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89TH ANNUAL CONFERENCE
ORLANDO, FLORIDA
INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION

Telecom Toolkit

Critical Issues for Local Governments

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About Us

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Moderator



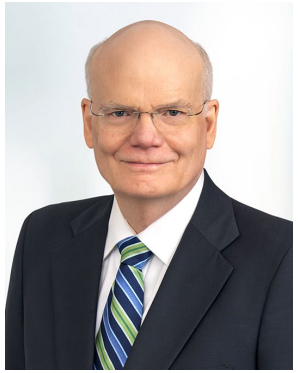
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Agenda

1. Introduction
2. Hill and FCC Outlook
3. Recent FCC Consumer Protection Initiatives
4. The Future of Franchising and ROW Fees
5. Leveraging Municipal Rights of Way for Fiber Networks
6. Wireless Permitting Pitfalls & Negotiating with Wireless Industry Tenants
7. AI at the FCC
8. Litigation Updates
9. Q&A

Introduction

The Need for the toolkit to include flexibility.

White House







Harris/Watz Agenda

Responding to Court Decisions:

- Chevron Standard,
- Net Neutrality and
- Universal Service Fund
  - ACP

Assisting NTIA administer $50B in BEAD and Digital Equity funds

Preserve FCC/NTIA Membership?

Trump/Vance Agenda

Embracing Court Decisions:

- Chevron Standard,
- Net Neutrality

Responding to Court Decisions:

- Universal Service Fund
  - ACP

Populating FCC/NTIA/Justice

- Manage $50B in BEAD and Digital Equity funds

Senate Commerce

Leadership likely remains the same, but titles may or may not change depending on which party is in the majority.

Wild Card is Sen Thune (R-SD) who may be leading candidate to replace Sen McConnell (R-KY) as GOP leader.

Biggest Issues:

- Oversight of Broadband Infrastructure
- Respond to Court threats to USF (and possible answer to ACP funding.)
- Confirmation hearings for new or extended leaders at FCC/NTIA and other agencies under the Committee's jurisdiction.
- Serve as "Saucer" to House legislation

Committee Breakdown



Maria Cantwell
(D-WA)
Chairman



Ted Cruz
(R-TX)
Ranking Member



Ben Lujan
(D-NM)
Chairman



John Thune
(R-SD)
Ranking Member

House
Who will be the next Speaker?
What work was carried over from 118th Congress
House Commerce





New Chair regardless of outcome due to McMorris Rodgers retirement.

New Player (Matsui) at the Subcommittee level.

Historically bipartisan on most issues.

Biggest Issues:

- Addressing potential loss of USF and actual loss of ACP
- FCC Oversight
- Oversight of Broadband Infrastructure /NTIA
- Potential Preemption of Local Government



Chairman
Rep. Cathy McMorris Rodgers
R-WA-05



Ranking Member
Rep. Frank Pallone
D-NJ-06



Bob Latta
(R-OH-05)
Chairman



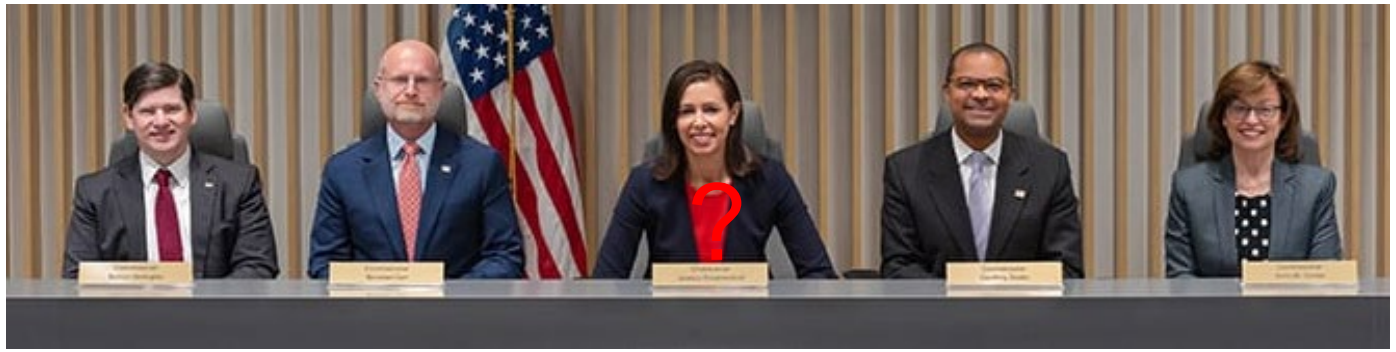
Doris Matsui
(D-CA-07)
Ranking Member

Federal Communications Commission

Biggest Issues:

Regardless of election

- Addressing USF Threat –
- Determining Streamers' status
- Democrats win
- Consumer Protections (See Tim's presentation)
- Hopefully 621 Order
- Responding to Courts
- Republicans win
- Overturning Democratic Initiatives
- Further Preemption of Local authority.



	Comm. Nathan Simington	Comm. Brendan Carr	Chair Jessica Rosenworcel	Comm. Geoffrey Starks	Comm. Anna Gomez
Term Expires in June of:	2024	2028	2025	2027	2026
Actual Departure Required on Jan 3 of:	2026	2030	2027	2029	2028

Recent FCC Consumer Protection Initiatives

Tillman Lay

Cable/Video/MVPD Initiatives

- Report & Order, All-In Pricing for Cable and DBS TV Service, MB DN 23-203
  - Requires cable & DBS providers to state, in promo materials and subscribers' bills as a single line item, the aggregate price of video service (including broadcast & regional sports fees but excluding franchise fees & taxes). Permits supplemental itemized explanation of elements included in "all-in" price.
  - Rules found at 47 CFR Section 310.
  - NATOA & other local govt interests filed a petition for clarification/recon asking FCC to remove statement in R&O that PEG fees are franchise fees (petition is pending).

