

**THE BALLER HERBST LAW GROUP**

*A PROFESSIONAL CORPORATION*

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**NATIONAL ASSOCIATION OF TELECOMMUNICATIONS  
OFFICERS AND ADVISORS**

**REGIONAL WORKSHOP  
NASHVILLE, TENNESSEE  
MARCH 7, 2003**

**KEY LEGAL ISSUES AFFECTING  
COMMUNITY-OWNED BROADBAND SYSTEMS**

**Jim Baller  
Sean Stokes  
Casey Lide**

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## **JAMES BALLER**

Jim Baller is the founder of the Baller Herbst Law Group, a national law firm based in Washington, DC, and Minneapolis, MN, that specializes in representing local governments and public power utilities in matters involving telecommunications, cable television, high-speed data communications, Internet access, wireless telecommunications, right-of-way management, pole and conduit attachments, and barriers to the public-sector entry into telecommunications. His clients include the American Public Power Association (APPA), the National Association of Telecommunications Officers and Advisors (NATOA), regional and state utility associations, municipal leagues and numerous individual local governments and public power utilities. NATOA named him its Member of the Year for 2001.

Working regularly with multi-disciplinary teams of legal, financial, accounting, engineering and other technical experts, Mr. Baller also assists government entities in making comprehensive telecommunications plans, developing state-of-the-art telecommunications systems, searching for strategic partners, and integrating right-of-way and zoning ordinances, franchises, licenses, pole-attachment agreements, contracts, forms, permits and other related documents. As a litigator, Mr. Baller has had first-chair responsibility in numerous cases involving complex factual, legal and policy issues, multiple parties and large amounts in controversy. He was lead counsel in the City of Bristol's successful challenge to a Virginia ban on municipal telecommunications (vacated as moot following enactment of corrective legislation). He is also currently lead counsel in two other important test cases, one on the right of localities to provide telecommunications services free of state barriers to entry, and the other on what the term "level playing field" means in broadband franchising.

Mr. Baller was the subject of a feature interview in *Telecommunications Reports* entitled "On The Record: Cities, Public Utilities To Keep Fighting Telecom Service Bans." His recent writings and presentations include *Pole Attachment Guidebook* (APPA, Oct. 2002) (co-author); "Advanced Course on Legal Issues for Public Power Utilities" (APPA, Oct. 2002); "Broadband Deployment: Major Implications for Local Governments" (NATOA, April 2002); "Combating Predatory Practices by Incumbents" (APPA, Oct. 2001); "The Case For Municipal Broadband Networks: Stronger Than Ever," *NATOA J. of Mun. Telecom. Policy* (Fall 2001) (co-author); "Overbuilds" (NATOA, April and May 2001); "Pole Attachments: New Developments" (APPA, Mar. 2001); *Utilities Telecommunications Guidebook* (APPA, Sep. 2000) (co-author); "The FAQs About Institutional Networks" (IMLA, Sep. 1999) (co-author).

Mr. Baller is a graduate of Dartmouth College ('69) and Cornell Law School ('72). He is a member of the Bars of the Supreme Court of the United States; the United States Circuit Courts of Appeal for the Federal, District of Columbia, Fourth, Fifth and Sixth Circuits; and the courts of the District of Columbia. He holds Martindale-Hubbell's highest AV rating; is a member of the editorial board of the *Journal of Municipal*

*Telecommunications*; is a lifetime member of the *National Registry of Who's Who*; and is recognized in *Who's Who in American Law* and *Who's Who in Emerging Leaders*.

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## **NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS**

### **REGIONAL WORKSHOP NASHVILLE, TENNESSEE MARCH 7, 2003**

### **KEY LEGAL ISSUES AFFECTING COMMUNITY-OWNED BROADBAND SYSTEMS**

**Jim Baller  
Sean Stokes  
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#### **I. THE BENEFITS OF PUBLIC BROADBAND SYSTEMS**

- A. Access to advanced communications services vital to economic growth, educational opportunity, affordable health care and quality of life
- B. In the foreseeable future, the private sector will not offer communities outside dense population centers sufficiently robust communications services to spur economic development
  1. *See, e.g.*, J. Baller & S. Stokes, "The Case for Municipal Broadband Networks: Stronger Than Ever" (Fall 2001), available at <http://www.baller.com/library-articles.html>.
  2. "It is important to note here that the current generation of broadband technologies (cable and DSL) may prove woefully insufficient to carry many of the advanced applications driving future demand. Today's broadband will be tomorrow's traffic jam, and the need for speed will persist as new applications and services gobble up existing bandwidth." Office of Technology Policy, U.S. Dep't of Commerce, *Understanding Broadband Demand: A Review of Critical Issues*, at 6 (Sept. 2002).

3. “Under current technology, broadband service should take account of the substantially greater demand of consumers for downstream capacity. *Most cable systems have determined, based upon their analysis of usage requirements and bandwidth availability, that 128 kbps is adequate to accommodate the current needs of broadband users under most circumstances.* ... If upstream rates are set too high, for example, the available downstream capacity will be limited. *By setting the peak upstream rate at 128 kbps, the network is optimized to provide the very fast downstream rates that consumers expect from their broadband cable networks.*” Comments of the National Cable Telecommunications Association, *In the Matter of: Deployment of Broadband Networks and Advanced Telecommunications*, Docket No. 011109273-1273-01 (Dec. 2001).
  4. “Verizon proposes the following definition as the basis for the Administration’s policymaking: A broadband service is one that, using a packet-switched or successor technology, includes the capability of transmitting information that is generally not less than 384 kilobits per second in at least one direction or 56 kilobits per second in both directions.” Comments of Verizon Communications, *In the Matter of: Deployment of Broadband Networks and Advanced Telecommunications*, Docket No. 011109273-1273-01 (Dec. 2001).
  5. Immediately after the FCC recently announced its decision to remove obligations of incumbent local exchange carriers to make broadband facilities available to their competitors on an unbundled basis at wholesale rates, the Bells announced that they would not make substantial new investments in broadband facilities until they obtained additional concessions in deregulating their telephone obligations
- C. By owning its own communications network, a community maximizes its ability to
1. control the types, quality, reliability, timing and location of communications services deployed in the community
  2. ensure that services will be available to the community at the lowest possible price
  3. promote universal access and interconnectivity
  4. enhance the community’s economic development, educational opportunity and quality of life
  5. minimize disruption to public property and maximize efficient use of public rights of way
  6. improve government efficiency and communication with the public
  7. enhance the local government’s revenues from, and decrease its external expenditures for, communications services

8. spur incumbent providers to lower prices and improve quality of service
  9. amounts saved will remain in the community, where they will typically recycle four or more times
- D. A credible threat of municipal entry may be sufficient to cause significant changes in an incumbent's performance. (E.g., Braintree, MA)
- E. Communities that operate their own electric utilities are particularly well-suited to operate their own communications systems
1. Same technological, demographic, economic forces at work as those existing in the early stages of the electric power industry. *See* J. Baller & S. Stokes, "The Public Sector's Authority to Engage in Telecommunications Activities" (April 1999), available at <http://www.baller.com/library-articles.html>.
  2. 75% of America's public power utilities serve communities with less than 10,000 residents. In the next 3-5 years, public power utilities may be the only viable provider of advanced communications services in many of these communities
  3. Public power utilities are "anchor tenants" that substantially reduce the financial risks of the building and operating public communications networks
  4. Public power utilities have more than a century of experience in providing sophisticated, technologically-complex services, billing and supporting customers of all kinds, and furnishing universal service
  5. Need to survive in decontrolled and restructured electric power industry against competitors that can bundle energy and telecommunications services.

