DENVER
THE MILE HIGH CITY

CITY AND COUNTY OF DENVER

DEPARTMENT OF LAW
D. SCOTT MARTINEZ
CITY ATTORNEY

1437 Bannock Street
Room 353
Denver, Colorado 80202
Phone: 720-865-8600
FAX: 720-865-8796

MICHAEL B. HANCOCK
Mayor

TO: Denver City Council

FROM: David W. Broadwell, Asst. City Attorney

RE: **LEGAL AUTHORITY FOR A MUNICPAL ORDINANCE REQUIRING THE UNDERGROUND RELOCATION OF OVERHEAD TELECOMMUNICATIONS FACILITIES**

DATE: February 23, 2015

Summary of Proposed Ordinance

The proposed ordinance would require CenturyLink and other telecommunications companies that maintain aerial lines or cables suspended from utility poles on city property to relocate their facilities underground under two circumstances: (1) in coordination with undergrounding projects in which the Manager of Public Works has ordered Xcel Energy to relocate electric distribution facilities underground pursuant to Article 8 of the City's electric utility franchise; or (2) when the City is otherwise improving a right-of-way or other city-owned property and requires the removal of overhead telecommunications lines to make way for the improvement. In either case, the overhead telecommunications lines must be removed within 180 days of a demand by the Manager of Public Works.

Legal Authority for Muncipalities to Regulate Telecommunications Facilities Under the Police Power

Authority over "the phone company" in relation to the PUC. Under the Colorado Constitution and related state statutes, the authority to regulate many aspects of traditional local exchange telephone service (e.g. rate regulation and service standards) resides exclusively with the Colorado Public Utilities Commission.[1] However, the

[1] Art. 25, Colo. Const. ("... all power to regulate the facilities, service and rates and charges therefor, including facilities and service and rates and charges therefor within home rule cities and home rule towns, of every corporation, individual, or association of individuals, wheresoever situate or operating within the State of Colorado, whether within or without a home rule city or home rule town, as a public utility, as

constitutional provision empowering the PUC also contains this important disclaimer: ". . . nothing herein shall affect the power of municipalities to exercise reasonable police and licensing powers, nor their power to grant franchises . . . ." Until 1967, the phone company was indeed required to have a franchise to operate in Denver and other municipalities. However, in the landmark case of *City of Englewood v. Mountain State Telephone and Telegraph, Co.,*[2] the Colorado Supreme Court ruled held that the main phone service provider in the state (then popularly known as "Mountain Bell") essentially enjoyed a statewide "franchise" to occupy public right-of-way throughout Colorado by virtue of their PUC permit, without the need to obtain separate franchises from each and every community. Nevertheless, the court recognized that the phone company still must obtain standard construction permits from local governments when locating or improving their facilities in the public right-of-way.

Authority to regulate telecommunication providers generally under federal law. The Federal Telecommunications Act of 1996[3] was adopted to promote competition and to reduce regulation on telecommunications providers, including both traditional telephone providers and the new wave of broadband companies.[4] The main thrust of this law was to require state and local governments to regulate public-rights of way on a "competitively neutral and non-discriminatory basis." However, the statute expressly acknowledges the authority to local governments to exercise traditional police power authority over the facilities of telecommunications companies and provides: "noting in this section affects the authority of a . . . local government to manage the public right-of-way."[5]

Authority to regulate telecommunication providers under SB 96-10. In conjunction with the adoption of the Federal Telecommunications Act of 1996, the Colorado General Assembly adopted SB 96-10, which essentially said <u>*all*</u> telecommunication providers enjoy a right to occupy state and local rights-of-way in Colorado without the need for a local franchise. In the case of *City and County of Denver v. Qwest,*[6] the city unsuccessfully attempted to defend an ordinance that would have required all telecommunication companies to obtain a "private use permit" and pay substantial fees for the privilege of occupying city rights-of-way. The Colorado Supreme Court held the ordinance was preempted by SB 10, but in so doing the court said:

- "The statute impliedly acknowledges the authority of (political) subdivisions to require construction permits . . . ."[7]

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presently or as may hereafter be defined as a public utility by the laws of the State of Colorado, is hereby vested in . . . the Public Utilities Commission of the State of Colorado; provided however,)

[2] 431 P.2d 40 (Colo. 1967).

