

Walking the High Wire Act of Broadband over Powerlines

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The "last mile" has confounded telecommunications providers and consumers for years. Telecommunications providers collectively refer to the "last mile" as the figurative distance from the telecommunications provider's switch to a residential end user. The costs and the potential requirement of having to unbundle network elements have discouraged a significant amount of telecommunications providers from deploying

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fiber networks to the residential end user to cover the last mile. While wireless technologies (e.g., Wi-Fi, MMDS) have been advocated by many as a viable option to the last mile dilemma, lack of penetration of PCS services to rural markets serves as an example of the difficulty that exists in this business model. Specifically, the Federal Communications Commission ("FCC") noted that PCS penetration rates for the lower quartile of counties in terms of population, only 18.0% have three or more mobile telephone providers compared to 93.2% of the highest quartile of counties.

A viable solution to the last mile dilemma that is recently being heralded by some within the communications industry is Broadband over Power Line systems (BPL). Although the technology has been used by utilities for years for high-voltage system control and information feedback,

the demand for high bandwidth communication has created a distribution opportunity over medium and low voltage lines. Recent technological breakthroughs make this a more viable product through reduction in RF interference. In a recent Notice of Inquiry, the FCC described the service as "systems using existing electrical power lines as a transmission medium to provide high-speed communications capabilities by coupling RF energy into the power line." The FCC threw its support behind

the technology by claiming that BPL could "bring Internet and high-speed broadband access to rural and underserved areas" which are so underserved.

The main players in the BPL market are composed of the utilities situated throughout the country. Utilities range from public power to investor owned and electric cooperative utilities. While the FCC considers the legal, regulatory and technical issues associated with the service (see discussion in future edition of *Broadband Properties*), the remainder of this article will discuss only the state legal and regulatory issues associated with BPL.

The legal and regulatory requirements faced by a utility wishing to deploy broadband depends largely upon how one's service is categorized and whether the entity is a municipality or individually owned. The service will most likely fall within one of two

categories. A telecommunications service "means the transmission, between and 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." An information service is defined as "the offering of a capability for generating, acquiring, storing, transforming, procession, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."

The FCC has tentatively concluded that wireline broadband Internet Service is an "information service," and that the transmission aspect of that service is "telecommunications." The tentative conclusion is far from final, as a final FCC Order has not been released and it is expected that numerous petitions of reconsideration will be filed asking the Commission to reexamine whatever conclusions it makes. Therefore, the classifications and the regulatory regimes that accompany the two aforementioned categories should be carefully considered by utility entities when evaluating the potential provision of broadband service.

Public Power Utilities

Although Federal law does not



expressly prohibit municipal entities from providing telecommunications service, neither does it expressly approve it. The Federal law that is the most applicable is Section 253(a) of the Telecommunications Act which provides, "No State or local statute or regulation...may prohibit or have the effect of prohibiting the ability of any entity to provide interstate or intrastate telecommunications service."

The statute has spawned conflicting interpretations the phrase "any entity." In Public Utility Commission of Texas, 13 FCC Rcd 3460, the FCC held that because the State prohibition of a municipality providing telecommunications service was an exercise of the state sovereignty of the "fundamental" "traditional" kind which Congress did not intend to interfere with, the phrase "any entity" does not apply to municipalities. On the other hand, an 8th Circuit Court recently ruled that municipalities are commonly considered to be entities and as such, held that municipally owned utilities clearly fall into the standard definition of the term "entity." If and until the U.S. Supreme Court settles the controversy, the implications of

the federal statute will be depend solely upon the jurisdiction in which one is located.

As a result of the conflicting court interpretations, a patchwork of different state laws exist. As an example, some states have granted broad authority to provide service while others

have placed restrictions or outright bans. Examples of statutes granting authority are California (California Const., Article XI, Section 9(a)) and Florida (Fla. Stat. Ch. XII Section 166.047), while restrictive States include: Arkansas which prohibits municipal entities from providing basic local exchange services (Ark. Code § 23-17-409); Minnesota, which requires municipalities to obtain a supermajority of 65% of the voters before providing telecommunications services (Minn. Stat. Ann. § 237.19); and Nevada, which generally prohibits municipalities with populations larger than 25,000 from providing "telecommunications services," as defined by federal law. (Nevada Statutes § 268.086).

If the service is considered an information service, an indirect implication of the controversy can be seen from same FCC Texas Order. The Texas Order provides that the prohibition applies to actions which have the "practical effect" of prohibiting an entity from providing telecommunications service. Therefore, a municipality seeking to offer



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a bundled service could make the argument that any prohibition placed upon its Internet service has the practical effect of acting as a barrier to the provision of telecommunications service and should not be permitted.

Privately Owned Utilities

In addition to the aforementioned discussion of Section 253(a), both public and private utilities must deal with requirements established by state regulatory bodies. Depending on whether the service is deemed as telecommunications or information sharing, the realm of permissible activities, rates and level of oversight is determined by each of the fifty state Public Service Commissions. Prior to an entity providing telecommunications service, most states generally require some level of Certification. The Certification requires a showing that the

entity demonstrate that it has the legal, technical, financial and management qualifications to provide the contemplated service. The level of review is completely state specific. Tariffs, and other regulatory fees and may be required. Further, a number of states have adopted their own state pole attachment regulations. For investor owned utilities, state regulatory entities are responsible for reviewing transactions between parent and affiliated companies to ensure that ratepayers are compensated for the value of the asset and there is no cross subsidization between the parent and the affiliate. The level of scrutiny here is also state specific.

Should a utility consider offering broadband service (telecommunications or information sharing), a thorough review of the applicable state regulations is seriously recommended. Regardless of whether state regulations

apply, it is more than likely a broadband competitor will assert "monopoly-provider type arguments" and claim that payments for electrical services should not be subsidized and not be permitted to support the development of a broadband infrastructure. In short, the last mile, the area that will undoubtedly garner the most attention from consumers and regulators alike, should be traveled both deliberately and cautiously. ■

About the Author

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