

Case No. A08-1928

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**STATE OF MINNESOTA  
IN COURT OF APPEALS**

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Bridgewater Telephone Company, Inc., a Minnesota corporation

Plaintiff-Appellant,

v.

City of Monticello, Minnesota,

Defendant-Respondent.

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**BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF  
TELECOMMUNICATIONS OFFICERS AND ADVISORS  
IN SUPPORT OF THE CITY OF MONTICELLO**

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## **INTEREST OF THE AMICUS CURIAE<sup>1</sup>**

On November 26, 2008, this Court granted the National Association of Telecommunications Officers and Advisors (“NATOA”) leave to file an amicus brief in this case. As a national trade association based in Alexandria, Virginia, NATOA represents local government jurisdictions, entities, and consortiums, and the elected and appointed officials and staff responsible for telecommunications issues in their respective communities. NATOA promotes community interests in communications before the federal and state courts, Congress, and governmental agencies such as the Federal Communications Commission. NATOA provides its members with information, education, training, and advocacy with respect to national and regional communications issues.

NATOA has a particular interest in preserving and highlighting the importance of local government entities’ ability to deploy broadband services, including high-speed internet. With a stated policy supporting the rapid deployment of broadband services by public and private entities, NATOA is uniquely qualified to address the utility of broadband deployment.

NATOA has long advocated that broadband can be a very powerful economic development tool. NATOA has joined with other entities, including nongovernmental organizations and telecommunications providers such as AT&T and Verizon, to call for the use of broadband as part of the Nation’s economic

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<sup>1</sup> No party other than NATOA contributed to the writing of this brief, whether financially or otherwise.

stimulus package. Responding to statements from then-President-Elect Obama, from Speaker Pelosi and other political and business leaders, NATOA has developed suggestions, principles, and related materials addressing the need for a national broadband strategy.

Through the experiences of our members and communities nationwide, NATOA has seen first hand the impact accessible broadband creates, and is working to see its benefits reach communities yet to be served by broadband. NATOA, through a task force of members, developed ten (10) Broadband Principles to help the United States achieve the broadband capacity and access it needs for the future. These Broadband Principles outline the critical need for widespread deployment of next-generation broadband networks and necessary steps to achieve this goal. In particular, NATOA calls for fiber to the premises as the preferred broadband option, and notes that high capacity broadband connectivity must be affordable and widely accessible. Further, NATOA's Broadband Principles require that local governments be intimately involved in development and deployment and be allowed to build and operate broadband networks to ensure that local needs and interests are met. NATOA's Broadband Principles are available on the NATOA website at <http://www.natoa.org/Documents/BroadbandPreamble%26Principles.pdf>.

### **SUMMARY OF THE ARGUMENT**

Local governments, such as Monticello, should have the right to deploy advanced communications infrastructure to their citizens. Monticello's Fiber

Project should be considered a “utility or other public convenience” due to the important benefits it will provide the citizens of Monticello. The Fiber Project meets the statutory requirements laid out by the Minnesota legislature for bond issuances. Strong policies reasons support such a conclusion.

The policies reasons supporting municipal deployment of broadband echo the sentiments expressed by Franklin Delano Roosevelt when he discussed the importance of allowing the government to deploy other types of utilities:

I therefore lay down the following principle: That where a community--a city or county or a district--is not satisfied with the service rendered or the rates charged by the private utility, it has the undeniable basic right, as one of its functions of Government, one of its functions of home rule, to set up, after a fair referendum to its voters has been had, its own governmentally owned and operated service.

That right has been recognized in a good many of the States of the Union. Its general recognition by every State will hasten the day of better service and lower rates. It is perfectly clear to me, and to every thinking citizen, that no community which is sure that it is now being served well, and at reasonable rates by a private utility company, will seek to build or operate its own plant. But on the other hand the very fact that a community can, by vote of the electorate, create a yardstick of its own, will, in most cases, guarantee good service and low rates to its population. I might call the right of the people to own and operate their own utility something like this: a “birch rod” in the cupboard to be taken out and used only when the: “child” gets beyond the point where a mere scolding does no good.

Franklin Delano Roosevelt, September 21, 1932 *Portland Speech: Public Utilities Hydro-Electric Power*, reprinted in *The Public Papers and Addresses of Franklin*

D. Roosevelt, Vol. 1, 1928-32 at 727 (Random House 1938). His reasoning rings as true today as it did more than 75 years ago.

