often higher than the taxes paid by private entities.[57] Municipal utilities do not earn profits subject to income taxes, but that advantage is offset by the billions of dollars of tax benefits that the private sector receives each year.[58] Municipal utilities also not only frequently charge themselves the same fees that a private provider would pay but also provide services free or at cost to other entities of local governments, such as street lighting, service to public buildings, etc.

Even though municipal utilities may sometimes have access to tax-exempt financing, securing such financing is a complex, time-consuming and burdensome process requiring public disclosure, extensive debate and prior public approval. Such financing also typically is accomplished through bond agreements that impose substantial limitations on the uses of the funds in question. Municipal utilities must also comply with burdensome private-use tax restrictions that can offset or eliminate the potential benefits of low-cost financing.

The argument that local governments have access to public work forces, poles, ducts, conduits and rights-of-way is also overstated. In reality, municipal utilities take great pains to allocate their costs to avoid cross-subsidization and, as indicated, make their facilities available on a competitively neutral and non-discriminatory basis. This is not just a matter of complying with federal and state requirements, but also one of knowing that they will have to justify their actions to their citizens. In addition, municipalities are required to make their records and books open to the public to a much greater extent than private entities.

On the other side of the "level playing field" coin, municipal utilities are subject to numerous burdens that the private sector does not share. Municipal utilities, as custodians of the public interest, must comply with all relevant "sunshine" and open- records requirements, and they must inform the public and secure prior approval of all major decisions. By contrast, privately-owned telecommunications providers are largely free to operate behind closed doors, subject only to

general corporate record-keeping and reporting requirements. They need not disclose their marketing strategies, prospective strategic partners, customers, terms of their ongoing business arrangements, etc. Their leaders are appointed rather than elected and are therefore not subject to constant public scrutiny and criticism.

Municipal utilities are typically subject to cumbersome competitive bidding requirements; conditions on wages imposed by the requirements such as the Davis-Bacon Act; obligations under "Buy American," minority set-aside and similar programs; and restrictions on the kinds of relationships that they can enter with private entities. Privately-owned providers are free to enter into any contracts that they believe to be in their best interests. Except for complying with general standards of legality, they also are not subject to procedural or substantive restrictions of any kind.

Municipal utilities also are typically constrained by civil service requirements, relatively inflexible compensation programs and budgetary limitations. Subject only to routine labor laws, privately-owned providers are free to hire and promote whomever they wish, to offer competitive salaries and benefits, and, with relative ease, to remove persons who are not performing up to expectations.

Municipal utilities are usually limited to operating wholly or primarily in their own local communities. They must live within the constraints posed by their relatively small size and can succeed only if they can offer advantages in price and quality of service. Privately-owned providers, particularly the giant Bell Operating Companies and GTE, are already free to operate in large regional and international markets, and if pending mergers are approved, in other markets. The mergers, they say, will allow them to achieve economies of scale in finance, management, workforce, R&D, administration, etc.[59] These advantages enables them to purchase plant, equipment, supplies, advertising and other requirements in sufficient amounts to qualify for substantial quantity discounts. In the absence of effective competition, they can also control the price, quality and content of the services they provide.

In short, the incumbents' "level playing field" argument is inappropriate, incomplete and incorrect. The Georgia Public Service Commission may have put this best in a brief justifying its decision not to impose supposedly field-leveling restrictions on Marietta FiberNet:

> Preventing anticompetitive practices, unfair competition, and abuse of market position does not mean that the Commission must impose conditions on every applicant which has some advantage not shared by every other applicant. The Commission is required to treat all LEC's equally, not make all LEC's equal. BellSouth and the large cable companies certainly enjoy better capital costs than a typical small business owner. Does this put the small company at a competitive disadvantage? Of course. Should the Commission determine which LEC has the highest capital costs and require that all other companies impute that amount into their rates to Alevel the playing field"? Certainly not. If Marietta has to comply with expensive open records requirements or expensive municipal bidding requirements, should those costs be imputed into the rates of all private companies? Again, no. Similarly, if BellSouth has a large tax write-off one year, it would be ridiculous to require that they impute into their tax rates the taxes they did not have to pay merely because some other company may not have had a tax write-off that year.