## **II. BURDENS AND RISKS OF PUBLIC BROADBAND SYSTEMS**

- A. Financial
1. Costs – construction, operations and maintenance
  2. Revenues – need relatively high penetration rates
  3. Unavailability of suitable financing at all stages
  4. Restrictions on financing
  5. Costs of combating challenges by incumbents (legislative and judicial)

B. Technological

1. Changing technologies – complete obsolescence or enough competition to cut penetration below necessary levels
  - a. the longer the payback period needed to reach success, the greater the likelihood of pressures from new or improved technologies
  - b. include all technologies, e.g., improved performance (DSL for wireline and DOCSIS 2 and beyond for cable), WiFi, fixed terrestrial and satellite wireless, Ultra Wide Broadband
  - c. electric power lines – Manassas, VA pilot
2. Economies of technological scale – local vs. regional, national or international operations
3. Need for expertise in multiple areas

C. Marketing

1. Government entities generally lack communications marketing expertise
2. National brands vs. local identity
3. Bundling of cable, local and long distance telephone, Internet, etc.
  - a. value of whole package may offset deficiencies in any individual area – e.g., poor cable service
  - b. economies of scale in operations, bulk purchasing, borrowing, advertising, etc.
4. Deep cost cutting by incumbents

D. Political

1. Deep philosophical differences – e.g., private enterprise v. local self-help
2. Regional differences
3. Major incumbents have vast political clout with Congress, many state legislatures

E. Legal – see next section

### III. LEGAL AUTHORITY OF PUBLIC ENTITIES TO PROVIDE COMMUNICATIONS SERVICES

#### A. Federal Law Encourages, But Does Not Affirmatively Empower, Local Governments to Provide Communications Services

##### 1. “Cable Service”

a. The term “cable service” means (A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service. 47 U.S.C. § 522(6).

b. Section 613(e) of the Communications Act, 47 U.S.C. § 533(3), provides:

“(1) Subject to paragraph (2), a State or franchising authority may hold any ownership interest in any cable system.

“(2) Any State or franchising authority shall not exercise any editorial control regarding the content of any cable service on a cable system in which such governmental entity holds ownership interest (other than programming on any channel designated for educational or governmental use), unless such control is exercised through an entity separate from the franchising authority.”

c. At least one court has found that Section 533(e) is “permissive rather than empowering” – i.e., it does not furnish a federal grant of authority to provide cable service. *Time Warner Communications Inc. v. Borough of Schuylkill Haven*, 784 F. Supp. 203, 213 (E.D. Pa. 1992); *but see Warner Cable Communications, Inc. v. City of Niceville, FL*, 911 U.S. 634, 635 (11<sup>th</sup> Cir. 1990) (Section 533(e) “authorizes local governments to own and operate their own cable systems”).

d. In *Marcus Cable Associates, L.L.C. v. City of Bristol*, 237 F.Supp.2d 675 (W.D.VA 2002), *appeal pending*, *City of Bristol v. Marcus Associates, L.L.C.*, No. 03-1094 (4<sup>th</sup> Cir.), the district court held that, because the City of Bristol lacks explicit or implicit authority to provide cable television service, Virginia’s strict version of Dillon’s Rule requires that it be deemed to lack such authority. The court also found that cable television service is not an essential service is thus not a “public utility” of the kind that the City was authorized to provide under Virginia law and the City’s charter.



2. “Telecommunications service”

- a. The term “telecommunications service” means “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” 47 U.S.C. § 3(46). The term “telecommunications,” in turn, means the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received. 47 U.S.C. § 3(43).
- b. Section 253(a) the Telecommunications Act provides that:

“No state or local statute or regulation or other state or local legal requirement may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”
- c. At least two courts have held that Section 253(a) does not affirmatively empower local governments to provide telecommunications services but merely precludes states from removing pre-existing local authority to provide such services. *Missouri Municipal League v. FCC*, 2002 WL 1842319, \*6 (8<sup>th</sup> Cir., March 14, 2002); *City of Bristol, VA v. Earley*, 145 F.Supp.2d 741, 745 (W.D.Va. 2001) (vacated as moot following enactment of corrective state legislation).
- d. In *Public Utility Commission of Texas*, 1997 WL 603179 (October 1, 1997), the FCC ruled that the term “any entity” in Section 253(a) does not cover municipalities, as such. The FCC found 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,” and that Section 253(a) is not plain enough to satisfy the “plain statement” standard articulated in *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991).
- e. In *City of Abilene v. FCC*, 164 F.3d 49, 54 (D.C. Cir. 1999), the U.S Court of Appeals for the D.C. Circuit upheld the FCC’s decision, finding that “it was not plain to the Commission, and it is not plain to us, that § 253(a) was meant to include municipalities in the category “any entity.” Under Gregory, the petition for judicial review must therefore be denied.” The court did not mention Abilene’s leading authority, *Salinas v. United States*, 522 U.S. 52 (1999), which was decided while *Abilene* was on appeal, in which a unanimous Supreme Court held that a term modified unrestrictedly by “any” must be interpreted broadly unless the statute or legislative history requires a narrowing construction.

- d. In *Missouri Municipal League*, 2001 WL 28068 (January 12, 2001), the FCC focused on municipalities that operate their own electric utilities but still held that they are not covered by Section 253(a). Finding that Missouri law treats municipal electric utilities and the municipalities of which they are a part as inseparable, the FCC found that the Missouri case is legally indistinguishable from, and is therefore controlled by, *Abilene*. The FCC interpreted *Salinas* as holding only that a court should interpret an ambiguous statute in a manner that avoids intrusion upon states' rights. The FCC did not discuss the petitioners' argument that *Salinas* went on to say that Congress's broad and unrestricted use of "any" eliminates any ambiguity and satisfies *Gregory v. Ashcroft's* "plain statement" standard.
- e. In *Missouri Municipal League v. FCC*, 2002 WL 1842319 (8<sup>th</sup> Cir. 2002), the U.S. Court of Appeals for the Eighth Circuit reversed the FCC's *Missouri* decision. Disagreeing with the FCC and the D.C. Circuit, the 8<sup>th</sup> Circuit found that found municipalities are commonly considered to be "entities" and that, under *Salinas* and similar Supreme Court precedents, courts must assume that when Congress used the modifier "any" in an expansive, unrestricted way, it intended that the term modified be given its broadest possible scope. The State of Missouri has petitioned the United States Supreme Court to hear the case.
- g. Previously, a federal district court in Virginia had found that "any entity" in Section 253(a) does cover municipal utilities and invalidated Virginia's former barrier to public entry. *City of Bristol, VA v. Earley*, 145 F.Supp.2d 741 (W.D.Va. 2001) (vacated as moot following enactment of corrective state legislation). In the *Missouri* case, the 8<sup>th</sup> Circuit cited *Bristol* twice with approval.
- h. The Nebraska Supreme Court, in a case involving Lincoln Electric Service of Lincoln, NE, found that Nebraska's barrier to entry violated federal law under Section 253(a). *In re Application of Lincoln Electric System*, 655 N.W. 2d 363 (Neb. 2003). The Court found that it was not bound by the D.C. Circuit's or the 8<sup>th</sup> Circuit's decisions and ruled that the latter was the better reasoned. In applying Nebraska's restrictive Home Rule provision, the Court also found that providing telecom services was inherent in or connected with a municipality's functions.
- i. Prior to the *Bristol* and *Missouri* decisions, two state courts have deferred to the FCC's restrictive interpretation of Section 253(a) in its *Texas* decision, as affirmed by *Abilene*. *Municipal Elec. Auth. of Georgia v. Ga. Pub. Serv. Comm'n*, 241 Ga. App. 237, 525 S.E.2d 399, 403 (1999), *cert. denied*, *Municipal Electric Authority of Georgia v. Georgia Public Service Comm'n* (Ga. 2000); *Iowa Tel. Ass'n v. City of Hawarden, IA*, 589 N.W.2d 245, 252 (Iowa 1999).