## **ARGUMENT**

### **I. THE FIBER PROJECT IS A UTILITY AND PUBLIC CONVENIENCE**

The critical question in this case is whether the City’s Fiber Project falls within the phrase “any utility or other public convenience” as used in Minn. Stat. 475.52 Subd.1., the Minnesota statute governing the issuance of revenue bonds. The City’s Fiber Project falls within the statute if the Fiber Project is considered a utility or if it is considered more broadly a “public convenience.” While NATOA feels that the current and future ubiquitous importance and nature of broadband should qualify it as a “utility,” broadband services are at the very least a “public convenience.”

Before addressing the substance of whether broadband is a utility or a public convenience, NATOA wishes to address a grammatical issue in the structure of Minn. Stat. § 475.52 Subd.1, which is important to the analysis of the statute. The relevant text of the statute reads that a city may issue bonds “for any utility or other public convenience . . . .” Minn. Stat. § 475.52 Subd.1.

As the statute states, *any* utility falls within its purview. In addition any “other public convenience” also falls within the statute. As a grammatical matter, it must be noted that utilities are a subset of the category “public convenience.” The term “utility” does not modify the phrase “other public convenience.” The phrasing of the statute shows a utility to be a “public convenience,” but it does not

limit “public conveniences” to utilities or things that share the identical attributes of utilities.

A simple exercise in logic shows why this grammatical reading is correct: It is a basic mathematical tenet that not all quadrilaterals are squares, yet all squares are quadrilaterals. This is true because all quadrilaterals have 4 sides and 4 angles, the interior sum of which is 360 degrees. Squares, however, have special attributes which are not shared by all other quadrilaterals: Squares have 4 right angles and 4 sides that are equal in length, with two pairs of sides being parallel to each other. Irregular quadrilaterals, on the other hand, while having 4 sides and 4 angles whose interior sums equal 360 degrees do not have parallel sides, do not have 4 right angles (in fact they may have no right angles at all), and the sides are often not the same length. And yet, both squares and irregular quadrilaterals are quadrilaterals.

Likewise, not all “public conveniences” are utilities, but all utilities are “public conveniences.” While all utilities have the attributes of public conveniences, non-utility public conveniences may have attributes distinct from utilities, and vice versa. The attributes of public conveniences will be discussed below in Subsection B.

**A. Monticello’s Fiber Project Should Be Considered a Utility.**

Based on the uses of broadband and its requirement for continued economic development nationally and locally, NATOA strongly believes that broadband is a utility, much as electricity, gas, telecommunications, and water are considered

utilities. “Utility” is defined as “a public service, as a telephone or electric-light system, a streetcar or railroad line, or the like.” *See*, <http://dictionary.reference.com/browse/utility>. “Public utility” is defined as “a business or service which is engaged in regularly supplying the public with some commodity or service which is of public consequence and need, such as electricity, gas, water, transportation, or telephone or telegraph.” *Black’s Law Dictionary* 1232 (6<sup>th</sup> Ed. 1990).

Broadband access is like telephone, electric and transportation services in that it allows the improved mobility of citizens for business and entertainment purposes, much as the telephone, electricity, and transportation services did before the advent of broadband services. As will be discussed below in Section II, access to broadband capabilities, especially high-speed internet services, is becoming an essential service, if it has not already reached that status in light of its importance for facilitating sustainable economic and educational growth.

NATOA joins the City in pointing out that Minn. Stat. § 471.656, subd. 3(c) (2008) defines municipal public utilities as “the provision by a municipality of electricity, natural gas, water, wastewater removal and treatment, *telecommunications, district heating, or cable television and related services.* Minn. Stat. § 471.656, subd. 3(c) (2008)(emphasis added). *See*, Brief and Appendix of City of Monticello at 17. Bridgewater ignores the phrase “and related services” in its Reply Brief when it argues that the Fiber Project cannot be

considered a utility or other public convenience. *See*, Reply Brief of Plaintiff-Appellant at 6.

While “related services” is not defined, broadband service, and high-speed internet in particular, certainly is “related” to telecommunications and cable services. Black’s Law Dictionary defines “related” as “connected; allied; akin.” *Black’s Law Dictionary* 1288 (6<sup>th</sup> Ed. 1990). In other words, “related” means “similar.” Internet service is similar to telecommunications and cable services in its ability to connect people and businesses to each other for commercial and personal purposes and its ability to entertain. As such, the City’s Fiber Project, with its three components (telephone, cable, and internet) should be considered a utility in its entirety.