> Petitioners should realize that the goal of the Georgia Act is to allow the market, rather than the Commission, to set rates. Under their proposal, not only would the Commission be requiring that Marietta FiberNet impute taxes and capital costs, the Commission would presumably have to decide what those costs should be. Requiring imputation for costs not incurred is in essence setting Marietta FiberNet's minimum prices. The Legislature and the Georgia Constitution, however, have determined that it is the role of the market and municipalities to determine those prices.[60]

In addition to their "level playing field" arguments, opponents of municipal telecommunications activities argue that municipal entities are not capable of operating complex telecommunications utilities and should not be allowed to enter into highly risky telecommunications ventures. For over a century, however, municipalities have proven in the electric power industry that they can operate highly sophisticated technologies. They also have a wealth of experience in billing customers, responding to inquiries and complaints, and providing technical service. Where barriers to entry do not exist, numerous municipalities have demonstrated that they can also operate successfully in the communications area. Municipal utilities in Glasgow, KY, Gainesville, FL, Cedar Falls, Harlan and Hawarden, IA, Lusk, WY, Tacoma, WA, and numerous other locations have led the way, and hundreds of other municipalities are prepared to follow. For municipal utilities, these are not "highly risky ventures" but logical extensions of their current activities. Moreover, any decisions to proceed will be tested through time consuming and open public debate in the communities in question. In this process, telecommunications activities will be judged on their merits, and the officials responsible for them will be held accountable at the ballot box. This sort of process is foreign to the corporate world.

Finally, opponents of municipal telecommunications activities argue that consumer-owned entities should not compete with the private sector when it can adequately meet public needs. This contention is disingenuous, as in many areas of the country, the private sector knows perfectly well that it cannot provide vital services any time soon. In these localities, municipalities are often the only viable means of introducing such services. Furthermore, even if the private sector could satisfy a community's needs, a "free market" economy should encompass the ability of consumers to decide not to purchase services from the private sector but to satisfy their needs through their own facilities.

Observations and Recommendations

Based on our experience in the Texas and Missouri proceedings as well as in legislative battles over proposed barriers to municipal entry in several other states, we offer the following observations and recommendations to those who may encounter efforts by incumbent providers to obtain barriers to entry in their states.

- Start preparations early -- the incumbents will.

- Build coalitions, not only with other municipalities and their state associations, but also with businesses, educational institutions, health care providers, citizens groups and others who would benefit from municipal involvement in telecommunications.

- Learn from the experiences of municipalities in other states. Some arguments work well; others may be counterproductive. Themes to stress include economic development, educational opportunity, fear of being left behind, quality of life, etc. Themes that put off many state legislators include "We want to get into the telecommunications business."

- Prepare detailed white papers, "two-pagers" and other briefing papers addressing the opponents major points, with a local orientation. Many models from other states now exist.

- Brief your supporters in the legislature as early and often as possible and ask them to notify you as quickly as they can if new bills or riders are introduced.

- Assume that the incumbents will be aggressive, sneaky and ruthless.

- Hire the most persuasive lobbyists available as early as possible -- incumbents often use or create conflicts of interest for the best lobbyists.

- Be prepared for a long hard battle, with constantly changing bills, amendments, proposals and counterproposals. Have knowledgeable counsel available to advise you on the nuances and potential consequences of each.

- Line up financial support, arrange for equitable cost-sharing, and collect shares early on. Once the battle starts, collecting on commitments becomes increasingly difficult, especially if matters do not go as well as hoped.

- Be realistic and creative. Compromises may be necessary.

Conclusion

The public sector has an essential role to play in the deployment of our national telecommunications infrastructure. The FCC's commissioners and senior staff understand this. The Missouri case, we hope, will turn the tide on state barriers to entry, once and for all.

Comment on this paper and see what other readers have said.

REFERENCES

[1]Separate Statement of Chairman Kennard, accompanying adoption of *Report on the Deployment of Advanced Telecommunications Capability to All Americans,* CC Docket No. 98-146, released February 3, 1999.

[2]This section is adapted from Baller, "The Essential Role of Municipal Electric Utilities in Developing the National Information Infrastructure," which was presented at the American Public Power Association's national conference on telecommunications in October 1994.

[3]R. Rudolph and S. Ridley, *Power Struggle: The Hundred Year War Over Electricity,* at 10 (1986) (hereafter "*Power Struggle*").

[4]R. Morgan, T. Riesenberg and M. Troutman, *Taking Charge: A New Look at Power* at 5 (1976); *Power Struggle* at 28- 29. In reality, power systems had already been built in Cleveland, Ohio, Wabash, Indiana, and Butler, Missouri. American Public Power Association, *Public Power In America: A Histor*y at 1-2.

[5]D. Nye, *Electrifying America* at 26- 27 (1990); *Power Struggle* 30-31.

[6]*Power Struggle* at 382; see also Electrifying America at 28-32.

[7]*Power Struggle* at 29-30.

[8]Hundreds of other rural communities formed electric cooperatives.

[9]American Public Power Association, *Public Power in America: A History* at 2.

[10]*Power Struggle* at 32.

[11]*Power Struggle* at 32-38.

[12]*Power Struggle* at 46-52; *Electrifying America* at 182-83.

[13]*Power Struggle* at 47.

[14]*Electrifying America* at 183.

