

Light Reading Live
Triple Play 2004
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The Rules of the Game

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Overview

- Lay of the Land
- Current Law – Stove Pipe Services
- Importance of Knowing Your Terms
- Looks like a Duck...Brand X decision
- VOIP
- Triple Play Entry Issues
- Nixon v MML – The Supreme Court speaks
- Implications – State battles
- Workable Law – Louisiana

Lay of the Land

- Telecommunications Act 1996
 - Over 10 years in the making
 - Lets make a deal
 - Bells out from MFJ
 - AT&T into local
 - Cable into local
 - Internet only referenced in passing

Current Law – Stove Pipe Structure

- Title II – Common Carriers
- Title III – Wireless
- Title VI – Cable Service
- Internet and IP services?
- Mergers rather than competition
 - 7Bells and GTE = 4 now
 - AT&T/TCI/MediaOne = Comcast
- Competition around the margins in the gray areas

Importance of Knowing Your Terms

“Telecommunications Services”

“The offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”

- General, indiscriminate offerings to the public (i.e., common carrier) services
- Subject to common carrier regulations (e.g., Interconnection, USF)

Cable Service

“The one-way transmission to subscribers of

- (i) video programming, or
- (ii) other programming service, and

Subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service”

- Subject to local franchising
- Closed system
- Typically not considered a “utility” service

Information Service

“The offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications...”

- “Information services,” are not “cable services” and are not “telecommunications services”
- Generally not regulated
- Internet is an information service

Walks Like a Duck...Brand X

- 2002 -- FCC Declaratory ruling that Cable modem Internet access is neither “cable service” nor “telecommunications service” it is an “information service”
- 2002 -- FCC issues “Wireline NPRM tentatively concluding that Internet access over wireline (i.e. telephone line) is an information service and not a telecommunications service
- 9th Circuit reverses FCC holds that cable modem is a telecommunications service
- December 3, 2004 -- Supreme Court grants petition for cert

VOIP – What is it?

- FCC IP Enabled docket – regulatory classification
 - Preemption, USF, 911, CALEA, Consumer protections
 - Fees
- Pulver.Com Free World Dialup -- no facilities computer to computer service is an unregulated information service
- FCC Vonage Order – Vonage’s *Digital Voice* VoIP service is an inherently interstate service
 - FCC has exclusive jurisdiction over “all interstate and foreign communication” and “all persons engaged . . . in such communication. 47 U.S.C. 152(a)
 - Preempts state jurisdiction
 - Does not provide regulatory classification of VoIP

Triple Play Entry Issues

- What is the service?
- FCC eliminates Act's 271 unbundling requirement on Bell fiber facilities
- Bells opposing franchising requirements
 - Required under 621 of Act for cable operators
 - State/local get about \$2.5 billion annually in fees
- Level playing field requirements
 - Inherent advantages of incumbent
 - *The Fallacy of Regulatory Symmetry: An Economic Analysis of 'the Level Playing Field'* -- T. Hazlett
 - Terms and conditions need not be identical – *Insight Communications, LP v. City of Louisville, KY*

State Barriers to Municipal Entry

- Federal law encourages, does not authorize public entry
- Public entities must have state/local authority for each service and activity
 - Dillions Rule vs. Home Rule authority
 - State laws, interpretations differ widely
 - Must consider local charters, ordinances, bonds

Nixon v. MML – The Supreme Court Speaks

- Telecom Act Sec. 253 preempts state laws that prohibit “any entity” from providing “any telecommunications service”
 - Nixon v. Missouri Municipal League, 541 S.Ct. 1555, Supreme Court held that “any entity” is not clear enough to cover public entities, BUT stated:
 - Decision not a ruling on the merits of public entry
 - Public entities have a “respectable position”
 - FCC “minced no words” in “denouncing” policies underlying Missouri law
 - Ten Amici Curiae filed briefs supporting public entry

Implications of Missouri Decision

- Most states currently do not have barriers
- Existing barriers stay in effect -- but need to be read carefully
- Battles before state legislatures and PSC's in 2004
 - FL, GA, IA, LA, NE, PA, UT, VA, WA, WI
- Heated local campaigns (see www.tricitybroadband.com)
 - Lafayette, LA, Philadelphia, Truckee Donner, CA
- “Level Playing Field” efforts
 - Feasibility studies
 - Cost imputations
 - Bond limitations
 - Retail restrictions

Workable Entry – Louisiana SB 877

- Start: “ALEC” Model
 - Riddled with cumbersome barriers
- Process: Real negotiations with stakeholders (Bellsouth/Cox/LUS)
 - Governor locked the parties in a room
- Result: Workable (not perfect) entry rules
 - Achievable standards and workable procedures
- Next step: Battle shifts to PSC

Promises, Promises But Competition Makes It Work

- Verizon gets \$3B to blanket Pennsylvania with 1.5 Mbps by 2015
 - In 1994 Bell Atlantic got \$2.1 billion dollars, for promise of 45Mbps symmetrical speeds to the door throughout the state
 - 20% of the state was to be wired by 1998, and 50% by 2004.
- SBC -- Project Lightspeed: 6 Mbps down, 1 Mbps up by 2010.
 - This is slower than France and Japan in 2005.
 - By 2009, average US homes will need bandwidth capacity of 57-72 Mbps, high tech homes will need 100 Mbps -- Jupiter Research
- Significant push only where competition or threat of competition

Conclusion

[W]here a community, or a city...is not satisfied with the service rendered or the rates charged by the private utility, it has the undeniable right as one of its functions of government . . . to set up . . . its own governmentally owned and operated service . . . the very fact that a community can, by vote of the electorate, create a yardstick of its own, will, in most cases, guarantee good service...I might call the right of the people to own and operate their own utility a 'birch rod in the cupboard, to be taken out and used when the child gets beyond the point where more scolding does any good. -- Franklin D. Roosevelt