

ARTHUR A. BUTLER, ESQ./JOEL R. PAISNER, ESQ.
ATER WYNNE LLP

LSI MUNICIPAL BROADBAND CONFERENCE
DECEMBER 2-3, 2002

MUNICIPAL BROADBAND:
DECIDING WHETHER TO BUILD A MUNICIPAL BROADBAND NETWORK,
CHOOSING THE BUSINESS PLAN AND ENTITY
(MARKET REALITIES, FEDERAL REGULATORY ISSUES, LEGAL AUTHORITY
AND COMMUNITY OPTIONS)

MUNICIPAL BROADBAND:
DECIDING WHETHER TO BUILD A MUNICIPAL BROADBAND NETWORK,
CHOOSING THE BUSINESS PLAN AND ENTITY
(MARKET REALITIES, FEDERAL REGULATORY ISSUES, LEGAL AUTHORITY
AND COMMUNITY OPTIONS)

MARKET REALITIES – WHAT HAPPENED:

- Cable MSOs and telecommunications companies continue to consolidate and severely cutback capital spending.
- CLECs remain heavily reliant on incumbent LEC loops and transport, particularly high capacity facilities.
- While nationally CLECs have made substantial investments in network infrastructure (\$56 billion through 2001), this has not translated into a large number of local loop facilities. Most CLEC fiber facilities are long haul, intercity facilities instead of loops to customer premises.
- The availability and ubiquity of loop facilities, including high capacity facilities, has not increased significantly since 1999.
- CLEC fiber only connects to about 3% to 5% of the nation's commercial office buildings (about 30,000 buildings). Most of these buildings are carrier hotels, ISP POPs, and very large office buildings where there is demand for several DS-3s or OC-n circuits. Thus, service to these buildings is not an indication of the general availability of CLEC facilities, including high capacity facilities.
- There are a number of factors that impair the ability of CLECs to self-provision loops: high cost of deployment, and closing of capital markets.
- Many of the CLECs that fueled the late-1990's fiber construction are now in financial distress, or have declared bankruptcy. Those CLECs that have survived are finding it harder to get financing to continue deployment of their networks.
- There are other hurdles such as right-of-way and building access issues.
- Often CLECs are forced to use incumbent LEC special access services, which are priced well above UNE rates; they also endure protracted provisioning delays for such facilities because they have no alternative.

- Incumbent LECs have no incentive to aid retail competitors who are viewed as competitors, and taking market share.
- Incumbent LECs have the incentive to leverage their legacy network facilities and legacy, high-margin services. Thus, without competitive pressure, they have reduced incentives to deploy lower cost, higher capacity services, particularly where those services would risk eroding the high revenues obtained from existing broadband customers.

RECENT FEDERAL LEGAL DEVELOPMENTS REGARDING BROADBAND

THE FCC'S LEGAL RULES AFFECTING BROADBAND DEPLOYMENT ARE MARKED BY CONTINUING UNCERTAINTY.

- The law treats different communications technologies (wireline, cable, satellite, wireless) differently. Some are essentially unregulated, some are regulated by the FCC, others are regulated by municipalities.
- Because broadband services (1) can deliver data, voice, video, and Internet access quickly and efficiently; (2) can be provided over a variety of facilities and technologies (copper or fiber optic lines, cable, wireless, free-space optical, or satellite); and (3) use some different equipment than traditional telephony (e.g., packet v. circuit switches), they are difficult for regulators to categorize.

ISSUES OF BROADBAND DEPLOYMENT ARE INVOLVED IN MANY OTHER TELECOMMUNICATIONS REGULATORY PROCEEDINGS.

- UNBUNDLING – Should the FCC require the unbundling of broadband facilities?
- UNIVERSAL SERVICE – Will the use of broadband undermine the traditional services that fund universal service? If so, how should universal service be funded in the future? Should broadband be required to contribute? Should broadband services be supported by universal service? If so, which providers should get the support, entities that provide only broadband services or only entities that provide broadband in conjunction with basic telephone services?

- REGULATORY JURISDICTION – Should broadband be deregulated? Even if there is an absence of effective competition? If it should be regulated, by whom (the FCC or state PUCs)? If cable provides broadband services, should they be regulated by municipalities as the cable TV services are? Should all broadband services be regulated in the same way and subject to the same rules, regardless of the provider or the technology used?

