



The Evolution of Regulatory Jurisdiction

LSI Seminar - Internet Enabled Television
June 15, 2007


Howard J. Symons
hjsymons@mintz.com

Overview

- The Old World - Cable Service
- Strange Interlude - IPTV
- The New World - Video Service
- When Worlds Collide - "Internet Video"

Cable Service


- Federal Communications Act - Title VI
- Establishes regulatory framework for "cable operators" providing "cable service" over a "cable system"
- "Cable service" means the *one-way* transmission to subscribers of video programming or other programming service, and subscriber interaction, if any, which is required for the *selection or use* of such video programming or other programming service. 47 U.S.C. § 522(6)
- Cable modem service is not a cable service
 - *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002), *aff'd sub nom. Brand X Internet Servs. v. FCC*, 545 U.S. 967, 125 S. Ct. 2688 (2005)



Subscriber Interaction

- H. Rep. No. 98-934 (1984)
 - *"The Committee intends that the interaction permitted in a cable service shall be that required for the retrieval of information from among a specific number of options or categories delineated by the cable operator or the programming service provider."*
 - *"[A] cable service may not include 'active' information services such as at-home shopping and banking."*
- H. Conf. Rep. 104-458 (1996)
 - *"The conferees intend the [addition of 'or use'] to reflect the evolution of cable to include interactive services such as game channels and information services made available to subscribers by the cable operator, as well as enhanced services."*


MINTZ LEVIN COHN FERRIS GLOUSKY AND POPEO P



Other Programming Service

- "Other programming service" means information that a cable operator makes available to all subscribers generally. 47 U.S.C. § 522(14)
- H. Rep. No. 98-934 (1984)
 - *"If information transmitted on a cable system is made available only to an individual subscriber or to a discrete group of subscribers, the transmission of this information is not a cable service. . . [,but] [i]nformation that is of interest or use to only a particular class of customers may still be . . . a cable service as long as it is made generally available to all subscribers."*
 - *"In general, services providing subscribers with the capacity to engage in transactions or to store, transform, forward, manipulate, or otherwise process information or data would not be cable services."*


MINTZ LEVIN COHN FERRIS GLOUSKY AND POPEO P



Cable Operator Requirements

- State or local franchise
- "Must carry" and retransmission consent
- Basic tier rate regulation
- Franchise fees
- Nondiscrimination and buildout
- Public access and leased access channels
- V-chip and "parental control" device
- Program access
- Program carriage
- Retail navigation devices


MINTZ LEVIN COHN FERRIS GLOUSKY AND POPEO P



MVPD

- “Multichannel video programming distributor” means a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming. 47 U.S.C. § 522(13)


MINTZ LEVIN COHN FERRIS GLOUSKY AND POPEO P



IPTV

- IP-based
- Two-way (?)
- Information service rather than cable service
- “Information service” means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . .” 47 U.S.C. § 153(20)
- *IP-Enabled Services*, NPRM, 19 FCC Rcd 4863 (FCC 2004)


MINTZ LEVIN COHN FERRIS GLOUSKY AND POPEO P



IPTV Requirements

- NO State or local franchise
- NO “Must carry”
- NO Basic tier rate regulation
- NO Franchise fees
- NO Nondiscrimination and buildout
- NO Public access and leased access channels
- NO V-chip and “parental control” device
- Retransmission consent
- Program access and program carriage
- Retail navigation devices


MINTZ LEVIN COHN FERRIS GLOUSKY AND POPEO P



Connecticut

- *Investigation of the Terms and Conditions Under Which Video Products May Be Offered by Connecticut's Incumbent Local Exchange Carriers*, Docket No. 05-06-12 (June 7, 2006)
 - *"In essence, the Department finds that SBC's planned IPTV service is merely another form of data stream transmitted like data over the Internet, and as such it is not subject to legacy cable franchising requirements."*
- *OCC v. SNET & DPUC*, Case No. 3:06cv1106 (JBA) (D. Conn., filed July 19, 2006)
 - *"[AT&T's] service will be nearly identical to . . . cable service from a subscriber perspective, with the same television channels (ABC, CNN, ESPN, etc.) and similar features to those available from cable operators today."*


MINTZ LEVIN COHN FERRIS GLOUSKY AND POPEO P



"IP" TV?

- *Phone-to-Phone IP Telephony Service*, 9 FCC Rcd 7457 (FCC 2004)
 - *"We clarify, therefore, that AT&T's [IP telephony service] constitutes a telecommunications service . . . We are not persuaded by arguments that AT&T's specific service is an information service due to its future potential to provide enhanced functionality."*
- "Cable system" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service . . ."
- Switched video
- IP cable service

MINTZ LEVIN COHN FERRIS GLOUSKY AND POPEO P



Video Service

- Wireline multichannel video service provided by an entity that is not a cable operator
- Subject to state franchising
- TX, IN, CA, MI, MO, FL, KS, CT, IA
- "Video service" means video programming provided through facilities located at least in part in the public rights-of-way without regard to delivery technology, including internet protocol technology, *but not* video programming provided solely as part of, and via, a service that enables users to access content, information, electronic mail, or other services offered over the public Internet.


MINTZ LEVIN COHN FERRIS GLOUSKY AND POPEO P



Video Service Provider Requirements

- Streamlined state franchise
- NO "Must carry"
- NO Basic tier rate regulation
- Franchise fees
- Nondiscrimination
- NO (or limited) buildout
- Public access channels
- NO leased access channels
- NO V-chip and "parental control" device
- Retransmission consent
- Program access and program carriage
- Retail navigation devices


MINTZ LEVIN COHN FERRIS GLOUSKY AND POPEO P



Internet Video

- True web-based video
- Online service?
- Video programming?
 - *Internet Ventures, Inc.*, 15 FCC Rcd 3247 (FCC 2000):
 "We might face a different set of issues if IVI . . . proposed to utilize leased access capacity for the provision of a service comprised wholly of video programming available via the Internet. . . . [We need not address arguments questioning whether] video content obtained through the Internet qualifies as 'video programming' . . . and whether ISPs . . . are actually 'providers' of video programming"

MINTZ LEVIN COHN FERRIS GLOUSKY AND POPEO P



Other Possibilities

- Other information service?
- Information service?
- MVPD?
 - *Rights (program access) and responsibilities (retransmission consent, closed captioning, EEO, etc.)*

THE END OF THE WORLD AS WE KNOW IT?

MINTZ LEVIN COHN FERRIS GLOUSKY AND POPEO P



Entertainment Connections, Inc.

- SMATV operator leased landline capacity from Ameritech to distribute signal to multiple buildings
- FCC found that ECI provided “cable service” but was not a “cable operator” because it did not own a significant interest in the transmission network directly or through an affiliate and it did not control and was not responsible for the management or operation of the network. 47 U.S.C. § 522(5).
- “[T]here is absolute separation of ownership between ECI and Ameritech and there is nothing more than the carrier-user relationship between them; . . . Ameritech has no editorial control over the content of ECI’s programming; . . . the facilities primarily used by Ameritech to provide service to ECI were not constructed at ECI’s request; . . . there is capacity to serve several other programming providers.”
- 13 FCC Rcd 14277, *aff’d sub nom. City of Chicago v. FCC*, 199 F3d 424 (7th Cir. 1999)

MINTZ LEVIN COHN FERRIS GLOUSKY AND POPEO P
