



WISCONSIN LEGISLATIVE COUNCIL INFORMATION MEMORANDUM

New Law Regarding Municipal Cable Television, Telecommunications, and Broadband Services (2003 Wisconsin Act 278)

Act 278 of the 2003 Wisconsin Legislature creates procedural requirements related to the start-up of municipal cable television, broadband, or telecommunications services and prohibits municipal subsidization of municipal cable television and telecommunications services. The Act includes a complex set of exceptions. This memorandum describes the requirements and prohibitions that the Act creates and how the exceptions affect the applicability of those provisions.

The Act takes effect on July 1, 2004.

DEFINITIONS

CABLE TELEVISION SERVICE

The Act uses the existing definition of “cable service” which, in summary, is the one-way transmission to subscribers of video or other programming and any subscriber interaction required for the selection of those services--what is commonly understood as cable television service. It does *not* include telecommunications or broadband services.

The Act also uses the term “cable television system,” again relying on the existing definition. That definition, which includes a description of the physical system, limits the term to systems that are intended for use in providing cable

service. It excludes systems used for certain other functions, specifically excluding systems used for telecommunications services except to the extent that the system is also used for cable service.

TELECOMMUNICATIONS SERVICE

The Act uses the definition of “telecommunications service” used in the statutes regulating telecommunications utilities. The details and nuances of this definition are beyond the scope of this memorandum. In general, it is what is commonly understood as telephone service. Note, however, that the determination of whether a service is a “telecommunications service” can vary depending on how and by whom the service is offered. For additional comments on this subject, see the discussion of the services affected by the prohibition on municipal subsidy of telecommunications services, in the final part of this memorandum.

BROADBAND SERVICE

The Act does not define “broadband service.” Thus, interpretation of this term is left initially to municipalities affected by the Act and ultimately, if a municipality’s interpretation is challenged, to the courts. It is commonly understood to be the transmission of data at speeds greater than those possible over dial-up

telephone connections. It is often thought of specifically as Internet access service, but can also include other applications, such as high-speed data networks.

MUNICIPALITY

The Act uses both "municipality" and "local government" in referring to the affected units of government. In all cases, this means cities, villages, and towns. This memorandum uses the term "municipality" throughout.

PROCEDURAL REQUIREMENTS FOR MUNICIPAL CONSTRUCTION, OWNERSHIP, OR OPERATION OF FACILITIES

SUMMARY

The Act creates procedural requirements that apply to any municipality that enacts an ordinance or adopts a resolution authorizing the municipality to construct, own, or operate any facility for providing cable service, telecommunications service, or broadband service to the public. Specifically, a municipality may not enact such an ordinance or adopt such a resolution unless it first prepares and makes available for public inspection a feasibility study of the proposed service and holds a public hearing on the proposed ordinance or resolution. (Hereafter, this provision will be referred to as "the procedural requirements" of the Act.)

The Act creates a number of exceptions. All of the exceptions described below apply to the procedural requirements of the Act; that is to say, a municipality may enact an ordinance or adopt a resolution authorizing the construction, ownership, or operation of the described facilities without following the procedural requirements if the municipality meets the conditions of the exception. In addition, the first four exceptions apply to one or both of the

subsidy prohibitions created by the Act, and will be referenced later in this memorandum, as appropriate.

CLEC Referendum Exception

A municipality is not subject to the procedural requirements if: (1) as of November 1, 2003, the Public Service Commission (PSC) had certified the municipality as an alternative telecommunications utility, commonly referred to as a competitive local exchange carrier (CLEC); and (2) an advisory referendum on "the question of supporting the operation of the facility" is approved by the voters in the municipality. As of November 1, 2003, 24 municipalities were certified as CLECs. These municipalities are listed in the attachment. This exception applies relative to facilities for the delivery of all three services--cable, telecommunications, and broadband.

Exception in the Absence of Other Broadband Service

A municipality that proposes to construct, own, or operate facilities to provide **broadband** service in an area of the municipality where such service is not commercially available may not be subject to the procedural requirements, depending on the intent and actions of current service providers. To receive the benefit of this exception, the municipality must make a written inquiry to each provider of broadband service within its boundaries to determine whether any such provider currently provides broadband service to the area the municipality proposes to serve or plans to serve that area in the next nine months. If no provider serves that area, or if a provider fails to follow through on a stated intention to provide such service within nine months, the municipality may proceed without following the procedural requirements of the Act.