THE FCC HAS STARTED THE PROCESS OF TACKLING BROADBAND REGULATORY POLICY IN A COMPREHENSIVE MANNER

- There remains to be considerable uncertainty about whether the final outcome will result in regulatory parity among the different technologies
- It is also uncertain whether the outcome will allow for *intramodal* (within a technology platform) or only *intermodal* (*between different technology platforms*) competition.

CABLE MODEM DECLARATORY RULING AND NPRM

- Order issued on March 15, 2002.
- FCC determined that cable modem service (high speed Internet access through a cable system) should be classified as an interstate *information* service, as opposed to a *telecommunications* service or a *cable* service, for regulatory purposes.
- Under the Telecom Act, an “information service” includes “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.” 47 U.S.C. §153(20).
- *No Open Access Requirement.* Because cable modem service is an information service, the FCC concluded that Title II of the Act and the FCC’s *Computer II* and *Computer III* rules do not impose any open access requirement on cable companies (i.e., the obligation to provide ISPs with access to the cable company’s subscribers through its cable modem service).
- To the extent a cable company voluntarily provides a stand-alone telecommunications offering to an independent ISP as part of providing cable modem service, that relationship is one of *private carriage*, not common carriage, under the Act, and not a telecommunications service.

- The FCC initiated a further rulemaking proceeding to consider whether it should exercise its ancillary authority under Title I of the Act to impose open access or other regulatory requirements on cable modem service, and what role, if any, is left to the States in this regulatory regime.
- The Order is on appeal to the 9th Circuit Court of Appeals (which previously ruled in *AT&T v. City of Portland*, 216 F.3d 871, 878 (9th Cir. 2000), that cable modem service was a telecommunications service.
- As a result of FCC proposals, do local governments have any role left in the regulation broadband services?

WIRELINER BROADBAND NPRM

- Concerns the appropriate characterization and treatment of broadband service delivered over telephone company wireline facilities.
- The FCC tentatively concluded that wireline broadband service should be considered an information service, not a telecommunications service.
- NPRM raises a number of questions about the consequences of that classification:
- Do the open access rules of Computer II and Computer III govern the obligations of incumbent LECs who themselves offer broadband Internet access? i.e., must these incumbents continue to offer telecommunications inputs needed by unaffiliated ISPs to reach the LEC subscribers? Or, should such relationships be left to private ordering or some other regulatory approach?
- Should incumbent LECs that self-provision the transmission component of an internet access service, and do not offer the transmission component separately to other ISPs, be relieved of all Title II obligations, including the unbundling and interconnection requirements of Section 252 of the Act, with respect to the facilities used in providing that service?
- Should an incumbent LEC's relationships with unaffiliated ISPs be considered private carriage, and not common carriage, and thus not subject to Title II?
- Should wireline broadband service providers be required to contribute to universal service support programs?

AVAILABILITY OF UNBUNDLED NETWORK ELEMENTS

- Under sections 251(c)(3) of the Federal Telecommunications Act, incumbent LECs are required to lease certain parts of their network specified by the FCC or by state PUCs. Pursuant to section 252(d)(1) these network elements must be provided on an unbundled basis at cost-based rates.
- In its *UNE Remand Order*, issued November 5, 1999, the FCC specified the unbundled network elements (“UNEs”) to which a competitor must be provided access: the “loops” that connect the switches to end users, including high-capacity loops; the switches (with some exceptions), the transport facilities between switches and other networks, and the software needed to operate the telephone network.
- In its *Line Sharing Orders* the FCC required that the high-frequency portion of the loop necessary to provide DSL services be unbundled.
- Because of recent court decisions and regulatory proceedings, the future of the unbundling rules is unclear.
- Both the *UNE Remand Order* and the *Line Sharing Orders* were remanded by the D.C. Circuit Court of Appeals in *United States Telecom Ass’n v. FCC*, decided on May 24, 2002; the *Line Sharing Orders* were vacated. The court concluded, among other things, that the FCC had not considered the availability of competitive facilities on a sufficiently granular basis.
- Apart from the D.C. Circuit decision, the FCC has already imposed significant restrictions on the use of dedicated transport facilities, and combinations of loop and dedicated transport (EELs) in order to ensure that long-distance carriers could not use these facilities to bypass the incumbents’ special access services. Local use restrictions were upheld by the D.C. Circuit Court of Appeals. *Competitive Telecomms. Ass’n v. FCC*, No. 00-1272, 2002 WL 31398290 (D.C. Cir. Oct. 25, 2002).
- In its *UNE Remand Order* the FCC committed itself to reconsider all of its unbundling rules three years after issuing its *UNE Remand Order*. On December 20, 2001, the FCC commenced its *Triennial Review* of its unbundling rules. The Notice for that proceeding indicates that the FCC is seriously considering significant new limits on the incumbent LECs’ unbundling obligations:
- Should the availability of switching be further limited?