Cable/Video/MVPD Initiatives (cont'd)

- NPRM, Cable & DBS Provider Billing Practices, DN 23-405
  - Proposes to prohibit cable & DBS providers from imposing on subscribers early termination fees (ETFs) and billing cycle fees (BCFs) on subscribers
  - Given the FCC's shared jurisdiction with LFAs over cable customer service issues, NPRM sought input from LFAs on (1) their experiences with subscriber complaints and enforcement mechanisms, and (2) how enforcement mechanisms at the local level could inform & be coordinated with enforcement at the federal level
  - Also sought comment on enforcement of an ETF or BCF ban on bundled cable & non-cable services, and the impact of the FCC's mixed-use rule on state or LFA enforcement

Cable/Video/MVPD Initiatives (cont'd)

- Local Station Blackout-Related Proceedings
  - NPRM, Rebates for Undelivered Video Programming During Blackouts, DN 24-20
    - Proposes to require cable and DBS providers to give subscribers rebates when their subscribers are deprived of video programming due to failed retrans consent or other video programming carriage negotiations.
  - NPRM, Reporting Requirements for TV Station Blackouts, DN 23-437
    - Proposes requiring MVPDs to notify the FCC of local TV station blackouts arising from retrans consent disputes

Broadband Initiatives

- Report & Order & FNPRM, Broadband Labeling Requirements, DN
- Adopts rules that –
  - Require ISPs to display, at point of sale, labels disclosing info about broadband prices, intro rates, data allowances and broadband speeds, with links to info on network management practices, privacy policies and the (now defunct) FCC's ACP
  - Set forth requirements for uniform broadband label format & display location to facilitate comparison shopping

Broadband Initiatives (cont'd)

- R&O, Preventing Digital Discrimination, DN 22-69
  - Defines "digital discrimination" to encompass both disparate treatment & disparate impact (with the latter being the major issue in pending court appeals of the R&O)
  - Prohibits digital discrimination
  - Amends FCC's existing enforcement rules to authorize investigations regarding alleged digital discrimination
  - Revises the FCC's informal consumer complaint process to facilitate digital discrimination complaints
  - Adopts model policies and best practices for state, local and Tribal gov'ts to support their efforts to combat digital discrimination

General FCC Consumer Protection Initiatives

- Draft NPRM on Bulk Billing
  - Chairwoman Rosenworcel has announced the circulation of a draft NPRM on bulk billing arrangements to the other Commissioners
  - Proposes to prohibit bulk billing arrangements by which tenants in MDUs are required to pay for broadband, cable and/or satellite service provided by a specific provider (with whom the MDU owner has entered into a bulk billing arrangement)
  - Tradeoff: Bulk billing does lower the price of service per MDU unit, but also renders competition within the MDU impractical
  - Letter from 51 mayors urged FCC to abandon the proposal

General FCC Consumer Protection Initiatives (cont'd)

- Chairwoman Rosenworcel has circulated a draft NOI to other Commissioners on ways to ensure consumers have adequate and efficient access to customer service resources when contacting their phone, cable and broadband providers
- Among the topics:
  - Access to live CSRs
  - Simple service cancellation
  - Establishing uniform requirements regarding installations, service outages and service calls
  - Special considerations for persons with disabilities

The Future of Franchising and ROW Fees

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The Problem – Sharply Declining Local Cable and Other Right-of-Way Fee Revenues

- Causes –
  - Cable cord-cutting (cable service revenues shrink, while broadband service revenues grow and now represent well over 50% of cable operators' revenue, and that percentage is rapidly growing)
  - FCC's 2019 Section 621 Order
  - Unsettled status of video streaming services under federal and state law
  - FCC's 2018 Small Cell Order
  - Unsettled status of permissible non-small cell broadband/telecom ROW compensation under federal and state law

FCC Section 621 Order - Sixth Circuit Review

- The Sixth Circuit reviewed, and partially overturned the Federal Communications Commission's Section 621 Third Report and Order, 34 FCC Rcd. 6844 (2019), in *City of Eugene, Oregon v. Federal Communications Commission*, 998 F.3d 701 (6th Cir. 2021), *cert. den.* 142 S.Ct. 1109 (2022).
  - In-Kind Rule: Upheld the rule that cable operators can request an offset for their 'in-kind' franchise obligations against the 5 percent franchise fee, *but only at marginal cost* (rejecting fair market value as in the FCC rule). 47 CFR §76.42(a). In many cases, marginal cost may be near zero.
  - Mixed-Use Rule, on the one hand: Court questioned the rule as written, concluding that LFAs *may* regulate an operator's provision of non-cable service unless inconsistent with the Cable Act, 47 CFR § 76.43.
  - Mixed-Use Rule, on the other: Court ruled that a Cable Act franchise gives a cable operator the right to use the ROW to provide information services (including broadband) free from any generally applicable ROW compensation requirement for non-cable services – in other words, a "free ride" in the ROW for cable operators' information services that broadband providers who are not also cable operators don't enjoy.

Unresolved Cable Act Issues

- Key Act provisions:
  - Definitions:
    - Cable service is "(A) the one-way transmission to subscribers of (i) **video programming**, or (ii) **other programming service**, and (B) **subscriber interaction**, if any, which is required **for the selection or use of** such video programming or other programming service." 47 USC 522(6) (emphasis added).
    - Video programming is "programming provided by, or generally considered to be comparable to programming provided by, a television broadcast station." 47 USC 522(20).
    - Other programming service is "information that a cable operator makes available to all subscribers generally." 47 USC 522(14).

