



Baller looks to history for broadband lesson

By Carol Wilson - 7/30/2004



The growing movement backing municipally owned fiber-to-the-home networks has many champions at the local, state and national levels. But none are as well versed in the history behind this movement as Washington attorney James Baller.

Baller, senior partner in The Baller Herbst Law Group, which has represented many municipalities in their legal fight to own and operate their own telecom networks, doesn't just argue today's issues but draws a careful analogy between what publicly-owned utility companies want to do today in their towns and cities, and what they did more than 100 years ago to bring electricity to rural America.

"The current debate over whether municipal utilities should be able to build telecom networks is a throwback to the turn of the century, when we realized that electrification was the key to our future," he says. "Some cities waited for the big private electric power companies to reach them but others built their own electric utilities. At their peak, there were over 3000 of these publicly-owned utilities. About one-third of them, having achieved their purpose of not being left behind, sold their facilities to the private sector. About 2000 of them continue to exist."

"Where communities established their own electric utilities, they usually thrived," he says. "By contrast, many cities that sat back and waited for the private sector to act didn't fare so well. Some waited 50 years to get electricity, and some became ghost towns before electricity arrived."

Municipalities began building their own networks in the 1880s, but they did not reach all rural areas. It wasn't until the Rural Electrification Administration came in with federal support, under Franklin Roosevelt's New Deal in the 1930s, that many other towns finally got electric service. Many cities and towns, including a large number that were once left behind by the power industry, now feel the same way about advanced broadband infrastructure, says Baller, who has been working in this area of law since 1992. "They believe that if they sit back and wait for the telephone companies or cable companies to build a FTTH network, it's not going to happen anytime soon, if ever."

"If the end goal is to get truly advanced connectivity to as much of our country as rapidly as possible, the public sector is going to have to play a significant role in this," says Baller. "If we are serious about spurring global competitiveness, local and regional economic development, educational and occupational opportunity and high quality of life, then we should be doing everything that we can do to encourage municipalities step forward to do their part. The last thing we should be doing is throwing obstacles in their path."

Incumbents continue to fight, however, with some success, to limit how local governments and publicly owned utility companies can use their financial and infrastructure resources to create advanced communications networks. In March, the U.S. Supreme Court upheld a Missouri law that sought to prohibit municipalities from building their own telecom networks.

"A number of states have barriers to public entry," says Baller. "In Texas, for example, they have a flat out, in-your-face prohibition. Over the years, since the enactment of the Telecom Act, the prohibitions have gone from outright bans to more subtle forms of barriers - laws that conditionally allow entry but create conditions that are themselves very difficult or impossible to meet."

Baller and groups such as the American Public Power Assn. and the National Association of Telecommunications Officers and Advisers (NATOA), which support local choice, are a thorn in the side of the large incumbent telcos and cable companies, who characterize the municipal networks as risky ventures that are improperly subsidized by local taxes.

In every case in which his firm has represented a municipality building its own network, however, an early step has always been to try to get the cooperation of local incumbents. "We go to the incumbents to try to find some way to work together to save everyone money and heartburn," Baller says. "We suggest joint construction. We talk about designing systems that meet their needs. But the incumbents have not been receptive by and large. In only the rarest of circumstances does anything come of such efforts."

"The incumbents have their own way of doing things," he says. "The cable industry has already made most of the upgrades that they think they need, spending some \$85 billion in the process. They say they are largely done with their capital expenditures for the foreseeable future and don't need us. But, in my view, the cable industry's networks are not sufficient to meet future demands."

As for the telephone industry, it is focused on getting as much out of its existing copper network as possible. "One would think that the phone industry should be particularly interested in working hand-in-hand with communities, because the telephone industry's copper infrastructure is many decades old and has only limited capacity for upgrading," Baller adds. "But that is not happening - at least not yet."

Recently, Verizon has begun to tout FTTH, and SBC and BellSouth are promoting what they call fiber-to-the-premises (FTTP), an advanced form of DSL technology that is more robust than DSL but has considerably less capacity than FTTH. Baller admits a bit of skepticism about how these efforts will turn out.

"The phone industry is notorious for making promises that it doesn't keep, particularly in the broadband area," Baller comments. "In Pennsylvania, Bell Atlantic (now Verizon) made lavish promises of building out broadband, and in return, they got the right to raise rates. Then, Bell Atlantic just kept the benefits but never delivered on their promises."

"I truly hope that the Bells are genuine this time around," Baller says. "But even taking their promises at face value, they're not going to be doing all that much in the foreseeable future. SBC is talking about \$4 billion to \$6 billion over five years. That won't go far. Verizon is talking about eight cities and nine unspecified states over the next couple of years. That's only a tiny fraction of the more than 60,000 cities and towns in this country."

What Baller and others who back municipally owned utilities would like to see is more support from the federal government for their efforts. They would like to see federal law clarified to prevent states from passing laws that prohibit municipally-owned telecom networks, and they would also like to see the emergence of a coherent national policy that pushes for truly high-bandwidth broadband.

"The first thing that the federal government should do is to stop equating progress with subscribership of cable modem service and DSL. Our target should be truly high-bandwidth broadband," says Baller. He also disagrees with the FCC's heavy reliance on the "duopoly" between the cable industry and the telecommunications industry to achieve the nation's broadband goals. "The problem with that approach is that the cable and telephone industries have settled into a relatively low level of competition in which they are not pushing each other to the leading edge of technology."

"The technologies in which the cable and telephone industries have invested heavily -- cable modem service and DSL -- are widely recognized as transitional technologies that are insufficient to meet future bandwidth demand," he adds. "I think that the FCC needs to be much more aggressive in encouraging others to come forward with more advanced technologies, including municipalities. They're the ones with the energy and drive to get us going."

Baller also believes that the history of the electric power industry has ironically given America a significant strategic asset in the global race to develop advanced communications infrastructure.

“The fact that America has 2000+ public power utilities is an extraordinary resource that no other country can match.” Baller notes. “Because public power utilities need highly sophisticated telecommunications services for their core electric power needs, they can serve as anchor tenants that cut the costs and risks of building advanced communications networks. They also have the experience, skill, resources and ethic of universal service to operate such systems successfully. It would be foolish for our country not to take maximum advantage of this extraordinary resource.”