- Should additional geographic or service-specific showings be required as a prerequisite to demonstrating “impairment” sufficient to justify unbundling?
- Should the incumbents be freed from unbundling obligations for newly constructed facilities? (New plant, new rules; old plant, old rules) Or for high-capacity facilities?
- Should the restriction on using UNEs for long distance access and long distance services be made permanent?
- Should the mandatory leasing of transport facilities be limited?

PRICING OF UNEs

- The Act provides that the states will set prices for UNEs based on “cost,” which may include a “reasonable profit.” The FCC has determined that “cost” means forward-looking economic cost and has required the states to use a methodology called “Total Element Long Run Incremental Cost” or “TELRIC.”
 - The pricing method is based on use of the most efficient technology currently available and the lowest cost network configuration, given the existing location of the incumbent’s wire centers.
 - The FCC’s regulations also contain “combination” rules requiring an incumbent to perform the functions necessary to combine network elements for an entrant, unless the combination is not technically feasible.
- Incumbent LECs challenged the TELRIC and combination rules in court, arguing that the Act requires that UNE prices be set based on “actual,” “historical,” or “embedded” cost, and that the incumbents should not be required to combine elements for entrants; they must do it themselves.
- The pricing debate was recently resolved by the U.S. Supreme Court in its recent decision in *Verizon Communications, Inc. v. FCC*, 535 U.S. (2002)(Decided May 13, 2002). The Court upheld the lawfulness and the wisdom of the FCC’s TELRIC methodology and pricing standard and its combination rules, ruling that they were a reasonable exercise of the FCC’s regulatory discretion and consistent with the language and intent of Congress reflected in the Act.
- There is one important caveat: the FCC could always change the pricing methodology it has prescribed.

BROADBAND LEGISLATION

- TAUZIN/DINGELL HOUSE BILL
 - Would end obligation of RBOCs to share upgraded networks at economic cost.
 - Would end open access obligations.
 - Would exempt RBOC from restriction on providing interLATA broadband services without complying with the local market opening requirements of section 271 of the Act.
- BREAUX SENATE BILL
 - Would require regulatory parity between wireline and cable modem internet access (no open access; no unbundling)
- HOLLINGS SENATE BILL
 - Would preserve CLEC Access to UNEs including remote terminals.
 - \$500MM fund for broadband deployment.
- FARM BILL – Initial Funding Mainly In Rural Areas Via RUS.
- TECHNET 100MB PROPOSAL - 100mbps to 100 million homes and businesses in 10 years.
- LIEBERMAN WHITE PAPER – Incorporates TechNet Proposal.

CONCLUSION

- PUBLIC NETWORKS MAY REPRESENT THE ONLY AND BEST CHANCE TO:
 - Ensure open access.
 - Ensure retail competition and the innovation and reasonable service prices that goes along with that.
 - Ensure the timely and ubiquitous deployment of true broadband services, particularly in communities and areas that lack the size and density to attract private capital investment.

UNDERSTANDING THE LEGAL AUTHORITY OF MUNICIPALITIES TO PROVIDE COMMUNICATIONS SERVICES

- FEDERAL LAW CONTEMPLATES MUNICIPAL PROVISION OF COMMUNICATIONS SERVICES BUT DOES NOT AFFIRMATIVELY GRANT AUTHORITY FOR IT.

CABLE SERVICES

- “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).
- Section 613(e)(1) of the Communications Act provides that “a State or franchising authority may hold any ownership interest in any cable system.” 47 U.S.C. §533(3). However, this section has been held to be “permissive rather than empowering”; in other words, it does not constitute a federal grant of authority to provide cable service. *Time Warner Comm. Inc. v. Borough of Schuylkill Haven*, 784 F. Supp. 203 (E.D. Pa. 1992).