[15]*Taking Charge* at 7-8; *Power Struggle* at 51, 195.

[16]President Hoover's comments are quoted in *Power Struggle* at 66.

[17]Franklin Delano Roosevelt's speech, delivered in Portland, Oregon in September 1932, is quoted in *Taking Charge* at 9.

[18]For example, in recent filings with the Federal Communications Commission, SBC Corporation and Ameritech urge the Commission to approve their proposed merger on the ground that it will enable them to bring competitive services to the top 30 markets that neither currently serves. *In the Matter of Application for Consent to Transfer Control from Ameritech to SBC, Corporation,* CC Docket No. 98-141, initial application for transfer filed July 24, 1998. Similarly, Bell Atlantic and GTE Corporation explain that their merger will promote competition

in major markets outside their existing territories. *In the Matter of Application for Consent to Transfer Control from GTE to Bell Atlantic,* CC Docket No. 98-184, initial application for transfer filed October 2, 1998. Likewise, the FCC relied in large measure on AT&T's stated plans to develop local broadband competition in major markets, as well as other markets where economically feasible, as justification for approving AT&T's acquisition of Tele-Communications, Inc. *In the Matter of Application for Consent to Transfer Control from Tele-Communications, Inc. to AT&T, Corp., Memorandum Opinion and Order,* CS Docket No. 98-178, at pars. 139,146- 147, released February 18, 1999.

[19]"After Years of Chaotic Competition, Phone Industry Is Ruled By Four Firms," *Interactive Wall Street Journal* (March 8, 1999).

[20]*Merriam v. Moody's Executors*, 25 Iowa 163, 170 (1868).

[21]For a useful example of such an analysis, see the recent opinion by the Attorney General of Ohio finding that vocational schools can purchase hardware and software for a system to provide Internet access to its students and then offer Internet access for a fee to other entities and individuals. The opinion can be found on the Internet at http://www.ag.state.oh.us/opinions/1999/99-007.htm.

[22]A charter or ordinance may be relatively easy to change. For example, the City of Alameda, California, recently amended its charter to eliminate a provision that would have required it to obtain a 2/3 vote of the people in order to form a communications utility.

[23]O.C.G.A. § 46-5-161(a).

[24]O.C.G.A. § 46-5-163(b).

[25]O.C.G.A. 46-5-163(17).

[26]Georgia Public Service Commission, *Order on Reconsideration Granting Interim Certificate of Authority With Conditions*, Docket No. 6329-U (September 3, 1996), *aff'd The Cable Television Association of Georgia, et. al v. Georgia Public Service Comm'n,* Case No. E-53464 (Ga. Super. Ct., May 19, 1997).

[27]Georgia Public Service Commission, *Order,* Docket No. 7967-U (March 31, 1998), *aff'd Municipal Electric Authority of Georgia v. Georgia Public Service Comm'n,* Civil Action No. E-67795 (Ga. Super. Ct., September 29, 1998) (appeal pending).

[28]ORS 759.020; *see also* Oregon Public Service Commission, *In the Matter of the City of Ashland,* OR, No. 98-54 (December 30, 1998) confirming that cities have the right under Oregon law to provide telecommunications services without conditions.

[29]California Constitution, Article XI, Section 9(a); Cal. Pub. Utilities Code § 10001; 54 Cal. Atty. Gen. Ops. 135 (1971).

[30]In 1997, the Iowa legislature, by unanimous vote of both houses, enacted a law that expressly authorized the Iowa Utilities Board to award certificates of convenience and necessity to municipalities that had voted to provide telecommunications services to themselves through municipal utilities. The Act was entitled "An ACT authorizing the utilities board to issue

certificates of public convenience and necessity to municipal telecommunications utilities, regulating certain municipal utilities as competitive local exchange service providers, and including effective date and retroactive applicability provisions." To date, at least 33 communities in Iowa have approved measures, many by overwhelming majorities, to establish municipal utilities to provide cable, telephone and other communications services. Yet, despite the clarity of the statutory language and the actions of Iowa's municipalities, the Supreme Court of Iowa recently concluded that the legislature's activity was not clear and explicit enough to provide municipalities in Iowa authority to provide telecommunications services. *Iowa Telephone Ass'n v. City of Hawarden*, No. 145/97-83 (Iowa, February 17, 1999), http://www.judicial.state.ia.us/decisions/supreme/opinions/19990217/97-0083.asp.

