State Broadband Battles

By Cathy Swirbul

Communities across the United States are working to bring broadband to their residents. Often, they are working with the private sector to provide services. But where private companies are unwilling or unable to meet local needs as fast as the community demands, some municipal governments are considering providing advanced communications networks and services themselves. Incumbent telecommunications companies and cable operators have often responded with fierce opposition and launch efforts to obtain state laws obstructing municipal broadband initiatives. Municipalities in Indiana faced such a fight this year—and secured a victory. "We expected a fight from the private providers," said Carolyn Wright, director of government relations for the Indiana Municipal Power Agency. "We understand the economics from the telcos' business perspective, but Indiana municipals must bring broadband to our communities that request it. I believe the United States is ranked 16th in the world in terms of broadband deployment. That is not a good track record."

In 2005, opposition reached fever pitch as the telephone and cable companies pushed hard for state legislation to slow down or thwart municipal broadband projects.

"Several factors accounted for the flurry of activity in 2005," said James Baller, principal of the Baller Herbst Law Group, which assisted the municipalities in most of these fights and often helps municipalities with legal and political issues surrounding community broadband projects. "First, 2005 was the first legislative year following the Supreme Court *Missouri* decision that said federal law does not preempt states from prohibiting localities from providing telecommunications services. Second, at the end of 2004, Pennsylvania enacted a truly ugly law that emboldened the incumbents to seek similar laws elsewhere."

The Pennsylvania law required communities to gain permission from their local telephone companies before proceeding with a broadband project. If the telephone company would offer broadband at the data speed the community wanted, then the municipality could not proceed. The

law, however, focused only on data speed and did not allow consideration of other factors, such as price, quality, mobility, symmetry or efficiency.

"Third, wireless really grew as a broadband option in 2004," Baller said. "Not just small rural communities, but even large cities, such as Philadelphia, San Francisco and Minneapolis, had become intensely interested in developing citywide wireless projects. The incumbents saw this as a much more significant threat than the relatively small number of municipalities that were operating or pursuing wireline options."

In 2005, the telephone and cable companies sought to persuade 14 state legislatures to enact new barriers to municipal communications initiatives. "Fortunately," Baller said, "the incumbents failed in all but one of the 14 states, Nebraska. In that state, a significant barrier to public entry was already on the books. Everywhere else, the municipalities either defeated the proposed barriers or negotiated compromises that all concerned considered workable."

This year, the incumbents have thus far sought barriers to public entry in only two states—Indiana and Tennessee. In Indiana, the municipalities won a victory, reversing an early loss by a 40-6 vote in the state Senate. In Tennessee, as a result of intensive municipal legislative work, the anti-municipal broadband legislation did not make it out of committee before the legislative session expired.

Baller attributes the success to hard work. "Local municipal organizations have worked very hard and very effectively to educate state legislators about the key facts and issues," he said. "Also, the fear and revulsion that the Pennsylvania law created across America enabled us to build a powerful coalition, including national and local municipal associations; consumer groups and grass roots organizations; institutions of higher learning; the elderly; and, most important to many state legislators, the high-technology industry.

"The coalition generated a wealth of new data, white papers, responses to industry myths, revelations of industry funding of supposed 'experts,' and the like for the benefit of federal and state legislators, the media, and the public," Baller said. "These materials showed that barriers to public communications initiatives are inconsistent with America's legacy of self-help initiatives and are bad for the communities involved, bad for the private sector, and bad for America's ability to remain competitive in the emerging global economy."

Here is a state-by-state overview of proposed barriers to municipal broadband provided by Baller:

Bills Introduced in 2006

Indiana

As initially introduced, SB 245 would have established a new Chapter 35 that restricted municipalities from initiating or extending broadband service if any private provider was doing so in the designated area or intended to do so within three months. The bill also required municipalities to go through an elaborate process to determine whether any current or potential providers existed. If the municipality determined that no provider existed, it would be required to engage in a cumbersome administrative process to determine whether to proceed, followed by judicial review that could effectively tie up a municipal project for years. Chapter 35 also would have prohibited municipalities from charging any portion of the costs of a project to persons other than service recipients, and it would have restricted funding to revenue bonds. In effect, the original Chapter 35 would have prohibited municipalities from providing both broadband with less than one Mbps capacity in both directions and advanced networks with far more bandwidth capacity than an incumbent might be providing. Municipalities in Indiana persuaded the Legislature to drop the proposed Chapter 35 in its entirety from the telecom bill that was ultimately enacted into law.

