

THE BALLER HERBST LAW GROUP

A PROFESSIONAL CORPORATION

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JIM BALLER'S

ADDRESS

AT

ESME VOS'S FIRST MUNIWIRELESS CONFERENCE

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SAN FRANCISCO, CALIFORNIA

Thank you very much, Esme. The great physicist Sir Isaac Newton once said, "If I have seen a little farther, it is by standing on the shoulders of giants." In the world of municipal wireless, you are the giant on whose shoulders we all stand. I am therefore deeply honored that you have introduced me as "the foremost legal expert on U.S. public broadband matters."

My colleagues and friends –

Esme asked me to lead off today's presentations with a brief overview of the main challenges that municipal wireless projects face today. I'm afraid that's a lot more territory than I can cover in just a few minutes.

Over the last decade, I have been involved in dozens of public communications projects, large and small. Nearly every one has been like a huge Rubik's cube, with each twist and turn creating complex interactions among the various technological, financial, commercial, political, legal, and other issues involved. As a result, I'm not sure that generalizations would be very helpful, and some might actually be harmful.

So, instead of talking about project-specific challenges, let me address a bigger threat, one that could undermine everything that you and I are trying to achieve in community broadband. As you have probably guessed, I'm referring to state or federal barriers to local government participation in the deployment of advanced communications services and capabilities to all Americans as rapidly as possible.

The threat of barriers to public broadband initiatives overshadows any differences that we may have among ourselves over the best technologies, the best public involvement models, the best methods of financing, or the best of anything else.

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It is a challenge that we not only can meet, but that we must meet, if America's localities are to survive and thrive as places to live, learn, work, and play in the new Information Age that is emerging with breathtaking speed around the globe.

One of the great legacies that we have as Americans is the ability to take matters into our own hands, through our local governments, when we believe that private providers of any product or service are unwilling or unable to meet our needs on our own timetable rather than theirs.

For example, at the turn of the last century, more than 3000 localities created their own electric utilities when private power companies chose to serve lucrative population centers and leave most of rural and low-income urban America behind. Localities that did so generally survived and thrived, while many others that chose to wait for the private sector to get around to them withered and became ghost towns.

Similarly, with the expiration in 1894 of the patents that had allowed the Bell system to withhold telephone service from much of America, local cooperatives and independents drove a vast expansion of telephone service across America in the next two decades.

Again, in the 1950s and 1960s, localities gave birth to the cable industry by creating their own "CATV" systems – that is, "Community Antenna Television" systems.

In our time, localities have led the way in broadband. Municipalities have been at the forefront of America's fiber-to-the-home deployments. A municipality – the City of Manassas, Virginia – launched the first city-wide broadband-over-powerline system. Now, localities large and small are also pushing hard to make wireless broadband accessible and affordable to all Americans.

To put today's debate about barriers to public entry into context, let me begin by taking you back to the debates that preceded the enactment of the Telecommunications Act of 1996. Anticipating that incumbent providers would seek to thwart entry by local governments, we persuaded Congress to include in the Act a provision that would protect all public and private entities from state barriers to entry.

That provision was Section 253(a), which prohibited states from enacting any measure that would prohibit, or have the effect of prohibiting, the ability of "any entity" to provide any interstate or intrastate telecommunications service.

Unfortunately, in the first case that came before the Federal Communications Commission (FCC), the FCC found that Congress had not made its intent in Section 253(a) clear enough to authorize the agency to preempt state barriers to municipal entry. One federal court of appeals upheld the Commission, but later, several other courts disagreed, and finally the Supreme Court of the United States agreed to resolve the dispute.

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In *Nixon v. Missouri Municipal League*, the Supreme Court ruled that “any entity” had to be read narrowly as covering only private entities. Applying its traditional rule of statutory construction that federal statutes cannot be read to preempt a fundamental state power unless Congress makes it its intent unmistakable clear, the Court found that the term “any entity” in Section 253(a) did not meet that high standard of clarity. The Court made clear, however, that it was not ruling on the merits of municipal entry.

In fact, the Court pointedly observed that the municipalities had “at the very least, a respectable position” that keeping them out of telecommunications “flouts the public interest.” The Court also underscored that the FCC itself had “condemned” the policies behind state barriers to public entry and that numerous *amici curiae* had filed briefs supporting the municipalities.

Still, the bottom line was that we lost. Instead of confirming that Congress had given us a powerful federal weapon with which to attack all new and existing state barriers to public entry, the Court left us with no choice but to continue to fight state barriers one at a time, state by state.

Then, something unexpected happened. As Shakespeare said in *As You Like It*, “Sweet are the uses of adversity.” The adversity in our case was losing the battle of Pennsylvania. The sweet use was our ability to turn that loss into victories in most other states.