**B. Monticello’s Fiber Project is a Public Convenience**

Even if broadband access, particularly high-speed internet, were not considered a “utility,” it is surely a “public convenience.” While legislatures often have not defined “public convenience,” Black’s Law Dictionary refers to a “public convenience” as that which is fitting or suited to the public need. *Black’s Law Dictionary* 1228 (6<sup>th</sup> Ed. 1990). (The most recent editions of Black’s Law Dictionary appear to have dropped the definition of public convenience.) In addition, courts around the country have interpreted the phrase when required to do so by the facts of a case, while noting that the concept is fluid. While these cases are not binding on this Court, they provide some insight into the meaning of “public convenience.”

In *Hunter v. Mayor and Aldermen of Newport*, 5 R. I. 325 (R.I. 1858), the Rhode Island Supreme Court upheld the judgment of a mayor and board of aldermen “that the public convenience requires that the highway shall be laid out.” The Rhode Island Supreme Court determined that the “public convenience” is served when public officials remedy situations to which the public has unreasonably become subject. *Hunter*, at \*4. 1927, the Rhode Island Supreme Court reiterated this principle when it defined “public convenience” as “something fitting or suited to the public need.” *Abbott v. Public Utilities Comm’n*, 136 A. 490, 491 (R.I. 1927). In both cases, the Rhode Island Supreme Court focused on the benefit to the public of the proposed undertaking in evaluating what kinds of things qualify as “public conveniences.”

Likewise, in *Luxor Cab Co. v. Cahill*, 98 Cal. Rptr. 576, 580 (Cal. App. 1971), the California Court of Appeals defined “public convenience” as a “public matter, without which the public is inconvenienced to the extent of being handicapped in the practice of business or wholesome pleasure or both, and without which the people of the community are denied, to their detriment, that which is enjoyed by others similarly situated.” The case examined the propriety of the issuance of certificates to operate taxicabs in the City and County of San Francisco. Evidence in the record showed that taxicab service prior to the issuance of the new permits was inadequate to accommodate both business and pleasure pursuits in San Francisco, therefore the issuance of additional permits qualified as a public convenience.

More recently, the Wisconsin Court of Appeals defined “public convenience” as that which provides comfort or advantage conducive to personal ease or comfort to the public as a whole. *Hearst-Argyle Stations, Inc. v. Bd. of Zoning Appeals of City of Milwaukee*, 659 N.W.2d 424, 431 (Wis. App. 2003). At issue was a television station’s desire to mount a digital TV antenna on a transmission tower. Because only .5% of the community would be benefited by the permit to mount the antenna, the court upheld the zoning board’s decision that the permit did not meet the standards required for being a “public convenience.”

Like the construction of highways and development of public transportation, the broadband capabilities of the City’s Fiber Project, including the high-speed internet component, will allow the City’s residents to increase their ability to engage in business, educational, and entertainment pursuits. Unlike the situation in *Hearst-Argyle* where almost no residents were affected, the vast majority of Monticello’s population will be beneficially affected by the deployment of fiber to the community. *See, e.g.*, Brief of Appellant at 16, noting that less than half of current residents have high-speed internet.

Bridgewater Telephone suggests that internet service is not a public convenience because not enough of Monticello’s residents have it to qualify it as a necessity. *See*, Brief of Appellant at 16. In its brief, the City responded that the state of universal use should not drive the assessment of what qualifies as a public convenience. Brief of Respondent City of Monticello at 21-23.

A 1913 Ohio trial court opinion handed down in the early days of telephone service is instructive on this point. A telephone company sought to extend the service it provided and a suggestion was made that the extension would not be a “public convenience,” in part due to the limited telephone use by the public. The trial court rejected this suggestion:

“The public convenience manifestly does not mean the convenience of every member of the public, because many do not use and probably never will become users of a telephone. But if any considerable number of the members of a community, having but one telephone, but closely connected for social and business purposes with another community which has two or more, desire to have those which have not yet been extended to them, I am not able to say that the finding by the Public Service Commission, that it is proper and necessary for the public convenience, that it or they be so extended, is unreasonable.”

