

OPTICOMM
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Legal and Policy Issues

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Overview

- Need for Speed
- Telecommunications Act of 1996
- Entry Issues
- Myths and Realities
- Post-Entry Survival Issues
- Post-Entry Operating Issues
- Other Issues

“The widespread deployment of broadband infrastructure has become the central communications policy objective of the day.”

FCC, Wireline Internet NPRM, ¶ 2

What is Broadband?



Definitions

- No universal definition of “broadband”
- FCC: “advanced telecom” = 200 kbps up/down
- FCC: “high speed” = 200 kbps one direction
- Gartner Group: 10 Mbps “true” broadband => \$500B increase in GDP over next decade
- TechNet: 100 Mbps to 100 MM sites w/in 10 yrs
- Gigabit Ethernet: 1+ Gbps may be viable today

“Upstream capacity of 128 kbps is fully adequate to accommodate current and foreseeable needs of broadband users under most circumstances.”

Nat'l Cable Telecom Assn
Comments to NTIA

“[T]he current generation of broadband technologies (cable and DSL) may prove woefully insufficient to carry many of the advanced applications driving future demand. **Today’s broadband will be tomorrow’s traffic jam**, and the need for speed will persist as new applications and services gobble up existing bandwidth.”

**U.S. Dep’t of Commerce
September 23, 2002**

Why Public Communications Networks?

- **Yogi Berra:** “It’s ‘déjà vu’ all over again”
- **Goals:** Economic development, educational opportunity and high quality life
- **Anchor tenants:** Utilities, municipal government, schools
- **Experience:** high tech, customers of all kinds, customer service, billing, tech support, etc.
- **Infrastructure:** poles, ducts, conduits, ROW
- **Ethic:** a century of universal service
- **Reputation:** high level of customer satisfaction

More Reasons For Growth of Interest

- Meltdown of private-sector CLECs and overbuilders
- Economic and other woes of many incumbents (e.g., Adelphia, Charter, Qwest)
- Continuing consolidation of giant incumbents
 - diminished responsiveness to local needs
 - constantly rising rates with no end in sight
 - inconsistent customer service (at best)
- Cable modem service and DSL are not sufficient for economic development

The Telecommunications Act of 1996

- **Replace monopolies with robust competition**
- **Eliminate barriers to entry**
- **Create a “level playing field” for competitors**
- **Facilitate prompt access to rights of way, poles, ducts, conduits, PROW, towers –safe harbors**
- **Promote universal service and rapid deployment of advanced telecom services and capabilities**

Structure of Communications Laws

- **Telecommunications v. Cable v. Information v. Wireless v. Satellite**
- **Effects of convergence and emergence of Internet**
- **Key Definitions -- Implications for cable, ROW, poles, etc.**
- **FCC's Declaratory Ruling NPRM**
- **FCC's Wireline NPRM**

Entry Issues

- Federal law encourages, does not authorize
- Must have both state and local authority
- Service-specific -- cable v. telecom v. Internet
- Explicit grants of authority

Entry Issues Continued

- Explicit or implicit denials of authority
- Conditional grants of authority -- effects
unsure
- Dillon's Rule v. Home Rule

Federal Prohibition on State Barriers

“No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of **any entity** to provide **any** interstate or intrastate telecommunications service.”

Telecommunications Act, 47 U.S.C. § 253(a)

Litigation on State Barriers

- Abilene Case – Lost in D.C. Circuit
- Missouri Case – Won in 8th Circuit
- Bristol Case – Won in federal district court
- Gainesville – Won in Florida lower court
- Pacific PUD, WA – Lost in Washington state court
- Lincoln Electric, NE -- Won in State Supreme Court

Supreme Court Case -- Missouri

- US Attorney General; MO Attorney General, SBC v Missouri Municipal League
- Opening briefs filed in September/October
- Oral Argument in late 2003 early 2004

The Future

- Increasing interest in public communications utilities as private sector continues to disappoint
- Favorable press, bridges to industry groups, other associations representing local interests
- No more explicit prohibitions, possible repeals
- Pressure for “fair competition” laws
 - e.g., VA, SC, MO, UT
 - “Munitoons”

