

SPIEGEL &
MCDIARMID
LLP

Connecting America's Public Sector
to the Broadband Future

FEDERAL TELECOM AND CABLE POLICY IN IP TRANSITION

by Tillman L. Lay

TATOA Annual Conference
Seabrook, Texas

October 25, 2013

1333 New Hampshire Avenue, NW
Washington, DC 20036

www.spiegelmc.com

202.879.4022
tim.lay@spiegelmc.com



BROADBAND

A Bit of History

A. TECHNOLOGY

1. Pre-IP.

Telecommunications

- ▶ Historically, mostly landline, but wireless, too.
- ▶ Switched.
- ▶ Two-way, mostly point-to-point.
- ▶ Pure information transport as directed by the user.

Broadcasting

- ▶ Wireless.
- ▶ One-way, point-to-multi-point.
- ▶ Content controlled by facility owner.

Cable

- ▶ Landline.
- ▶ Unswitched.
- ▶ One-way, point-to-multi-point.
- ▶ Originally, just local TV re-transmission, but as satellite programming grew, content came under control by cable operator.



BROADBAND

A Bit of History

A. TECHNOLOGY (cont'd)

2. IP.

- ▶ Landline & wireless.
- ▶ Unswitched.
- ▶ Two-way, can be point-to-point, point-to-multi-point, multi-point-to-multi-point, and multi-point-to-point.
- ▶ Can be pure transport, but content can also be controlled or generated by facility owner.
- ▶ In other words, an IP-based network can perform telecommunications, broadcasting & cable functions.
- ▶ IP is packet-based, meaning the bits that make up a single message may traverse different geographic routes to reach the same destination.
- ▶ Packets, and thus messages, can be prioritized.



BROADBAND

A Bit of History

B. REGULATION.

1. Pre-IP.

Telecommunications

- ▶ Common carrier regulation – Duty to serve all at reasonable rates and on not unreasonably discriminatory terms and conditions.
- ▶ Interstate service regulated by FCC.
- ▶ Intrastate service regulated by the states.

Broadcasting

- ▶ Enjoys 1st Amendment protection.
- ▶ No rate regulation.
- ▶ Exclusive federal “public interest” licensing and regulation.

Cable

- ▶ Enjoys some 1st Amendment protection.
- ▶ Mixed broadcast/ common carrier regulation, with a strong lean toward broadcast model.
- ▶ Some capacity set aside obligations: Broadcast must-carry, PEG and commercial leased access.
- ▶ Mixed federal/state-local regulation, but based more on physical location of system, not end-to-end nature of the communications traffic.



BROADBAND

A Bit of History

B. REGULATION. (cont'd)

2. IP.

- ▶ This is the multi-billion dollar question: Historical regulation is service function-based (voice, data, video), but in an IP world, service functions can be non network-based applications. The common denominator is an IP-based transport network.
- ▶ Prior FCC decisions arguably suggest many IP-based services are inherently interstate “information services,” which could mean preemptive federal deregulation.
- ▶ Some states have already preemptively deregulated IP-based services.
- ▶ The IP “cable service” question.
- ▶ What is VOIP? What is OTT video (OVD)?



BROADBAND

Regulatory Implications

A. CONSTITUTIONAL IMPLICATIONS.

- ▶ If IP network providers are treated as non-common carriers entitled to broadcaster/cable-like 1st Amendment protection—
 - ❑ Does that place them beyond the reach of most forms of rate and service obligation regulation, including any Congressional legislative action?
 - ❑ Does it mean the end of pure common carrier information transport services as we have known them for over a century?
 - ❑ Would it leave providers free to refuse to serve and/or to block or discriminate at will (subject only to antitrust and generally applicable consumer protection laws)?



BROADBAND

Regulatory Implications

B. RATES & SERVICE OBLIGATIONS.

1. Whether IP networks' pure "information transport" functions should be separated and regulated differently than their proprietary content, cable/broadcast-like functions?
2. If so, how?
3. Or should we just treat IP networks like grocery stores?



BROADBAND

Regulatory Implications

C. FEDERAL/STATE/LOCAL JURISDICTION ALLOCATION.

1. Can, and if so, should any IP network rate or service regulation be separated into interstate and intrastate components?
2. Should regulatory responsibility be allocated by subject matter?
 - ❑ E.g., FCC regulates tech standards, and any “open Internet” and USF obligations, while states/locals regulate end-user customer service and consumer protection?
 - ❑ Other possible allocations.
 - ❑ What about PEG?



BROADBAND

Regulatory Implications

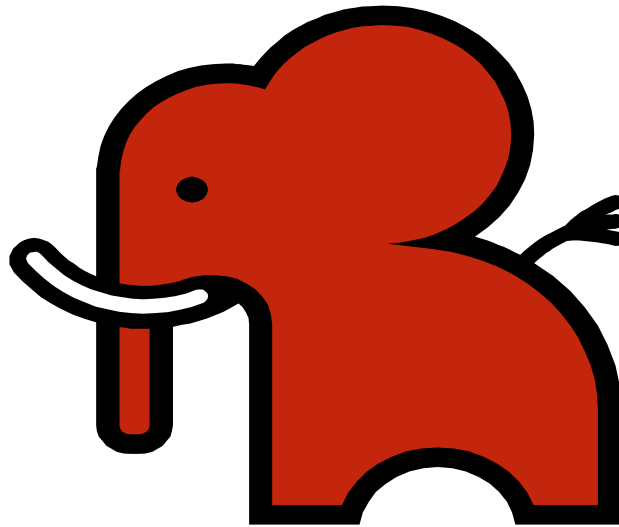
C. FEDERAL/STATE/LOCAL JURISDICTION ALLOCATION.

3. Many will argue any IP network regulation should be exclusively federal.
 - ❑ And unless several state laws prohibiting state IP regulation are repealed, federal/FCC may be the only potentially effective IP regulatory option left.
 - ❑ Possible exception: State laws, like Texas', that reach ROW-using "video service providers," including IP-based ones like AT&T U-verse.

BROADBAND

The Bright Red Elephant in the Room

The D.C. Circuit Open Internet appeal
(*Verizon v. FCC*).





BROADBAND

Local Oversight and Authority

- A. These are not what I mean by “rate and service regulation”:
- ▶ ROW compensation and management.
 - ▶ Taxation.
 - ▶ Local land use and zoning.
- B. IP network regulatory status and IP service classification should have no effect on these state and local powers, but that may not turn out to be the case.
1. Federal preemption.
 - ITFA, DGSTFA and the like.
 - 2012 MCTRJCA § 6409 preemption (wireless collocation by right).
 - Section 253 or 332(c)(7) (or IP analogue) preemption?
 2. State law preemption or limitations on local authority.



BROADBAND

Questions?

Questions?

Tillman L. Lay

SPIEGEL & MCDIARMID LLP

1333 New Hampshire Avenue, NW
Washington, DC 20036

202.879.4022

tim.lay@spiegelmc.com

www.spiegelmc.com

**SPIEGEL &
MCDIARMID**
LLP