*Sidney Tel. Co. v. Public Service Commission*, 23 Ohio Dec. 639, 1913 WL 1583, \*4 (Ohio Com. Pl. 1913). Despite the fact that the number of telephone users was small, the Ohio trial court had the foresight to understand the importance of telephone access as a public convenience in 1913. The public convenience nature of high-speed internet service is surely even more understandable than phone service was a century ago. As such, broadband service, including high-speed internet, should be considered a “public convenience.”

## **II. BROADBAND’S IMPORTANCE TO AMERICA’S COMMUNITIES**

Economic development increasingly depends on the advanced communications infrastructure known as broadband. The utility of broadband is about more than viewing television, surfing the Web and making phone calls. It is

about new forms of communication and mass collaboration through the virtually unlimited potential for sharing information, storage capacity, processing power and software made possible through high-capacity bandwidth connections. This collaboration will generate new ideas, accelerate economic development and lead to opportunities for wealth creation, social development and personal expression. *See*, NATOA's Broadband Principles at 1.

While other industrialized nations have developed strategies for next-generation broadband infrastructure, the United States currently lacks a national broadband strategy. As a result, investment in broadband infrastructure is lacking and the United States has failed to realize the many positive externalities created by next-generation broadband networks. As a result, the communities NATOA represents are losing their competitive advantage to communities in Europe and Asia. *See, e.g.*, Organisation for Economic Co-operation and Development, *OECD Broadband Statistics to June 2006*, available at [http://www.oecd.org/document/9/0,3343,en\\_2649\\_34225\\_37529673\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/9/0,3343,en_2649_34225_37529673_1_1_1_1,00.html); Karl Bode, *100 Mbps for \$39 in Japan*, BROADBAND REPORTS, Aug. 11, 2006, available at <http://www.broadbandreports.com/shownews/77192>; James Enck, *Second Gear*, *EuroTelcoBlog*, Aug. 18, 2006, available at <http://eurotelcoblog.blogspot.com/2006/08/second-gear.html>.

Continued inaction will harm local communities with respect to education, healthcare, economic development, standard of living, and the level and quality of civic discourse. Further, such inaction will adversely affect local governments'

ability to provide public safety or to create a more sustainable environment for the future. To find that no utility or public convenience exists here would leave the fate of communities in the hands of providers who have already decided whom they will serve and who will go without broadband.

As broadband becomes increasingly important for commerce, employment, education and healthcare, the need for local communities to have access to broadband grows. Private enterprise does a good job of providing broadband to areas where profits can be maximized. Unfortunately, in those areas where profits may be small or not realized in the short term, private enterprise is less likely to develop broadband infrastructure. While the profit motive often fosters innovation and deployment, with respect to broadband deployment and development, many community needs are unmet. Without the involvement of local governments to fill the gaps, broadband deployment in the United States will continue to fall behind other developed nations.

**B. Municipal Broadband Deployment Follows in the Footsteps of Earlier Infrastructure Developments**

The United States has long been a world leader in economic development. It has a proud history of deploying electric, telephone, transportation, and other infrastructure throughout the country for use by all its citizens. Investments in physical infrastructure have been critical to supporting economic progress in the United States, whether in the form of the 19th century railroad systems, the early

20th century deployment of electric and telephone networks, or the post-World War II construction of airports and the interstate highway system.

Local governments in particular have played an essential role in ensuring that the benefits of infrastructure, especially communications infrastructure, becomes available to all, thereby creating what is now a traditional role of providing essential services to citizens when competitive markets fail to do so. See, Steven C. Carlson, *A Historical, Economic, and Legal Analysis of Municipal Ownership of the Information Highway*, 25 Rutgers Computer and Tech. L. J. 1, 24 (1999). The reasons underlying the emergence of municipal telecommunications providers are strikingly similar to those that gave rise to publicly-owned electric utilities at the turn of the century.

Publicly-owned utilities first emerged in small towns that were unable to attract private providers. In the late nineteenth century, electricity was seen as more of a novelty than a necessity, but soon it came to be viewed as an essential commodity directly linked to a community's economic survival. Many rural communities were left with the choice of forming a government-owned electric utility or being left in the dark. *Id.*

Because local governments traditionally occupied a vital role in deploying necessary infrastructure, localities must, by necessity and by choice, be part of the solution to the national broadband deficit. For example, just as local governments built municipal power systems as part of the efforts to electrify America in the first part of the 20th Century, and just as local governments today administer public

transportation networks, water and sewage networks; so too must local governments be allowed to provide broadband infrastructure and services. As broadband becomes a necessary utility for things such as commerce, education, and healthcare, local government entities across the country have taken up their traditional role of providing this needed service to residents and local businesses by building and providing broadband networks and services, especially in those areas where private development is slow or lacking entirely.