Unresolved Cable Act Issues (cont'd)

- Key Act provisions (cont.):
  - Scope of franchise fee revenue base: "5 percent of [a] cable operator's gross revenues derived … from the operation of the cable system to provide cable services." 47 USC 542(b). Note that the base is not necessarily limited to "cable service" revenue. If an operator receives other revenue as a result of its operation of the system to provide cable service, the revenue counts.

  - Cable Act also permits fees or taxes (not exceeding 5%) on cable and non-cable services (including video streaming services) provided by non-cable operators over a cable system:
    - "Nothing in [the Cable Act] shall be construed to limit any authority of a franchising authority to impose a tax, fee, or other assessment of any kind **on any person (other than a cable operator)** with respect to **cable service or other communications service** provided by such person over a cable system for which charges are assessed to subscribers but not received by the cable operator." 47 U.S.C. § 542(h)(1) (emphasis added).

Video Streaming Services

- Whether video streaming services are a “cable service” is an unresolved question. There are good arguments both ways. Do not agree to language in your cable franchise agreement excluding such services. Better to leave the agreement silent on the issue, with language saying that your gross revenue definition and franchise fee is to be construed to be the maximum permitted by the Cable Act.
- As noted, even if video streaming services are not a “cable service” and revenue from them can’t be reached in your cable franchise agreement, the Cable Act does not prohibit a local fee or tax, not to exceed 5%, directly on video streaming service providers that are not cable operators. State or local law may or may not permit such a tax, but the Cable Act does not bar such a tax.

State Video Franchising Laws

- Background –
  - Between 2005 and 2015, over 20 states enacted laws giving the state (rather than local governments) franchising authority over cable operators and "video service providers." Generally, the laws require cable operators and video service providers to (1) obtain a franchise from the state, and (2) pay a 5% franchise fee to local governments.
  - "Video service" is typically defined to include video programming delivered in IP, but excludes video provided over the "public internet."
  - "Video service provider" is typically defined as a provider of video service that "uses" the ROW.

Municipal lawsuits against video streaming services

- Beginning in 2021, lawsuits have been filed by municipalities in at least 13 states against Netflix and Hulu (and sometimes Disney), the leading OTT service providers.
- The lawsuits claim that OTT providers (1) provide “video service” and “use” local ROW to provide that service (via other parties’ broadband networks in the ROW) , and therefore (2) must obtain a state video franchise, and (3) owe the municipalities the 5% video franchise fee.

Municipal lawsuits against video streaming services (cont'd)

- Key issues in these cases:
  - Whether local governments have a right of action under the state video franchise law to sue video streaming service providers for failing to obtain a state video service franchise.
  - Whether video streaming services are a "video service" or instead fall within the "public internet" exception to the "video service" definition.
  - Whether video streaming service providers "use" the ROW when they own no ROW facilities but instead ride over the ROW facilities of broadband service providers.

Municipal lawsuits against video streaming services (cont'd)

- Municipalities have not fared well, largely losing at the (predominantly state) trial court level.
- Four federal circuits have ruled that state video franchising laws do not provide local governments with a right of action against OTTs for fees:
  - *City of Reno v. Netflix and Hulu*, 52 F.4th 874 (9th Cir. 2022) (Nevada video franchising law).
  - *City of Ashdown v. Netflix and Hulu*, 52 F.4th 1025 (8th Cir. 2022) (Arkansas video franchising law).
  - *City of East St. Louis, Ill. v. Netflix, Inc.*, et al. (7th Cir. Oct. 13, 2023) (Illinois franchising law).
  - *Borough of Longpoint v. Netflix*, No. 22-2139 (3rd Cir. Feb. 29, 2024) (New Jersey franchising law).

New State Video Streaming Laws and Other Limiting State Laws

- At least nine states have enacted amendments to their state video franchising laws explicitly excluding video streaming services from the “video service” definition (and thus the franchise fee base).
  - Louisiana: HB276 (2022)
  - Arkansas: HB 1338 (2023)
  - Tennessee: SB 456 (2023)
  - Ohio: HB 66 (2023)
  - Illinois: HB 3808 (2023)
  - Arizona: AB 1179 (2022)
  - Kansas: SB 144 (2023)
  - Oklahoma: SB 460 (2024)
  - Nevada: AB 146 (2023)
- Similar bills can be expected to be introduced in most, if not all, states with video franchising laws.
- Texas SB 1152 - “pay for one, get one free” law.

Maine LD 1967: A Different Approach

- Became law without the Governor's signature on February 18, 2024.
- Extends Maine's cable franchise and fee obligations to all "video service providers," which includes entities that provide access to any "video, audio or computer-generated or computer-augmented entertainment" and own facilities located in public ROW that are used to provide those services, irrespective of technology.
  - Includes a common carrier that operators a cable television system but does not include Netflix, CMRS providers and internet access providers that have no ROW facilities.
  - Comcast opposes because any streaming service provided by Comcast or its affiliates (like Peacock) would be subject to franchise fees, PEG support fees, and other legacy cable franchising authority regulation, but other streaming services would not.
  - Whether law is consistent with FCC's 2019 621Order and *City of Eugene v FCC* is unclear.
  - Comcast and NBC Universal allege that Maine's law violates the First Amendment by imposing a tax that singles out facilities-based content creators.

Maine LD 1967 (cont.)

- Provider responsible for all PEG costs shown by franchising authority "to be reasonably necessary in light of community needs and interest for the capture, processing and delivery to the provider" of PEG access channels within the franchising authority, including "upgrade costs of signal quality improvement"
  - "A video service provider may not offset any such costs through the payment of [franchise fees] but may recover such costs from subscribers to the extent permitted by applicable law and as negotiated with the municipality."
  - As long as PEG costs are capital costs under the Act, this is permitted by the federal Cable Act.
- Requires all video service providers (including streamers) to retransmit PEG signals.