This exception applies relative to facilities for the delivery of broadband service only. It

would not apply if a facility were intended or used for another service. If the facilities were intended for broadband in combination with another service, the exception would apply to the broadband component only, to the extent that the components can be distinguished.

Wholesale Broadband Exception

A municipality that offers use of a facility on a nondiscriminatory basis to entities that provide **broadband** service to end users and does not, itself, use the facilities to provide broadband service to end users--that is to say, a municipality that offers only wholesale broadband service--is exempt from the procedural requirements if the municipality determines that the facility does not compete with more than one other provider of broadband service. Again, this exception applies relative to facilities for the delivery of broadband service only.

Grandfather Exception

The Act also exempts a municipality from the procedural requirements relative to facilities for delivery of any of the three services if, on March 1, 2004, the municipality was providing cable television service. The two municipalities that were providing cable television service on March 1, 2004, are Oconto Falls and Reedsburg.

Exception for Feasibility Study

The Act allows a municipality to conduct a feasibility study of proposed municipal cable, broadband, or telecommunications service without first complying with the procedural requirements. However, it requires that, if the municipality subsequently provides the service, it must reimburse the municipal treasury the cost of the study from revenues derived from the service.

FACILITIES AND SERVICES AFFECTED

The procedural requirements of the Act apply to any facility for providing cable service, telecommunications service, or broadband service directly or indirectly to the public. This includes a wide range of facility types including telephone, coaxial cable, and fiber optic cable networks, wireless transmission systems, switching facilities, and others. The requirements apply to the construction, ownership, and operation of these facilities. This would include the purchase of facilities and the offering of service over the facilities. It does *not* include any service that a municipality provides for itself or a single entity, such as an internal or private data network, as this is not a service provided to the public.

MUNICIPALITIES AFFECTED

In general terms, the procedural requirements apply to a municipality that is starting a new municipal service. The requirements are triggered by the enactment of an ordinance or the adoption of a resolution by the municipality authorizing construction, ownership, or operation of covered facilities.

Anecdotal information provided at public hearings on 2003 Senate Bill 272, prior to its enactment as Act 278, and from other sources indicates that a number of Wisconsin municipalities are in various stages of studying or planning one or another kind of service. Most of the hearing testimony related to efforts by municipalities to bring broadband service to their communities, either by installing "dark fiber" (fiber optic cable that can be leased to provide telecommunications or broadband service) or by directly providing broadband service over "lighted fiber," coaxial cable, or a wireless transmission system. A few municipalities indicate that they are studying the possibility of providing telecommunications service or cable service. Municipalities studying or offering services include

Manitowoc, Marshfield, Menasha, Oconomowoc, Oconto Falls, Prairie du Sac, Reedsburg, Sun Prairie, and Waupaca.

A municipality that is currently providing cable, broadband, or telecommunications service would be able to continue providing that service, unaffected by the procedural requirements. However, such a municipality would become subject to the requirements if it enacted a new ordinance or adopted a new resolution that authorizes the construction, ownership, or operation of covered facilities. An ordinance or resolution that would trigger the requirements might be an ordinance or resolution to expand an existing service, authorize a new service or authorize bonding for capital expenses. It is unclear whether an amendment to an existing authorizing ordinance would trigger the requirements; presumably, minor amendments would not.

In addition, in certain circumstances, a new municipal service might *not* be subject to the procedural requirements. Many municipal utility services are under the supervision of utility boards operating under very broadly worded ordinances. In such cases, the utility board may be able to initiate a new service without the need for the governing body of the municipality to take any action. For example, the Manitowoc Public Utility (MPU) has the authority to undertake utility projects at costs up to \$2.5 million without special approval from the Manitowoc City Council. The MPU is currently exploring the possibility of installing dark fiber. It is considering financing the construction through capital contributions by the entities that would use the fiber. If the project cost does not exceed \$2.5 million and the MPU is able to raise all necessary capital through contributions, it would appear that this project would not require any action by the Manitowoc City Council and so would not be subject to the procedural requirements of the Act.