Tennessee

Current law authorizes a municipal electric utility in Tennessee to establish a joint venture or other business relationship with one or more third parties to provide related services including, but not limited to, cable television and Internet services. A municipal electric utility also must establish a separate division for delivery of cable, Internet, and related services, and the division must maintain its own accounting and record-keeping system. A municipal electric utility may not subsidize the operation of the division with revenues from other utility operations, but the utility can loan funds for the provision of such services. Bills introduced in the state Legislature would have eliminated the option of forming a business relationship other than a joint venture, required that records of such joint venture agreements be open to public inspection; prohibited the municipal system from lending funds to the division; and required independent audits, including an examination to determine whether the newly created division had been subsidized by revenues of the utility's other operations. The bills did not move out of committee before the legislative session ended.

Bills Introduced in 2005

Colorado

As originally proposed, SB 05-152 would have prohibited municipalities from providing telecommunications, cable or advanced services (Internet access with capacity of at least 144 kbps in both directions), directly or indirectly, at wholesale or retail, unless the municipalities met various onerous hearing and referendum requirements. The original bill also prohibited municipalities from

cross-subsidizing covered services and facilities in any way; required municipalities to secure and pay for bonds used to finance telecommunications, cable, and advanced-service facilities from the revenues of each of these services, taken separately; subjected municipalities to all federal, state and local requirements that apply to private entities; required municipalities to set rates high enough to recover their actual direct and indirect costs, plus imputed fees, taxes and other charges that similarly situated private entities would pay; and removed municipal eminent domain authority and antitrust immunity. The final bill removed most of these restrictions. The enacted legislation requires a public vote only if a municipality wants to provide retail communications services and it specifically allow various municipal activities, including leasing of "insubstantial amounts of excess capacity to private providers," without a vote.

Florida

As originally proposed, SB 1714 and HB 1325 would have permitted municipalities that were providing communications or information services of any kind on May 1, 2005, to continue to do so, but would bar adding new services, expanded service areas, or new subscribers. For services not provided by the private sector, the bills would have required municipalities to send letters to all non-governmental providers in the area and then wait 240 days to see whether at least one provider stepped forward to provide the service. If none did, the municipality would have had to obtain a detailed feasibility study, hold a hearing, and conduct a referendum before providing the service. SB 2072 was originally a slightly less onerous version of SB 1714/ HB 1325. It would still have prohibited municipalities from providing any communications service or application provided by a private entity, but its waiting period would be 180 days rather than 240 days, and it would not have required a referendum. Under SB 2072, the grandfather provision would have allowed municipalities already providing communications services on the effective date of the legislation to continue to do so, but they could not extend "service offerings or service areas."

Eventually, a compromise bill, SB 1322, was enacted. The compromise requires municipalities to hold public hearings and make certain specified findings, including that the municipality has a business plan under which project revenues would begin to cover operating expenses and debt service within four years. Municipalities must obtain a vote of the public only if they use bonds with a maturity of longer than 15 years. They cannot cross-subsidize communications services with revenues from other utilities or taxes, and must cover long-run incremental costs. They must also hold annual hearings. After four years, if the project is not covering operating costs and bond payments, the municipality must hold a public hearing to review a plan to do one of four things: shut down the system, sell it, partner with a private entity, or continue operating the system.

Illinois

SB 499 Amendment 1 would have added a new subsection to the Illinois statute that governs the Illinois Commerce Commission's authority to issue certificates of service authority, 220 ILCS 5/13-401. The provision would have read as follows "(c) 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." After the bill's sponsor decided not to move the measure, it died in committee.

