Regulatory Issues Facing Local Government
convergence and competition are transforming the telecommunications industry, straining established regulatory schemes in the process. The Federal Communications Commission (FCC) has taken the position that traditional regulatory schemes should not be imposed on new services, particularly high-speed data communications services that are coupled with the Internet Protocol Suite enabling access to the World Wide Web and other resources of the Internet (broadband services).

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The FCC's Broadband Policy

The FCC's policy for broadband services has two principal bases. The first is the established principle that services which utilize telecommunications services to provide access to or to manipulate the form or content of information, are not telecommunications services. Dial-up Internet access service is one example. The second basis is the divergent court rulings on decisions of local franchising authorities imposing "open access" obligations on cable systems.

Different courts held that cable modem service was an information service, a telecommunications service, a cable service, or combinations thereof. The holding in AT&T v. City of Portland, 216 F. 3d 871 (9th Cir. 2000), that cable modem service is not a cable service, but a combination of information service and telecommunications services components, did not go far enough to suit the FCC. The FCC was concerned that regulations applicable to telecommunications carriers would be tantamount to "open access" obligations, and it concluded that investments in so-called "last mile" infrastructure to support broadband services by cable operators and telecommunications carriers would be made only if regulatory obligations were minimized.

In brief, the FCC's broadband policy is that all facilities-based broadband services — including broadband services provided by cable operators and incumbent local exchange carriers (ILECs) — should not be regulated either as cable services or as telecommunications services, but as information services, subject to minimal federal regulation. This policy was first articulated in the FCC's Cable Modem Decision and then made the centerpiece of the FCC's proposal for ILEC broadband services.

FCC's Cable Modem Decision. In 2002, the FCC ruled that cable modem service is not a cable service nor a combination of telecommunications services and information services. Instead, the FCC held that cable modem service is an information service, subject to minimal regulation under Title I of the Act:

the cable operator providing cable modem service over its own facilities ... is not offering telecommunications service to the end user, but rather is merely using telecommunications to provide end users with cable modem service [...] a single, integrated information service that the subscriber to the cable modem service receives.

In taking this approach, the FCC clearly intends that cable modem service not be regulated as a telecommunications service or as a cable service.

FCC's Wireline Broadband Proposal. Before the print was dry on the Cable Modem Decision, the Commission initiated a proceeding regarding the classification of DSL service and, more broadly, the provision of broadband services over ILEC facilities. The Regional Bell Operating Companies (RBOCs) sought regulatory parity with cable operators, hammering home the point in countless pleadings that regulation of their broadband services was unwarranted in light of the facilities-based competition of cable operators.

In its Wireline Broadband NPRM, the FCC reached tentative conclusions calling for deregulation of wireline broadband services: (1) the provision of wireline broadband Internet access service is an information service, (2) when an entity provides wireline broadband Internet access service over its own transmission facilities, the service is an information service, and (3) the transmission component of retail wireline broadband Internet access service provided over an entity's own facilities is "telecommunications" and not a "telecommunications service." The court's decision in Brand X Internet Services v. FCC has delayed final FCC action on this proposal.

Municipal Interests and the FCC's Broadband Policy

At one level, the FCC's Cable Modem Decision cuts against the interest of municipalities of ensuring cable franchisees fulfill their public interest obligations to the community. The FCC clearly intends to prevent local governments from imposing "open access" obligations in cable franchise agreements. While this aspect of the Cable Modem Decision is of paramount concern for many local governments, this article addresses another aspect of the Cable Modem Decision that creates a different challenge for those municipalities beginning to realize that their communities could be on the wrong side of the "Digital Divide."

In many communities located outside metropolitan area cores, the ILEC and franchised cable operator are not offering robust broadband services and have expressed little interest in deploying the necessary infrastructure. For these towns and cities, the benefits of broadband services may only be realized if the municipality assumes the role of services provider or infrastructure supplier.

