



Municipal Broadband: The Legal, Business and Political Landscape

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Overview

- Status of Community Broadband
- Why Interest Has Exploded
- What Proponents Are Doing
- What Opponents Are Doing
- Ten False Charges About Community Broadband
- Some Thoughts About the Future



Status of Community Broadband

- Tremendous surge of interest across US
 - both large and small communities
 - whether or not operate own utilities
- APPA statistics – www.APPAnet.org
- FTTH Council – www.FTTHCouncil.org
- WiFi and other wireless applications



Why Interest Has Grown Dramatically

- Vehicle to meet critical community goals
 - Economic development
 - Educational and occupational opportunity
 - Regional and global competitiveness
 - Urban core revitalization
 - Affordable modern health care
 - Reduced congestion via telecommuting
 - Fewer adverse environmental impacts
 - High quality of life



More Reasons For Growth of Interest

- Hard times for private-sector CLECs and overbuilders
- Economic and other woes of many incumbents (e.g., Adelphia, Charter, Qwest)
- Continuing consolidation of giant incumbents
 - less responsiveness to local needs
 - constantly rising rates with no end in sight
 - inconsistent customer service (at best)



Still More Reasons ...

- Growing number of models of success
- Emergence of simple and inexpensive technologies where fiber infeasible (e.g., WiFi, satellite)
- Major victories in state barrier-to-entry litigation (e.g., *Bristol*, *Missouri*, *Lincoln Electric*)
- Generally sympathetic media coverage
- Increasing recognition that DSL and cable modem service inadequate to meet future needs



Cable Modems and DSL – Big Deal!

“It is important to note here that the 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.**”

Office of Technology Policy, U.S. Department of Commerce, *Understanding Broadband Demand: A Review of Critical Issues*, at 6 (Sept. 2002)

Bandwidth Comparisons

64Kbps Phone Line



128Kbps ISDN



3Mbps DSL



600Kbps DSL



1.544Mbps T1



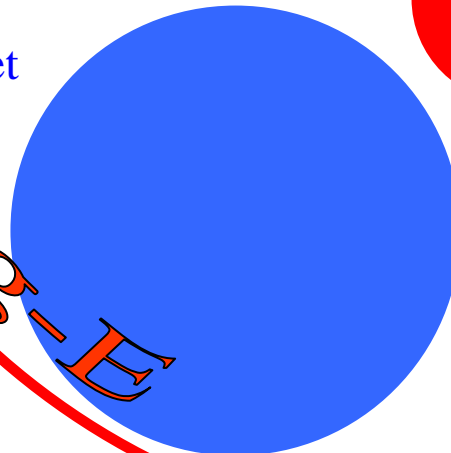
3.7Mbps MPEG-2
CBR VHS Quality
Video Stream



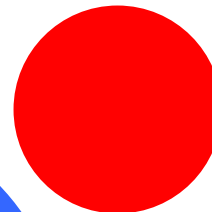
10Mbps Ethernet



100Mbps Ethernet



20Mbps MPEG-2 CBR
HDTV Quality Video
Stream



Work at home

Educational &
Medical
Applications



What Proponents Are Doing

- Constructing fiber, WiFi and other networks
- Involvement models of all kinds
- Sharing experiences, resources to combat state legislation, misinformation by incumbents
- Forming non-traditional alliances (e.g., FTTH Council)
- Focusing on *Missouri* case before Supreme Court



What Opponents Are Doing

- Seeking more state barriers and administrative rulings
- Mounting fierce opposition at local level
- Bringing protracted, costly lawsuits
- Engaging in anti-competitive conduct
 - Predatory pricing
 - Discriminatory “winback” programs
 - Denial of access to critical content
 - Refusals to deal with suppliers, contractors
 - Refusals to carry advertising
 - Numerous other “dirty tricks”



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



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