Maine LD 1967 (cont.)

- Includes a number of “best practices” cable provisions.
  - Authorizes the use of franchise fees for any purpose; sets interest for late payments at 12%; defines failure to pay as a material breach; requires every payment to be accompanied by a verified financial statement; clarifies and eases PEG access to electronic program guides.
  - Not as great: sets time limits on challenging the accuracy of a franchise fee payment (36 months if the required financial statement is provided).
- Makes a violation of the cable provisions a violation of the Maine Unfair Trade Practices Act.
- Provides processes to resolve disputes between municipalities and video service providers at the state PUC.
- Increases build out requirements by mandating any new, renewed or amended franchise to impose a minimum density of 15 residences per linear strand mile.

Cable Franchise Renewal Issues

- Marginal cost issues relating to PEG transport and I-Nets.
- Living with an expired franchise.
- Franchise renewals vs. extensions.
- Key questions: Do you like your current franchise? What would you like to improve? What is crucial to preserve? What is at risk of losing in light of the FCC's Order and *Eugene v. FCC?*

Cable Franchise Renewal Issues (cont'd)

- Unilateral Operator Termination Issue: Some franchisees (typically former telephone companies but also smaller cable operators) seek to include in their renewal franchise a provision giving them the unilateral right to terminate their cable franchise on notice to the local government. The reason: They wish to respond to cord-cutting by abandoning the offering of traditional cable service and instead move former cable customers to broadband services, encouraging them to rely on streaming services for their video service needs. Presents difficult issues:
  - Potential loss of fees and PEG.

Cable Franchise Renewal Issues (cont'd)

- Potential fight over whether offering of video streaming services is a "cable service."
- If operator seeking to exit the franchise is not the incumbent, exit could trigger "competitive equity" provision in incumbent's franchise.

“Fair and Reasonable” Non-Cable ROW Compensation and Other Wireline Section 253 Issues

- 47 USC 253(a) preempts any state or local requirement that prohibits or has the effect of prohibiting the ability of any entity to provide telecommunications service. But 47 USC 253(c) has a safe harbor for nondiscriminatory “fair and reasonable” right-of-way compensation.
- Largely in the context of disputes over fees imposed on wireline facilities, courts have divided over what level of fees are so excessive as to be prohibitive within the meaning of Section 253(a), as well as what Section 253(c)’s “fair and reasonable” compensation means. Some have ruled that gross revenue-based and other forms of rent-based fees qualify as “fair and reasonable” compensation, while others have ruled that compensation must be based on the amount of ROW used. Still others have concluded that fees should be limited to cost recovery, while others have stated that both “prohibition” and “fair and reasonable compensation” are fact-specific.

“Fair and Reasonable” Non-Cable ROW Compensation and Other Wireline Section 253 Issues (cont’d)

- In its 2018 *Small Cell Order*, the FCC ruled that, in the case of small wireless facilities placed in the ROW, any ROW fee imposed on those facilities that is above costs is a “prohibition” within the meaning of Section 253(a) and also not “fair and reasonable” within the meaning of Section 253(c). The Ninth Circuit affirmed those rulings in *Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020).
- Whether the FCC’s ruling that ROW fees must be limited to costs applies outside the context of small cells, and specifically, to wireline ROW fees, is unsettled. In August, however, a federal court of appeals addressed the issue. In upholding the City of Santa Fe’s 2% ROW fee on landline telecom and broadband networks, the Tenth Circuit rejected a wireline broadband provider’s argument that the *Small Cell Order*’s reasoning concerning cost-based fees should be extended to landline networks. *NMSurf v. Webber*, 2023 WL 5217859 (10th Cir. filed Aug. 15, 2023). Although the case is far from the last word on this question, it is a helpful start for local governments.

Potential Impact of FCC's *Open Internet Order*

- Last spring, FCC voted to adopt the *Open Internet Order*, which, among other things, reclassified broadband internet access service (BIAS) from an "information service" to a "telecommunications service". Media attention has been focused on reinstatement of "net neutrality," but consequences are broader.
- 47 U.S.C. § 253, provides:
  - "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate **telecommunications service**."
- Under the *Open Internet Order*, BIAS would qualify as an interstate telecommunications service.
  - BIAS is "a mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all internet endpoints…" 47 C.F.R. § 8.1(b).
- Sixth Circuit's 2021 *Eugene* opinion relied on BIAS's then-current status as an "information service" and specifically declined to reach the issue as to whether the outcome would be different if broadband were a "telecommunications service".

Potential Impact of FCC's *Open Internet Order* (cont'd)

- Multiple appeals of the FCC's Open Internet Order were filed in several different circuits, but all were subsequently transferred to and consolidated in the Sixth Circuit. *In re MCP No. 185, Federal Communications Commission, in the Matter of Safeguarding and Securing the Open Internet, Report and Order, and Order on Reconsideration,* No. 24-7000 (6th Cir.).
- On August 1, the Sixth Circuit granted industry petitioners' motion to stay the *Open Internet Order* pending appeal, finding (among other things) that petitioners as likely to succeed on the merits under the "major questions" doctrine, so at least until the appeal is resolved, BIAS will remain an "information service," not a "telecommunications service."
- The court also set an expedited briefing schedule and scheduled oral argument for October 31 in Cincinnati.

Leveraging Municipal Rights of Way for Fiber Networks

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Typical Fiber Optic Cable Deployments

- Types of uses:
  - Internet backbone
  - Fiber to the home or premise
  - Wireless facility backhaul
- Authority to use ROW and poles depends on regulatory status of the entity deploying the fiber which is tied to the *service* being offered
- Gray area for ROW authority of entities deploying fiber-only and not offering services or only proposing to offer broadband service

Bringing Broadband to Your Community Through Fiber

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- What is “Broadband Service”
  - The Federal Communications Commission on March 14 voted that the definition of broadband was outdated, increasing the threshold from 25Mbps download and 3Mbps upload speed to 100/20Mbps.
- Four main options:
  - Construct Your Own Network
  - Partner with ISP for Build-Out
  - Acquiring Dark Fiber from Third Parties
  - Hybrid Approach Combing All of the Above

So, You're Going To Build Your Own Network?

