



Disclaimer

The comments and opinions expressed during this presentation represent the personal views of the speaker and not necessarily the views of the clients of Bingham McCutchen LLP

BINGHAM McCUTCHEN 1

Overview

- Perspective and Background
- The Past as Prologue: A Brief History of Telecommunications Competition, Business and Regulation
- The Development of Networks and Applications: Telecommunications Competition in the Internet Era: How Broadband Changed Everything
- The Madison River Case – The FCC Responds to “Blocking”
- A Practical Guide to Network Discrimination: Engineering Degree Not Required
- The InSentive to Discriminate
- Regulation vs. Deregulation: The Debate Any Washingtonian Can Learn to Love
- A Snapshot In Time: The Current Discussion

BINGHAM McCUTCHEN 2

Status of the Debate: Why Now

- 1. Increasing Concentration of Network Provider Assets (loops and backbone)
- 2. Migration of "Everything over IP"
- 3. Deregulation of IP Networks
- 4. Threats to Traditional Core Revenues of Network Providers
- 5. Network Provider Needs to Avoid becoming a "Commodity" and Accompanying Price Erosion
- 6. Move of Network Providers into "Content" and Applications
- 7. Concern that Network Providers will have the Economic Incentive to Discriminate (physically or economically) and Favor their Own Applications

BINGHAM MCCUTCHEEN

3

History: Telecommunications Competition

- Ma Bell
- RBOCs
- Competition
 - IXC's (now absorbed into RBOCs)
 - CLECs (most bankrupt or consolidated)
 - Independent ISPs (consolidation or bankrupt)
 - VoIP (patent issues, viability questioned)
- Cable
- Lack of true broadband competition

BINGHAM MCCUTCHEEN

4

History: Telecommunications Business

- **1957 RBOC Revenue Components**
 - Local Service
- **1997 RBOC Revenue Components**
 - Equipment
 - Local Service
 - Access Services (**)
 - Reciprocal Compensation (-)
 - Collocation/Special Access/Other
- **2007 RBOC Revenue Components**
 - Internet/Data (**)
 - Local Service (-)
 - "Long Distance" (-)
 - Reciprocal Compensation (0)
 - Wireless (+)
 - Access (+)

What's Next: Video?

Question: How Do The RBOCs Replace Lost "Access Revenue"

BINGHAM MCCUTCHEEN

5

History: Telecommunications Regulation

- Title II (Sections 201 and 202)
 - No Unreasonable Discrimination
 - "Reasonable"
 - Hush-A-Phone
- Title I "Regulation"
- Deregulation

BINGHAM MCCUTCHEEN

6

How Broadband Changed Everything

- 1997-2007
 - Applications created powerful demand for the broadband Internet.
 - Offered by cable, rbocs, third parties
 - Voice and Video applications that compete with the "core" offerings of the incumbent providers
 - Broadband is "always on"; Key for "voice" networks
 - Network providers consider combination of broadband and applications a competitive "Trojan horse" (revisit economic slide)
 - Competition and Innovation undreamed of by incumbent network providers: Youtube, Slingbox, Vonage, Skype, iTunes, RealNetworks, Xbox online gaming
- Will Network Providers Become Toll Collectors for Applications on the Information Highway?
 - Example: iTunes; Joost
- Are they "double dipping" if network provider already collects from end-user customer
 - Quote from Ed Whitacre

BINGHAM MCCUTCHEEN

7

Madison River

- Allegations of "port" Blocking
- FCC "Consent Decree" (Feb 2005)
 - Madison River agreed not to block DSL users from accessing VoIP services, without admitting violation of FCC rules
- Reliance Upon Title II
 - Subsequent FCC order reclassifying DSL as an information service limits the precedential value of this decree

BINGHAM MCCUTCHEEN

8

Other Potential Forms of Discrimination

- Content Impairment (intentional blocking, or degrading)
- Tiering (Pricing, QOS) ("access to ports for a price")
- Discrimination (Offering favorable access/bandwidth, QOS, Pricing to affiliated entity)
- QOS for 3rd Party VOIP at Extra Cost while "free" if you use Incumbent Service
- But is "unreasonable" Discrimination Really an Issue *post Madison River*?

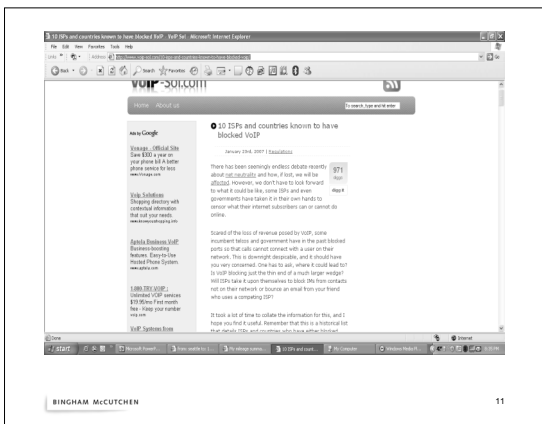
BINGHAM McCUTCHEM

9



BINGHAM McCUTCHEM

10



BINGHAM McCUTCHEM

11

Status of The Debate

- Debate is teed up in Congress and at the FCC and FTC
 - What **conduct** is impermissible?
 - Who's **rights** are protected? (consumers, providers, both)
 - Who **decides**? (Courts, FCC, FTC)
 - What is form of **action** (Complaint, Lawsuit, Other).
- What can be done to facilitate **broadband deployment and investment** without sacrificing principals of reasonable non-discrimination
- How Do Lawmakers address issues of "reasonable" discrimination, such as "**network management**"
- Non-Discrimination Protections Without Title II Regulation or should we **retain Title II regulation** over Networks and fewer obligations upon "applications"

Status of the Debate

- FCC's 4 Principals (unenforceable)
 - Access to lawful **content** of their choice
 - Access to **applications** subject to needs of law enforcement
 - Attach legal **devices** that do not harm the network
 - Consumers entitled to **competition** among network providers, application providers, and content providers.
- SBC/AT&T and Verizon/MCI Merger Conditions included Network Neutrality controls for a limited period of time
 - Consideration of 5th principal in context of merger – **non-discrimination** among similar applications
- Skype Petition
- International Developments – UAE, Mexico,

William Wilhelm
William.Wilhelm@bingham.com
202-373-6027 (t)