

The Case for Municipal Provision of Competitive Broadband Infrastructure

Society is entering an age of learning, an age in which the success of individuals, organizations, communities, regions, states, and nations will depend on their degree of integration into a developing learning and discovery infrastructure. Accordingly, one goal of the EDUCAUSE Net@EDU Broadband Policy Group (BPG) is to ensure the availability of high-bandwidth, advanced Internet and communications services at commodity prices reflecting the full potential of emerging new technologies in a robust, competitive market. The problem, however, is that the United States does not currently have “robust, competitive markets” at the local or regional levels. For the past decade, market issues, more than technical requirements, have driven the need for higher education interests to aggregate services—to capture traffic—at the campus, community, regional, state, and national levels. With the new opportunities presented by technological advancements in today’s societal evolution, a radically different communications and network infrastructure is required.

Advocating Broadband for the Public Good

The BPG is proposing a number of fundamental principles to aid EDUCAUSE in determining the appropriate level of involvement in policymaking at the state and national levels with regard to the market structure of telecommunications for higher education interests:

- Access to advanced communications services and capabilities is essential to individual and community learning and to economic competitiveness.

- Affordable access to advanced communications services and capabilities should be seen as a public good.¹
- Progress in the deployment of public broadband services requires a new and streamlined regulatory structure that is based on sound economic and social concepts and that recognizes the advantages inherent in new network technologies.

Although these principles are meant to advocate for positive change, the telecommunications industry feels that its very existence is at stake and is putting significant energy (and investment) into lobbying for regulatory and policy easements that will allow it to continue to leverage its existing assets.

The Appropriate Role for Public Entities

Higher education institutions hold a public-service perspective in common with surrounding communities and municipalities, whose interests in economic development are complementary to higher education’s interests in having access to affordable bandwidth. The issue is often framed as “public sector vs. private sector,” but it is more appropriately framed by emphasizing the economic development implications of the local telecommunications infrastructure, which is crucial for regional growth and quality of life. When market mechanisms fail to provide an efficient level of infrastructure, public entities have an appropriate role to play. In an effort to develop competitive markets for telecommunications, Congress enacted the 1996 Telecommunications Act, which includes a

statute to remove barriers to entry: “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.”²

This statute has been controversial since its adoption because it directly conflicts with existing laws in eleven U.S. states, which currently have legislation barring or hindering municipalities from offering telecommunications services (Arkansas, Florida, Minnesota, Missouri, Nebraska, Nevada, South Carolina, Tennessee, Texas, Utah, and Washington). Legislative battles are ongoing in several of the eleven states. The most recent of these cases, *Nixon vs. Missouri Municipal League*, was argued before the U.S. Supreme Court on January 12, 2004. This is actually a consolidation of the cases brought to the Court by three petitioners opposing the Missouri Municipal League (MML), which represents the interests of a group of Missouri localities that had attempted to overturn a state statute prohibiting political subdivisions of the state from providing broadband services. The Federal Communications Commission (FCC) refused to preempt the law, but the Eighth Circuit Court found in favor of the MML and reversed the FCC’s decision. The Supreme Court was promptly petitioned for *certiorari* by the three petitioners: the FCC; the Missouri attorney general, Jeremiah Nixon; and the incumbent telecommunications provider, Southwestern Bell.

The key argument is whether the phrase “any entity” in the Telecommunications Act applies to a state’s political

subdivisions and, if so, whether Congress meant to (or could) usurp state powers of regulation by enacting such a provision. Reinforcing the core arguments are a dozen *amicus curiae* briefs, including one submitted in October 2003 by EDUCAUSE in support of the municipalities' authority to provide telecommunications services. Virtually every argument for and against municipal broadband is presented in these briefs. The petitioners' briefs primarily argue the states' rights side of the argument; the respondents' briefs vary, but all touch on the essential need for

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telecommunications as a public good and on the view that the inequitable access resulting from market failure will not be remedied by the private sector alone.

The Supreme Court's judgment in this case was released on March 24, 2004. The Court ruled against the Missouri municipalities. In its 8–1 decision (Justice John Paul Stevens dissenting), the Court held that the term “any entity” does not include public entities because such a ruling would have the potential to create “strange and indeterminate” results in interpreting the law. The Court also stated that the phrase is not specific enough to justify federal intervention into state sovereignty because the normal convention is to include the modifier “public and private” when both types of entity are meant to be included in the term “any.” However, the Court also made it clear that the decision is not a ruling on the *merits* of municipal telecommunications. The Court observed that municipalities have a “respectable position” and that the FCC has “minced no words” in saying that “participation by municipally owned entities in the telecommunications business would further the goal of the 1996 Act to

bring the benefits of competition to all Americans.”³

James Baller, the founder of the Baller Herbst Law Group and one of the lead attorneys who helped litigate the *Missouri* case, stated in regard to this disappointing ruling:

As to the future, we note that only a handful of states currently have barriers to municipal entry, and we hope that other states will take to heart the FCC's admonition that such barriers are unwise, unnecessary to achieve any legitimate state interest, and contrary to the purposes of the Telecommunications Act. Some states have already reversed or relaxed barriers enacted in the past, and we hope that this trend will continue as well.

We also hope that state legislators everywhere will realize that, without the involvement of local governments, our Nation cannot achieve its goal of rapid deployment of truly advanced and affordable telecommunications services and capabilities to all Americans, including those in rural and high cost areas.⁴

Visions of the Future

The next twenty years will see significant and fundamental changes in the technology underpinning the U.S. communications infrastructure. These changes, in communications capability and economics, have the potential to act as extraordinary multipliers of productivity and efficiency. For the majority of the research and advanced technology activities in higher education, these changes will dictate what is produced and where it is produced. The question is whether the entire U.S. higher education community will have sufficient and early access to these capabilities in order to remain competitive with the international higher education community. The answer depends on whether all regions will be allowed to

provide services for leading-edge, developmental communications networks and infrastructures.

Notes

1. The term *public good* does not refer to something that is “good for the public.” It refers to a product or service with properties that lead to collective consumption or production rather than private consumption or production. See “What Is a Public Good?” in Committee on Issues in the Transborder Flow of Scientific Data, U.S. National Committee for CODATA, Commission on Physical Sciences, Mathematics, and Applications, and National Research Council, *Bits of Power: Issues in Global Access to Scientific Data* (Washington, D.C.: National Academy Press, 1997), <<http://www.nap.edu/readingroom/books/BitsOfPower/box4.1.html>> (accessed March 23, 2004).
2. Telecommunications Act of 1996, 47 USC §253 (emphasis added).
3. *Nixon, Attorney General of Missouri v. Missouri Municipal League et al.* (decided March 24, 2004), in *Find Law*, <<http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&navby=case&vol=000&invol=02-1238>> (accessed March 30, 2004).
4. Excerpt of an e-mail from James Baller to his mailing list, March 24, 2004.

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