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PROPOSED STATE BARRIERS TO PUBLIC ENTRY
(As of June 8, 2006)

Bills Introduced in 2006
(Analysis of 2005 bills follows)

Indiana - SB 245 (*Chapter 35 stricken from final legislation*)

As introduced, the municipal broadband provisions of SB 245, collected in Chapter 35, were in some respects similar to those in Indiana HB 1148, which died in committee last year. The original Chapter 35 would have prohibited municipalities from providing any "communications service" after June 30, 2006, with two exceptions: (1) they could continue to provide "communications service" in areas in which they were already providing such service, and (2) they could provide "broadband service" if they followed the procedures outlined in the bill. The term "communications service" was defined to include telecommunications services, cable services, broadband services, information services, and Internet Protocol-enabled services (e.g., VoIP, IPTV, etc.), as defined by the FCC. The term "broadband service" was defined as "a connection to the Internet that provides capacity for transmission of more than one (1) megabit per second both to and from the subscriber, regardless of the technology or medium used to provide the connection. The term includes a connection to the Internet provided by wireless technology, copper wire, fiber optic cable, coaxial cable, broadband over power lines, or other facilities or future technologies."

Under the original Chapter 35, a municipality could initiate or extend its provision of "broadband service" after June 30, 2006, only if no other entity was providing broadband service or intended to do so within 3 months, in the designated area at issue. Chapter 35 required a municipality to go through an elaborate specified process to determine whether one or more current or potential providers existed. If the municipality determined that no such provider existed, it was then 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 would also 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 1 Mbps capacity in both directions AND advanced networks with far more bandwidth capacity than an incumbent might be providing.

As passed by the Senate on January 24, 2006, Chapter 35 did not include the provision that would have precluded municipalities from providing new or extended broadband services after June 30, 2006, if at least one private entity was providing or intending to provide service within three months. A municipality would still have had to determine whether any such entity existed, and, if it found at least one, it would still have had to go through the cumbersome administrative process to determine whether

to proceed. It would also have been subject to the other restrictions discussed above. The new Chapter 35 also added two new provisions. One would have allowed municipalities to provide certain video and other services – but not IP-enabled services – after June 30, 2009. The other would have allowed municipalities to make their facilities available to private persons, but subject to various conditions that would likely render this option illusory for most municipalities, particularly in rural areas. Thus, while seemingly less onerous than the original version, the new Chapter 35 would still have precluded municipalities from providing broadband service with capacity of less than 1 Mbps in both directions and would effectively have precluded most municipalities from developing high-capacity networks.

Chapter 35 was eventually stripped from SB 245, and the remainder of SB 245, as amended, was combined with HB 1279, which did not contain any municipal networks provisions. The successor bill, HB 1279, was sent to the governor for signature on March 7, 2006.

Tennessee HB3569 / SB3514 [Currently in committee]

Present Tennessee law authorizes a municipality operating an electric plant 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. These bills would have eliminated the option of forming a business relationship other than a joint venture, and they would have required that the records of such joint venture agreements be open to public inspection. Under the bills, joint venture agreements also had to be presented to the chief legislative body of the municipality in which the municipal electric system was located. This presentation was to include the managerial and financial information of any prospective private joint venture partner.

Present Tennessee law requires a municipal electric system to establish a separate division for delivery of cable, Internet, and related services. This division must maintain its own accounting and record-keeping system. A municipal electric system may not subsidize the operation of the division with revenues from its power or other utility operations, but a municipal electric system may lend funds for the provision of such services. These bills would have prohibited a municipal electric system from lending funds to the communications division. The bills would also have required the division to submit to an independent audit, which had to include an examination to determine whether the newly created division had been subsidized by revenues of the municipal electric system's other operations.

Effective municipal lobbying kept the bills from emerging out of committee before the legislative session ended.

Bills Introduced in 2005

Colorado -- SB 05-152 [*Signed into law 6/3/05*]

As originally proposed, SB 05-152 would have prohibited municipalities from providing telecommunications services, cable services, or advanced services (Internet access with capacity of at least 144 Kb/s in both directions), directly or indirectly, at wholesale or retail, unless the municipalities met various onerous requirements. A municipality intending to provide retail services would have been required to hold a preliminary public hearing to inform the public of its intent and would also have had

to obtain a majority vote in a referendum on its proposal. 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 direct costs, plus imputed fees, taxes and other charges that similarly-situated private entities would pay; and removed municipal eminent domain authority and antitrust immunity. As amended and passed by the Senate on March 1, 2005, the bill would have imposed referendum requirements for retail services and would have eliminate the cross-subsidization, revenue-bond and price-fixing restrictions. It would have given unserved municipalities the right to invoke a Pennsylvania-like first-refusal process, and it have would grandfathered local governments that have "entered into an agreement or otherwise taken any substantial action" prior to the effective date of the act.