Municipalities that qualify for one of the exceptions described above are not subject to the procedural requirements. However, it is noteworthy that most of the exceptions entail procedural requirements of their own. A municipality with CLEC status (any of those listed in the attachment), is exempt from the procedural requirements if it follows a different set of procedures, the procedures specified in the CLEC referendum exception. A municipality offering only broadband service is exempt if it follows yet another set of procedures, those specified in the exception in the absence of other broadband service. A municipality that offers only wholesale broadband service is exempt if it determines that its facilities do not compete with more than one broadband provider. Oconto Falls and Reedsburg are completely exempt because of the grandfather exception.

MUNICIPAL SUBSIDY OF CABLE TELEVISION SYSTEMS

SUMMARY

The Act prohibits a municipality from subsidizing its own cable television system, with some exceptions. It states that a municipality may not require nonsubscribers to pay any of the costs of the municipality's cable television system. The CLEC referendum exception, exception in the absence of other broadband service, and grandfather exception, described above, all apply to this provision. The Act also provides two additional exceptions to this provision for: (1) public, educational, and government access channels; and (2) debt service on bonds issued to finance the construction, renovation, or expansion of the system.

This provision applies to costs incurred on and after July 1, 2004.

SERVICES AFFECTED

This provision applies to cable television systems and to the costs of those systems. "Costs of the cable television system" is not defined. The applicable definitions make clear that the term "cable television system" is limited to systems for the delivery of cable television service. However, these systems are now being used to deliver telecommunications and broadband services, as well. Clearly, the Act prohibits municipal subsidization of cable service over the municipality's cable television system. Since "cable television system" excludes facilities for telecommunications services, it would appear that the costs of such services are not included in the costs of the cable television system. If this is correct, the Act does *not* prohibit municipal subsidization of telecommunications services provided over the municipality's cable system. Applicability of this provision to broadband service is less clear and depends, in part, on whether broadband service is a telecommunications service. For comments on that question, see the discussion of services affected by the prohibition on municipal subsidy of telecommunications services, in the final section of this memorandum.

MUNICIPALITIES AFFECTED

This provision applies to any municipality that operates a cable television system and is not subject to one of the exceptions. A municipality that is certified as a CLEC and that follows the procedures under the CLEC referendum exception, as well as Oconto Falls and Reedsburg, *may* require nonsubscribers to pay costs of the municipal cable television system. The effect of the exception in the absence of other broadband service is not entirely clear since it pertains only to broadband service.

MUNICIPAL SUBSIDY OF TELECOMMUNICATIONS SERVICES

SUMMARY

The Act prohibits a municipality from subsidizing telecommunications services that it offers, with some exceptions.

In general, telecommunications utilities are prohibited from subsidizing unregulated activities with revenues from regulated activities. One mechanism used to prevent cross-subsidization is a requirement that all services be priced to exceed the cost of providing the service, termed the "total service long-run incremental cost" (TSLRIC). The TSLRIC requirement does not apply to CLECs. Since municipal telecommunications utilities are CLECs, the TSLRIC requirement did not apply to them under prior law. In addition, telecommunications utilities serving 150,000 or fewer access lines in this state receive a partial exemption to the requirement, although the PSC may apply the requirement to these utilities by order. Finally, the PSC may waive the TSLRIC requirement for any utility if certain criteria relating to competition and the general availability of service are met.

The Act specifies that the exemption from the TSLRIC requirement for CLECs and the partial exemption for utilities serving 150,000 or fewer access lines do not apply to municipal utilities. In addition, it specifies that the PSC may not waive the requirement for municipal utilities. As a result, the Act applies the TSLRIC requirement to *all* municipal telecommunications utilities, without exception.

The Act also addresses how TSLRIC must be calculated for a municipal telecommunications utility. In calculating TSLRIC, it requires a municipal utility to include costs that are incurred by nonmunicipal utilities but that are not incurred by municipal utilities. Specifically,

the municipality must take into account equivalent charges for all taxes, pole rentals, rights-of-way, licenses, and similar costs. The CLEC referendum, wholesale broadband, and grandfather exceptions apply to this requirement.

This prohibition applies to services, etc., offered or used on and after July 1, 2004.

SERVICES AFFECTED

The prohibition on municipal subsidy of telecommunications services applies to the pricing of "each telecommunications service, relevant group of services, and basic network function offered or used by a telecommunications utility." A full analysis of what is included in that term is beyond the scope of this memorandum. In general, it includes what is commonly understood as telephone service and many of the facilities over which that service is provided. It may be useful, though, to identify two types of service and one type of facility that are *not* included in it, at least at this time.