- j. Another case currently in litigation: *Washington Independent Telephone Association v. Pacific County Public Utility District #2*, Dkt. No. 99-2-00430-4 (Super. Ct. Pacific County, WA) (Key issue: Does PUD have authority to provide retail Internet access under Washington law?).
3. “Broadband,” “Advanced services,” “Advanced telecommunications capability” and “Information services”
- a. Neither the Communications Act nor the FCC has defined the term “broadband.” The FCC defines the terms “advanced services” and “advanced telecommunications capability” collectively as “services and facilities with an upstream (customer-to-provider) and downstream (provider-to-customer) transmission speed of more than 200 kbps.” *In the Matter of Inquiry Concerning the Provision 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*, ¶9, CC Docket 98-146, *Third Report*, (rel. February 6, 2002). The FCC defines “high speed” services those “with over 200 kbps capability in at least one direction.” *Id.*
  - b. The Communications Act defines the term “information service” as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” 47 U.S.C. § 3(20).
  - c. Section 254(b)(3) of the Telecommunications Act expresses the national goal that “Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.”
  - d. Section 706(a) of the Telecommunications Act requires the FCC and the States to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”

- e. Section 706(b) of the Telecommunications Act requires the FCC to determine annually whether “advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion,” and if the FCC’s determination is negative, to “take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”
4. While Section 253(a) expressly applies to “telecommunications service[s],” it prohibits “effective” prohibitions as well as explicit prohibitions
- a. In ¶ 22 of its *Texas Order*, the FCC stated:
 

“[S]ection 253 expressly empowers -- indeed, obligates -- the Commission to remove any state or local legal mandate that “prohibit[s] or has the effect of prohibiting” a firm from providing any interstate or intrastate telecommunications service. *We believe that 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. As to this latter category of indirect, effective prohibitions, we consider whether they materially inhibit or limit the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.*”
  - b. Under the foregoing standard, is a state barrier on cable or Internet service an “effective” barrier to the provision of “telecommunications service” if a potential provider’s business plan shows that inability to provide *all* such services destroys its ability to provide *any* of them?
- B. State Laws Affecting the Authority of Public Entities to Provide Communications Services
- 1. Dillon’s Rule States
    - a. Under “Dillon’s Rule,”<sup>\*</sup> 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.
    - b. In some states, the rule is codified, and in others it is judge-made. Occasionally, a state has both codified and judge-made versions that are in apparent conflict (e.g., South Carolina).

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\* Dillon’s Rule is named for John Dillon, the chief judge of the Iowa Supreme Court who first articulated it in *Merriam v. Moody’s Executors*, 25 Iowa 163, 170 (1868).

- c. Where the rule exists, silence is generally construed against public authority to provide communications services.
  - d. If a government entity is in a Dillon’s Rule state, one must, if possible, justify the specific communications activity in question as a reasonable extension of a power otherwise granted.<sup>†</sup>
2. “Home Rule” States
- a. In “Home Rule” states, “home rule” or “charter” cities 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.
  - b. Many states – including Iowa itself -- have wholly or partially repudiated Dillon’s Rule.
  - c. In Home Rule states, local governments have a great degree of autonomy and are often able to act in both a sovereign and a proprietary capacity.
  - d. It is very important to understand exactly how a state’s Home Rule provision works. For example, in some states, only certain public entities are covered. Sometimes the state rule has presumptions that apply in certain situations but not others.<sup>‡</sup>
  - e. If a public entity would qualify for coverage by a state’s constitutional or statutory Home Rule measure, one must ensure that the entity has followed, or will follow, all appropriate procedures necessary to take advantage of the measure.
3. State Measures
- a. Some states have expressly granted local governments broad authority to provide communications services. *See, e.g.,* Ala. Code §11-50B-3; Ariz. Rev. Stat. § 9-511(A), 9-514(A) (with voter approval); California Const., Article XI, Section 9(a) and Cal. Pub. Utilities Code § 10001; 54 Cal. Atty.

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<sup>†</sup> For an example of such an analysis, see an 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. See <http://www.ag.state.oh.us/opinions/1999/99-007.htm>.

<sup>‡</sup> Opinion of the State of Washington Attorney General, AGO 2001-3. Although municipal corporations must have explicit or implicit authority, they enjoy presumption in their favor.

Gen. Ops. 135 (1971) and Fla. Stat. Ch. XII, § 166.047; O.C.G.A. §§ 46-5-163(b) and 46-5-163(17) (Georgia),<sup>§</sup> Oregon Revised Statutes §759.020; Va. Code § 15.2-2160 (competitive local exchange services) and § 56-484.7:1 (“qualifying communications services”).

- b. Some states authorize local governments to provide some services but not others. For telecommunications services, Section 253(a) of the Telecommunications Act applies to the provision of “any interstate or intrastate telecommunications service.” Thus, partial barriers are arguably invalid under the rationale of the Eighth Circuit’s decision in the *Missouri* case and the federal district court’s decision in the *Bristol* case. Examples of partial barriers include:
  - i. Missouri prohibits the state’s political subdivisions from providing all telecommunications services and facilities other than services to telecommunications providers (under certain circumstances), services for internal use, services for medical and educational purposes, emergency services and “Internet-type” services. Revised Statutes of Missouri § 392.410(7). (Declared unconstitutional in *Missouri Municipal League* case)
  - ii. Tennessee bans municipal provision of paging and security service but allows provision of cable, two-way video, video programming, Internet and other “like” services only upon satisfying various anti-competitive public disclosures, hearing and voting requirements that a private provider would not have to meet. Tenn. Code Ann. § 7-52-601 *et seq.*
  - iii. Nebraska prohibited public entities from becoming telecommunications carriers but allows them to offer “dark fiber” – fiber optic cable without the electronics required for transmission of information – under onerous conditions. Neb. Rev. Stat. § 86-2304 *et seq.* (Declared unlawful in *Lincoln Electric* case)

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<sup>§</sup> The Georgia Public Service Commission has held that the Georgia statute 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.” *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). The Commission has also held, however, that neither the Act nor MEAG’s enabling legislation authorizes it to furnish telecommunications services. *Order*, Docket No. 7967-U (March 31, 1998), *aff’d, Municipal Elec. Auth. of Georgia v. Ga. Pub. Serv. Comm’n*, 241 Ga. App. 237, 525 S.E.2d 399, 403 (1999), *cert. denied, Municipal Electric Authority of Georgia v. Georgia Public Service Comm’n* (Ga. 2000).

