



TO: Pitkin County Board of County Commissioners

FROM: Kara Silbernagel

DATE: January 6, 2015; *Revised May 2015*

RE: Senate Bill 05-152: Concerning local government competition in the provision of specified communications services

ISSUE

In 2005, the Colorado state legislature adopted Senate Bill 05-152 concerning local government competition in the provision of specified communications services. The bill specifically prohibits local governments from providing broadband internet services either directly or through public-private partnerships. The state has largely approached the regulation of broadband providers as a segment of the free market, but with the passage of SB 05-152, the state explicitly limited public involvement in the provision of broadband services, defined as upload/download speeds greater than 256 kb/second. As a result, the communities hardest hit by the legislation are the very ones that suffer from a lack of broadband. The rural areas of Colorado are the least well-served by broadband services due to sparse population and complex geography, but also the most in need of broadband services for economic vitality.

In May 2014, the Governor Hickenlooper signed five separate telecommunication reform bills adopted by the state legislature in an effort to break the digital divide and bring broadband access to rural Colorado. The passages of HB-1327, HB-1328, HB-1329, HB-1330 and HB-1331 seek to improve broadband in rural areas and even provide additional funding to public and private entities. Yet, due to prohibitive limitations of SB-152, local governments are restricted from accessing this funding stream, further increasing the digital divide between the urban and rural communities of the state.

Broadband services are no longer simply a luxury. Broadband is an essential part of a community's infrastructure. Schools rely on broadband for education and testing; businesses large and small depend on the service for running credit card transactions; hospitals and emergency managers demand high speed internet for sharing data and information; and governments require internet to improve transparency and efficiency to the electorate. From the mountain communities with rising location neutral businesses and employees, to the rising technological demands of farming and ranching equipment, broadband is part of our daily lives. Senate Bill 152 is antiquated legislation that directly conflicts with needs and goals of Colorado citizens.

The United States currently ranks 32nd in the world in broadband services. With Senate Bill 05-152, Colorado lags even further behind. In order for our state to remain a leader in innovation, creativity and job creation, we need to ensure that every citizen, from the eastern plains to mountain cabins, from downtown Denver to city hall in Meeker, has access to high speed internet. Unless state congress acts on the bill as written, Colorado is certain to fall even further behind.

BACKGROUND

In 1996, President Clinton signed the Telecommunications Act. This was the first significant telecommunications policy in the country in over sixty years. The Telecommunications Act was also the first federal public policy to integrate the internet with radio and television broadcasting and telephone services. The overarching goal of the Act was to foster competition and remove regulatory barriers. The bill recognized the increasing regionalism of telecommunications. Telecommunications, such as telephone services were no longer tied to natural markets because of distance. Technology was improving and providers in Washington D.C. could be the same providers in Washington State and would regulated separately than television or information services. A key provision of the Act allowed the FCC to preempt state or local legal requirements.

Although the 1996 legislation was one of the first policies to regulate internet, it also imposed minimal regulations for internet providers as opposed to telephone. Under the Telecommunications Act, internet was treated similar to cable television. Unlike telephone companies, considered a public utility that has tremendous government oversight but also open access to an array of infrastructure, internet service providers were largely responsible for building out their own infrastructure. As identified by the Northwest Colorado Council of Governments Regional Broadband Strategic Plan, the impact of the Telecommunications Act of 1996 created an environment that simultaneously encouraged broadband investment in developed, competitive markets but left other markets behind where network infrastructure didn't make sense economically, limiting competition.¹ As a result, broadband providers lacked incentive to invest in sparsely populated communities or areas with difficult topography, leaving rural areas underserved with inadequate internet services.

