STATE RESTRICTIONS ON COMMUNITY BROADBAND INITIATIVES AND PUBLIC-PRIVATE PARTNERSHIPS
(as of July 1, 2021)

This list is the successor to the list formerly maintained by Baller Stokes & Lide, PC.[1] It summarizes the laws of the states that have substantial barriers to public communications initiatives and public-private broadband partnerships. These measures include explicit prohibitions on telecommunications, cable, broadband, or combinations of these services. They also include restrictions that may superficially appear to be benign—and were promoted by incumbent carriers as necessary to achieve "fair competition" and "a level playing field"—but are in practice discriminatory and prohibitory.[2]

The list does not include state laws of general applicability that apply to all local government activities in the state, not just to communications matters. Nor does it include state laws that allow community broadband initiatives and public-private partnerships but bar or restrict their access to federal or state broadband subsidies. While we oppose such restrictions as shortsighted, unwise, and unfair—especially where they would prevent communities from obtaining access to substantially more robust communications capabilities than incumbent carriers would use the subsidies to provide—these restrictions raise different issues than those posed by the barriers discussed in this list. We will address such funding restrictions separately.

1. Alabama authorizes municipalities to provide telecommunications, cable, and broadband services but imposes numerous territorial and other restrictions that collectively make it very difficult for municipalities to take advantage of this authority or to succeed if they can even get started. For example, Alabama prohibits municipalities from using local taxes or other funds to pay for the start-up expenses that any capital intensive project must pay until the project is constructed and revenues become sufficient to cover ongoing expenses and debt service; requires each municipal communications service to be self-sustaining, thus impairing bundling and other

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[2] The Federal Communications Commission analyzed a representative example of these laws in extensive detail in *In the Matter of City of Wilson, NC, Petition for Preemption of North Carolina General Statute 160A-340 et seq. ...*, FCC Rcd. 2408 (F.C.C.), 2015 WL 1120113. The Commission preempted the North Carolina law, finding that "[t]aken together, these purported "level playing field" provisions single out communications services for asymmetric regulatory burdens that function as barriers to and have the effect of increasing the expense of and causing delay in broadband deployment and infrastructure investment." *Id.*, at ¶ 30. In *State of Tennessee v. Federal Communications Commission*, 832 F.3d 597 (6th Cir. 2016), the Sixth Circuit did not did not question the merits of the Commission's findings about the negative effects of the law, but the Court found that the Commission lacked authority to preempt the North Carolina law.

common industry marketing practices; and requires municipalities to conduct a referendum before providing cable services.[3] (*Alabama Code § 11-50B-1 et seq.*)

2. Arkansas removed most of its restrictions in 2021. It continued to give municipalities that own electric utilities or cable systems broad authority to provide communications services, except for basic local exchange services. Because of that explicit restriction, Arkansas remains on this list. Otherwise, Arkansas provided municipalities substantial discretion in providing communications services or entering into public-private partnerships. (Act No. 67, codified in *Ark. Code § 23-17-409(b)*).

3. Florida imposes price-raising *ad valorem* taxes on municipal telecommunications services, in contrast to its treatment of all other municipal services sold to the public. (*Florida Statutes §§ 125.421. 166.047, 196.012, 199.183 and 212.08*). In addition, since 2005, Florida has subjected municipalities to requirements that make it difficult for capital intensive communications initiatives, such as fiber-to-the-home projects, to go forward. For example, Florida requires municipalities that wish to provide communications services to conduct at least two public hearings at which they must consider a variety of factors, including "a plan to ensure that revenues exceed operating expenses and payment of principal and interest on debt within four years." Since fiber-to-the-home (FTTH) projects, whether public or private, often require longer than four years to become cash-flow positive, this requirement either precludes municipalities from proposing FTTH projects or invites endless disputes over whether or not a municipality's plan is viable. (*Florida Statutes § 350.81*)

4, Georgia does not have restrictions on municipal telecommunications or broadband Internet access services. It does, however, have significant restrictions on municipal cable services. As the Federal Communications Commission has often found, restrictions on cable service can also serve as barriers to broadband deployment.[4] Among other things, Georgia prohibits

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[3] Referenda are time-consuming, burdensome, and costly for local governments. Moreover, incumbent communications service providers often vastly outspend proponents of public broadband initiatives. But as more than 140 communities in Colorado have shown, a simple majority referendum requirement, standing alone, is not necessarily a substantial barrier to entry. Applying this standard, we have removed Colorado while leaving Minnesota on our list, as Minnesota's referendum provision requires a 2/3 supermajority vote. We have also continued to include the referendum requirements in Alabama and elsewhere that are coupled with other onerous barriers to entry.

