

# APPA Economic Development and Broadband Conference

Nashville, Tennessee

July 21, 2008

**Addressing Critical Legal,  
Competitive, and Operating Issues**

Jim Baller

The Baller Herbst Law Group, PC

Washington, DC

(202) 833-1144

[Jim@Baller.com](mailto:Jim@Baller.com)

# Disclaimer

This presentation does not constitute legal advice and should not be interpreted as such. For advice on federal, state or local law, please consult your own legal counsel.

Jim Baller

# Overview

- Municipal Broadband
- Cable Franchising
- Network Neutrality
- Key Classifications
- Access to Content
- Access to Customers
- Pole Attachments
- Universal Service Reform
- Other Issues

## Municipal Broadband

- Public entities must have state/local authority
  - State laws, interpretations, procedures differ widely
  - Dillon's Rule v. Home Rule
  - Service-by-service (cuts both ways)
- State legislative activity during the last three years
- Federal developments during the last three years
- Key litigation during the last three years
  - Lafayette, Truckee-Donner PUD, Lebanon, Portland, UTOPIA, Chattanooga, Monticello

More information: [www.baller.com/Comm\\_broadband.html](http://www.baller.com/Comm_broadband.html)

## Cable Franchising

- State franchise laws/bills
- FCC Docket 05-311
  - *First Report and Order* (new entrants) (Upheld by 6<sup>th</sup> Circuit)
    - “Shot clocks,” PEG, I-Net, buildout, 5% fee limits
  - *Second Report and Order* (incumbents) – Before FCC on recon. and on appeal before 6<sup>th</sup> Circuit
    - Similar restrictions (as pertinent to incumbents)
- AT&T litigation in CA, IL, CT

## Key Classifications

- Communications Act and State counterparts
  - Separate “silos” for telecom, cable, wireless, and unregulated “enhanced” or “information services”
  - Each has its own history, policies, definitions, benefits, burdens, FCC rulings, court decisions, constituencies
- Convergence: Technological + Corporate + Market

**Bottom Line: Huge Clash**

## Key Classifications (continued)

- FCC rulings regarding “Internet access service”
  - *Cable Modem Ruling* => Upheld in *Brand X*
  - *DSL, BPL, Wireless, DQE* orders
  - **Wholesale data transport v. retail Internet access**
- What are VoIP, IPTV, other IP-enabled services?
  - VoIP: *Pulver, AT&T, Vonage, IP-Enabled Docket*
  - IPTV: *AT&T litigation, IP-Enabled Docket*
- “Interconnected VoIP” providers subject to:
  - E911, CALEA, USF, CPNI, disabilities, reporting, etc.

# Net Neutrality

- What exactly is “net neutrality”?
- How did “net neutrality” become an issue?
  - Larry Lessig, Michael Wu, CBUI, etc.
  - Michael Powell VON Speech “Four Freedoms”
  - FCC’s *Madison* decision
  - *Brand X / FCC DSL Order* and Policy Statement (next)
  - Net Neutrality deadlock kills federal legislation in 2006
  - Then AT&T’s Ed Whitacre kicked hornet’s nest

## Net Neutrality (continued)

- FCC's "Four Freedoms" (September 23, 2005)
  - Consumers entitled to access lawful **content** of their choice
  - Consumers entitled to run **applications** and use **services** of their choice, subject to needs of law enforcement
  - Consumers entitled to connect their choice of legal **devices** that do not harm network
  - Consumers entitled to **competition** among network providers, application and service providers, and content providers
- "Subject to reasonable network management"
- Just policy, not specific rules; no "teeth"

## Net Neutrality (continued)

- FCC
  - Bell merger conditions
  - Network Management proceeding (Docket 07-52)
  - Comcast – BitTorrent complaint proceeding
- Congress
  - Markey-Pickering (H.R. 5353)
  - Conyers (H.R. 5994)
  - Dorgan-Snowe (S. 215)
- State bills (CA, ME)

## Access to Content From Video Programming Distributors

- FCC extended its ban on exclusive contracts for satellite-delivered programming, to October 2012
  - Did not apply ban to exclusive **terrestrial-delivered** cable programming, exclusive contracts by entities **not affiliated** with cablecos, **tying arrangements**, etc.
- FCC follow-up rulemaking to address these issues, also sharing of headends, restrictions on IPTV, etc.
- National Cable Television Cooperative “moratorium”
- Discriminatory burdens on small providers of IPTV (rates, security, tying content, tiers, ads, MDUs, etc.)