In an effort to remedy the 1996 legislation, the FCC unveiled the Connect America Fund in 2010 to increase broadband through the country, recognizing that the role of the internet had changed. Just this month, President Obama spoke out about the need for net neutrality and reclassifying

¹ Northwest Colorado Council of Governments. "Regional Broadband Strategic Plan." 13 December 2013. Prepared by OHivey. <http://nwccog.org/docs/broadband/FINAL%20Regional%20Broadband%20Strategic%20Plan%20v2-1.pdf>

the internet as a telecommunication service, “[ensuring] the network works for everyone – not just one or two companies².” The Connect America Fund is designed to provide state and local governments, as well as private entities, with funding to expand broadband services to rural and high-cost areas. As a result, the FCC defined broadband (high speed internet) as, at a minimum, 10 megabits per second download speed and 1 million megabits per second (Mbps) upload speed. Yet even today, as the technology continues to improve exponentially, the FCC is considering changing the minimum thresholds, requiring service providers to provide a minimum of 25 Mbps down/5 Mbps up. Most urban broadband services offer 20 Gigabits per second to consumers.

But currently in Colorado, local counties and municipalities have their hands tied and are unable to advance broadband services. With support from large communication providers, Senate Bill 152 passed in 2005, prohibiting local governments from investing in broadband networks directly and indirectly, including through public-private partnerships. The bill’s proponents argued that the legislation was intended to limit government from taking over the private sector and that municipal broadband is a risky endeavor for tax-payer dollars. But the internet is not the same as it was nearly 10 years ago. It is a necessity of day-to-day life. More local governments, and Colorado citizens are also recognizing this trend. In the recent mid-term election earlier this month, seven (7) counties and municipalities went to their local electorate and asked to regain control of their own broadband deployment. All seven passed, some with nearly 75% of the electorate. To date, nearly a dozen cities and counties, urban and rural, which have regained their broadband independence.

One of the unintended consequences of SB-152 was its failure to anticipate future opportunities; including grant funds from the federal and state government that are not available to private entities. As public opinion begins to spread, it is time for the State to revisit SB-152. The state cannot afford to have a patchwork of the “can” and “cannot” communities. The Colorado Legislature needs to act and find a resolution that will ensure every citizen has open and equitable access to high speed internet.

ALTERNATIVE 1 – Maintain Existing Legislation (with Individual Government Opt-Out)

Under the existing legislation, SB-152 defines high speed internet as anything greater than 256 kilobits per second (Kbps) up and down. Local governments are defined as any city, county, special district or political subdivision. According to the legislation, any local government is prohibited from providing cable, telecommunication or internet services directly or the necessary infrastructure for relaying the services. In addition, local governments are prohibited from providing the service or infrastructure directly or indirectly through partnerships, joint ventures, or leaseback arrangements. The only exemption to bill is if: a) through a referendum voters elect

² Contorno, Steve. Obama reaffirms support for net neutrality by backing major shift in federal regulations. *Tampa Bay Times*. 10 November 2014.

by simple majority to allow local governments to provide the services; or b) the community is not served by any provider.

By maintaining SB-152 in its current form, local governments will continue to enlist a referendum if they wish to deploy broadband services to their community. In addition, since broadband speeds have drastically increased over the past 10 years, any local government wishing to provide free WiFi services in public facilities, such as libraries and airports, or in public meeting rooms must ensure speeds do not exceed 256 Kbps.

Originally, the bill sought to develop statewide uniformity and predictability in the regulation of all public and private entities for the provision of cable and internet. But as more communities opt out of SB-152, the state becomes a patchwork of policies and regulation that becomes more difficult to navigate. As a result communities are unable to work across political boundaries, limiting the ability to leverage resources and regional efforts, and disincentivizing potential providers from investing in our state, hindering the expansion of broadband across Colorado.

Maintaining the existing legislation does not even maintain the status quo. Up until now, Colorado counties and municipalities have been able to make some progress in expanding broadband. But as the state and the FCC look to release millions of dollars for broadband expansion, local governments that do not opt out of SB-152 will be unable to access any of these funds. Other states and counties around the U.S are empowered to assist their citizens with deployment of broadband, accessing the millions of dollars from the FCC and other sources to attract, build and recruit competitive broadband markets. Maintaining the existing legislation will only perpetuate the broadband gap, leaving Colorado, its economy and its creativity and innovation, behind.