- iv. Arkansas prohibits municipal entities from providing basic local exchange services, but not other telecommunications services. Ark. Code § 23-17-409
  - v. Washington expressly authorizes Public Utility Districts to provide wholesale telecommunications services but does not furnish similar explicit authority to provide retail services. RCW § 54.16.330.
- c. Some states have enacted outright prohibitions on municipal telecommunications activities. Examples follow:
- i. Texas bars municipalities and municipal electric utilities from offering telecommunications services or facilities directly or indirectly through private telecommunications providers. Texas Pub. Util. Code § 54.202 *et seq.*
  - ii. Arkansas prohibits municipalities from providing local exchange services. Ark. Code § 23-17-409.
  - iii. With certain limited exceptions, Nevada precludes cities with populations of 25,000 or more from offering any telecommunications services, as defined in the federal Telecommunications Act. Nevada Statutes § 268.086.
- d. Some states have enacted measures that are not explicit prohibitions but impose burdens that are difficult, if not impossible, to meet. For example,
- i. Minnesota requires municipalities to obtain a 65% super-majority vote in order to provide telecommunications services. Minn. Stat. Ann. § 237.19.
  - ii. Massachusetts expressly authorizes cities and towns to provide communications services but impose onerous voting requirements. M.G.L., Ch. 164, Sections 34, 35 and 36.
  - iii. South Carolina allows public entities to provide telecommunications services subject to various imputed-cost requirements. S.C. Code § 58-9-2600.
  - iv. Utah authorizes municipalities to provide retail cable and telecommunications services, UT Code § 10-8-14, but if they chose to go beyond subjects them to extremely onerous procedural requirements and substantive restrictions, UT Code § 10-18-101 *et seq.* (Law

exempts provision of infrastructure to private providers and grandfathers arrangements in effect on March 1, 2001.)

- v. Virginia now allows localities to provide local exchange and other communications services, but subjects localities to various onerous burdens. Va. Code §§ 15.2-2160, 56-265.4:4.
  - vi. Florida allows municipalities to exercise home rule authority to provide telecommunications services, Fla. Const., Article VIII, ' 2(b); Fla. Stat. Ch. XII, § 166.021(3) but imposes ad valorem taxes on municipal telecommunications services, Fla. Stat. Ch. XII, § 166.047. (Provision invalidated under Florida law in *City of Gainesville v. Zingale*, CA No. 2000-CA-00 1582 (Cir. Ct. 2d Cir., Leon Co., March 20, 2002), *appeal pending*, *Dep't of Revenue v. City of Gainesville*, No. 1D02-1582 (Fl. Dist. Ct. App., 1<sup>st</sup> Dist).
- d. Several state legislatures are currently considering new restriction on public communications providers
- i. Iowa – SSB 1037/HSB 46 (municipal telecom)
  - ii. Oregon -- HB 2442/HB 2443 (municipal telecom)
  - iii. Virginia – SB 875 (municipal cable)
  - iv. Washington State – SB 5899 (wholesale PUD telecom)
- e. others are considering measures to decontrol incumbent activities
- i. California AB508 (would exempt wireless providers from PUC regulation)
  - ii. Indiana HB 1467 (would remove IURC authority to regulate broadband and SBC “winback” programs)
  - iii. Minnesota (bill anticipated that would exempt OVS providers from state cable requirements)
  - iv. Various states – Bells seek state deregulation of broadband (Oklahoma approved; Kansas rejected)
- f. If state law authorizes or permits public communications projects, be sure to comply with or challenge relevant procedural requirements. For example,
- i. Iowa, Georgia and Ohio have relatively simple procedural requirements



- ii. Utah, Nebraska, and Tennessee have complex procedural requirements
- iii. Virginia's procedures are under development
- g. Recent trend in new state legislation – “fair competition” requirements
  - i. Imputed cost requirements defeated in Georgia, Ohio, Oregon, Virginia, etc., but more recently enacted in Utah, Virginia, Missouri and South Carolina
  - ii. How impute costs? Who's comparable? How obtain data? *See* Georgia Public Service Commission brief in *Marietta FiberNet* case.
  - iii. If imputing requirements read to require raising prices, they are fundamentally anticompetitive and contrary to the public interest
- g. Who regulates? What is regulated?
  - i. States public service commissions increasingly involved in determining initial qualifications – e.g., Utah, Georgia
  - ii. Some states also regulate compliance with “fair competition” requirements – e.g. Georgia, Utah, Virginia

C. Local Restrictions

- 1. Local ordinances, charters, franchises, pole agreements, bond restrictions, contracts, etc., may contain explicit or implicit barriers to entry. **REVIEW THESE CAREFULLY.**
- 2. For example, the City of Alameda, CA, had a charter provision that precluded it from establishing any new utilities without a 2/3 vote of the electors – a practical impossibility. The City was able to, and did, eliminate the charter provision by a simple majority vote.

**IV. INVOLVEMENT MODELS AND STRUCTURES**

A. Public communications projects come in many shapes and forms

B. Examples

- 1. Publicly-created, independent communications entity – e.g., Memphis Network
- 2. Public communications services only to government and educational users – e.g., Portland Integrated Regional Network Enterprise (OR); Milwaukee, (WI); many others

3. Publicly-owned communications utility providing only wholesale services to retail providers – e.g., NOANet (WA and OR)
4. Publicly-owned communications utility providing retail services to public – e.g., Bristol (VA); Kutztown (PA); Tacoma (WA); Ashland (OR); Cedar Falls (IA); Glasgow (KY); scores of others
5. Non-profit entity – e.g., Georgia Public Web
6. Strategic partnership with private-sector – e.g., Hawarden (IA) (with LongLines and NIPSCO); LaGrange (GA) (with Charter); Shawnee (KS) (Shawnee Municipal Authority, Com Solutions and Systems Inc., and the Oklahoma Municipal Services Corporation)
7. Lease of municipal facilities to private-sector provider – e.g., Anaheim (CA)
8. Construction and sale of municipal facilities to private sector provider – e.g., Lynchburg (VA) (sold \$3.5 million 42-mile fiber-optic network to CFW Communications (now nTtelos) for \$1 and, in return, received (a) 30-year irrevocable right to use all of the fibers it had previously been using; (b) 8 fibers on all new routes in City; (c) CFW's agreement to offer broadband service to 95% of addresses in City within 4 years; (d) the best telephone rates in Virginia for 10 years; (e) hundreds of thousands of dollars worth of technical assistance and equipment discounts, (f) various other benefits).
9. Regional entities – e.g., Oregon Central Coast Economic Development Alliance; UTOPIA project in Utah; Tri-Cities project in Illinois; *eCorridor* Project in Virginia. (NB: *see GTE Northwest, Inc. v. Oregon Public Utility Comm'n*, 39 P.3d 201 (Or.App. 2002), on a county's authority to provide extraterritorial telecommunications services.)
10. Demand aggregation – e.g., Chicago CityNet (IL); BerkshireConnect (MA); Stillwater (OK).

## V. OTHER CONSIDERATIONS

- A. Predatory pricing and other anticompetitive conduct by Incumbents – *see, e.g.,* Scottsboro (AL) Power Board filings and FCC response at <http://www.baller.com/library-comments.html>.