## Access to Content From Broadcasters

- Regulatory Framework: Must carry / Retransmission consent / Network non-duplication – Dec08 Round
- FCC rules and decisions written primarily to balance the power of large, nationwide cable operators and broadcasters
  - Rules on “good faith” negotiations assume market power and make little sense for smaller entities
  - ACA’s 2002 petition on behalf of small cable operators largely ignored; now, FCC more hospitable
- Options
  - FCC, Congress

## Access to Customers

- Retention marketing practices
  - Verizon retention marketing case – under CPNI rules
  - Verizon complaint regarding mirror cable practices
- Access to customers in multiple dwelling units (MDUs) and multiple tenant environments (MTEs) (next slide)
- Predatory and discriminatory pricing
  - We know below-cost pricing occurring, but intent and likelihood of recoupment very hard to prove
  - FCC's ineffective “effective competition” rules
  - Publicity can work in multiple ways!

## Access to Customers

- 1997 and 2003 – FCC took no action on complaints about exclusive *cable* service contracts in MDUs
- 2000 – FCC banned exclusive *telecom* service contracts in *commercial*, but not residential, MTEs
- 2007 – FCC’s “sheet rock” order aids access to wiring
- 2007 – FCC bans exclusive cable service contracts in MDUs under Section 628 + other authorities
  - Did not deal with providers not subject to Sec. 628 or with exclusive wiring, marketing, bulk take-or-pay, etc.
  - Follow-up rulemaking now dealing with these issues
- 2008 – FCC banned exclusive *telecom* contracts in *residential* MTE’s

## Pole Attachments

- Most public power utilities exempt from federal rules
  - BUT some states incorporate federal rules and others use them as benchmarks of reasonableness
- FCC Docket 07-245 – key issues:
  - Remove huge disparity between cable/telecom rates?
  - Extend to pure broadband providers? What rates?
  - Give ILECs attachment rights?
  - Numerous technical issues
- Possible federal legislation
- APPA's position

## Universal Service Issues

- Key reporting and contribution issues
  - Contribution issues  $\neq$  subsidy issues
  - Stiffer penalty provisions
- Universal service “high cost” program subsidizing so many providers, including wireless, that charges to telecom providers (and, indirectly, to consumers) have become very high
  - FCC focusing on revising distribution system, eligibility, other issues (Docket 05-337)
  - Several bills in House and Senate to reform

## Other Issues (continued)

- Customer Proprietary Network Information
  - Protect privacy of consumers under Section 222
  - Rules in place many years regarding Personally Identifiable Information (PII)
  - Apr07 amendments focusing on “pretexting”
    - Must check passwords before releasing info
    - Notify law enforcement if unauthorized release
    - Opt-in before releasing CPNI to joint venture partners or independent contractors for marketing
    - Must file compliance plan/policy with FCC
    - Stiff penalties

## Other Issues (continued)

- More Customer Information Issues
  - FTC identity theft rules go into effect November 1, 2008
  - Digital Millennium Copyright Act
    - “Safe harbors” – the more involved, the more risk
    - “Deep Packet Inspection” issues (Verizon, NebuAd)
  - Website management issues
  - Communications Assistance to Law Enforcement Act
    - Compliance deadline May 14, 2007 -- \$10,000 a day
    - Underlying legality of surveillance demands
- Other issues

# Competitiveness Issues – Today and Tomorrow

Thanks!