

Municipal Broadband Conference

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Anticipating Anticompetitive Practices

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Overview

- Anticipate Challenges to Authority
- Keep an Eye Out For Anticompetitive Legislation
- Level Playing Field Provisions
- Predatory Pricing
- Rate Discrimination
- Program Access
- Exclusive MDU contracts
- Media Blitz

Anticipate Challenges to Authority

- Federal law encourages, does not authorize
- Must have both state and local authority
- Weigh politics of not seeking PSC authority
- Service-specific -- cable v. telecom v. Internet
 - Authority to operate “utilities” does not necessarily include all communications services
- Follow Process to perfect authority
 - In re Application of Lincoln Electric System, 655 N.W. 2d 363 (Neb. 2003)

Keep an Eye Out For Anticompetitive Legislation – Participate in Process and Post Enactment Rulemaking

- Incumbents continue to seek state laws prohibiting public entry
- Incumbents seek to impose “fair competition” laws – implicit barriers to entry
 - e.g., VA, SC, MO, UT
 - “Munitoons”
 - Imputation requirements = price fixing
 - Artificial service model restrictions – wholesale only

Level Playing Field Franchise Provisions

- Incumbents have an inherent advantage over new entrants
- Under federal Cable Act a municipality does not need to have a cable franchise -- 47 § 541(f)(2).
- Politically a municipality should nevertheless obtain a franchise in order to insulate against charges of unfair treatment

Level Playing Field Franchise Provisions

- Many states have level playing field provisions essentially saying new franchises can be no more favorable or less burdensome than existing franchise
- Law may or may not apply to municipals
- Need not be identical – overall burdens and context should be looked at
 - *Insight Communications, LP v. City of Louisville, KY*, (KY. Ct. of Appeals July, 2003).

Survival Issues – Predatory Pricing

- Scottsboro, Alabama
 - In Scottsboro Charter charged \$19.95 to \$24.95 a month for 200 channels
 - In neighboring communities Charter charged \$72.99 to \$79.99 a month for 150 channels
 - Charter added a free month of service, \$200 cash for switching to its cable service, and an additional \$200 cash for switching to its high speed Internet service
 - **Charter was losing at least \$210 a year on every cable subscriber that it snatched from Scottsboro**

Survival Issues – Predatory Pricing

The allegations made in the comments of Scottsboro and Knology highlight the difficulties of new entrants that, for whatever reason, are capable of competing only within a confined geographic region. The vast resources of a large MSO may simply prove too much if brought to bear in a targeted fashion against a single system entrant... There has been some suggestion that our authority to prohibit anticompetitive acts or unfair practices under section 628 of the Act would reach targeted and predatory competitive responses. Alternatively, it may be that we would have to seek additional authority from Congress in order to combat such practices, which tend to limit competition and discourage new entry.

FCC's *Eighth Annual Video Competition Report* at ¶¶208-09.

Predatory pricing in AT&T/Comcast merger

We do not agree with the Applicants that targeted pricing enhances competition. To the contrary, targeted pricing may keep prices artificially high for consumers who do not have overbuilders operating in their areas because of the overbuilders' inability to compete against an incumbent who uses such strategies. **Thus, we believe that targeted pricing as described in this record could harm MVPD competition.** Nevertheless, we are unable to conclude that this transaction will aggravate the problem.

Mounting consumer frustration regarding secretive pricing practices and the threat that such practices pose to competition in this market suggest, however, that regulatory intervention may be required either at the local, state, or federal level. We will continue to monitor allegations of targeted pricing closely and address specific abuses on a case-by-case basis.

Rate Discrimination

- “Win-Back” programs -- MSOs use targeted rate discrimination towards competitor’s customers
- Uniform rate requirement in 47 U.S.C. § 521(d) enacted “to prevent cable operators from having different rate structures in different parts of one cable franchise ... [and] to prevent cable operators from dropping the rates in one portion of a franchise area to undercut a competitor temporarily” -- FCC
- Congress amended § 521(d) in areas where cable faces “effective competition.”

Effective Competition Test

- FCC has gutted uniform rate protection by adopting loose interpretation of effective competition under presence of DBS
- Effective competition found if franchise area
 - Has at least two unaffiliated MVPD offering comparable video programming to at least 50% of the households in the franchise area; and
 - the number of households subscribing to programming services offered by the competitive MVPDs exceeds 15% of the households in the franchise area
- The FCC consistently finds effective competition based on the presence of DBS despite the FCC's own finding the DBS has no significant effect on cable rates.

Effective Competition LEC Test

- The so-called “LEC test” finds effective competition where a local exchange carrier or its affiliate provides comparable cable service to the incumbent cable operator.
- When adopted in 1996 the LEC test was intended to apply to the Bells and other major *incumbent* local exchange carriers, which Congress expected to become major and ubiquitous players in the cable industry.
- The FCC, however, has applied the LEC test indiscriminately to any local exchange carrier, including new broadband overbuilders with market power.
- In the absence of a homes-passed or actual subscribership standard under the LEC test, the FCC has found that “effective competition” can be found to exist as long as the LEC is *planning* to provide cable TV service in the area

Program Access

- 1992 Cable Act banned unfair and anticompetitive restrictions on access to cable programming, including certain exclusive contracts, and required satellite-based distributors in which cable had attributable interests to make programming available to competitors on a non-discriminatory basis. 47 U.S.C. § 548.
- Huge gaping loop hole for programming delivered by terrestrial means

Program Access

- Regional “clustering” of cable properties exacerbates the anticompetitive effects of terrestrially-delivered video programming
- Regional sports programming is especially susceptible to abuse
- Despite recognizing potential anticompetitive effects the FCC has concluded that it lacks statutory authority to extend its exclusive contracts rules beyond satellite-delivered programming.
- Exclusive contracts with new services providers such as video on demand starting to emerge

Exclusive MDU Contracts

- MSOs tie up MDUs in exclusive long-term contracts
- In many markets 20 – 23% of a cable operator's income comes from MDU subscribers.
 - MSO's sometimes use strong arm tactics like threatening to disconnect MDUs if they do not sign exclusive agreements
- Despite acknowledging these practices the FCC has held that the record does not justify a ban or a time limit on exclusive contracts.

Abuse of Process

- Overly broad open records requests against local governments to access competitive information on utility communications systems
- Interfere with franchise process
 - RCN has alleged that Comcast interfered with its local franchise negotiations in Prince George's County, Maryland and in Philadelphia, Pennsylvania
- Unwilling to carry advertising
 - In Florida, Cox Cable refuses to carry advertising of its competitor, Gainesville Regional Utilities.

Media Blitz

- In the Tri-Cities of St. Charles, Batavia and Geneva, Illinois, Comcast and SBC conducted severely biased “surveys” of public opinion and bombarded the area with disinformation to dissuade voters from approving a public communications network.
- Comcast’s and SBC’s misstatements and responses to them are available online at <http://www.tricitybroadband.com>;