- B. Access to essential facilities and programming – *see, e.g.*, APPA’s comments to the FCC on exclusive contracts for programming, <http://www.baller.com/library-comments.html>; *see also In The Matter of Implementation Of The Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution, Section 628(c)(5) of the Communications Act Sunset of Exclusive Contract Prohibition, Report and Order*, at ¶ 7, 17 FCC Rcd. 12,124, 2002 WL 1396090 (rel. June 28, 2002)
- C. Access to customers, particularly in multi-user settings – *see In the Matter of Telecommunications Services Inside Wiring ...*, CS Docket No. 95-184, MM Docket No. 92-260,, *First Order on Reconsideration and Second Report and Order* at ¶ 71 (rel. January 29, 2003), at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-03-9A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-9A1.doc).
- D. “Level Playing Field” issues – *see, e.g.*, state statutes, cases and analysis of these issues in City of Louisville briefs and summary judgment decision at <http://www.baller.com/library-comments.html>.
- E. Incumbents may attempt to resurrect arguments they lost in early legal challenges to municipal systems
  - 1. Inside wiring issues – *e.g.*, Glasgow, KY, dealt successfully with such issues in litigation in late 1980s and early 1990s, and then Congress codified protections in Cable Act Amendments of 1992. The FCC recently stated that the inside wiring rules apply to all multichannel video programming distributors (MVPDs) in the same manner. In essence, the order maintains the status quo, reaffirming the contract-oriented rules governing home run wiring, inside wiring and MDUs. *First Order On Reconsideration And Second Report and Order, Cable Inside Wiring*, CS Docket No. 95-184; MM Docket No. 92-260, (rel. January 29, 2003), at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-03-9A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-9A1.doc).
  - 2. Antitrust issues – *e.g.*, City of Paragould, AK, dealt successfully with such issues in *Paragould Cablevision, Inc. v. City of Paragould*, 930 F.2d 1310 (8<sup>th</sup> Cir. 1991).
  - 3. “Public purpose” issues – *e.g.*, City of Morganton, NC, dealt with such issues successfully in *Madison Cablevision, Inc. v. City of Morganton, NC*, 325 N.C. 634, 386 S.E.2d 200 (1989).

## VI. FEDERAL REGULATORY ISSUES

### A. Key Definitions

- 1. The term “telecommunications carrier” means “any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226). A telecommunications carrier shall be treated as a

common carrier under this Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.” Act, § 3(44).

2. The term “telecommunications service” means “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” Act, § (46).
3. The term “telecommunications” means the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received. Act, § 3(43).
4. The term “information service” means “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” Act, § 3(20).
5. The term “cable service” means (A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service. Act, § 602(6).
6. The term “commercial mobile service” means any mobile service . . . that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission. Act, § 332(d).

B. Implications of Key Definitions:

1. A provider of “telecommunications service” must comply with common carrier requirements to the extent that it is engaged in providing such services. Act, § 3(44).
  - a. Title II of the Communications Act spells out numerous additional duties of “common carriers,” including compliance with rules governing equal access and pricing, trifling, record keeping, reporting, participating in the Commission’s complaint processes, performing studies prescribed by the Commission; etc.
  - b. Commission has relaxed some tariffing requirements on non-dominant carriers
2. Under § 251(a) of the Act, each “telecommunications carrier” has a general duty “(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and (2) not to install network features, functions, or

capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256,” which apply to access by handicapped and disadvantaged persons [NB: The Commission has said that a telecommunications carrier can satisfy part (1) simply by interconnecting with the public switched network; to date, the Commission has not defined the duties referred to in part (2)].

3. Under § 254 of the Act and several implementing orders and decision, all “telecommunications carriers” and all “other providers of interstate telecommunications” must contribute to the federal universal service fund. Contributions are based on a contribution factor announced by the Commission each quarter.
4. Providers of “telecommunications service” must also fulfill various privacy requirement under § 222.
5. The Act also affords “telecommunications carrier[s]” certain benefits, including the right to interconnect with the facilities of incumbent local exchange carriers on a just, reasonable and non-discriminatory basis; the right to participate in negotiations and/or arbitrations framed by the Commission’s interconnection rules; the right to receive reimbursement for furnishing services covered by the universal service program.
6. Providers of “cable service” are regulated under the federal cable provisions of Title VI of the Communications Act and are required to obtain a franchise at either the state or local level, depending on state law. An exception to the franchise requirement is that municipally-owned cable systems are not required to obtain a franchise under the federal Cable Act, as amended. (NB: As a practical matter, however, many public cable systems subject themselves to obligations that are identical or substantially similar to those imposed on private cable companies.)
7. Providers of “information service” are not subject to federal regulation or, in most states, state regulation.
  - a. Up until this year, the FCC had declined to take a definitive position as to the regulatory classification of cable modem service. This uncertainty helped to spawn conflicting federal court opinions on the proper classification of the service. The 9<sup>th</sup> Circuit in *City of Portland, OR v. AT&T Corp.*, 45 F.Supp.2d 1146 (W.D. Or. 1999), *rev’d*, 216 F.3d 871 (9<sup>th</sup> Cir. 2000), concluded that cable modem service is a type of telecommunications service. In contrast the 11<sup>th</sup> Circuit, in *Gulf Power v. FCC*, 208 F.3d 1263 (11<sup>th</sup> Cir. 2000), held that cable modem service is neither a “cable service” nor a “telecommunications service” but an “information service.” The *Gulf Power* decision was overturned by the Supreme Court on other grounds. *National Cable & Telecommunications Ass’n, Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002).

- b. In March 2002, the FCC released a declaratory ruling in which it found that cable modem service is an “interstate information service” and thus not a “cable service.” *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities Internet Over Cable Declaratory Ruling ...*, GN Docket No. 00-185, CS Docket No. 02-52, (rel. March 15, 2002). The FCC's decision has been appealed to the 9<sup>th</sup> Court of Appeals. The elimination of cable modem service has mixed regulatory, financial and political implications for municipal utilities. It should allow for greater regulatory freedom, but it also eliminates cable modem revenue from the calculation of cable franchise fees payable to local franchising authorities.
  - c. In a proceeding related to its cable modem proceeding, the FCC has issued a *Notice of Proposed Rulemaking* to develop a legal and policy framework under the Communications Act, as amended, for access to the Internet provided over domestic wireline facilities. *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities ...*, CC Docket Nos. 02-33, 95-20, 98-10, *Notice of Proposed Rulemaking* (rel. February 15, 2002). In the NPRM, the FCC proposes to rule that Internet access service over wireline facilities is also an *interstate* “information service” rather than a “cable service” or a “telecommunications service.”
  - d. After examining the statutory definitions of "telecommunications," "telecommunications service," and "information service," the FCC tentatively concluded in the *Wireline NPRM* that providers of wireline broadband Internet access service should properly be classified as "information service" providers under the Act, rather than as providers of "telecommunications services." As a consequence, among other things, incumbent local telephone companies would not be compelled to provide Digital Subscriber Line (DSL) facilities to competitors at wholesale prices as Unbundled Network Elements.
  - e. In its *Wireline NPRM*, the FCC sought comment on the potential consequences of its tentative legal interpretation. Among the areas of concern identified by APPA were whether the FCC's proposed action would significantly impair the development of competition, as envisioned in the Telecommunications Act, and whether the ultimate effect of moving an increasing number of services out of the definitions of “telecommunications services” or “telecommunications” would be to bankrupt the federal Universal Service Program. The FCC's action also implicates access safeguards, interconnection, security, consumer protections and a host of other important issues.
8. Providers of commercial mobile service – i.e., commercial wireless services – are subject to minimal regulation
- a. Section 332 of the Communications Act imposes minimal federal regulation

- b. Section 332 preempts state and local regulation of the rates of, or entry into, commercial mobile service
- c. State and local governments can only regulate certain “other terms and conditions,” such as customer billing information and practices; billing disputes and other consumer protection matters; facility siting issues (e.g., zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis.

