



# Advanced Legal Issues

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# 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.

Also, the slides for this presentation were completed on September 5, 2008, and do not take into account developments since then.

# Overview

- Municipal Broadband
- Cable Franchising
- Net Neutrality
- Key Classifications
- Other Issues

# Municipal Broadband

- Public entities must have state/local authority
  - State laws, interpretations, procedures differ widely
  - Dillion'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, where pertinent
- AT&T litigation in CA, IL, CT

# Network 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
  - AT&T’s Ed Whitacre
  - Comcast - BitTorrent

# Network Neutrality (Continued)

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

## Access to Content From Video Programming Distributors

- FCC extended to October 2012 its ban on exclusive contracts for satellite-delivered programming
  - Did not extend ban to exclusive terrestrial-delivered cable programming, exclusive contracts by entities not affiliated with cablecos, tying arrangements, etc.
- FCC follow-up rulemaking addresses issues noted above, also terrestrial, sharing of headends, restrictions on IPTV, etc.
- National Cable Television Cooperative “moratorium”
- Discriminatory burdens on small providers of IPTV

# Access to Content From Broadcasters

- Regulatory Framework: Must carry / Retransmission consent / Network non-duplication
- FCC rules and decisions written 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 petitions on behalf of small cable operators largely ignored – until recently!
- Options: FCC, Congress, Courts

# 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

- Below-cost pricing occurring, but intent and likelihood of recoupment virtually impossible to prove
- FCC's ineffective "effective competition" rules
- Publicity can work in multiple ways!

## Access to Customers – MDUs/MTEs

- 1997 and 2003 – FCC no action on exclusives in *cable*
- 2000 – FCC ban on *all* kinds commercial *telecom* exclusives
- 2007 – FCC’s “sheet rock” order aids access to inside wiring
- 2007 – FCC bans exclusive *cable service contracts* in MDUs under Section 628 + other authorities
  - Did not deal with PCOs and DBS, 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

# Universal Service

- 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

- 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

## More Other Issues

- 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
    - Deadline May 14, 2007 -- \$10,000 a day
    - Underlying legality of surveillance demands
- Other issues



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