[4] *See, e.g., Implementation of Section 621(A)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5132-33, ¶ 62 (2006) ("The record here indicates that a provider's ability to offer video service and to deploy broadband networks are linked intrinsically, and the federal goals of enhanced cable competition and rapid broadband deployment are interrelated." (citation omitted)), *aff'd., Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008); *In the Matter of Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements,* ¶ 36, 2010 WL 236800 (F.C.C.) (rel. January 10, 2010) (by impeding the ability of MVPDs to

municipalities from providing cable service unless the local franchising authority first gives incumbent providers notice of their alleged deficiencies and an opportunity to provide a corrective plan. If the plan is unacceptable to the local franchising authority, it must conduct an extensive "independent feasibility analysis and require the municipal provider to prepare a business plan to provide service. The feasibility analysis must cover at least 11 specified subjects in detail, and the business plan must address at least six market-specific cost, subscriber, geographic, financial, and other topics in substantially greater detail than a private company would ever make public. *(O.C.G.A. § 36-90-1 et seq.)* If a municipal cable service provider can surmount all of the foregoing hurdles, it must then comply with multiple operating restrictions, including charging rates that are no lower than the incumbent provider's.

5. Louisiana requires municipalities to hold a referendum before providing any communications services and to impute to themselves various costs that a private provider might pay if it were providing comparable services.[5] If a municipality does not hold a referendum, it must forgo any incumbent provider's franchise and other obligations (e.g., franchise fees, PEG access, institutional networks, etc.) as soon as the municipality announces that it is ready to serve even a single customer of the service in question. The suspension remains in force until the monetary value of the municipality's obligations equal the monetary value of the obligations incurred by the private operators for the previous ten years. (*La. Rev. Stat. Ann. § 45:484.41 et seq.*)

6. Michigan permits public entities to provide telecommunications services only if they have first requested bids for the services at issue, have received less than three qualified bids from private entities to provide such services, and have subjected themselves to the same terms and conditions as those specified in their request for proposals. (*Mich. Comp. Laws Ann. § 484.2252*)

7. Minnesota allows municipalities to acquire or construct telephone exchanges upon obtaining a majority vote in a referendum on that issue. But if an exchange already exists in an area, a municipality can construct a new one only upon obtaining a 65% super-majority of the votes. (*Minn. Stat. Ann. § 237.19*). Also, Chapter 429 of the Minnesota Statutes, which applies to "Local Improvements, Special Assessments," states in *Minn. Stat. Ann. § 429.021(19)* that the council of a municipality to improve, construct, extend, and maintain facilities for Internet access and other communications purposes if the council finds that: (i) the facilities are necessary to make available Internet access or other communications services that are not and will not be available through other providers or the private market in the reasonably foreseeable future; and (ii) the service to be provided by the facilities will not compete with service provided by private entities. (*Minn. Stat. Ann. § 429.021(19)*)

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provide video service, unfair acts involving terrestrially delivered, cable-affiliated programming can also impede the ability of MVPDs to provide broadband services.).

[5] Imputed cost requirements are a form legislatively-sanctioned price fixing that have the purpose and effect of driving municipal rates up to the levels that private entities want to charge. Imputing costs is also difficult, time-consuming, inexact, and highly subjective. As a result, imputed cost requirements give opponents of public communications initiatives virtually unlimited opportunities to raise objections that significantly delay and add to the costs of such initiatives.

8. Missouri bars municipalities and municipal electric utilities from selling or leasing telecommunications services to the public or telecommunications facilities to other communications providers, except for services used for internal purposes; services for educational, emergency and health care uses; and, significantly, "Internet-type" services. (*Mo. Rev. Stat. § 392.410(7)*).

9. Montana allows a city or town to act as an internet services provider only if no private internet service provider is available within the city or town's jurisdiction; if the city or town provided services prior to July 1, 2001; or if providing advanced services that are not otherwise available from a private internet services provider within the city or town's jurisdiction. If a private internet services provider elects to provide internet services in a jurisdiction where a city or town is providing internet services, the private internet services provider must inform the city or town in writing at least 30 days in advance of offering internet services. Upon receiving such a notice, the city or town must notify its subscribers within 30 days, and it may choose to discontinue providing internet services within 180 days of the notice. (*Mon. Code Ann. § 2-17-603*).