Ten Common Objections and Answers

1. Localities shouldn't compete with the private sector

- Localities only compete if public demands it
- Fill service gaps or offer better services/rates
- Advance economic/community development goals
- Currently, public power communities are focusing on FTTH/B, which the private sector will not make available in most locations for years, if ever

Objections and Answers

2. Regulators shouldn't compete with the regulated

- Localities don't regulate telecom providers – FCC and states do
- ISPs not regulated at all
- Cable regulation subject to federal standards and nondiscriminatory master cable ordinances; cable franchises administered by City Hall, not utility
- Limited local discretion in ROW management – must be non-discriminatory/competitively neutral

Objections and Answers

3. Localities don't pay taxes

- Community utilities make payments in lieu of taxes that are often higher than private taxes
- No income taxes because no profits
- Private sector gets billions annually in tax breaks (see APPA study)

Objections and Answers

4. Localities can use tax-advantaged financing

- This is a perfectly legitimate practice for public improvement projects
- **BUT** tax-advantaged financing is often unavailable or overrated and comes with numerous onerous burdens
- Projects today often use taxable financing
- Large cable and telcos have access to the best available rates

Objections and Answers

5. Localities cross-subsidize communications services at the expense of electric rate payers

- This should be OK (e.g., schools, fire departments, sidewalks all subsidized by municipal utilities)
- **BUT**, for political reasons, localities are careful to avoid cross subsidization
- Arm's length loans are not cross subsidies
- Private entities routinely subsidize across products, geographic markets

Objections and Answers

6. Public involvement raises First Amendment concerns

- Public involvement adds to number of speakers
- Shrinking number of private-sector speakers a serious concern (note controversy over media ownership)
- Cable Act requires separation of regulators and entity that chooses programming
- No evidence of public interference with any cable operator's speech

Objections and Answers

7. Public communications projects have often failed

- This is flatly untrue
(see www.tricitybroadband.com)
- Industry “studies” are seriously flawed
- Success means different things to public and private sectors -- i.e., public projects do not need to earn profits over relatively short period
- Economic development, educational opportunity, etc. have great monetary value for community

Objections and Answers

8. Local officials are lazy, incompetent, inexperienced

- Community utilities have a century-old record of stellar performance
- Communications industry is not unduly complex
- Communities with electric utilities are already operating sophisticated communications systems
- Technical assistance available where needed

Objections and Answers

9. Local governments have unfair access to poles, ducts, conduits and rights of way

- These are FAIR advantages, as long as the locality allocates costs appropriately
- Major communications providers have similar or even greater advantages
- Incumbents already occupy poles, ducts, conduits and ROW

Objections and Answers

10. Localities should not enter into risky ventures, especially since the private sector is on brink of rolling out ultra high speed services
 - True, localities should not assume unreasonable risks, but public, not incumbents, should decide this
 - Risks are lower for communities that operate utilities than for private sector providers
 - Private sector will not roll out truly high speed broadband services to most communities in the foreseeable future, if ever

Post-entry Survival Issues

- Anticompetitive Practices
 - Scottsboro
 - Relationship with BSPA
- Access to Programming
 - Exclusive contracts – satellite v. terrestrial
- Access to Customers, particularly MDUs

Post-entry Operational Issues

- Telecom – interconnection, collocation, UNEs
- Cable
 - Digital TV
 - “Must Carry” and “Retransmission Consent”
 - Intellectual property (DMCA, etc.)
 - Adult entertainment
 - Privacy
- Broadband/cable
 - “Open access,” definitional issues, franchise fees, customer service, privacy

Other Issues

- Bankruptcies
 - Lemons and lemonade
- Security
- Spectrum
- ROW Management

Some Thoughts About the Future

- All trends discussed here will continue
- Greater recognition of importance of local involvement, but continuing disputes about proper role
- Threat of supposed “level playing field” laws
- Anticompetitive practices demand effective measures
- Competitive issues – FTTP, WiFi, Powerline
- Continuing need for communications among localities, with emphasis on national, regional approaches

Questions & Discussion