Indiana

HB 1148 would have barred municipalities that were providing communications services on June 30, 2005, from adding new services or extending services to new areas. After that date, the bill would have prohibited any municipality from providing any telecommunications, cable, broadband or information service, as well as voice over Internet protocol, or any communications infrastructure or facility, if even a single private-sector entity was already providing the service in question, or claimed that it intended to do so within nine months of the time that the municipality proposed to do so. The bill made no provision for fundamental differences attributable to data speeds; symmetry (one versus two directions); mobility (wireless versus fixed); price; affordability; signal quality; content; quality of customer service and support; or other factors that a community may consider important. The bill would also have established cumbersome adminis-

trative procedures for a municipality to use in determining whether a company is providing, or intends to provide, one or more services. Finally, the bill would have prohibited a municipal project from going forward until any litigation had run its course (which could take years). With strong municipal opposition, the bill died in committee.

Iowa

As originally introduced, two bills, SSB 1136 and HSB Bill 182 (eventually amended and re-designated as HF 861), would have added significant restrictions to the feasibility study process; eliminated voter-approved general revenue bonds and restricted project funding to revenue bonds; required a municipality to obtain a super-majority vote of 60 percent in a referendum before providing communications services or leasing communications facilities; required the municipality to repeat the referendum process every time it wanted to expand the project; and prohibited municipalities from using funds from other city sources to pay start-up costs of the municipal project and arguably even from paying for services provided to other agencies from a telecommunications project. A third bill, HSB 205, would have removed the municipal exemption from property taxes for property used to provide cable service and would phase in such taxation over 20 years. The Iowa municipalities succeeded in bottling up both of these bills in committee.

Louisiana

Compromise legislation in 2004 required municipalities to comply with requirements in their charters regarding referenda for projects similar in scope to municipal communications projects or, if they had no such requirements, to meet the requirements set forth in the act. As introduced, SB 126 would have required municipalities to conduct referenda in all cases before providing communications services. The bill also would have suspended any incumbent provider's franchise and other obligations (e.g., franchise fees, access to public, educational and governmental channels, provision of institutional networks, etc.) as soon as a municipality announced plans to serve even a single customer. The suspension would have remained in force until the monetary value of the municipality's like obligations equaled the value of the obligations incurred by the private operators for the previous 10 years. As enacted, S.B. 126 exempted Lafayette, clarified that a municipality need not conduct more than one referendum and exempted any municipality that conducts a referendum from the other punitive measures in the bill.

Michigan

At the beginning of the legislative session, two bills were introduced, HB 4600 and SB 528, that included a provision stating: "A governmental entity shall not provide a communications service except for the use of the entity itself." The term "communications service" was defined as "a telecommunications service as that term is defined in 47 USC 153 and the implementing orders and regulations of the Federal Communications Commission." Later, HB 5237 was introduced with a provision that would have required public entities to follow onerous procurement processes before providing communications services. As finally enacted into law, the bill gives public entities substantially more flexibility in drafting and judging responses to requests for proposals. Public entities can go forward if they do not receive at least three qualifying bids that meet the detailed requirements that municipalities may prescribe. The law does not apply to advanced meter-reading applications for municipal electric utilities.

Nebraska

Nebraska is the only state that adopted substantial new barriers to entry in 2005, supplementing the barriers already in place. With very limited exceptions, new LB 645, as enacted, prohibits any agency or political subdivision of the state that is not a public power supplier from providing any wholesale or retail broadband, Internet, telecommunications or cable service. Entities providing service on Jan. 1, 2005, are grandfathered. LB 645 also permanently bans public power utilities from providing retail services and bans municipal wholesale services until Dec. 31, 2007. Again, suppliers providing services on Jan. 1, 2005, are grandfathered and can expand existing services. The bill does not prohibit agencies, political subdivisions, or public power suppliers from providing services for internal utility or city uses. LB 645 also establishes a task force to study and report on the public broadband issue by Dec. 31, 2006.

Ohio

Except as provided in the bill, HB 188 would have prohibited state and local agencies from providing any electronic communications service that at least two private providers are offering. Before providing such a service, a municipality would have to hold a public hearing and make extensive findings, including initial and life-cycle costs and benefits, per-taxpayer costs, needs that the private sector is not meeting, etc. The bill did not progress.