On April 5, 2005, the bill was approved by the House Local Government Committee, with further amendment and clarifications. As voted out 10-1, the bill would require a vote only if a municipality wanted to provide retail communications services. The bill would also allow various municipal activities, including leasing of "insubstantial amounts of excess capacity to private providers." The definition of advanced telecommunications services was also changed to 256 Kbps in both directions. On April 15, 2005, the bill passed the House, with relatively minor changes from the form approved by the Senate. The bill was signed into law on June 3, 2005.

Florida -- SB 1322 [*Signed into law 6/2/05*]

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 they could not extend their service areas, add new subscribers, or add new services. With regard to services omitted by the private sector, municipalities would have had 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. On April 7, 2005, the House Tax and Finance Committee reported the bill favorably, with an amendment that read: "The foregoing prohibition shall not apply to, and shall not prohibit, a governmental authority from supplying a covered service, or a facility used to provide a covered service, for internal operational needs, intergovernmental communications, and public service communications."

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 that was being provided by a private entity, but its waiting period would be 180 days rather than 240 days, and it would not have imposed a referendum requirement. Under SB 2072, the grandfather provision would have allowed municipalities that were 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."

On April 12, 2005, a bill that would substitute for SB 2072 and SB 1714 was introduced in the Senate Communications and Public Utilities Committee. The bill was a compromise among Florida's private

providers, municipalities, the Governor's office, and some members of the Florida legislature. Under the compromise, municipalities would have to hold two public hearings and make certain findings before providing communications services. Among these findings is that the municipality has a business plan under which project revenues would begin to cover operating expenses and debt service within four years. Municipalities would have to obtain a vote of the public only for bonds with a maturity of longer than 15 years. Municipalities also would be prohibited from cross-subsidizing communications services with revenues from other utilities or taxes, and a municipal project would have to cover long run incremental costs.

After a flurry of last-minute activity, the compromise bill passed both houses, in the form of SB 1322. SB 1322 embraced the compromise, with two changes: municipals must hold a public hearing each year to report on the municipal system's progress, and if system revenues are not covering operating costs and bond payments after four years, the municipality must hold a public hearing to review a plan to do one of four things: shut the system down, sell it, enter into a partnership with a private entity, or continue operating the system. The compromise was signed into law on June 2, 2005.

Illinois – SB 499 Amendment 1 [*Died in committee*]

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 new 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 sponsor of the bill decided not to move the bill, it died committee after the sponsor of the bill decided not to move the bill, it died committee.

Indiana - HB 1148 [Died in committee]

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 service, any cable service, any broadband service, any information service, any application such 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 wanted to do so. The bill made no provision for fundamental differences attributable to data speeds (e.g., 200 kilobits per second versus 100 Megabits per second); symmetry (one direction versus both directions); mobility (wireless versus fixed); price; affordability to particular groups; signal quality; content (e.g., number of channels, categories of programming, local versus regional or national subject matter); quality of customer service and support; or other factors that a community may consider important. The bill would also have established cumbersome administrative procedures for a municipality to use in determining whether a private-sector provider is providing, or intends to provide, on or more of the services in question. Finally, the bill would also have prohibited a municipal project from going forward until any litigation challenging the municipality's decision to provide a service or facility had run its course (which could take years). The bill died in committee.

Iowa

HF 861 [*Died in committee*]

Originally, two identical bills, SSB 1136 and HSB Bill 182, 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. As voted out of the House Ways and Means Committee on 4/5/05 and renumbered on 4/15/05, HF 861 would have eliminated the provisions relating to financing but retained most of the other restrictive measures. It would also allowed voter authorization for a telecom project and approval of revenue bonds to fund the project to be considered in the same election, and it would have allowed a city council to proceed by a special election to determine whether to establish or dispose of a municipal utility. On 4/15/05, amendment H1474 was filed. In addition to changing HF 861 in various minor respects, the amendment would have relieved municipalities from having to comply with the extensive procedural requirements of the bill if a private investor, other than a purchaser of revenue bonds for the project, provided or was obligated to provide, fifty percent or more of the project's funding and was willing to take all financial risks involved.