## C. Pole Attachments

### 1. Key definitions

- a. As amended by Section 703 of the Telecommunications Act, § 224 of the Communications Act of 1934 imposes on every “utility” a broad range of duties concerning pole attachments
- b. Section 224(a)(1) defines “utility” as “any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way (hereafter collectively “pole attachments”) used, in whole or in part, for any wire communications. *Such term does not include any railroad, any person owned by the Federal Government or any State*” (emphasis added).
- c. Section 224(a)(3) defines the term “State” as “any State, territory, or possession of the United States, the District of Columbia, *or any political subdivision, agency or instrumentality thereof*” (emphasis added).
- d. Thus, public power utilities are exempt from federal regulation of their poles, attachments, ducts, conduits and rights-of-way.

### 2. Major implications of the “municipal exemption”

- a. Public power utilities do not have to apply the specific federal access, rate or procedural requirements, but should nevertheless pay close attention to them because:
  - i. some states have incorporated federal requirements
  - ii. federal requirements often viewed as benchmarks
  - iii. Congress may eliminate exemption
  - iv. allowable rates under federal rules may be higher than current charges

- v. public power entities that provide cable or telecom services have attachment rights under federal law
  - vi. Government entities are, however, subject to Section 253's ban on barriers to entry and non-discrimination requirements
    - (A). unreasonable rates, terms or conditions, or substantial delay in processing applications, can arguably be barriers to entry
    - (B) legislative history and recent cases hold that "nondiscriminatory" does not necessarily mean "equal"
- b. **Conclusion: public power utilities have substantial flexibility but cannot discriminate unreasonably**
- c. *TCI Cablevision of Washington, Inc. v. City of Seattle*, No. 97-2-02395-5SEA (Super. Ct. for King County, WA, 5/3/98) (appeal withdrawn) held:
- i. Seattle was exempt from federal requirements and subject only to state's requirement that rates be "just, reasonable, nondiscriminatory and sufficient"
  - ii. Seattle did not have to distinguish among cable and telecom providers as federal statutes do
  - iii. Seattle could implement rate increases immediately, without waiting until 2001 and then phasing increases in over 5 years
  - iv. Seattle did not have to apply 2/3 limit on recovery of costs of unusable space
  - v. Seattle could allocate usable space by usage (cable 1 foot, telephone 2 feet, electric utility the rest)
  - vi. City could allocate unusable space per capita
  - vii. City could allocate costs of 4-foot clearance space per capita among all users of the pole
3. Federal access requirements
- a. Utilities covered by the definition of "utility" in §224(a) are subject to the following general requirements:



- i. In evaluating a request for access, a utility may continue to rely on such recognized industry standards as the National Electric Safety Code to prescribe standards with respect to capacity, safety, reliability, and general engineering principles.
  - ii. Federal requirements, such as those imposed by FERC and OSHA, will continue to apply to utilities to the extent such requirements affect requests for attachments to utility facilities.
  - iii. The FCC will defer to relevant state and local requirements and presume them to be reasonable.
  - iv. Where access is mandated, the rates, terms, and conditions of access must be uniformly applied to all telecommunications carriers and cable operators that have or seek access.
  - v. With certain exceptions, a utility may not favor itself over other parties with respect to the provision of telecommunications or video programming services.
- d. The Commission also adopted the following guidelines and presumptions:
- i. Believing that a utility can and will expand capacity when it needs to do so for its own purposes, the Commission had concluded that the nondiscriminatory access requirements of Section 224(f)(1) require a utility to expand capacity upon request by other telecommunications carriers and cable operators. In a recent decision, however, the U.S. Court of Appeals for the 11<sup>th</sup> circuit, rejected the FCC's interpretation of the law. In *Southern Company v. FCC*, 293 F.3d 1338 (11<sup>th</sup> Cir.), the court concluded that the FCC's interpretation is inconsistent with the plain language of the Act's statutory exemption from the requirement to grant access in instances where there is insufficient capacity. Accordingly, a utility need not expand capacity in order to accommodate a request for attachment that would not otherwise be in compliance with established safety, engineering or reliability standards.
  - ii. The Commission will permit an electric utility to reserve space *if* such reservation is consistent with a bona fide development plan that reasonably and specifically projects a need for that space in the provision of *the utility's core electric service, and not in the provision of telecommunications service*. The utility must permit use of its reserved space by cable operators and telecommunication carriers until such time as the utility has an actual need for that space. At that time, the utility may recover the reserved space for its own use. The utility must give the displaced cable operator or telecommunications

carrier the opportunity to pay for the cost of any modifications needed to expand capacity and to continue to maintain its attachment.

- iii. A provider of utility service will not be considered a “utility” within the meaning of Section 224(a)(1) if it neither allows other persons to use its facilities for wire communications nor uses its facilities for wire communications itself, including in the provision of its core electric service. If *any* portion of a utility service provider’s facilities is used for wire communications, the provider must afford reasonable, nondiscriminatory access to *all* poles, ducts, conduits and rights-of-way, even those not currently being used for wire communications.
  - iv. A utility may require that individuals who will work in the proximity of electric lines have the same qualifications, in terms of training, as the utility's own workers, but the party seeking access can use any individual workers who meet these criteria.
  - v. To the extent safety and reliability concerns are greater at a transmission facility, the statute permits a utility to impose stricter conditions on any grant of access or, in appropriate circumstances, to deny access if legitimate safety or reliability concerns cannot be reasonably accommodated.
  - vi. § 224(f)(1) does not mandate that a utility make space available on the roof of its corporate offices for the installation of a telecommunications carrier's transmission tower. It only requires utilities to permit cable operators and telecommunications carriers to "piggyback" along distribution networks owned or controlled by utilities, as opposed to granting access to every piece of equipment or real property owned or controlled by the utility. In *Southern Company*, the 11<sup>th</sup> Circuit reversed the FCC's application of the pole attachment rules to interstate transmission facilities and held that only structures that are solely or partially used for distribution of electricity are covered by the Act’s definition of a "pole."
  - vii. The Act does not describe the specific type of telecommunications or cable equipment that may be attached when access to utility facilities is mandated. The Commission presumes, however, that the size, weight, and other characteristics of attaching equipment have an impact on the utility's assessment of the factors determined by the statute to be pertinent -- capacity, safety, reliability, and engineering principles. The question of access should be decided based on those factors.
- e. With respect to modifications, the Commission adopted the following standards:

