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**Beware of Dillon's Rule**  
**Pesky precedent may complicate**  
**formation of public/private partnerships**

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As interest in snagging a piece of the broadband stimulus builds to fever pitch, it may be a good idea to sound a cautionary note with respect to one obscure, but potentially important, quirk in U.S. law that could mess up a lot of plans. I'm talking about Dillon's Rule. Never heard of it? Not surprising. Despite its importance, it's easy to overlook, unless you happen to have an interest in the jurisprudence of state and local governments. But overlook it at your peril. Dillon's Rule could effectively bar, or at least seriously complicate, efforts by private entities to successfully dip into the deep pool of stimulus funds through the device of public/private partnerships (a device recommended by a number of supposed gurus).

The fascination for public/private partnerships as a means of reaching Stimulus El Dorado derives from Section 6001(e)(1) of the Act. That section provides NTIA stimulus fund eligibility not only to States, but also to their political subdivisions, the District of Columbia, United States territories and possessions, Indian tribes, native Hawaiian organizations, and non-profit groups. So the line for stimulus cash forms here if you're anybody but a commercial entity.

As an inside track to accessing the funds, some savants have suggested that commercial interests partner up with State or local governments to receive the NTIA funds. This is because public/private partnerships get a preference in the scoring process. In that case, you might imagine that a local government entity – county, city, town, etc. – would make an ideal partner.

This is where Dillon's Rule rears its ugly head. Dillon's Rule is a court-created doctrine (circa 1886, but still alive and kicking today) which provides that a political subdivision of a State has only those powers expressly conferred on it by charter or law. If a court finds that an act of a local government is beyond the local government's powers, the local government does not have authority to engage in the act. And without that authority, even the most willing county, or town, or city, would be powerless to enter into a public/private partnership.

How many States have conferred upon their constituent counties, towns, parishes or cities the power to provide broadband services to their residents – either specifically or by categorical grant of power to provide communications services to residents and businesses? I admit that I have not conducted a survey, but anyone thinking about doing a deal with one or another particular local government would be well-advised to research that point thoroughly before jumping in.

Dillon's Rule or some variant of it is in effect in most States, although it is not necessarily included in State statutes or constitutions. In many instances Dillon's Rule is a non-statutory doctrine enforced by the courts of a State. In still other cases, Dillon's Rule is codified. In many States, the State legislature has enacted "home rule" provisions for its counties and/or municipalities which allow the county and/or municipality to engage in some activities that are not traditional local governmental activities. These activities may or may not include operating or owning a broadband service business. In some other States where Dillon is construed very narrowly, counties or cities have no power independent from the State. In other words, without careful research there is no safe and simple way of knowing whether any particular local government is going to be legally competent to partner up with you, even if they really want to.

But wait, you say – the Stimulus Package is a Federal law. How can individual States somehow override Uncle Sam? Simple. Dillon's Rule involves the power of each State to regulate its own affairs. It has twice survived attacks on its constitutionality before the United States Supreme Court. As a matter of conventional federalism, the Feds are not in a position to waive it or declare it inoperative.

If you are a municipality, a county, a parish or a town with your eye on broadband stimulus money, I suggest that you closely review your authority to seek out and use this money. If you are a commercial organization that is considering partnering with a local government to qualify for, or assure better access to, NTIA grants, I suggest that you look carefully at the authority of the local government partner to seek out and use this money.