On 4/29/05, the House passed HF 861, as amended by H-1589. The amended bill would have allowed municipalities to provide telecommunications services if they submit a proposal for voter approval, make a full cost-benefit analysis of the proposal at least 30 prior to the vote and hold a public hearing at least 20 days prior to the vote, and obtain a majority vote of the public on the fiancé plan prior to the issuance of public debt in support of the proposal. The amended bill also would not have applied to telecommunications systems that had obtained voter approval prior to May 1, 2005. Amended HB 861 died in committee.

HSB 205 [*Died in committee*]

HSB 205, reissued as HF 843, would remove the municipal exemption from property taxes for property used to provide cable service and would phase in such taxation over 20 years. It died in committee.

Louisiana - SB 126 [*Signed into law, 7/11/05*]

Last year's compromise legislation required municipalities to comply with requirements in their charters with regard to 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, PEG Access, I-Nets, etc.) as soon as a municipality announced that it was ready to serve even a single customer of the service in question. The suspension would have remained in force until the monetary value of the municipality's like obligations equaled the monetary amount value of the

obligations incurred by the private operators for the previous ten years. On May 25, the Senate Commerce Committee passed SB 126, as amended. The amended bill exempted Lafayette altogether, clarified that a municipality need not conduct more than one referendum (rather separate referenda on whether to go forward with the project and whether to issue bonds to finance it), and exempted any municipality that conducts a referendum from the other punitive measures in the bill. The amended bill was signed into law on and effective 7/11/05.

Michigan - HB 5237

At the beginning of the legislative session, two bills were introduced, HB 4600 and SB 528, that included a provision that 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, comprehensive telecommunications reform bills emerged in the Senate and House. The Senate bill, SB 754, did not contain a barrier to public entry. The House bill, HB 5237, did contain such a barrier.

In its original form, Section 252 would have require public entities to follow certain specified procurement processes before providing "telecommunications services" (which is defined broadly enough to cover virtually any communications service). If at least two bidders submitted bids, the public entity would have had to accept the best bid – regardless of how good it was – and give the winning bidder a year to begin to deliver the services in question. If the winning bidder failed to do so, the public entity had to give the next best bidder *another* year to begin service, and so on down the list. Section 252 also precluded public entities from providing telecommunications services outside their incorporated boundaries, and it prohibited public entities from establishing boards or other entities for the purpose of providing oversight of a private provider. A public entity that was providing services to at least 10% of its *population* on the date of enactment would be grandfathered.

As finally passed by the House (October 20, 2005) and Senate (November 3, 2005), revised Section 252 would give public entities substantially more flexibility in drafting and judging responses to requests for proposal. Public entities would be allowed to go forward themselves if they did not receive at least three qualifying bids. The relevant period of time that a project could be delayed would be shortened to six months. The grandfather clause would now cover all public entities that were providing service (with no prescribed minimum), or had issued an RFP, or had an enforceable contract in effect, by November 1, 2005. Also, the requirements of Section 252 would not apply to municipal electric advanced meter reading applications.

Nebraska - LB 645 [*Signed into law 6/3/05*]

With very limited exceptions, 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 January 1, 2005 are grandfathered.

LB 645 also prohibits public power suppliers from providing such services on a retail basis permanently and on a wholesale basis until December 31, 2007. Again, suppliers providing services on January 1, 2005, are grandfathered, and such entities can expand existing services. The bill does not prohibit agencies, political subdivisions, or public power suppliers from providing services "for the internal use and purpose of the agency, political subdivision, or public power supplier, or to carry out the public purposes of the agency, political subdivision, or public power supplier." LB 645 also establishes a task force to study and report on the public broadband issue by December 31, 2006.

Ohio

HB 591 [*Not yet introduced new session, but still under discussion*]

As introduced last year, HB 591 would have extended to municipal providers of telecommunications service, as defined in federal law, various requirements previously in effect for municipal providers of cable service. In addition, the bill would have added a highly vague prohibition on cross-subsidization. The bill did not pass last year and has not yet been introduced this year, but it is under discussion among interested parties.

HB 188

Except as provided in the bill, HB 188 would prohibit 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 lifecycle costs and benefits, per-taxpayer costs, needs that the private sector is not meeting, etc.

Oregon - HB 2445 [*Died in committee*]

HB 2445 was essentially the same bill that died in committee in 2003 (HB 2443). HB 2445 would have required municipalities to publish a cost-benefit analysis done over an unrealistic three year time frame 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 would also have created new statutory references to existing open records and open meetings requirements that do not apply to private-sector providers. The bill died in committee.