Broadband Internet Access Service NOT Affected, at This Time

The regulatory status of broadband service, including broadband Internet access, is currently in flux. In particular, it is unsettled whether federal regulation will treat it as a telecommunications service, thus making it subject to regulation. The Federal Communications Commission (FCC) has categorized broadband Internet access service provided by cable systems as an information service, not a telecommunications service. The federal courts have offered conflicting rulings on this, in one case upholding the FCC's position and in another case ruling that such service includes a telecommunications component. The issue is being appealed to the U.S. Supreme Court.

Under state law, the definition of "telecommunications service" appears broad enough to include broadband Internet access service. However, the PSC has so far not chosen to assert regulatory jurisdiction over it, apparently awaiting greater regulatory certainty at the federal level. Consequently, broadband Internet access service would initially not be subject to this provision of the Act, but could become subject to it depending on future regulatory developments.

PSC staff indicate that high-speed data transmission *is* a telecommunications service, and would be subject to the provisions of the Act regarding TSLRIC.

Voice-Over-Internet-Protocol Service NOT Affected, at This Time

The regulatory status of voice-over-Internet-protocol (VoIP) service is similar to that of broadband service. The FCC has suggested that this is an information service, too. To date, it has forborne exercising any regulatory jurisdiction over this service but has recently undertaken an investigation to determine how to treat it. In the meantime, PSC staff have indicated their view that VoIP is a telecommunications service but the commission has not taken a formal position. Consequently, at least for the time being, VoIP service would not be subject to the TSLRIC requirement imposed by the Act.

Dark Fiber NOT Affected, in General

As was noted above, a number of Wisconsin municipalities have installed or are considering installing dark fiber to stimulate the availability of broadband access in their communities. PSC staff indicate that the installation and leasing of dark fiber is not a telecommunications service because it does not involve the delivery of a service to the general public. As such, the installation and leasing of dark fiber does not

make the municipality subject to the TSLRIC requirement.

However, PSC staff also indicate that the PSC asserts jurisdiction over the installation and leasing of dark fiber by telecommunications utilities, as an ancillary telecommunications service. The staff observed that a municipality that has sought and received certification as a CLEC has declared itself to be a telecommunications utility and so will be treated as such. Consequently, the installation and leasing of dark fiber by a municipality that is a CLEC would be subject to this provision.

A municipality that offers lighted fiber, that is, provides service over its fiber optic cable network, could be subject to the provisions of the Act regarding TSLRIC, depending on the service offered. As already explained, if the only service offered is broadband Internet access or cable television service, the municipality would not, at least for the time being, be subject to it.

MUNICIPALITIES AFFECTED

The requirement to price service above the TSLRIC applies to any municipality that provides a telecommunications service. At this

time, PSC staff indicate that three municipal utilities--the utilities of the Cities of Menasha, Shawano and Waupaca--have reported revenues from telecommunications services, an indication that they provide telecommunications services. In addition, hearing testimony indicated that the City of Reedsburg is considering providing one or more telecommunications services.

The requirement that the TSLRIC be calculated to include costs that are incurred by nonmunicipal utilities but that are not incurred by municipal utilities applies to the same set of municipalities *except* for a municipality that qualifies for the CLEC referendum, wholesale broadband, or grandfather exception.

The memorandum was prepared by **David L. Lovell, Senior Analyst**, on May 5, 2004. This information memorandum is not a policy statement of the Joint Legislative Council or its staff.

Attachment

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Municipal Utilities with CLEC Status

Bangor Municipal Utility
Brodhead Water and Light Commission
Columbus Water and Light Department
Deforest Municipal Water Utility
Hustisford Utilities
Kaukauna Utilities
Lake Mills Light and Water Department
Manitowoc Public Utilities
Marshfield Electric and Water Department
Menasha Electric and Water Utilities
New London Electric and Water Utility
Oconomowoc City of Utilities
Oconto Falls Water and Light Commission
Plymouth Utilities Company
Reedsburg Utility Commission
Richland Center Electric Utility
River Falls Municipal Utility
Shawano Municipal Utilities
Stoughton Municipal Utilities
Sun Prairie Water and Light Commission
Two Rivers Water and Light Utility
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Waupaca City of
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