10. Nebraska generally prohibits agencies or political subdivisions of the state, other than public power utilities, from providing wholesale or retail broadband, Internet, telecommunications or cable service. Public power utilities are permanently prohibited from providing such services on a retail basis, and they can sell or lease dark fiber on a wholesale basis only under severely limited conditions. For example, a public power utility cannot sell or lease dark fiber at rates lower than the rates incumbents are charging in the market in question. (*Neb. Rev. Stat. Ann. § 86-575, § 86-594*)

11. Nevada prohibits municipalities with populations of 25,000 or more and counties with populations of 55,000 or more from providing "telecommunications services," defined in a manner similar to federal law. (*Nevada Statutes § 268.086, § 710.147*)

12. North Carolina imposes numerous requirements that collectively have the practical effect of impairing public communications initiatives. For example, public entities must comply with unspecified legal requirements that may apply to private providers; impute phantom costs into their rates; conduct a referendum before providing service; forego popular financing mechanisms; refrain from using typical industry pricing mechanisms; and make their commercially sensitive information available to their incumbent competitors. Some, but not, all existing public providers are partially grandfathered. (*NC Statutes Chapter 160A, Article 16A*) In 2018, the legislature added a requirement that "any lease by a city of any duration for components of a wired or wireless network shall be entered into on a competitively neutral and nondiscriminatory basis and made available to similarly situated providers on comparable terms and conditions and shall not be used to subsidize the provision of competitive service." (*Section 160A-272(d)*)

13. Pennsylvania prohibits municipalities from providing broadband services to the public for a fee unless such services are not provided by the local telephone company and the local telephone company refuses to provide such services within 14 months of a request by the political subdivision. In determining whether the local telephone company is providing, or will provide, broadband service in the community, the only relevant consideration is data speed. That is, if the

company is willing to provide the data speed that the community seeks, no other factor can be considered, including price, quality of service, coverage, mobility, enhanced efficiency of other utilities, etc. (*66 Pa. Cons. Stat. Ann. § 3014(h)*)

14. South Carolina imposes significant restrictions and burdensome procedural requirements on governmental providers of telecommunications, cable, and broadband services "to the public for hire." Among other things, South Carolina requires governmental providers to comply with all legal requirements that would apply to private service providers, to impute phantom costs into their prices, including funds contributed to stimulus projects, taxes that unspecified private entities would incur, and other unspecified costs. These requirements significantly detract from the feasibility of public projects and are so vaguely worded that they invite endless disagreements and costly, protracted challenges by the incumbents. (*S.C. Code Ann. § 58-9-2600* et seq.)

15. Tennessee allows municipalities that operate their own electric utilities to provide "telephone, telegraph, telecommunications services, or any other like system" (not including paging or security services) anywhere in the state. (*Tennessee Code Ann. § 7-52-401 et seq.*) Tennessee also allows such municipalities to provide "cable service, two-way video transmission, video programming, Internet services, or any other like system," but only within the municipal electric utility's service area. (*Tennessee Code Ann. § 7-52-601 et seq.*) Subsections 402-408 and 602-611 impose various additional terms and conditions, including a referendum requirement in Subsection 602. Municipalities that do not operate electric utilities can provide services only in "historically unserved areas," and only through joint ventures with the private sector. (*Tennessee Code Ann. § 7-59-316*). In addition, by a 2/3 vote, the governing body of a municipality can establish an authority to provide "telecommunications services" within or outside the municipality. (*Tennessee Code Ann. § 7-36-101 et seq.*) In this context, the term "telecommunications service" is defined as including "telephone, cable television, voice, data, or video transmissions, video programming, Internet access and related services…." (*Tennessee Code Ann. § 7-36-102(20)*) On February 16, 2015, the Federal Communications Commissions preempted the anti-competitive territorial restrictions in Section 7-52-601. *In the Matter of City of Wilson, NC, Petition for Preemption of North Carolina General Statute 160A-340 et seq. and The Electric Power Board of Chattanooga, Tennessee Petition for Preemption of a Portion of Tennessee Code Annotated Section 7-52-601*, 30 FCC Rcd. 2408 (F.C.C.), 2015 WL 1120113. In *State of Tennessee v. Federal Communications Commission*, 832 F.3d 597 (6th Cir. 2016), the Sixth Circuit overruled the FCC's decision, finding that the FCC lacked authority to preempt such state barriers.