Oregon

HB 2445 was essentially the same bill that died in committee in 2003. It would have required municipalities to publish a cost-benefit analysis and then obtain a majority vote in a referendum before providing any communications services or facilities. The language was vague enough to make the election mandate apply to any new product or service on an existing system or any upgrade to an existing system. The bill also would have created new statutory references to existing open-records and open-meetings requirements that do not apply to private-sector providers. It died in committee.

Tennessee

As originally proposed, HB 1403 and SB 1760 would have repealed the authority of municipal electric utilities to provide most communications services and prohibited any municipality that did not already have authority to provide communications services from seeking to do so, unless the state comptroller issued a favorable report on existing municipal providers and the state Legislature enacted new legislation to reinstate municipal authority. As amended and enacted, HB 1403 merely provided for a moratorium on new approvals (with numerous specified exceptions) and did not require an affirmative act of the Tennessee Legislature to restore municipal authority to provide communications services after the moratorium expired. The state comptroller eventually rendered a report favorable to municipalities and the moratorium expired.

Texas

As originally proposed, HB 789, a major rewrite of Texas telecommunications law, would have extended and broadened the existing Texas barrier to municipal entry to broadband and information services. After numerous changes that softened these restrictions, the House of Representative adopted substitute restrictions that would have effectively prohibited many municipalities from providing wireless broadband services. The bill was enacted into law with no new barriers to public entry.

Virginia

Under the Virginia Wireless Service Authority Act, Virginia localities could establish wireless authorities to provide any communications service that was not generally available in functionally equivalent form from at least three private-sector providers in the relevant geographic area. The act left the determination of whether these conditions were met to localities, subject to certain required, but streamlined, procedures. The act did not require localities that established wireless authorities to comply with the existing Virginia barrier to entry that prohibits new public providers of communications services from charging prices lower than those of incumbent providers of functionally equivalent services. HB 2395 would have subjected localities that were not providing wireless services throughout their jurisdictions on July 1, 2005, to substantially more time-consuming, cumbersome and costly procedures before the State Corporation Commission. The bill would have required all localities, including those providing wireless services on July 1, 2005, to comply with Virginia's price-fixing provision for functionally equivalent services. The bill was killed in committee.

West Virginia

Early in the legislative session, proponents of municipal broadband proposed a bill that would have authorized local governments to issue revenue bonds for the acquisition, construction and provision of technology infrastructure including: cable service, telecommunications service, information service, advanced services, broadband service, and Internet protocol-enabled services. Following the bill's introduction, Verizon proposed amendments that would have eliminated the authority of local governments to provide any technology infrastructure services other than through partnerships with private industry, and then only after there had been a determination by the Public Service Commission that private industry would not provide such services either currently or in the foreseeable future. The bill died in conference.

The Battle Ahead

Although municipal and other interested organizations have successfully pushed back most of the private company attacks on municipal broadband, the battle is far from over, according to Baller. "This year, the telcos appear to be preoccupied with other issues, such as cable franchising and net neutrality. We may be back next year fighting the same battles over municipal broadband unless we are able to get strong federal legislation in this area. Fortunately, APPA and its allies are making good progress in developing support for municipal broadband in Congress."

Municipalities must also be wary of the incumbents' misuse of seemingly neutral state laws. For example, after negotiating workable compromise legislation with the incumbents—Louisiana State Act 736—and winning a landslide in a referendum in favor of its fiber-to-the-home project, the city of Lafayette, La., has faced numerous lawsuits in which the incumbents have failed to honor the commitments they made at the negotiating table, Baller said.

"Ever since legislation has been put in place in Louisiana, we have seen it used as a stepping stone by parties interested in derailing our project," said Terry Huval, Lafayette's director of utilities. "We are seeing what has become a well-oiled strategy by our local incumbent telephone and cable TV providers to use third parties as a way to derail our ability to do what the people of Lafayette have voted for us to do.

But just as the telephone and cable companies won't be laying down arms any time soon, municipals are also pressing forward with broadband initiatives. "Since the people of Lafayette have voted in favor of municipal broadband," Huval said, "we now have a public mandate to find a way to make it happen."