TELECOMMUNICATIONS SERVICES

- “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. §153(46). “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.” 47 U.S.C. §153(43).

- Section 253 of the federal Telecommunications Act of 1996 states:

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.

47 USC §253(a).

- Does “*any entity*” include units of state government?
 - *City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999): No. The court affirmed an FCC order holding that section 253 did not preempt a Texas statute forbidding Texas municipalities from providing telecommunications services because the phrase “any entity” could not be interpreted broadly to

include municipalities. Both the FCC and other courts have followed the *Abilene* decision without much discussion. See *Missouri Mun. League*, 2001 WL 28068 (FCC Jan. 12, 2001); *Mun. Elec. Auth. of Georgia v. Georgia Pub. Serv. Comm'n*, 241 Ga. App. 237, 525 S.E.2d 399, 403 (Ga Ct App 1999); *Iowa Tel. Ass'n v. City of Hawarden*, 589 N.W.2d 245, 252 (Iowa 1999).

- *City of Bristol v. Earley*, 145 F.Supp.2d (W.D. Va. 2001)(vacated as moot following enactment of corrective legislation): Yes. The court rejected the *Abilene* decision and held that the use of the broad language “any entity” made it “clear and manifest that Congress intended section 253(a) to have sweeping application, including areas in which states traditionally enjoyed exclusive regulatory power.” Accordingly, the court held that a Virginia statute prohibiting municipalities from providing telecommunications services to the public was preempted by section 253(a). The court also stated that whether the Virginia law were couched in terms of *prohibiting* activities that otherwise were a valid exercise of municipal government or a *withholding of authorization* to the city, the state law would violate the federal rule.
- *Missouri Municipal League v. FCC*, 299 F.3d 1949 (8th Cir. 2002): Yes. The court held that Section 253(a) does not provide independent authority to local governments to provide telecommunications type services, but will preclude a state from interfering with pre-existing authority to provide services. State interference in existing ability could be deemed a “prohibition.”
- The Legal Authority Of Municipalities To Provide Communications Services Depends On State Law And Varies Widely Among the States.
 - The authority of municipalities to construct and operate broadband communications networks differs among the states.
 - States that have dealt with the subject either grant express authority to provide communications services, grant the authority to provide some services but not others, expressly restrict the services that can be offered, expressly prohibit municipalities from providing all telecommunications services, or so condition the provision of specified services as to effectively prohibit them.
 - For states that have not addressed the subject, municipal authority to provide communications services is governed by general rules of municipal authority.
 - Dillon’s Rule States. Dillon’s rule, first proposed in 1868 by John Dillon, Chief Judge of the Iowa Supreme Court, is a judicially-enforced rule that has been incorporated into some state constitutions and codified into law in other states. It provides that the authority of a municipality is strictly construed to

include only those powers expressly granted or necessarily implied or necessarily incident to the powers expressly granted. If there is doubt about a claimed grant of power to a municipality, it is generally denied.

- Home Rule States. Home rule or “charter” municipalities generally are able to exercise any powers that are not expressly denied by the state’s constitution, statutes, or the municipality’s own charter. In some states, only certain municipalities are able to exercise home rule authority, while others are not. Similarly, in some states, statutes granting municipal authority to some entities are to be liberally construed, but strictly construed for other entities.
- Ultimately, each state’s law must be examined carefully, all procedural requirements are followed, and the public entity’s own charter allows the contemplated activity.
- **AUTHORITY OF WASHINGTON MUNICIPALITIES AND OTHER ENTITIES TO PROVIDE COMMUNICATIONS SERVICES**
 - CITIES
 - Washington statutes do not grant cities and towns express authority to own and operate a telecommunications utility or to offer telecommunications, cable, or internet services to the public for hire, sale, or resale. However, the state Supreme Court has recognized the implied authority of a code city to offer cable services. *City of Issaquah v. Teleprompter Corp.*, 93 Wn.2d 567, (1980).
 - Washington statutory law provides for several classes of cities, and the authority possessed by each varies. Therefore, in evaluating municipal authority, Washington courts will consider the type of city involved. The broadest powers are granted to first class and code cities, and those powers are liberally construed; other classes of cities have not received a similar “benefit of the doubt.”
 - Although there is no clear answer as to how Washington courts would view the authority of cities to offer telecommunications and internet services, an argument can be made that Washington cities do have implied authority to offer such services.