- Funding – Federal Sources Are Limited.
- Build-Out – Utilizing underground conduit (directional bore/cable plow/micro and traditional trenching) or aerial deployment via utility poles
- Regulatory Compliance – Federal law has 15+ separate reporting and registration requirements (Don't forget State law!)
- Operation and Management Concerns
- Special Municipal Ownership Special Issues (Rate setting, contracting in public)

So, You're Going to Partner With a Private Party/ISP?

- Funding
- Procurement limitations (don't forget state and local law requirements)
- P3 & Indefeasible Right of Use Agreements
- Ownership and Control of Network
- In-Kind Benefits (free internet etc)
- Conflicts Later (Who owns your customers, IP and trademarks?)
- Dark Fiber Leasing

Wireless Permitting Pitfalls

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Local Authority Over Siting Wireless Facilities

- State and federal law generally recognize and preserve local zoning authority over the placement, construction and modification of wireless communications facilities.
- However, various state laws, federal laws, and Federal Communications Commission (FCC) regulations impose significant constraints on the exercise of local authority. Principal among them is the federal Telecommunications Act of 1996 (47 U.S.C. 332(c)(7)) which provides that:
  - Local action on applications must to be within a reasonable period of time;
  - Local regulations and placement decisions may not prohibit or effectively prohibit the provision of personal wireless services;
  - Denials must be in writing and supported by substantial evidence;
  - Any consideration of RF emissions in siting decisions is prohibited if applicant meets FCC standards;
  - Local agencies may not unreasonably discriminate among providers of functionally equivalent services; and
  - Wireless applicants are entitled to expedited appeals to court.

Practical Considerations

- Local governments generally know about the FCC shot clocks but sometimes still get caught with denials because they lack a clear or timely process for issuing denial decisions
- Denials must be issued in in writing, based on substantial evidence, and denial and reasons must be issued contemporaneously.
  - How does your City deny applications? – in meeting minutes, in a resolution, is there a subsequent denial notice?
  - What is the timeline for appeals?
  - If you enter into tolling agreements, is the tolling long enough to issue the denial in writing?
- While there is no formal notification/delivery requirement under federal law today, it is advisable to deliver timely written denial to avoid shot clock challenges.
  - The Supreme Court has noted that in the TCA there is 'no verb at all to describe the conveying of information from a locality to an applicant,' and thus no notification burden on municipalities." *GTE Mobilnet of California Ltd. P'ship v. Carmel-by-the-Sea, No. 22-CV-00347-NC, 2022 WL 2357005, at *4 (N.D. Cal. June 30, 2022)(quoting T-Mobile S., LLC v. City of Roswell, Ga., 574 U.S. 293, 295 (2015)).*

Forget Small Cells – Let's Focus On EFRs

- Don't fall in trap of allowing applicants to ask if their application qualifies as an EFR **before** they submit the complete application
- 2014 Order is clear: Applicant requests, you decide
  - In pre-filing discussions
    - Be wary of questions like, can I apply for EFR based on this scope of work?
    - Be clear that the applicant has not yet applied
  - Proper evaluation requires an examination of all of the factors in 47 C.F.R. § 1.6100(b)(7)

EFR Processing Pitfalls cont'd

- Know what materials are needed as part of a complete application vs. what can be examined later in a different permit application. Be wary of:
  - Applicant claiming its lease granting an easement for access and utilities to place fiber within existing conduit satisfies EFR requirements
  - Plans that don't show any utilities
    - These approaches mischaracterize EFR requirements and do not allow proper evaluation
    - To qualify as EFR, applicant must show there is no excavation or deployment outside the existing site/easements

EFRs Processing Pitfalls cont'd

- Denials – "[I]f the reviewing State or municipality finds that Section 6409(a) does not apply (because, for example, it proposes a substantial change), we provide that the presumptively reasonable timeframe under Section 332(c)(7) will start to run from the issuance of the State's or municipality's decision that Section 6409(a) does not apply." *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 29 FCC Rcd. 12865, 12958 ¶ 220 (2014).
- If application does not qualify as an EFR:
  - *Make sure the denial is in writing, based on substantial evidence* (non-EFR case: *Cellco P'ship d/b/a Verizon Wireless v. City of Milwaukee*, No. 23-CV-1581-BHL, 2024 WL 329001 (E.D. Wis. Jan. 29, 2024) ("The City did not give Verizon even a basic explanation for the denials that was tied to anything in the record. This failure makes any judicial review (beyond mere "rubber-stamp" review) virtually impossible."))
  - *Note any appeal rights*
  - *Identify the new applicable FCC shot clock*
  - *Include an NOI for any missing items in the "new" application to stop the clock*

Strategies for Negotiating with Wireless Tenants

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Selecting the Initial Lease or License Document

- Control the drafting process
  - Carrier template agreements are incredibly one-sided
  - Revision to level the playing field is time intensive
- Wireless carriers can and will take advantage of naïve property owners
- Developing and using a standard form saves time and helps avoid overlooking issues

Negotiating Key Business Terms

- Revenue Share for Subsequent Collocations:
  - Carefully define who and what is subject to the revenue share
  - Greater of: 50% of rent of Flat Escalating Floor ~$14,000/year
- Termination Rights:
  - Default – Carriers will limit landlord termination to uncured default only.
  - Seek additional termination rights
- Holdover:
  - Make sure to account for carrier staying in place after expiration of term and require increased rent.