- i. Absent a private agreement establishing notification procedures, written notification of a modification must be provided to parties holding attachments on the facility to be modified at least 60 days prior to the commencement of the physical modification itself. Notice should be sufficiently specific to apprise the recipient of the nature and scope of the planned modification. If the contemplated modification involves an emergency situation for which advanced written notice would prove impractical, the notice requirement does not apply. In these circumstances, the notice should be given as soon as reasonably practicable, which in some cases may be after the modification is completed. The burden of requiring specific written notice of routine maintenance activities would not produce a commensurate benefit;
- ii. To the extent the cost of a modification is incurred for the specific benefit of any particular party, the benefiting party will be obligated to assume the cost of the modification, or to bear its proportionate share of cost with all other attaching entities participating in the modification. If a user's modification affects the attachments of others who do not initiate or request the modification, such as the movement of other attachments as part of a primary modification, the modification cost will be covered by the initiating or requesting party. Where multiple parties join in the modification, each party's proportionate share of the total cost shall be based on the ratio of the amount of new space occupied by that party to the total amount of new space occupied by all of the parties joining in the modification;
- iii. If an entity uses a proposed modification as an opportunity to adjust its preexisting attachment, the "piggybacking" entity should share in the overall cost of the modification to reflect its contribution to the resulting structural change. A utility or other party that uses a modification as an opportunity to bring its facilities into compliance with applicable safety or other requirements will be deemed to be sharing in the modification and will be responsible for its share of the modification cost;
- iv. If a modification would not have occurred absent the action of the initiating party, the cost should not be borne by those that did not take advantage of the opportunity by modifying their own facilities. An attaching party, incidentally benefiting from a modification, but not initiating or affirmatively participating in one, should not be responsible for the resulting cost;
- v. A modifying party or parties can recover a proportionate share of the modification costs from parties that later are able to obtain access as a result of the modification. The proportionate share of the subsequent

attacher should be reduced to take account of depreciation to the pole or other facility that has occurred since the modification;

- vi. Parties requesting or joining in a modification also will be responsible for resulting costs to maintain the facility on an ongoing basis;
  - vii. In some cases a facility modification may create excess capacity that eventually becomes a source of revenue for the facility owner, even though the owner did not share in the costs of the modification. The owner would not, however, have to use those revenues to compensate the parties that did pay for the modification.
- f. The FCC has adopted the following procedures for resolving disputes about poles attachments:
- i. If a utility wishes to deny a written request for access, it must furnish the requester a written denial by the 45th day. The denial must include all relevant information and explain the reasons for the denial in detail. Under the Section 224 complaint process, the requester will then have 30 days to file a complaint with the Commission. Copies must be served on the utility and the relevant federal, state and local agencies;
  - ii. The complaining party must establish a prima facie case that the denial was unlawful. The Commission will deny the petitioner's claim if a prima facie case is not established. A complaint will not be dismissed if a petitioner is unable to obtain a utility's written response, or if a petitioner is denied any other relevant information by the utility needed to establish a prima facie case;
  - iii. A utility that receives a legitimate inquiry regarding access to its facilities or property must make its maps, plats, and other relevant data available for inspection and copying by the requesting party, subject to reasonable conditions to protect proprietary information. The Commission therefore believes that its procedures will eliminate the need for costly discovery in pursuing a claim of improper denial of access, allowing attaching parties, including small entities with limited resources, to seek redress of such denials;
  - iv. If the complaining party makes a prima facie case, the burden shifts to the utility to prove that the denial was appropriate under the exceptions to access specified in § 224(f)(2).

4. Pricing of Pole Attachments
  - a. As of February 8, 2001, only cable television operators that are solely providing "cable services" are entitled to rely on the FCC's lower cable formula.
  - b. The requirement that utility pole owners must provide access on a non-discriminatory basis does not mean that all pole agreements must be identical, but differing provisions must not violate the requirement that terms be just, reasonable and non-discriminatory.
  - c. As of February 8, 2001, the total annual cost included in pole attachment rates for cable systems and telecommunications carriers providing telecommunications services will be based on both the usable and the unusable portions of the pole. The Commission adopted formulas and rules for determining usable and unusable space for poles and conduits.
  - d. For poles, the telecommunications formula adopted for unusable space includes as a factor the number of attaching entities. While initially excluding pole-owning utilities from the calculation of the number of "attaching entities," the FCC subsequently ruled on reconsideration that pole-owning utilities (both electric and telephone) should be included as separate attaching entities for the purposes of allocating non-usable space on a pole. *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996, Consolidated Order on Partial Reconsideration*, CS Docket No. 97-151, released May 25, 2001. In addition, the FCC has further clarified that any entity with a physical attachment to a pole should be counted as an attaching entity, including any government entity that has physical attachments to a pole other than temporary or seasonal attachments. The FCC's determination was upheld in *Southern Co. Services, Inc. v. FCC*, 313 F.3d 574 (D.C. Cir. 2002).
  - e. In its *Order on Reconsideration*, the FCC concluded that overlashing of an existing, authorized attachment, by either the owner of the underlying attachment or a third-party, does not constitute a separate attachment for the purposes of allocating the costs of either usable or unusable space. The Commission assumes that any additional burdens on the pole can be handled through standard engineering practices. The Commission will not require an overlasher to obtain a separate agreement with the utility. The Commission also determined that there are no additional costs to the pole owner caused by overlashing, such as increased loading, that are properly recoverable.
  - f. A third party leasing dark fiber capacity from a cable service provider will not be required to make any payment to the pole owner separate from the payment of the host attaching entity. If, however, an attachment previously used for providing solely cable service would, as a result of leasing of dark fiber, also be

used to provide telecommunications services, the rate for attachment will be determined under the rate for provision of telecommunications services.

- g. Prior existing presumptions of an average pole height, average amount of usable pole space and average amount of unusable space were confirmed by the Commission.
  - h. FCC Position: Cable operators providing commingled Internet and traditional cable services will be subject to the pole attachment rate applicable to cable operators; and wireless carriers will be entitled to the access provisions and just, reasonable and nondiscriminatory rates required by Section 224. This determination was upheld by the Supreme Court in its *Gulf Power* decision. *National Cable & Telecommunications Assn., Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002).
  - i. Cable operators will be required to notify pole owners upon providing telecommunications services.
  - j. For conduits, the FCC has adopted the rebuttable presumption that cable or telecommunications attacher occupies a ½ duct of space to determine reasonable conduit rate. In its *Memorandum on Reconsideration*, the FCC concluded that there is no unusable conduit space and therefore essentially applies the conduit rate applicable to cable operators to telecommunications providers.
  - k. The FCC declined to provide standards to govern rates for all rights-of-way situations and will proceed on a case-by-case basis.
  - l. The FCC declined to move to a forward-looking cost methodology and will continue to use historical or embedded costs for pole attachment rates.
5. In *Gulf Power*, the Supreme Court found that the FCC acted within its scope of authority in concluding that § 224 confers attachment rights on providers of wireless service and on cable systems that provide Internet service.

#### D. Universal Service

- 1. Section 254 of the Communications Act creates a new universal service program that is intended to ensure that all Americans, including those in rural, insular and high cost areas, have access to certain basic telecommunications services now and to more advanced services in the future. The program will also subsidize a portion of the costs of furnishing access to certain additional services to schools, libraries and non-profit rural health care facilities.