16. Texas prohibits municipalities and municipal electric utilities from offering certain specified categories of telecommunications services to the public either directly or indirectly through a private telecommunications provider. These prohibitions do not apply to cable television or Internet access services. (*Texas Utilities Code, § 54.201 et seq.*)

17. Utah imposes numerous burdensome procedural and accounting requirements on municipalities that wish to provide services directly to retail customers. Most of these requirements are very difficult, if not impossible, for *any* provider of retail services to meet, whether public or private. Utah exempts municipal providers of wholesale services from some of these requirements. (*Utah Code Ann. § 10-18-201 et seq.*) Legislation enacted in 2013 imposes additional restrictions on the use of municipal bonds. (*Utah Code Ann. § 11-14-103(4)*)

18. Virginia allows municipal electric utilities to become certificated municipal local exchange carriers and to offer all communications services that their systems are capable of supporting (except for cable services), provided that they do not subsidize services, that they impute private-sector costs into their rates, that they do not charge rates lower than the incumbents, and that comply with numerous procedural, financing, reporting and other requirements that do not apply to the private sector. (*VA Code §§ 56-265.4:4, 56-484.7:1*) Virginia also effectively prohibits municipalities from providing the "triple-play" of voice, video, and data services by effectively banning municipal cable service (except by Bristol, which was grandfathered). For example, in order to provide cable service, a municipality must first obtain a report from an independent feasibility consultant demonstrating that average annual revenues from cable service alone will exceed average annual costs in the first year of operation, as well as over the first five years of operation. (*VA Code § 15.2-2108.6*) This requirement, without more, makes it impossible for any Virginia municipality other than Bristol (which is exempt) to provide cable service, as no public or private cable system can cover all of its costs in its first year of operation. Moreover, Virginia also requires a referendum before municipalities can provide cable service. (*Id.*)[6]

19. Washington has for many years allowed first class cities, code cities, and charter counties with home rule powers to provide telecommunications services. Until 2021, smaller cities had no authority to provide telecommunications services, Public Utility Districts (PUDs) were restricted to providing wholesale telecommunications services, and ports had limited powers. In 2021, two bills were introduced in the Washington legislature to address this situation. One was HB 1336, which sought to remove almost all restrictions on the ability of public entities to provide telecommunications services (defined broadly to include video and Internet access service). The other was SB 5383, which would have allowed public entities to provide retail services only in "unserved" areas—those without internet access with speeds of at least 100 Mbps downstream and 20 Mbps upstream—and it would have created a challenge process for private telecommunications service providers. Incredibly, rather than reconcile the differences between these bills, the legislature passed them both, and Governor Jay Inslee signed both simultaneously, reportedly one with each hand. The Secretary of State sought judicial guidance on how to address this situation, and the court ruled that the Secretary had discretion to decide the matter. We understand that the Secretary then declared that HB 1336 was last to be filed, which would entitle it to precedence where and to the extent it is inconsistent with SB 5383. Bottom line: As of July 1, 2021, the matter remains murky in the State of Washington. (*Wash. Rev. Code Ann. §54.16.330*)

20. Wisconsin prohibits municipal cable systems from recovering their costs from non-subscribers of the cable television services. The State requires municipalities, prior to providing telecom, cable or Internet services, to conduct a feasibility study and hold a public hearing on a cost-benefit analysis covering at least three years. If a municipality intends to provide telecommunication services, it must charge prices that exceed "total service long-run incremental cost," which "shall take into account, by imputation or allocation, equivalent charges for all taxes, pole rentals, rights-of-way, licenses, and similar costs that are incurred by nongovernmental

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[6] Some municipalities may be able to provide communications services through an authority established under the Virginia Wireless Broadband Authorities Act, as codified in Virginia Code § 15.2-5431.1 *et seq*. That process is itself challenging and burdensome.

telecommunications utilities." There are exceptions to some of these requirements, but they may be difficult for some municipalities to meet. (*Wis. Stat. Ann. § 66.0420(12)(a); § 66.0422; § 196.204*)

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