

Platts

Broadband Power Lines Conference

Legal and Regulatory Considerations

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Overview

- Interference
- State barriers to public entry
- Financing and tax issues
- Regulatory Classifications/Requirements
- Rights of Way and Easements
- “Open Access”
 - Common carrier requirements
 - Pole attachment rules
 - Antitrust “Essential Facilities Doctrine”
- Anticompetitive incumbent practices

Interference

Federal Communications Commission, *In the Matter of Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband Over Power Line Systems; Carrier Current Systems, Including Broadband Over Power Line Systems*, ET Dockets 04-37 and 03-104 (Oct. 14, 2004)

State Barriers to Public Entry

- Federal law encourages, but does not authorize, public entry into communications
- Public entities need state/local authority for each activity
 - State authority can be express or implied
 - State laws and interpretations differ widely
 - Local authority -- must review charters, ordinances, franchises, bond instruments, contracts, etc.

State Barriers (continued)

- *Missouri v. Missouri Municipal League*
- Current state restrictions (but read with care!)
 - AR, FL, MN, MO, NE, SC, TN, TX, UT, VA, WA, WI
- Dillon's Rule v. Home Rule
- Vicious local campaigns (www.tricitybroadband.com)
 - E.g., TriCities, IL; Concord, MA; Lafayette, LA
- **New federal or state legislation?**

Financing and Tax Issues

- General obligation v. revenue bonds
- Tax exempt v. taxable financing
 - Private use issues
- **Restrictions in bond ordinances, instruments**
- Internet tax moratorium
- State tax simplification initiatives
- Grants, loans and other support

Regulatory Classification/Requirements

- What is BPL?
 - Telecom v. cable v. information services
 - Franchise fees, taxes, customer service, ROW, universal service, E911, CALEA, poles attachments, etc.
 - Internet access -- *Cable Modem, Wireline, Brand X*
 - *IP-enabled service -- Vonage*
 - *Verizon and BellSouth Petitions*

Rights of Way and Easements

- ROW – public property
 - Who issues ROW franchises?
 - What do they cover?
 - Non-discrimination and competitive neutrality
- Easements – private property
 - What do they cover?
 - Are they divisible?
 - *Tampa Electric, VEPCO, other cases*

“Open Access”

- “Telecommunications carriers” = common carriers
- “Cable operators” and “Information Service Providers” ≠ common carriers
- *City of Portland v. ATT* and *Brand X v. FCC* cases
- Communications Act § 224 (Pole Attachment Act)
 - Municipal/coop/railroad exemption
 - Attachments v. distribution wires themselves
- Towers and wireless facilities 47 U.S.C. § 332
- Antitrust “Essential Facilities Doctrine”

Anticompetitive Incumbent Practices

- Predatory pricing and targeted rate discrimination
- Denial of access to critical content
- Tying up multiple dwelling units in long term contracts
- Refusal to deal with contractors, suppliers
- Refusal to carry competitors' advertising
- Delay or refusal to honor interconnection, collocation or UNE commitments
- Destruction of property and other dirty tricks
- **Senate Judiciary Committee Hearings**