Choose Your Management Role

- Modifications
  - Carriers will request free reign to modify, add to, and remove facilities.
  - Consider requiring consent to modifications deviating from original approved plan
- Access
  - Carriers will request 24/7 access
  - Consider requiring advance notice before access or using other methods to track access

Signing Bonus and Expenses Reimbursement

- Request a Signing Bonus
- Request reimbursement for your expenses to draft and prepare the lease or license.
- Request reimbursement for signing and preparing other documents at carrier's request (e.g. land use entitlement documents; amendments; transfers etc.)
- Consider Deposit Agreement Requirement

Removal & Restoration + Relocation Provisions

- Require removal of all equipment at end of Term with hard deadline (30-60 days) and penalty if missed
- Require restoration to condition prior to deployment, normal wear and tear excepted (including below grade)
- Relocation – Relocations can cost $500k to upwards of $1.5 million. Push cost onto tenant through agreement.

Assignments & Subleases

- Assignments:
  - Carrier will request free transfer right to affiliates
  - Require consent to all other assignments
- Subleases: Landlords should request:
  - Advance consent
  - Revenue share
  - Separate lease/license for expanded ground space

Special Issues – Deployment on Public Structures

<u>Rooftops:</u>

- Protect structural integrity
- Roof Warranty?
- Limit Access – RF Protections & Signage
- Carefully define indemnity obligation
- Access/Construction Time Limits (Protect existing tenants/occupants)

Special Issues – Deployment on Public Structures

<u>Water Tanks/ Reservoirs (Public Entities):</u>

- Try to Avoid
- Consider magnetic mounts
- Require temporary relocation for water tank upgrades at Tenant's cost
- Upcoming CPI Projects
- Conduit and Utility Line Alignment

Special Issues - Selling Your Wireless Leases

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- Numerous tower operators seeking to buy landlord lease rights
  - Either permanently, or for a limited term via easement.
- Typically offer is a fraction of Net Present Value (NPV) of lease payments. Emphasize threat of nonrenewal, certainty of being paid
- May ask for amendments allowing unlimited collocations
- Minor Decrease in Offer Amount for Decreasing Term of Assignment (Perpetual -> 35 yrs)
- Make Sure to Follow Your Procurement Rules – get Competitive Bids.

AI at the FCC

Greg Caffas

AI Political Ad Rulemaking

- FCC released Notice of Proposed Rulemaking on July 25
  - In the Matter of Disclosure and Transparency of Artificial Intelligence-Generated Content in Political Advertisements, MB Docket No. 24-211, FCC 24-74, 89 F.R. 63381
  - Proposed definition of "AI-generated content":
    - "[A]n image, audio, or video that has been generated using computational technology or other machine-based system that depicts an individuals appearance, speech, or conduct, or an event, circumstance, or situation, including, in particular, AI-generated voices that sound like human voices, and AI-generated actors that appear to be human actors."
- References the definition used in October 30, 2023 Executive Order on Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence
  - The term "artificial intelligence" or "AI" has the meaning set forth in 15 U.S.C. 9401(3) and Defense Authorization Act of 2019

AI Political Ad Rulemaking

- The FCC proposes to require both radio and television broadcasters to
  - (1) ask the person or entity seeking to air a political ad whether the ad contains any "AI-generated content" prior to its broadcast; and
  - (2) include disclosures when there is such content in a political ad.
- As FCC's first rulemaking on AI, expect this to see legal challenges.

AI-Generated Robocall Rulemaking

- FCC Released Notice of Proposed Rulemaking and Notice of Inquiry August 8, 2024
  - In the Matter of Implications of Artificial Intelligence Technologies on Protecting Consumers from Unwanted Robocalls and Robotexts, CG Docket No. 23-236, FCC 24-84 (Aug. 8, 2024).
- Big News—Proposes Definition for AI-Generated Calls:
  - "For purposes of identifying the types of calls that would be subject to the new rules proposed below, we propose to define 'AI generated call" as "a call that uses any technology or tool to generate an artificial or prerecorded voice or a text using computational technology or other machine learning, including predictive algorithms, and large language models, to process natural language and produce voice or text content to communicate with a called party over an outbound telephone call.'"

AI Generated Robocall Rulemaking

- Proposed rules add AI to specific consent and disclosure requirements:
  - Callers must disclose that the call or text is AI-generated at the beginning of the communication.
  - Caller must obtain prior consent of recipient that explicitly includes agreement to the use of AI in the call or text.
  - Disclosure must be “clear and conspicuous”
- This is more of a modification than a new requirement;
  - February 8, 2024 Declaratory Ruling found that AI is included in TCPA regulations relating to “Artificial or Prerecorded Voice,” which already imposed similar disclosure and consent requirements
- NOI seeks comments on developing technologies to alert consumers to unwanted robocalls, including AI-generated calls.

Other AI Definitions

- October 30, 2023 Executive Order on Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence
  - The term “artificial intelligence” or “AI” has the meaning set forth in 15 U.S.C. 9401(3): a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments. Artificial intelligence systems use machine- and human-based inputs to perceive real and virtual environments; abstract such perceptions into models through analysis in an automated manner; and use model inference to formulate options for information or action.4

Wireless Siting Case Law Updates

Greg Caffas

Legal Updates and Practical Guidance on Application Processing Pitfalls

- 9th Circuit Rules on Section 6409 Challenge
- Effective Prohibition Claims
  - "Materially Inhibits" vs. "Significant Gap"
- *Loper Bright* overrules *Chevron*
- Remedies for Failure to Timely Act