Municipal deployment efforts are sometimes met with resistance from private entities who have lobbied for legislation to stifle municipal deployments or sought judicial intervention by arguing that local governments do not have the authority to be market participants in what the private entities believe to be a wholly private economic enterprise. Private entities portray local government infrastructure developments as inefficient government monopolies unfairly competing with a plethora of competitive private sector offerings. Unfortunately, these arguments ignore the reality of the lack of broadband deployment and the long history of local government involvement in deploying critical infrastructure.

#### **B. Economic Benefits of Municipal Broadband Deployment**

Broadband is a vital service and the infrastructure of the 21st Century, capable of connecting Americans not only with each other, but with jobs, information, and government resources that might otherwise be difficult if not impossible to obtain. It is a distribution system, a personal tool for interacting with the world, and a catalyst and enabler of an endless array of products, processes,

and services. With unparalleled versatility, broadband benefits a wide array of stakeholders from buyers and sellers of broadband connections, designers and builders of broadband networks, manufacturers of broadband-enabled equipment and devices, developers of software and other applications, creators of content of all kinds, and countless others who have a huge stake in America's rapid transition to an online digital society.

Municipal broadband systems increase investment in local communities. Local communities with municipal systems attract new jobs and keep old ones. *See, e.g.,* George S. Ford and Thomas M. Koutsky, *Broadband and Economic Development: A Municipal Case Study from Florida*, Applied Economic Studies, April 2005. Communities that must wait for private sector deployment lose residents and businesses to more well-connected places. *See, Fiber to the Home Council, Municipal Fiber to the Home Deployments: Next Generation Broadband as a Municipal Utility* at 4, June 5, 2008, available at [http://www.ftthcouncil.org/?t=143&llweb\\_records::\\_R\\_CategoryID=2](http://www.ftthcouncil.org/?t=143&llweb_records::_R_CategoryID=2) (detailing positive economic development in specific communities as a result of municipal fiber to the home projects).

Economic studies and case histories confirm that public investments in broadband, particularly high-capacity broadband networks, can yield up to ten times the value of the investment in increased jobs, spending power, sales, property values, tax revenues of all kinds, and more. *See, Baller Herbst Law Group, Bigger Vision, Bolder Action, Brighter Future: Capturing the Promise of*

*Broadband for North Carolina and America* 13-19 (June 2008), available at [http://www.e-nc.org/Baller-Herbst\\_Report.asp](http://www.e-nc.org/Baller-Herbst_Report.asp). Among the most important attributes of broadband is its ability to serve as an engine of economic development, enabling communities, regions, nations, and even whole continents to develop, attract, retain, and expand job-creating businesses and institutions. *Id.* See, also, Harold Feld, Gregory Rose, Mark Cooper, Ben Scott, *Connecting the Public: The Truth About Municipal Broadband*, April 2005, available at [http://www.freepress.net/files/mb\\_white\\_paper.pdf](http://www.freepress.net/files/mb_white_paper.pdf) (discussing generally the importance and benefits of municipal broadband deployment.)

The history of distribution technologies, such as the roadways, railroad, telegraph, and telephone repeatedly demonstrate the importance of public involvement to ensure full access at reasonable prices. The transformative power of broadband connectivity has changed and continues to change communities on a daily basis. It is vital for our economy that local government be allowed to deploy broadband networks.

## CONCLUSION

The importance of broadband services to the economic, educational, and social progress of the United States shows that Monticello's Fiber Project should be considered a utility or other public convenience.

Respectfully submitted,

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Dated: January 22, 2009

STATE OF MINNESOTA

IN COURT OF APPEALS

A08-1928

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Bridgewater Telephone Company, Inc.,  
a Minnesota corporation

Plaintiff-Appellant,

**Affidavit of Service By First Class Mail**

v.

City of Monticello, Minnesota,

Defendant-Respondent.

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I, Lani L. Williams, state that I mailed two copies of the foregoing BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS IN SUPPORT OF THE CITY OF MONTICELLO via Federal Express on January 22, 2008 to the following attorneys of record:

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Subscribed and Sworn to before me  
this 22<sup>nd</sup> of January, 2008.

Notary Public \_\_\_\_\_