Tennessee – HB 1403 [*Signed into law 6/7/05*]

As originally proposed, HB 1403 and its companion, SB 1760, would have repealed the authority of municipal electric systems to provide most communications services and prohibited any municipality that did not already have authority to provide communications service from seeking or obtaining approval to do so, unless and until 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 provides for a moratorium on new approvals but does not require an affirmative act of the Tennessee legislature to restore municipal authority to provide communications services after

the moratorium expires. Specifically, as enacted on June 7, 2005, the law prohibits municipalities from seeking or obtaining approval to provide communications services until February 1, 2006. By then, the legislature will have received the state comptroller's report, and comptroller may – or may not – have made recommendations to the Tennessee legislature. The law also grandfathers "two municipal electric systems located in the middle grand division" as well as all other municipal systems that have already begun to provide, or received approval to provide, communications services. Since no new projects are currently under consideration, the moratorium has no practical effect.

Texas - HB 789 [*Died in conference committee*]

As originally proposed, HB 789, a major rewrite of Texas telecommunications law, contained provisions that would have extended and broadened the existing Texas barrier to municipal entry. As amended on March 7, 2005, municipalities and municipal electric utilities would have been prohibited from providing, directly or indirectly, alone or in partnership with other service providers, either "telecommunications" or "information" services as those terms are defined under federal law. The amended bill contained a number of exceptions, including (but not limited to) the following: municipal providers of video or broadband services on January 1, 2005, would be grandfathered; municipalities could provide various governmental functions or services via the Internet; municipal electric utilities could partner with private-sector retailers to provide broadband over power lines; and municipalities would not be limited from engaging in economic development activities that are expressly authorized by statute. The bill would also have allowed only a limited number of small municipal electric utilities, and not all municipalities, to lease dark fiber under certain conditions. The House Committee on Regulated Industries dropped the restrictions from HB 789 on March 17, 2005.

On March 23, 2005, the House of Representatives adopted substitute restrictions proposed from the floor. The substitute would allow municipalities that providing wireless services for a fee on January 1, 2005, to continue to do so and prohibits all other municipalities from providing wireless services for a fee. The substitute would require the Public Utility Commission of Texas (PUCT) to study the municipal wireless issue and provide a report to the next Texas Legislature (by September 1, 2007, as the Texas Legislature meets only in alternate years). After September 1, 2006, no municipality may introduce new wireless services of any kind, free or paid, unless the municipality has filed with the PUCT, by June 26, 2006, a statement of intent showing that the city has a plan and the fiscal and managerial resources to provide the intended services. The PUCT has authority to approve such proposals (under unspecified criteria and timetables), and it must include any approved statements of intent in its report.

On May 24, the Senate passed its version of HB 789 without a barrier to municipal entry. The House and Senate conferees were unable to resolve the inconsistencies between the House and Senate versions before the legislative session closed, so the bill died without action.

The Texas governor subsequently called a special session to consider school finance legislation. Identical telecom/cable bills were passed by the Senate (SB 5) and House (HB 13) on August 10, 2005, but they did not include any new barriers to public entry. The governor signed SB 5 into law on September 5, 2005, without new barriers to public entry.

Virginia - HB 2395 [*Died in committee 2/28/05*]

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 the localities in question, subject to certain required, but streamlined, procedures. Also, the Act did not require localities that established wireless authorities to comply with the 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. (This provision is arguably unenforceable, as it would require localities to engage in price-fixing practices that would be per se violations of the Sherman Act if committed by a private entity.) HB 2395 would subject 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 also require all localities, including those that were providing wireless services on July 1, 2005, to comply with Virginia's price-fixing provision for functionally equivalent services.

West Virginia – SB 740 [*Died in committee*]

On March 23, 2005, a bill entitled The Electronic Telecommunication Open Infrastructure Act ("ETOPIA") originated in the Senate Committee on Transportation and Infrastructure. As introduced, the bill required a technology infrastructure needs survey to be conducted of all public bodies within the state, set up an Innovation Center within the West Virginia Development Office, and authorized local governments to provide, and 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 was later amended to eliminate the involvement of the Public Service Commission. On March 29, the bill was amended further. The substitute for SB 740, as passed by the Senate, would have required a technology infrastructure survey and establish the Innovation Center in the Development Office, but it would not impose limitations on local governments in the provision of infrastructure technology. The bill died in committee.

Late in the session, House Concurrent Resolution 98 and Senate Concurrent Resolution 107 were introduced to call for a study of the broadband issue. Neither resolution passed.