- Chapter 35.99 RCW establishes an overall statutory scheme for telecommunications providers to obtain permits from cities and towns for the use of public rights of way. It indicates the legislature contemplated that a city or town might own and operate telecommunications facilities and provide telecommunications and cable services either to other service providers for resale, or directly to the public.
- RCW 35.99.010(6) defines a “service provider” as including a “city or town owning, operating, or managing any facilities used to provide and providing telecommunications or cable television service for hire, sale, or resale to the general public.”
- RCW 35.99.070 authorizes cities and towns to require a service provider that is placing ducts or conduits in public rights of way to provide the city or town with additional duct or conduit, provided that (i) the city or town pay the fully allocated costs of the duct or conduit if it leases the capacity to a third party for the provision of telecommunications services, and (ii) *except as otherwise agreed by the service provider*, it will not use the duct or conduit to provide telecommunications or cable service for hire, sale, or resale to the general public.
- “Telecommunications service” is defined to mean “the transmission of information by wire, radio, optical cable, electromagnetic, or other similar means for hire, sale, or resale to the general public.” “Information” means “knowledge or intelligence represented by any form of writing, signs, signals, pictures, sounds, or any other symbols.” Telecommunications service excludes “the over-the-air transmission of broadcast television or broadcast radio signals.” RCW 35.99.030(7).
- The argument is stronger in the case of a city that can claim that the construction and operation of the telecommunications system would enhance and augment the electric service that the city provides to customers through its municipal electric utility, and that its lease of facilities on a wholesale basis or provision of retail services is conducted pursuant to its general authority to dispose of or use municipal property for the common benefit. The City of Tacoma has obtained a declaratory judgment from a superior court that it has implied authority to provide telecommunications services, but this is not dispositive of how a Washington court would decide the issue if it were fully litigated.

- PUBLIC UTILITY DISTRICTS

- Under Washington law, the powers of a municipal corporation are limited to those powers expressly granted and those powers essential to the declared purposes and objects of the corporation. *Hite v. PUD*, 112 Wn.2d 456, 772 P.2d 481 (1989). If there is any reasonable and substantial doubt as to the existence of a particular power, such power is deemed not to exist. *Port of Seattle v. Wash. Util. & Transp. Comm'n*, 92 Wn.2d 789, 597 P.2d 383 (1979). The range of powers of a municipal corporation that may be “fairly implied” or “incident to” powers expressly granted depends on whether the activity at issue is proprietary or governmental in nature. *See City of Tacoma v. Taxpayers of Tacoma*, 108 Wn.2d 679, 743 P.2d 793 (1987). Essentially all of the functions of a PUD are proprietary in nature, *e.g.*, producing and selling electricity. The powers of a municipal corporation acting in a proprietary capacity are liberally construed to include incidental powers necessary to make its authorized proprietary purpose efficient and beneficial to the public. *Id.*

- In 2000 the Washington legislature enacted RCW 54.16.330, which provides:

(1) A public utility in existence on June 8, 2000, may construct, purchase, acquire, develop, finance, lease, license, handle, provide, add to, contract for, interconnect, alter, improve, repair, operate, and maintain any telecommunications facilities within or without the district’s limits for the following purposes:

(a) For the district’s internal telecommunications needs; and

(b) For the provision of wholesale telecommunications services within the district any by contract with another public utility district.

Nothing in this subsection shall be construed to authorize public utility districts to provide telecommunications services to end users.

(Emphasis added). The legislature also simultaneously enacted RCW 53.08.370, which uses identical language to grant rural port districts authority to provide telecommunications services on a wholesale basis.