2. The basic concept underlying the universal services program, as interpreted by the Commission, is that all “telecommunications carriers” and “other providers of interstate telecommunications” should underwrite the above-average costs of those telecommunications carriers that are willing, or are compelled, to provide the services covered by the universal service program.
3. The Act established a Federal-State Joint Board that studied universal service reform and made recommendations to the Commission on November 8, 1996. The Commission adopted final regulations on May 8, 1997. The Commission has subsequently amended some of these rules in several *Orders* on reconsideration.
4. The Commission adopted most of the recommendations that the Federal-State Joint Board had made on November 7, 1996, but it justified its decisions on many issues on different and arguably more defensible grounds.
5. The major features of the new program include the following:
  - a. Universal service support will be available initially for the following basic services:
    - i. voice grade access to the public switched network, including, at a minimum, some usage;
    - ii. dual-tone multi-frequency signaling or its equivalent;
    - iii. single-party service;
    - iv. access to emergency services, including access to 911, where available;
    - v. access to operator services;
    - vi. access to interexchange services; and
    - viii. access to directory assistance.
  - b. Any telecommunications carrier, regardless of the technology that it uses, is eligible to receive universal service support if it is a common carrier and offers, throughout a designated service area, all of the services supported by the universal service program.
  - c. The federal universal service program has four major components. The High Cost component furnishes subsidies of approximately \$2 billion annually to providers of certain “core” telephone services now, and possibly of more advanced services in the future, to persons living in rural, insular and high-cost areas. The Low Income component provides subsidies of approximately \$500

million annually to defray a portion of the installation charges and telephone bills of low income persons, wherever they may be located, and to ensure that such individuals have affordable access to services similar to those covered in the High Cost program. The Schools and Libraries component provides up to \$2.5 billion annually to help schools and libraries obtain whatever telecommunications services they desire as well as internal connections and maintenance of telecommunications networks. The Rural Health Facilities component provides subsidies of up to \$400 million to help rural health care providers obtain telecommunications services at rates comparable to those in larger markets.

- d. The Act mandates that all providers of interstate “telecommunications service” contribute support payments to a universal service fund. Utilizing its discretionary authority under the Act, the FCC also requires entities that provide “interstate telecommunications” for a fee on a non-common carrier basis to contribute to the universal service program. This requirement does not include entities, such as utilities, that purely operate networks to meet their internal needs, and which are not made available to third-parties for a fee. Nor does the requirement extend to private networks that are utilized to provide service to public safety or governmental entities.
- e. All providers of interstate telecommunications service, and other providers, are required to make contributions to the fund and complete a universal service Worksheet on a bi-annual basis. Support payments are based on revenues generated from end-users. The FCC therefore does not require wholesale carriers to contribute to the universal support mechanisms, provided that the carrier who utilizes the wholesale capacity to offer retail services makes such contribution itself. Thus, a utility that provides wholesale telecommunications capacity under a carrier's carrier arrangement will not be subject to a universal service contribution requirement because this does not create “end-user” revenues for the utility. Nevertheless, all carriers, including carriers’ carriers, are required to complete a Worksheet. The FCC has adopted a new unified “Telecommunications Reporting Worksheet” that is to be utilized for the bi-annual reporting requirement.
- f. Telecommunications providers whose estimated interstate contributions to universal service support mechanisms would be *de minimis* are not required to contribute to universal service. The FCC has defined *de minimis* as a contribution that would be less than \$10,000. Providers whose contribution is *de minimis* are nevertheless required to retain a copy of the Worksheet for three years as documentation of their exemption.
- g. The FCC's proposed treatment of wireline Internet access services as an information service rather than a telecommunications service could potentially have an adverse impact on the universal service fund by removing a significant source of revenue contributions.



E. Other Important Federal Provisions

1. The cable provisions of Title VI of the Communications Act
2. Section 332 of the Communications Act – sets forth federal requirements on providers of wireless services
3. Section 103 of the Communications Act – allows registered public utility holding companies that would otherwise be subject to the core-business restrictions in the Public Utility Holding Company Act of 1935 to provide telecommunications services, information services and other communications services
4. Section 401 of the Communications Act – requires the FCC to forbear from applying any regulation or any provision of the Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic territory if the Commission determines that enforcement of such requirement is not necessary to ensure just, reasonable and non-discriminatory conduct or to protect consumers and that forbearance is in the public interest
5. Federal copyright, anti-trust, tax and other laws of general applicability

**VI. STATE REGULATORY ISSUES**

A. Certification\*\*

1. States generally regulate, or at least require some form of filing, for almost all intrastate telecommunications service activities – e.g., at least nominal regulation of facilities-based providers of intrastate service.
2. States typically assert this jurisdiction even if only a small amount of the services provided are intrastate.
3. Recent statutes authorizing municipal entry into telecommunications typically require initial approval by state public service commission via a certificate of public convenience or comparable authorization (e.g., Iowa) and sometimes ongoing role in overseeing compliance with statutory conditions of entry (e.g., Virginia)

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\*\* The discussion in this section is limited to state regulatory issues applicable to telecommunications services. Cable services are generally regulated at the local level rather than at the state level. Internet access service is typically not regulated at all, except when provided by dominant incumbent local exchange carriers under certain circumstances. Also, we do not discuss state municipal laws and the vast number of other state legal issues that apply generally to service providers.

- a. Applicants must typically demonstrate that it has the legal, technical, financial and managerial qualifications to provide the proposed services
- b. States vary with respect to the degree of scrutiny involved in granting a certificate

B. Tariffs

1. Most states require carriers to file tariffs with the PSC/PUC that sets forth a description of the type of services to be offered, the prices of services and other applicable terms or conditions
2. Typically, states require that an initial tariff be filed with the certification application. In such cases, the tariff is reviewed along with the application, and the two are granted together
3. States are increasingly adopting a more streamlined approach to the tariff filing process for non-dominant providers

C. Annual Reports

1. Most state PSC/PUCs require some kind of annual or quarterly report on the status of the regulated entity and the breakdown of gross revenues from intrastate services.
2. In addition, many state reporting requirements include a compilation and summary of the disposition of customer complaints that have been filed against the carrier with the PSC/PUC.

D. Universal Service and Other Contributions

1. Many states have their own universal service programs
2. Similarly, carriers are often required to contribute to state 911 and E-911 funds, which are utilized to support the development and maintenance of emergency call databases and systems capabilities.

E. Regulatory Fees

1. Many states assess an annual fee on regulated intrastate carriers to recover state costs of administration. These state fees may or may not be imposed on governmental entities that act as providers of communications services.
2. Increasingly, incumbent providers have been sponsoring state legislation requiring government entities to pay the same fees and taxes as private operators.

F. Interconnection Agreements

1. Public power utilities that seek to provide competitive local exchange services will need interconnection agreements and possibly collocation with the incumbent local exchange carriers.
2. These agreements establish the terms under which a competitive entrant may interconnect and collocate its facilities, purchase unbundled network elements or resell the incumbent's services.
3. Subject to the FCC's broad oversight and parameters, state PSC/PUCs oversee negotiations on interconnection agreements, and administer and enforce them once they are finalized.
4. Entrants can either "opt in" – i.e., use the terms of an existing agreement that the incumbent has entered into with another competitive local exchange carrier within the state – or negotiate a new agreement. If the parties cannot agree on the terms of such an agreement, then it will be submitted to the state public service commission must "arbitrate" the dispute and render a decision within nine months from the commencement of negotiations.

G. State laws and decisions affecting the authority of public power utilities to provide communications services – see Section III above.

B. State measures regulating the details of intrastate communications services

1. *See* particular state statutes and regulations
2. *See* public service commission orders and decisions

**VIII. LOCAL LEGAL ISSUES**

- A. City or utility charter provisions
- B. Local ordinances and resolutions
- D. Local cable and telecommunications franchises
- E. Local zoning requirements, including tower siting ordinances
- F. Easements
- G. Contracts
- H. Bond instruments