Specifically, in late 2004, Verizon pushed through the Pennsylvania legislature a bill that gave it a right of first refusal over municipal broadband initiatives. In essence, the Verizon bill did the reverse of what Sir Isaac Newton was talking about – it gave a giant the right to stand on the shoulders of Pennsylvania’s small communities, limiting their ability to see their way to a better future.

Here’s how the bill worked: If a municipality wanted to build a wireless broadband network, alone or with private-sector partners, it had to go to Verizon first and specify the data speed that the municipality wanted. Verizon then had two months to agree to provide that data speed, and if it did agree, it had a total of fourteen months to follow through. If Verizon met these requirements, the municipal project could not go forward.

Notably, data speed was the only relevant criterion under the statute. No other factor could be considered – not price to consumers, wireless mobility, upload and download symmetry, quality of service, efficiency, interactivity with public safety or homeland security systems, relationship with economic development or digital equity programs, or anything else.

The bill was originally intended to preclude Pennsylvania communities from following the Borough of Kutztown’s lead in developing their own fiber-to-the-home systems. As it happens, however, late in the legislative process, the City of Philadelphia realized that the bill would also stop the City’s city-wide wireless project in its tracks.

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Suddenly, things got really interesting. For one thing, the Pennsylvania Governor was Edward Rendell, a former mayor of Philadelphia, whose political support in Philadelphia had been crucial to his rise to the governorship. Thus, a veto was now a serious possibility.

The timing was also important. By the time that the Pennsylvania legislature passed its bill late in 2004, the other state legislatures had already ended their sessions. That meant that journalists interested in state barriers to public entry had only Pennsylvania to write about. Furthermore, with interest in municipal broadband growing rapidly worldwide and incumbents becoming increasingly antagonistic, the Philadelphia story also caught the attention of the mainstream media internationally.

Then the story took a dramatic turn – just before the deadline for Governor Rendell to sign or veto the bill, Verizon wrote Philadelphia a letter stating that it would not exercise its right of first refusal to block the City's wireless initiative. That let Governor Rendell off the hook, and he signed the bill, leaving all other localities in Pennsylvania in the lurch.

The day that Governor Rendell signed HB 30, I turned to my partners and predicted that the passage of this repugnant law would turn out to be the tipping point for public broadband, just as the sinking of the Lusitania had been the tipping point for America's entry into World War I. If I had thought of it at the time, I would also have shared a quote from Shakespeare's *Cymbeline*, Act IV, Scene 3, "Be cheerful; wipe thine eyes. Some falls are means the happier to arise."

Sure enough, almost immediately, fear and revulsion spread across America, like a wave circulating around a stadium. Before long, the cry "No more Pennsylvanias" was echoing from every corner of the country.

Before Pennsylvania, only three major national associations consistently battled state barriers to public entry – the American Public Power Association, the Fiber to the Home Council, and the National Association of Telecommunications Officers and Advisors. Now, many more national associations raised public broadband a high-priority, must-win issue.

Similarly, the major consumer groups stepped forward, including the coalition of groups, of which Harold Feld was one of the leaders, that had amazingly forced Congress to overrule the FCC's media ownership rules a couple of years ago. These organizations now saw public broadband as just as important for freedom of choice and localism as the battle over media ownership.

Perhaps most important, high-tech giants such as Intel and Dell, and several important high-tech business groups such as the High Tech Broadband Coalition, publicly announced their support for public broadband and informed local choice.

These companies and groups recognized that municipalities are an important strategic asset for America, that municipalities have a critical role to play in helping our country to recover its competitive edge, and that state barriers to public broadband initiatives are bad for the communities involved, bad for the private sector, and bad for America as a whole.

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As a result, when the incumbents proposed new barriers to public broadband in fourteen states – Colorado, Florida, Illinois, Indiana, Iowa, Louisiana, Michigan, Nebraska, Ohio, Oregon, Nebraska, Tennessee, Texas, Virginia, and West Virginia – we were able to mount a far more intensive and effective response than anyone could have imagined before Pennsylvania – including the incumbents.

Among other things, we tracked developments across the country in near real time on the Baller Herbst website and through our daily email list. The coalition spurred countless phone calls, emails, faxes and visits to key legislators. We generated dozens of handouts, white papers, economic studies, testimony, news articles, rebuttals to industry-sponsored papers, and point-by-point answers to industry misrepresentations about supposed municipal failures.

We also traced back to the incumbents the funding surreptitiously invested in “Astroturf” (artificial grass roots) organizations and supposedly unbiased “experts,” whom Glenn Fleishman colorfully labeled “sock puppets.”

We also had two other important things going for us. First, America continued to sink in global broadband standing. Now, we have not only plunged to 16th worldwide in per capita broadband penetration, but we are also rapidly falling behind the leading nations in availability of high-bandwidth capacity, cost per unit of bandwidth, and growth of broadband usage. While Americans have a broad range of political views and ideologies, we all share a common sense of embarrassment and concern about these figures.