- On April 23, 2001, the Washington Attorney General opined that a PUD or rural port district lacks the authority to provide telecommunications services to retail customers and cannot sell excess capacity directly to end users. An earlier AGO issued in 1998 (AGO 1998 No. 14) concluded that a PUD lacks authority to offer and provide Internet access to end users, but a PUD that installs fiber optic cable for statutorily authorized purposes may sell or lease excess capacity to a private entity, who in turn could use it for purposes of a separate business venture. The AG cautioned that its conclusion was based on the assumption that the amount of fiber optic cable installed was reasonable and in proportion to the PUD's present and future needs.
- The question of whether a PUD has the authority to provide Internet access services to retail end user customers is currently pending in *Wash. Indep. Tel. Ass'n v. Pacific Cy. Pub. Util. Dist. No. 2, Docket No. 99-2-00430-4 (Super. Ct. Pac. Cy)(trial scheduled for February, 2003)*.
- CO-OPS
 - Under Washington law, a cooperative may be organized “for the transaction of any lawful business . . .” RCW 23.86.010. The words “lawful business” mean “every kind of lawful effort for business . . .” RCW 23.86.020. Co-ops may “exercise all powers necessary or convenient to effect [their] purposes.” RCW 23.86.035(12).
 - RCW 23.86.050 requires that co-ops prepare written articles of incorporation, which shall set forth “the purpose for which it was formed which may include any lawful business . . .” Thus, a co-op providing communications services must ensure that its articles of incorporation include the provision of those communications services as one of its purposes.
- **AUTHORITY OF OREGON MUNICIPALITIES AND OTHER PUBLIC ENTITIES TO PROVIDE COMMUNICATIONS SERVICES**

CITIES

- Under Oregon's “home rule” statute,” a city may take all actions necessary or convenient for the government of its local affairs, “except as limited by express provision or necessary implication of general law.” ORS 221.410.

- Thus, if a city’s charter confers authority to provide either retail or wholesale telecommunications services, the city will be empowered to do so.
- Where the city charter contains a broad grant of authority (e.g., “over all matters of city concern to the fullest extent allowed”) it is likely no special grant will be necessary. *Multnomah Kennel Club v. Dept. of Revenue*, 295 Or 279 (1983).
- *GTE v. Lincoln County*, 179 Or App 46 (2002). Challenge to Lincoln County’s plan to provide telecommunication services both internally and beyond county borders:
 - LECs argued that municipalities have no right to compete with private industry, and that the county had no authority to provide services outside its borders.
 - Court found that it is irrelevant that municipal business competes with private industry. It also found that the county was within its statutory authority in providing service in two other counties.

PUBLIC UTILITY DISTRICTS

- The Oregon Constitution created PUDs “for the purpose of supplying water . . . for the development of water power and/or electricity . . . and for the distribution, disposal and sale of water, water power and electric energy”
- There is no other implied or express authority for PUDs to deliver telecom services

Co-Ops

- Under Oregon law, a cooperative may be organized “for any lawful purpose. . . .” *ORS 62.115*
- Cooperatives may “exercise all powers necessary or convenient to effect any or all of the purposes for which [they are] organized.” *ORS 62.125(14)*
- In Oregon some cooperatives currently organized specifically to provide telecommunications services
- An Oregon cooperative organized to provide electric or water services may wish to amend its organizational documents to specifically reference telecommunications services

UNDERSTANDING THE BENEFITS OF MUNICIPAL BROADBAND SYSTEMS

Municipal broadband systems can help communities retain current key industries and businesses by providing essential communication infrastructure. At the same time, a high bandwidth broadband network can attract businesses and jobs.

- ECONOMIC DEVELOPMENT - Through offering high bandwidth networks cities can enhance the economic climate in their respective communities by attracting new businesses.
- COMMUNITY PRESERVATION - Preserve industries and economic opportunities that may require access to high bandwidth networks to compete in the broader economy.
- ESSENTIAL COMMUNICATION SERVICES – Provide essential communication services to Public Safety, Educational Institutions and Hospitals. Increase access to essential medical services by facilitating links to regional medical and trauma centers.
- UNIFY COMMUNITY – Provide an advanced high bandwidth network throughout a community, offering opportunities for access to governmental and educational services.
- SPARK COMPETITION – Create real competition in the local area in cable telecommunication and Internet access and content business. Competition helps stabilize consumer prices, and offers greater choice and selection.
- OPEN ACCESS – Provide an Open Access platform for service providers, content providers and Internet access providers to use.
- TELECOMMUTING – With a high bandwidth network in place, real telecommuting becomes an option, helping relieve road congestion, and offering flexibility for both employers and employees.

PRACTICAL CHALLENGES

- TECHNOLOGY SELECTION:

Setting goals for the network will help drive this selection. Will the network be the only one providing Internet connectivity? Will it be an advanced high bandwidth network taking fiber-to-the-home and curb? Will it be a dark fiber, condominium network, or regional wholesale network? Answers to each of these questions may dictate a distinct selection of technology, or blend of technology.