Municipalities located in states having laws that restrict local governments from providing these services could be foreclosed indefinitely from addressing this need in their communities. This is particularly

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2 Definitions of italicized terms, such as telecommunications service, are included at the end of this article for convenient reference.
4 Cable Modem Decision, 17 FCC Rcd at 4823-24, ¶41 (emphasis added).
6 Wireline Broadband NPRM, at 3029, ¶17.
unfortunate inasmuch as the cost of sophisticated Wireless broadband technology is declining and leading companies are making significant capital commitments to mass-produce core components of Wireless broadband technology.

The Blind Spot in the FCC’s Broadband Policy

One consequence of the FCC’s definitional approach for harmonizing its broadband policy with the Communications Act is that it undermines the potential benefits of a Supreme Court decision in Nixon v. Missouri Municipal League which adopts the arguments of municipalities. The issue in this case is whether Section 253(a) of the Communications Act, which proscribes any state law or regulation that directly or indirectly restricts “any entity” in providing telecommunications service, applies to municipalities. A decision is expected later this year.

In general, municipal representatives argue that the words “any entity” in Section 253(a) should be construed literally and reasonably to encompass any municipality as well as any commercial entity. The Attorney General of Missouri and the Federal Communications Commission maintain that Section 253(a) applies only to commercial entities, arguing that this provision added by the Telecommunications Act of 1996 does not unambiguously demonstrate Congressional intent to preempt state laws that define the rights and powers of political subdivisions, as required under controlling Supreme Court precedent.

For those communities attempting to bridge the “Digital Divide,” the words telecommunications service in Section 253(a) may prove as problematic as the words “any entity.” Under the definitional approach of the Cable Modem Decision, broadband services are information services that are distinct from and do not include telecommunications service components. Thus, even if the Supreme Court were to decide in favor of municipalities in Nixon v. Missouri Municipal League, many municipalities could find themselves without recourse because Section 253(a) addresses only state laws that restrict “any entity” from providing telecommunications services, not information services.

The Courts May Temper the Rigidity of the FCC’s Broadband Policy

In October 2003, the Ninth Circuit declined to affirm the FCC’s Cable Modem Decision in Brand X Internet Services v. FCC, 345 F. 3d 1120 (9th Cir. 2003). While agreeing cable modem service is not a “cable service,” the court vacated and remanded the Cable Modem Decision’s holding that cable modem service is solely an “information service.” The court followed its prior holding in AT&T v. City of Portland that cable modem service includes a telecommunications service component and an information service component. Because of the import of Brand X Internet Services, a number of parties filed petitions for rehearing en banc with the Ninth Circuit Court of Appeals, including the FCC.7

Underscoring its commitment to deregulating broadband services, the FCC has indicated that if Brand X Internet Services ultimately is upheld, it might “forbear” from imposing telecommunications carrier obligations on cable companies with regard to the telecommunications service component of cable modem service.8 Because the stakes are so high in this

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7 Petitions were filed by 1) National League of Cities, National Association of Telecommunications Officers and Advisors, United States Conference of Mayors, National Association of Counties, and Texas Coalition of Cities for Utilities Issues, Case No. 02-71425 (filed November 19, 2003); 2) Federal Communications Commission and the United States of America, Case No. 02-71425 (filed December 3, 2003); and 3) The National Cable & Telecommunications Association, Time Warner Inc., Time Warner Cable, Charter Communications, Inc. and Cox Communications, Inc., Case No. 02-71425 (filed December 3, 2003).

8 Under Section 10 of the Communications Act of 1934, as amended, 47 USC § 160, the FCC is authorized to forbear from regulating telecommunications carriers or telecommunications services provided certain criteria are satisfied.
matter, we believe that regardless of the result of the petitions for rehearing of *Brand X Internet Services*, one or more of the aggrieved parties will likely petition the Supreme Court to review the Ninth Circuit’s decision. Thus, the matter could be subject to judicial review for at least another year.

**Assessment**

After *Nixon v. Missouri Municipal League* and *Brand X Internet Services v. FCC*, respectively, are resolved, local government leaders should assess the combined impact of these decisions on the ability of municipalities to provide broadband services. At a minimum, the FCC’s broadband policy should be tempered so that no municipality is foreclosed from taking steps to ensure that broadband services are available in their communities. It is doubtful that federal or state legislators or regulators want to perpetuate laws and regulatory policies that deepen the “Digital Divide.”

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