Second, we drew important support from an increasingly friendly world press – including Esme’s always timely and trenchant MuniWireless reports. Beginning in January 2005 with USA TODAY’s extensive report and favorable editorial on the Lafayette fiber project in Louisiana, we received sympathetic pieces in such mainstream media as the Wall Street Journal, the Washington Post, the Christian Science Monitor, Foreign Affairs, and many others.

If you would like copies of the materials I’ve just mentioned, and much additional relevant information, please visit the community broadband page of our website, www.baller.com.

In the end, of the twelve states that have completed their sessions for 2005, only Nebraska enacted a substantial new barrier to public entry, and it already had a significant barrier on its books. So, we started the year with about 14 state barriers to public involvement in the communications field, of which about half applied to broadband, and so far, that is still pretty much where are today.

Now let’s shift to Washington. In late May 2005, a few days after SBC failed to get its home legislature in Texas to pass the restrictions on community broadband that SBC had sought, Representative Pete Sessions (R-TX) introduced a bill in the U.S. House of Representatives, H.R. 2726, that would severely restrict all forms of public involvement in the communications field.

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Thanks to Esme, Ben Scott of Free Press, Glenn Fleishman of WiFi Networking News, and others, the press quickly learned that Sessions had worked for SBC for sixteen years, that his wife is currently an executive of SBC, and that the Sessions family has substantial stock options in SBC. As a result, the Sessions bill quickly became associated with SBC, and no other members of Congress rushed forward to embrace it – at least publicly.

A few weeks later, Senators Frank Lautenberg (D-NJ) and John McCain (R-AZ) introduced a terrific bill in the Senate, S.1294. This bill, which every one of us should support, would protect public entities from state barriers to entry, while at the same time providing appropriate safeguards to protect the private sector.

Next, Senator John Ensign (R-NV) included an anti-municipal measure as part of a wide-ranging telecom deregulation bill, S.1504. Senator McCain, explaining that he supported the overall deregulatory purposes of the Ensign bill but opposed its anti-municipal measure, signed on as a co-sponsor. That may be confusing to some, but Senator McCain is not alone in viewing public broadband as an important element of an overall policy of deregulation.

In the House of Representatives, staffers for Representatives Joe Barton (R-TX), John Dingell (D-MI), Fred Upton (R-MI), Ed Markey (D-MA), and Chip Pickering (R-FL) have recently circulated a draft telecom reform bill that contains a favorable public broadband provision, Section 409.

Section 409 is not perfect, but with one exception, we can live with it. The exception is a placeholder for a provision on cross subsidization. As a result, we're working to get Section 409 included, as is, in the bill that emerges from the House Commerce Committee, without a cross-subsidization provision.

In the months ahead, the staff draft, with various revisions, is likely to be introduced as a formal bill, and when it does, it will become the House's leading telecom reform vehicle. In the Senate, Senator Ted Stevens (R-AK) is working on a comprehensive bill that is likely to be the main Senate telecom reform measure. We hope that the Stevens bill will incorporate the text of Lautenberg-McCain or contain other favorable municipal broadband language, but it is too soon to tell.

Given the complexity of telecom reform, it is likely to take at least a couple of years for the House and Senate to work through all the issues and arrive at a broad consensus. It is highly unlikely that Congress will deal municipal broadband as a stand-alone issue.

With federal legislation unlikely for some time, the fight over municipal broadband is likely to shift back to the states, beginning in January 2006. We hope that our successes so far this year will deter at least some state legislators from introducing similar new measures. Realistically, however, we know that we'll have to fight at least some new battles.

Whatever happens, we'll be ready, and we'll greatly need your help.

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Let me close with a call for humility. We can all feel good about the progress that the municipal wireless movement has made over the last couple of years, but it is important for us to keep this in perspective.

Wireless is extremely important in many ways, particularly in communities in which other options are infeasible, but it currently offers far less bandwidth capacity than the leading nations are reaching today. To be a leader in the emerging global economy, America is not only going to need a lot more municipal wireless networks, but also a lot more municipal fiber networks, and eventually wireless and fiber systems working in tandem.

Yet, as a nation, we're nowhere near being able to achieve that goal. We don't even have a national broadband plan. Instead, what we have today is the Federal Communications Commission doing all that it can to hand our future over to giant incumbent cable and telephone companies.

We know that's wrongheaded, and we can't let it happen. To be successful, we have to work together in harmony. No matter what technology we may favor – be it fiber, wireless, BPL, or something else – no matter what involvement model we like best – be it infrastructure leasing, wholesale-only service, retail service, or some combination – we have got to put our differences aside and work together to ensure that our communities retain the right to decide their own destinies for themselves. That is the true legacy that we Americans must preserve and protect.

So, let us feel good about what we've done so far, but more important, let us recognize that we have much more to do. The odds and the big bucks are against us, but I'm confident that we'll succeed. We have to.

Thanks for the opportunity to share these thoughts with you, and I hope you enjoy the rest of the conference.