However, because the local telephone and cable company currently use copper and hybrid fiber coaxial cable infrastructure, building a forward looking network with capability of expansion may provide the best solution and best competitive edge.

- CUSTOMER RELATIONS AND MARKETING:

Is a municipal entity capable of providing the marketing of services to its customers? Is a national company better able to provide the sophisticated marketing that may be needed for the success of the network? Can a municipal entity respond to the competitive pressures in the market place? Can a municipal entity take advantage of bulk purchasing, as well as packaging of network services?

- LOCAL POLITICAL ISSUES:

How will the incumbent telephone company react? How will the incumbent cable company react? Does the community perceive the network as a threat to private business, or a key utility infrastructure to attract and retain businesses? Have the elected officials been fully briefed on what to expect from the incumbent operators? Are the incumbent operators partners in the venture?

- LEVEL PLAYING FIELD OBLIGATIONS:

To the extent a municipal system seeks to provide cable services, a franchise will be required from the city the network operates. *See* 47 U.S.C. 541 (cable operators must obtain a franchise from local governments). Franchising authorities must provide a “level playing field” between the incumbent cable provider and any new entrants. *See* 47 U.S.C. § 541(a)(1) (forbidding state franchising authorities from granting exclusive franchises or unreasonably refusing to award additional, competitive franchises).

A substantial body of “level playing field” cases has emerged in recent years. These cases generally provide for the following:

— Franchises must be compared, not on an item-by-item basis, but as entire packages.

— “Equal” benefits and “equal” burdens are not required; rather, the appropriate standard is “substantial” similarity.

— When comparing the terms and the build-out requirements of franchises, the appropriate comparison is not between the new entrant’s franchise and an incumbent’s renewal franchise, but between the new entrant’s franchise and the original franchise that the incumbent (or its predecessor) obtained at the time that its situation more closely resembled that of the new entrant today.

— It is inappropriate to compare a new entrant’s burden in constructing an entirely new system with an incumbent’s burden in upgrading an existing system.

— A franchising authority may properly give weight to both the added risks that a new entrant faces in attempting to enter a market against entrenched competition and the benefits of incumbency that an existing provider enjoys.

See the following cases: *In re: Dakota Telecommunications Group*, 590 N.W.2d 644 (Minn. App. 1999); *New England Cable Television Ass’n, Inc. v. Department of Public Utility Control*, 27 Conn. 95, 717 A.2d 1276 (1998); *United Cable Television Services Corp. v. Dep’t of Public Utility Control*, 235 Conn. 334, 663 A.2d 1011 (1995); *Knology, Inc. v. Insight Communication Co., L.P., et al.*, Civ. No. 3:00CV-723-R (W.D.KY)

THE “BEST” ENTITY?

There is some debate about whether existing publicly owned electric utilities may provide the “best” public entity to provide high bandwidth municipal broadband services. This debate will be waged for years to come, as the full variety of models begin to operate and expand. Some of the reasons for this conclusion are:

- Public power’s history of providing utility service to areas either not served or underserved by private utilities.
- Public power’s willingness to step in where service is limited or of poor quality
- Public power has provided competition in many larger cities - Los Angeles, Seattle, Tacoma
- Traditional role in community economic development
- Longer term return on investment acceptable for public infrastructure
- Customers already receive electric service and have existing billing relationship with the utility

- Utility has existing back office, network operations and outside plant maintenance operations, and has a history of installing service at customer premises
- Access to poles and other facilities in rights-of-way

Regardless of the conclusion, this list provides a window into some of the key issues each municipality will have to consider before adopting a particular entity in which to provide a high bandwidth broadband network.

WHAT OTHER PUBLIC ENTITIES ARE DOING AND WHY.

Broadband systems being built by public entities are emerging in a wide variety of forms. State laws may dictate what form these systems can take, and local and regional circumstances also play a strong role. Some parts of the country have a history of providing utility services through public ownership, other areas have been forced to consider municipal broadband systems due to a lack of any services in the market. Others see a localized market failure for certain services, and seek to fill that gap.

What these systems have in common is the ability to use traditional forms of municipal finance to lower costs of capital. In addition, most public agencies and municipalities have a longer term horizon in which to achieve a return on investment. They are not looking at 5 year return on invested capital. All these factors help make municipal broadband systems more cost effective, and gain the benefits of a robust broadband infrastructure for all residents of the community.