ALTERNATIVE 2 – Rescind SB 05-152

Many opponents of SB 05-152 prefer that the state legislature rescind the entire bill. Opponents argue the bill does not provide a uniform, statewide regulatory environment, as was identified to be the bill's original purpose. Instead, the bill limits competition to only the largest providers. As a result of limited competition and resources, existing providers restrict broadband deployment to only densely populated cities and towns, where there is the best opportunity for ROI's, with little investment in infrastructure beyond the urban cores. In addition, existing services within urbanized areas are left with little competition, which results in little initiative to improve, upgrade or expand existing services leaving the citizens of Colorado without quality service or competition. By repealing SB 05-152, local governments would be able to leverage resources and partner with private providers to provide reliable and sustainable broadband to rural and remote communities throughout Colorado. In addition, removing the constraints of SB 05-152 would foster more competition throughout the state, providing the citizens of Colorado with more affordable, high speed options for broadband. With an open market for broadband, Colorado will remain a leader in innovation and creativity and a destination for businesses and employees.

Senate Bill 05-152 does not only regulate high speed internet, but it also applies to cable and telecommunication services. In order to ensure Colorado and its citizens are do not fall behind because of antiquated legislation, it is recommended that SB 05-152 be amended to recognize that broadband is not the same as cable or telecommunications and complete repeal applies to only the broadband component of the legislature. Broadband is now a daily necessity and should be regulated as a utility rather than within the same category as cable television.

ALTERNATIVE 3: Amend SB 05-152

Broadband freedom is neither a conservative or progressive issue, but rather, a local issue. Ballot initiatives seeking to free local governments from the constraints of SB 05-152 have successfully passed in both progressive and conservative communities, demonstrating the widespread nonpartisan support for broadband and local control.

While it would be preferred for local governments to be free to provide broadband services, it is recognized this would most likely require a complete repeal of the bill. In addition, many local governments acknowledge that providing broadband services directly to citizens, commonly known as municipal broadband” is expensive and too risky for taxpayers. Instead, most communities simply want the ability to leverage resources to expand broadband. Local government should be allowed to participate in the provision of broadband services indirectly, as well as have the freedom to provide high speed internet in its public facilities without requiring a referendum.

Broadband technology is rapidly changing. The legislation should permit local governments to enter into partnerships and/or agreements with private entities. This would allow local governments and service providers to invest in broadband infrastructure in areas that have typically been ignored. In addition, the policy should be revised to acknowledge the rapidly changing technology within the industry. Rather than limiting local governments to only 256 Kbps (or less), SB 05-152 should instead align with the current (and any future) FCC definition of broadband. Lastly, with the passage of the Rural Broadband bills in the State in 2014, the existing legislation reflect the same language, intent and purpose as outlined in Rural Broadband package, rather than in direct contrast of it.

POLICY IMPLICATIONS

- If municipalities choose to “opt-out” of SB 05-152 how broad can the ballot language be to remain defensible? Shall local governments pursue overarching exemption from the legislation or remain specific to develop a legislation that would resemble an amendment as proposed in Alternative 3 (public/private partnerships).
- Does each municipality within a county need to opt out as well? Does county-owned infrastructure within a municipality that has not opted-out, remain subject to SB 05-152?
- What national initiatives, such as FCC or NTIA may be constructive or prohibitive to local governments’ ability to overcome SB 05-152?

CONCLUSION

Broadband is an everyday necessity in the 21st century. Colorado citizens demand affordable, reliable and innovative broadband solutions to remain competitive in today's economic environment and maintain a high quality of life. More and more businesses, urban and rural, small or large, believe that high speed internet is critical to compete and succeed in today's economy and can no longer afford to wait for the large, incumbent providers to meet their needs. Sustainable and reliable broadband empowers businesses, creates jobs, fosters tax revenues, increases property values, generates innovation and education and most importantly, contributes to the health and well-being of citizens of Colorado.

Senate Bill 05-152 is outdated legislation that does not serve the citizens, businesses or economy of Colorado. SB 05-152 instead limits competition, growth, and innovation, serving the needs of only the large broadband providers and stifling local and regional providers, preventing quality broadband from reaching each and every citizen across the state.