[31]Revised Statutes of Missouri § 392.410(7), which can be found on the Internet at http://www.moga.state.mo.us/statutes/c300-399/3920410.htm.This law reads as follows:

> No political subdivision of this state shall provide or offer for sale, either to the public or to a telecommunications provider, a telecommunications service or telecommunications facility used to provide a telecommunications service for which a certificate of service authority is required pursuant to this section. Nothing in this subsection shall be construed to restrict a political subdivision from allowing the nondiscriminatory use of its rights-of-way including its poles, conduits, ducts and similar support structures by telecommunications providers or from providing telecommunications services or facilities:
>
> 1. For its own use;
>
> 2. For 911, E-911 or other emergency services;
>
> 3. For medical or educational purposes;
>
> 4. To students by an educational institution;
>
> 5. Or Internet type services.
>
> The provisions of this subsection shall expire on August 28, 2002.

[32]Tenn. Code. Ann. § 7-52-406 (1997). The Tennessee Code is not available on the Internet.

[33]Virginia Code § 15.2-1500, which can be found on the Internet at http://leg1.state.va.us/cgi-bin/legp504.exe?981+ful+CHAP0906.

[34]Texas Pub. Util. Code § 54.202, which can be found on the Internet at http://www.capitol.state.tx.us/statutes/codes/UT000019.html.

[35]Ark. Code § 23-17-409 (1998). The Arkansas code is not available on the Internet.

[36]NS § 268.086, which can be found on the Internet at http://www.leg.state.nv.us/search?NS-search-page=document&NS-rel-doc-name=/nrs/CH_268.html&NS-query=268.806&NS-search-type=NS-boolean-query&NS-collection=NRS&NS-docs-found=1&NS-doc-number=1.

[37]*In the Matter of the Public Utility Commission of Texas,* FCC 97-346, (rel. Oct. 1, 1997) ("*Texas Order*"), which can be found on the Internet by searching for the date "10/1/97" at http://www.fcc.gov/headarch97.html.

[38]*Texas Order,* ¶¶ 173-190.

[39]*City of Abilene v. Federal Communications Comm'n,* 164 F.3d 49 (D.C. Cir. 1999), which is on the Internet at http://www.fcc.gov/ogc/recopin.html.

[40]*Texas Order,* & 179.

[41]*Texas Order,* & 181, quoting Gregory v. Ashcroft, 501 U.S. 452, 461 (1991).

[42]*Texas Order,* & 173.

[43]*Texas Order,* ¶ 190.

[44]The authors represented Abilene and APPA in this appeal.

[45]Brief of Respondents at 17-18.

[46]*Id.*

[47]*Abilene,* 164 F.3d at 53 n.7.

[38]*Iowa Telephone Ass'n v. City of Hawarden,* No. 18320 (Dist. Ct. for Sioux Cty., Dec. 12, 1996) at 10.

[49]The authors represent the petitioners and APPA in the Missouri proceeding.

[50]The Commission did not deny the inconsistency between the *Texas Order* and the agency's subsequent pronouncements, but it insisted that the FCC should not be faulted for having "ignored precedents that did not precede." Final Brief of Respondents at 23 (inner quotations and citations omitted).

[51]*In the Matter of Enforcement of Section 275(A)(2) of the Communications Act of 1934, As Amended By the Telecommunications Act of 1996, Against Ameritech Corporation,* 13 FCC Rcd 19046, ¶¶ 10, 16 (September 25, 1998).

[52]Brief for Respondents in *Gulf Power Co. v. Federal Communications Comm'n,* Case No. 98-6222 (11th Cir.) at 37-41.

[53]Transcript of hearing quoted in Public Power Weekly (March 8, 1999). The Government Printing Office's official published report of the hearing is not yet available.

[54]Comments of GTE Service Corp. at 11- 12.

[55]*Implementation of the Local Competition Provisions in the Telecommunications Act of 1996;*

Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Implementation of Sections 3(n) and 332 of the Communications Act, CC Docket No. 96-98, CC Docket No. 95-185, GN Docket No. 93-252; FCC 96-325, ¶ 10-11, which is available on the Internet at http://www.fcc.gov/ccb/local_competition/fcc96325.html.

[56]See, e.g., *AT&T Communications of the Southwest, Inc. v. City of Dallas,* 8 F.Supp.2d 582, 586-87 (N.D. Tex. 1998).

[57]1994 *Payments and Contributions By Public power Distribution Systems To State and Local Governments,* American Public Power Association, 1996.

[58]Investor-owned electric utilities alone receive more than $8 billion annually in tax breaks. MSB Energy Associates, "Federal Tax Breaks that Lower Investor-Owned Utility Costs and U.S. Treasury Revenues" (December 1998).

[59]July 28, 1998, Press Statement of GTE announcing merger with Bell Atlantic. Which can be found on the Internet at http://www.gte.com/AboutGTE/NewsCenter/News/Releases/gtebell.html.

[60]Brief of the Georgia Public Service Commission in *Cable Television Association of Georgia v. Georgia Public Service Commission,* Case No. E-53464 (Ga. Super. Ct.).

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