From traditional cable type systems to wholesale networks to dark fiber providers, public entities are approaching the lack of broadband connectivity in their communities from diverse perspectives.

- DEMAND AGGREGATORS/REGIONAL APPROACHES

NOANET – Northwest Open Access Networks. NoaNet Oregon and NoaNet Washington are completing a “middle-mile” network that leverages existing Bonneville Power Agency network throughout Washington and Oregon. Fiber and electronics are extended throughout areas of the Northwest to help connect communities, both rural and more urban areas. Last mile connections remain the obligation of each community. The Washington network is owned by a consortium of Public Utility Districts, and provides fiber links to its constituent of communities. The Oregon network is owned by a consortium of electric cooperatives throughout Oregon, several cities and an Indian tribe. Each NoaNet entity is distinct, and the laws in Washington and Oregon differ on whether such an entity may only provide wholesale service, or may be allowed to provide retail service as well.

CITYNET CHICAGO – City of Chicago is using its telecommunication buying power to leverage into a city-operated network.

UTOPIA - Utah Telecommunications Open Infrastructure Agency. As many as 17 different Utah cities, with a population of nearly 500,000 customers are banding together to build a wholesale fiber-to-the-home network. Retail businesses locate on the network and provide services to end customers. Bonds will be issued to finance construction upon sufficient service provider contracts.

PORTLAND, OREGON IRNE NETWORK – City operated internal network comprised of I-Net facilities, contributed conduit, and existing infrastructure to provide all city telecommunication services, as well as other governmental entities. Portland purchases wholesale elements from Qwest.

- **PUBLIC UTILITY TELECOMMUNICATION NETWORKS**

CITY OF ANAHEIM, CALIFORNIA - Municipal dark fiber network. The network leases capacity to private entities. Each customer locating on the network pays for the necessary electronics to light the fiber.

GRANT COUNTY PUBLIC UTILITY DISTRICT – Advanced fiber-to-the-home open access network capable of 1gigabit speed. Leveraging off of the NoaNet middle mile network, Grant County PUD is bringing fiber to the door to residences and businesses throughout its service territory. The territory averages 12 homes per square mile and servicing approximately 35,000 - 40,000 total homes in a total area of over 5,000 square miles. Upon completion, Grant County PUD estimates 47,000 miles of fiber at an estimated cost of \$120 million. As of June 2002:

- 6,436 HOMES PASSED
- 2,289 CUSTOMERS LIT
- 35% PENETRATION
- OPEN ACCESS PRESERVED (RCW 54.16.330) - 12 ISPs; 1 TELEPHONE PROVIDER; 1 SECURITY SERVICE PROVIDER (PER GRANT COUNTY).

CHELAN COUNTY PUD – Wholesale fiberoptic network, provides core internal communications with a trial for commercial and residential customers. Limited to wholesale network due to Washington law.

CLICK! NETWORK – Tacoma Power’s cable and data network. The network provides cable television and data to residential customers, as well as a commercial data network in parts of the city. Click! provides a residential retail network throughout the city. It is an open access platform with up to four distinct ISPs offering Internet connections. Competes directly with AT&T. Considering expanding to entire service region of Tacoma Power.

ASHLAND, OREGON – Similar network to Click! Competes with Charter Communications. Customer rates for Charter are lower in the City of Ashland than the surrounding region.

- **FIBER CONDOMINIUM**

CANARIE Project, Canada – Each end user purchases fiber, or IRUs (Indefeasible Rights To Use) in a conduit and electronics, and the cost is amortized over a period of years. Requires payment for maintenance as well.

- **SHOULD YOU REGISTER AS A COMPETITIVE LOCAL EXCHANGE COMPANY**

- OREGON. If providing switched voice service, must register as a CLEC. If providing data services only, may register as a CLEC.
- WASHINGTON: If providing voice or data services, must register as a CLEC
- ADVANTAGES:
 - Right to access ILEC poles, ducts and conduit at cost-based rates.
 - Right to enter into interconnection agreements with ILECs – allows calls to locally terminate.
 - Right to enforce interconnection agreements by state regulatory commission.
 - Right to purchase services for resale from the ILEC at a discount.
 - Right to purchase unbundled network elements from the ILEC at cost-based rates.
 - Right to collocate in ILEC end offices at cost-based rates.