[3] 47 U.S.C. §§ 151-614.

[4] In addition to addressing the delivery of telecommunication services through wires and cables, the law also addressed and, to some degree, preempted municipal authority to regulate the location of wireless facilities such as cell phone towers and antennae. The regulation of wireless telecommunications facilities are beyond the scope of this memorandum.

[5] 47 U.S.C. § 253(c).

[6] 18 P.3d 748 (Colo. 2001).

[7] Id at 757.

- ". . . a home rule city retains the discretion to legislate in way expressly permitted by Senate Bill 96-10 but also in any way that does not actually conflict with state law."[8]
- ". . . Senate Bill 96-10 clearly contemplates substantial regulation by political subdivisions of the time, place and manner in which telecommunication providers occupy the rights-of-way within their boundaries . . . ."[9]

A*uthority to regulate utility poles on public property under Title 31.* Generally Denver regulates the use of its property under its own home rule authority, particularly in regard to encumbrances and construction projects on public property by private parties. However, it is important to note that state statutes have long supported municipal authority in this regard by providing: "The governing body of each municipality has the power: . . . To regulate and prevent the use of streets, parks, and public grounds for . . . power and communications poles . . . ."[10]

Legal authority for municipalities to require relocation of telecommunications facilities under the common law

The Colorado Supreme Court has adopted the longstanding common law rule[11] that, when the owner of a public right-of-way is engaging in any public improvement to the right-of-way, utilities may be required to remove or relocate their facilities at their own expense in order to make way for the public improvements. For example, if the construction of a new sanitary sewer beneath a street requires telecommunications facilities to be relocated, then the telecommunication company must do so at company expense.[12] If the roadway itself is being relocated, re-graded or improved in a way that requires underground utilities to be relocated, the utility owner must do so at the owner's expense.[13]

The common law rule has been specifically applied in Colorado in a case upholding a municipal ordinance that requires the telephone company to relocate its facilities underground whenever the municipality is undergrounding its own electric distribution facilities.[14]

The Colorado General Assembly has never abrogated the common law rule by statute. However, two state laws on this subject are worth noting. In 1971 the state adopted the Colorado Underground Conversion of Utilities Act[15] which provides an

[8] Id at 757.
[9] Id at 761.
[10] §31-15-702, C.R.S.
[11] The origins and history of the common law rule are thoroughly discussed in: Stokes, Michael L., "Moving the Lines: The Common Law of Utility Relocation," 45 Val. U. L. Rev. 457 (Winter, 2011).
[12] *City and County of Denver v. Mountain States Tel. and Tel. Co.,* 754 P.2d 1172 (Colo. 1988).
[13] *Meadowbrook–Fairview Metro. Dist. v. Bd. of County Comm'rs,* 910 P.2d 681 (Colo.1996).
[14] *U.S. West v. City of Longmont,* 948 P.2d 509, 517 (Colo.1997).
[15] §§ 29-8-101, et seq., C.R.S.

elaborate mechanism for establishing assessment districts to pay for area-wide undergrounding projects, and indeed says that the statute provides the "exclusive" means for doing so. However, significantly, the statute also says: "the use of the procedures set forth in this article are permissive and not mandatory for incidental and episodic conversions associated with public improvements such as street widening or sewer construction."[16]

A second notable state statute, adopted in 2003, allows telecommunications companies to petition the PUC to recover costs associated with utility relocations projects requested by local governments.[17] Among other things, the statute allows the company to seek cost recovery either on a statewide basis, or by surcharging the customers most directly benefitted by a relocation project. The company can only recoup relocation costs from customers to the extent it can show that the relocation request by the local government was "beyond the normal scope of business." To the best of our knowledge, there has only been one docketed case before the PUC in which Qwest or CenturyLink sought cost recovery under this statute.[18]

[16] § 29-8-102, C.R.S.
[17] § 40-3-115, C.R.S
[18] PUC Docket No. 09A-634T, in which Qwest was allowed to recovery some relocations costs associated with major projects, such as the T-Rex improvements to I-25, but not for miscellaneous smaller projects.