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Pre-Conference Workshop
Legal Issues Affecting
Community Broadband Services

Jim Baller
The Baller Herbst Law Group, PC
Washington, D.C.
(202) 833-5300

Overview

- ✍ Structure of Communications Laws
- ✍ Authority Issues
- ✍ Anticompetitive Practices of Incumbents
- ✍ Headline Issues
- ✍ Right of Way Issues
- ✍ Poles Attachments
- ✍ Closing Thoughts

Structure of Communications Laws

- ✍ Federal v. state v. local
- ✍ Key definitions: “Telecommunications service”
v. “cable service” v. “information service”
- ✍ Wireline v. wireless v. satellite
- ✍ Effects of convergence, Internet, wireless

Authority to Provide Services

- ✍ Federal laws encourage, do not authorize
- ✍ Need state and local authority
- ✍ Service-by-service analysis
- ✍ Explicit and implicit measures
- ✍ Dillon Rule v. Home Rule
- ✍ Procedures to implement authority

Federal Ban 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)

State Barriers

- ✍ Most states expressly authorize public entry or allow Home Rule choice
- ✍ Explicit barriers – AR, MO, NV, NE, TN, TX, VA
- ✍ Implicit barriers – FL, MN, SC, UT, VA, WA
- ✍ Recent battles – IA, OH, OR, PA, VA, WA, WI

Leading Cases

- ✍ Early cases – Glasgow, Paragould, Niceville, Morganton, Schulkyll Haven, Tacoma
- ✍ “Any entity” cases – Abilene, Hawarden, MEAG, Bristol (telecom), Missouri,* Lincoln Electric*
- ✍ Other cases – Gainesville, Reedsburg/Sun Prairie, Bristol (cable), Pacific PUD, Spencer

Ten Century-Old Objections and Answers

1. As a matter of principle, localities shouldn't compete with the private sector

- Localities only compete if public demands it
- Fill service gaps or offer better services/rates
- Economic/community development goals
- Currently, emphasizing FTTH/B, which will not be available in most locations for years

Objections and Answers

2. Regulators shouldn't compete with entities they regulate

- Localities don't regulate telecom providers
- ISPs not regulated at all
- Cable regulation subject to federal standards and often master cable ordinances
- Limited discretion in ROW management – non-discriminatory/competitively neutral

Objections and Answers

3. Localities don't pay taxes

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

Objections and Answers

4. Localities can use tax-favored financing
 - Tax-favored financing often unavailable or overrated
 - 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
 - Localities are careful to avoid this
 - Arm's length loans are not cross subsidies
 - Private entities routinely cross-subsidize products, markets

Objections and Answers

6. Public involvement raises First Amendment concerns

- Public involvement adds 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

Objections and Answers

7. Public communications projects often fail
 - This is flatly untrue (see TriCities website)
 - Industry “studies” are seriously flawed
 - Success means different things to public and private sectors (economic development v. shareholder profits)
 - APPA projects

Objections and Answers

8. Local officials are lazy, incompetent, inexperienced
 - Century of stellar performance
 - Communications not unduly complex
 - Public power utilities already operating communications systems
 - Technical assistance available where needed

Objections and Answers

9. Local governments have unfair access to poles, ducts, conduits, ROW, linesmen, etc.
 - These are FAIR advantages, as long as the locality allocates costs appropriately
 - Major communications providers have similar or greater advantages

Objections and Answers

10. Localities should not enter into highly risky ventures, especially since private sector is on brink of rolling out ultra high speed services
 - Risk of doing nothing
 - Risks are lower for public power communities than for private sector
 - Private sector will not roll out super high speed services to most communities in the near future, if at all

Anticompetitive Practices

- ✍ Anticompetitive practices
 - Predatory pricing and rate discrimination
 - Denial of access to content
 - Threats to suppliers, contractors
 - Denial of advertising
 - Etc.
- ✍ Scottsboro coalition
- ✍ Other APPA activities
- ✍ NATOA initiative

Headline Issues

- ✍ FCC classification of Internet services
- ✍ FCC Triennial Review of UNEs
- ✍ Powerline broadband
- ✍ WiFi
- ✍ Homeland Security
- ✍ Privacy
- ✍ Spectrum management

Public Rights of Way

State and local government authority -- Nothing in this section affects the authority of a State or local government to **manage** the public rights-of-way or to require **fair and reasonable compensation** from telecommunications providers, on a **competitively neutral and nondiscriminatory basis**, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

Telecommunications Act, 47 U.S.C. 253(c)

Public Rights of Way – Key Issues

- ✍ Local governments under attack for allegedly excessive ROW management practices, fees
- ✍ At stake: ability of localities to manage precious local assets, obtain fair return for community
- ✍ Local government associations important political allies for public power utilities
- ✍ Industry tries to connect ROW issues to community broadband initiatives

Pole Attachments

- ✍ Telecommunications Act -- access and rate caps for cable and telecommunications providers
- ✍ Governments, coops and railroads exempt
- ✍ Highly restrictive FCC requirements – often cited as benchmarks by attachers
- ✍ Courts have upheld most FCC rulings
- ✍ Rate pressure on public power utilities
- ✍ Additional concerns when become municipals providers of communications services

Closing Thoughts

- ✍ Cable and telecom providers becoming larger, less responsive to local concerns
- ✍ Rates keep rising, quality deteriorating
- ✍ Industry focuses on larger markets
- ✍ Greater recognition of importance of local involvement, but no consensus on role
- ✍ Threat of “level playing field” laws
- ✍ Competitive issues – FTTP, WiFi, Powerline
- ✍ Need for better communication, emphasis on national, regional approaches