9th Circuit Appeal of Section 6409 Declaratory Ruling

- *League of California Cities v. FCC*, No. 20-71765 (9th Cir. Sept. 13, 2024)
  - Petitioners challenged FCC's 2020 Declaratory Ruling (Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012, 35 FCC Rcd. 5977 (2020))
  - Declaratory ruling "clarified" rules regarding Eligible Facilities Requests:
    - reduced protections for existing concealment of "non-stealth" facilities, among other industry-favorable interpretations

9th Circuit Appeal of Section 6409 Declaratory Ruling

- Summary of Holdings:
  - Overruled the Commission's misinterpretation of the FCC's Section 6409 rules' concealment provisions—invalidating the FCC's attempt to make conceal mean only "disguise" to the exclusion of "hide";
  - Narrowed FCC ruling re. limit on new equipment cabinets by construing it to mean there is a cumulative limit on the number of cabinets;
  - Upheld the FCC's decision that the 6409 shot clock begins when an applicant both (1) takes the first procedural step that the local jurisdiction requires, and (2) submits written documentation showing that a proposed modification is an eligible facilities request—noting that a locality that wishes its own form to be the first procedural step can adopt such a requirement;
  - Upheld the FCC's interpretation of the height limitation as long as the change does not (1) increase the height of the tower by more than 10%, or (2) place another antenna array more than twenty feet above the nearest existing antenna, whichever is greater;
  - Upheld the FCC's express evidence rule, because it "clarifies what evidence can be used to assert that a concealment element or other condition of siting approval existed at the time of the siting approval, such that a proposed modification would be substantial today," -- perplexingly concluding that the ruling is not retroactive; and
  - Found the FCC cannot end-run the requirements of the Administrative Procedure Act by using a declaratory ruling where a full rulemaking is needed.

Effective Prohibition Claims

Greg Caffas

Evaluating Effective Prohibition Claims

- Has an effective prohibition claim been made?
- What standard applies?
- What types of facilities does *Small Cell Order* standard apply to?
- What evidence is required?

Practical Considerations

- At local level, make sure effective prohibition claim is being raised before addressing it in a decision
  - Industry permitting consultants often use form language in applications that is unclear
  - Members of public often make claims the applicant hasn't shown a gap, etc.
  - BUT: Decisions need to be made first and foremost based on local law findings which may or may not require an effective prohibition showing
- If a claim is being made, address it (when in doubt, assume it is)
- Know your Circuit's standard

“Materially Inhibits” vs. “Significant Gap”

- In 2018 *Small Cell Order*, the FCC rejected the “significant gap/least intrusive means” standard adopted by many Circuit Courts under Section 332(c)(7)(B)(i)(II) as no longer relevant in era of 5G
- Favored its “materially inhibits” standard (in *California Payphone Ass'n*, 12 FCC Rcd. 14191 (1997)) to determine an effective prohibition of service under Sections 253(a) and 332(c)(7)(B)(i)(II):
  - Issue is whether denial “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”
  - Effective prohibition can occur “not only when filling a coverage gap but also when densifying a wireless network, introducing new services or otherwise improving service capabilities.”
  - Materially inhibits standard includes inhibiting a provider from deploying the “performance characteristics” of its choosing.

Effective Prohibition Standard in the Courts

- Ninth Circuit upheld most of the *Small Cell Order* (*City of Portland v. FCC*, 969 F.3d 1020 (9th Cir. 2020)):
  - noting that with respect to the application of "materially inhibits" standard, the FCC's explanation that "5G is different in that it requires rapid, widespread deployment of more facilities" and
  - finding that "[t]he differences in the FCC's new approach are therefore reasonably explained by the differences in 5G technology."
- For other circuits, arguably, under the Hobbs Act, only federal courts of appeal, not district courts, can determine whether the *Small Cell Order* is entitled to deference. (*T-Mobile South v. City of Roswell*, 2023 WL 2563227 (N.D. Ga. March 17, 2023)).
- Current Circuit Status:
  - Materially Inhibits: 1st Circuit (253), 2nd Circuit (253) 3rd Circuit, 5th Circuit (253), 10th Circuit (253), 8th Circuit (253)
  - Significant Gap: 1st Circuit (332), 2nd Circuit (332), 4th Circuit, 6th Circuit (332), 7th Circuit (332), 9th Circuit, 10th Circuit (332)

Second Circuit: Lower Courts Still Using Significant Gap under Sec. 332

- *Crown Castle Fiber, LLC v. Town of Oyster Bay*. Magistrate recommendation (2024 WL 1051171) adopted by Judge (2024 WL 1090305) grants Crown Castle summary judgment on its claims that the Town violated Section 332(c)(7) in failing to grant Crown's applications to install 23 SWFs in the Town's ROW and Section 253 facial challenge to portions of code.
  - Evaluation of denial/effective prohibition under Section 332(c)(7) relies on existing 2nd Circuit precedent in *Sprint Spectrum v. Willo*th, 176 F.3d 630, 639 (2d Cir. 1999) using significant gap std., does not apply *Small Cell Order*'s "materially inhibit" standard.
  - Evaluation of facial challenge to application criteria and fees under Section 253 relies on existing 2nd Circuit precedent in *TCG New York v. White Plains*, 30 F.3d 67 (2002) and MetroPCS v. Mount Vernon, 739 F.Supp.2d 409 (SDNY 2010), using materially inhibits standard

What Evidence is needed under Section 332 Materially Inhibits Standard?

