

**(Potential) State Authority to Regulate Aspects of Broadband Platforms --  
What is Possible Under Current State and/or Federal Law and Regulation**

<b>Broadband Platform</b>	<b>Pricing (Rates)</b>	<b>Access (Interconnection, etc.)</b>	<b>Content</b>	<b>Customer Protection/Service</b>
<b>xDSL</b>	FCC has asserted jurisdiction over some rates. However, the extent of state authority is unresolved. <sup>1</sup>	Unbundling and interconnection required by FCC and implemented by states. <sup>2</sup>	Not applicable (FCC considers xDSL a “transmission technology” and, therefore, separate from the informational component). <sup>3</sup>	FCC has asserted jurisdiction over some aspects of customer protection. However, the extent of state authority is unresolved. <sup>4</sup>
<b>Cable</b>	<ul style="list-style-type: none"> <li>• Yes, over basic service tier rates. This authority is exercised by home rule and general law municipalities.<sup>5</sup></li> <li>• Franchise fees – limited to 5% of gross revenues derived from the operation of the cable system to provide cable service to the franchised area.<sup>6</sup></li> </ul>	Unresolved (Internet access): <ul style="list-style-type: none"> <li>• “Cable service” -- <i>City of Portland</i>.<sup>7</sup></li> <li>• “Advanced telecommunications capability.”<sup>8</sup></li> </ul> Resolved (Telephony): <ul style="list-style-type: none"> <li>• “Telecommunication services.”<sup>9</sup></li> </ul>	Very limited. The LFA may prescribe requirements for channel capacity for public, educational, or governmental use. <sup>10</sup>	Yes, subject to minimum requirements established in the Communications Act. <sup>11</sup>
<b>Open Video System<sup>12</sup></b>	No authority, provided rates are “just and reasonable.” <sup>13</sup>	Unresolved (Internet access). <sup>14</sup>  Resolved (Telephony). <sup>15</sup>	Very limited. <sup>16</sup>	Unclear. <sup>17</sup>
<b>Wireless</b>	No authority.	Authority to approve interconnection agreements pursuant to the FTA. <sup>18</sup>	Not applicable.	Yes (“the other terms and conditions”). <sup>19</sup>
<b>Fixed Wireless</b>	No authority.	Authority to approve interconnection agreements pursuant to the FTA. <sup>20</sup>	Not applicable.	Yes (“the other terms and conditions”). <sup>21</sup>
<b>Direct Broadcast Satellite</b>	No authority.	No authority.	No authority.	No authority.

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<sup>1</sup> See *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, FCC Docket No. 98-188, Memorandum Opinion and Order, and Notice of Proposed Rulemaking at ¶ 116 (rel. Aug. 7, 1998). “To the extent that an advanced services affiliate provides advanced services on an intrastate basis, we encourage states to treat the affiliate equivalently to any other competing carrier offering advanced services.” The implication being that to the extent that an ILEC provides advanced services on a truly intrastate basis the ILEC must comply with applicable state regulations.

<sup>2</sup> See *id.*

<sup>3</sup> See *id.* at ¶¶ 35-36.

<sup>4</sup> See Note 1.

<sup>5</sup> Home rule and general law municipalities are referred to as local franchising authorities (LFA) in Title VI of the Communications Act.

<sup>6</sup> 47 U.S.C. § 542(b).

<sup>7</sup> See *AT&T Corp. v. City of Portland*, 43 F.Supp.2d 1146 (D.Or. 1999), appeal pending, No. 99-35609 (oral argument to Ninth Circuit, Nov. 1, 1999 and awaiting expedited decision)(AT&T and the City of Portland both agree that cable modem service is “cable service” for purposes of the Communications Act).

<sup>8</sup> See *id.*, *Amicus Curiae* Brief of the Federal Communication Commission (the FCC asserts that cable Internet access is an “advanced telecommunications capability” as defined by § 706 of the FTA and, as such, the FCC has preempted local cable regulation in this area by choosing to exercise regulatory forbearance).

<sup>9</sup> Assumes that “telecommunications service” over cable meets the definition of “local exchange telephone service” found in PURA § 51.002(5) (Vernon 1998 & Supp. 2000) requiring the cable operator to comply with duties found in 47 U.S.C. § 251(b). See also 47 U.S.C. § 541(d)(1) and (2) (regarding states authority to require informational tariffs and to regulate common carrier communications services).

<sup>10</sup> 47 U.S.C. § 531.

<sup>11</sup> 47 U.S.C. § 552.

<sup>12</sup> Open Video System (OVS) was designed, primarily, to permit ILEC’s to compete with cable operators in the video programming market. However, OVS has principally been utilized by CLECs for this purpose.

<sup>13</sup> 47 U.S.C. § 573 (b)(1)(A); see also 47 C.F.R. § 76.1504(c) (OVS operator rates are given a “strong presumption” of being just and reasonable when unaffiliated programming providers are providing more than one-third of the system capacity).

<sup>14</sup> In theory, the provision of Internet access over OVS raises the same concerns as providing Internet access over cable.

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<sup>15</sup> If the OVS operator wishes to provide “telephony” over cable the analysis in note 7, above, is appropriate.

<sup>16</sup> 47 U.S.C. § 573(c)(1)(B) and 47 C.F.R. § 76.1505 (making applicable to OVSs the PEG access requirements).

<sup>17</sup> 47 U.S.C. § 573(c)(1)(C) (while the text provides that the state and local government customer protection and service provisions of 47 U.S.C. § 552, applicable to cable operators, do not apply to OVS operators; it is unclear whether this would necessarily preempt a state and/or local government’s inherent police powers).

<sup>18</sup> 47 U.S.C. § 251(a).

<sup>19</sup> 47 U.S.C. § 332(c)(3)(A) (by “other terms and conditions,” Congress was referring to things like customer billing information and practices, billing disputes, consumer protection matters, and facilities siting issues).

<sup>20</sup> 47 U.S.C. § 251(a).

<sup>21</sup> 47 U.S.C. § 332(c)(3)(A) (see note 19).