- *Cellco Partnership v. White Deer Township*, 74 F.4th 96 (3rd Cir. 2023). Cites three factors in its analysis before affirming summary judgment in provider's favor:
  - 1st -- Prohibition doesn't need to be complete/insurmountable to "run afoul of" 332.
  - 2nd -- Local gov't action which either imposes unreasonable fees or requires a provider to accept unreasonable costs materially inhibits wireless services.
    - Cites example of imposing gross revenue fee resulting increased costs considered an effective prohibition (*Puerto Rico Tel. Co. v. Municipality Of Guayanilla*, 450 F.3d 9, 17–18 (1st Cir. 2006))
  - 3rd -- The "materially inhibit" standard requires court to consider the totality of the circumstances.
    - Ordinances that give unrestricted right to reject applications or impose extensive delays
    - *White Deer* court interpreted this broadly: "In light of our decision to adopt the 'materially inhibit' standard, not only does "insufficiency in coverage" ordinarily entitle a provider to a variance but so does insufficiency in network capacity, 5G services, or new technology."

What Evidence is needed under Section 332 Materially Inhibits Standard?

- *TowerNorth Dev., LLC v. City of Geneva*, No. 22 C 4151, 2024 WL 621616 (N.D. Ill. Feb. 14, 2024). Denied Plaintiff's motion for summary judgment after examining:
  - Insufficiency of Coverage. Propagation maps showing alleged insufficient coverage w/out underlying data not enough when contested with residents claiming adequate coverage.
  - Alternative Sites. Ruled plaintiff had not sufficiently shown why alternative locations were not available, but noted that "the FCC's 2018 Order rejected any test that requires no alterative sites exist."
  - Other considerations. Here the court considered delays caused by discovery that the site was in a Planned Unit Development that prohibited special uses, including wireless facilities, late in the application process (and who was at fault for not discovering the condition sooner), and concluded that in addressing the City's failure to render a decision within the FCC shot clock period, the "materially inhibit" standard requires court to consider the totality of the circumstances.

Loper Bright overrules *Chevron*

- Supreme Court decided *Loper Bright Enterprises, et. al. v. Raimondo, et. al.* on June 28, 2024, holding that:
  - The Administrative Procedure Act requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and courts may not defer to an agency's statutory interpretation simply because a statute is ambiguous; *Chevron* is overruled.
- What's next? With agency decisions entitled to less deference, parties affected by FCC rulings may be more emboldened to challenge in Court.
  - May impact current challenge of Open Internet Order before 6th Circuit
- Established agency decisions may also be vulnerable.
  - *Loper Bright* says prior decisions are still entitled to *stare decisis* if tests for that are met, but those tests are flexible.
  - Supreme Court's 2019 *PDR Network decision*, which suggested that there may be exceptions to the Hobbs Act's limitations on review of agency decisions, also creates a possible path for challenging prior *Chevron*-based decisions.

Remedies for Failure to Timely Act

Greg Caffas

Failures to Timely Act, Denials and Deemed Granted Remedies

- Appropriate remedy for failure to act is typically an order directing the locality to render a decision, and arguably considered a "harmless error" if decision has been issued.
  - *T-Mobile S., LLC v. City of Roswell*, 574 U.S. 293, 309 (2015) (Alito, concurring) ("[E]ven if a locality has erred, a court must not invalidate the locality's decision if the error was harmless.")
- No federal deemed granted remedy *except for* eligible facilities requests.
  - But check state law remedies.
- Pending federal legislation (HR 3557) would expand deemed granted remedies.
- Be wary that applicants may argue for permit grant as remedy in the face of an untimely *denial*.

When is an Action "Final"?

- Recent Case: *New Cingular Wireless PCS, LLC v. Lane Cnty.*, No. 6:22-CV-01635-MK, 2023 WL 7020126, at *4 (D. Or. Oct. 25, 2023) (appeal filed Feb. 15, 2024).
  - County denied AT&T's application to build a 150-foot tower on the grounds that the County Code prohibits telecommunications towers within 1200 feet of any residential dwelling unless the affected homeowner(s) consent, and none did. AT&T challenged the denial under Sections 332(c)(7) and 253.
  - The County successfully argued that the federal court lacked jurisdiction because the County's decision was a not a "final action" within the meaning of section 332(c)(7) because AT&T failed to exhaust its state law administrative remedy for reviewing the County hearings official's decision denying ATT' application. The court's decision turned on a unique aspect of Oregon law: Under Oregon law, the Land Use Board of Appeals (LUBA) has exclusive jurisdiction to review any local land use decision.
  - Among AT&T's arguments was the claim that awaiting the LUBA appeal process would be inconsistent with Section 332(c)(7)'s requirement that review of local decisions be expedited.
  - Effect of FCC shot clock conflict with local/state procedures to be decided on appeal.

Remedy for Failure to Act

- Absent a deemed granted statutory remedy, courts continue to find the appropriate remedy for a failure to act is to order the locality to issue a decision on an application.
  - *See New Cingular Wireless PCS LLC v. City of Jennings*, No. 2:22-CV-06025, 2023 WL 6209078, at *4 (W.D. La. Sept. 22, 2023) (City ordered to render decision, approval of application was not appropriate remedy)

Practical Considerations

- Local governments generally know about the FCC shot clocks but sometimes still get caught with denials because they lack a clear or timely process for issuing denial decisions
- Denials must be issued in in writing, based on substantial evidence, and denial and reasons must be issued contemporaneously.
  - How does your City deny applications? – in meeting minutes, in a resolution, is there a subsequent denial notice?
  - What is the timeline for appeals?
  - If you enter into tolling agreements, is the tolling long enough to issue the denial in writing?
- While there is no formal notification/delivery requirement under federal law today, it is advisable to deliver timely written denial to avoid shot clock challenges.
  - The Supreme Court has noted that in the TCA there is 'no verb at all to describe the conveying of information from a locality to an applicant,' and thus no notification burden on municipalities." *GTE Mobilnet of California Ltd. P'ship v. Carmel-by-the-Sea, No. 22-CV-00347-NC, 2022 WL 2357005, at *4 (N.D. Cal. June 30, 2022)(quoting T-Mobile S., LLC v. City of Roswell, Ga., 574 U.S. 293, 295 (2015)).*

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