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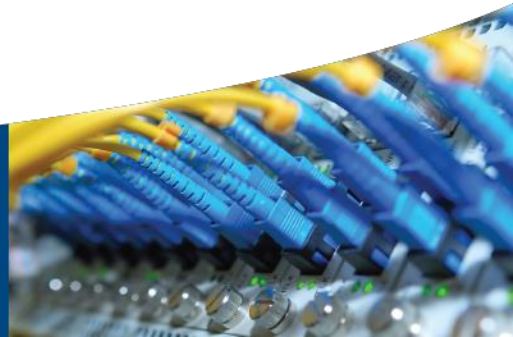
Telecommunications 2016: The Challenges Facing Local Government and its Counsel

IMLA Spring Meeting
Washington DC – April

PRESENTED BY

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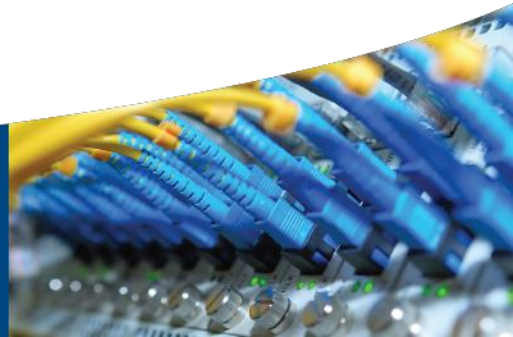
Summary of Key Areas of Activity

- Legislative
  - Internet Tax
  - Mobile Now
    - Dig Once
    - Rewrite of 332(c)(7)
  - FCC Reauthorization
  - Broadband Regulation
  - FCC Confirmation Votes
  - Broader Rewrite of Federal Law?
- The Courts
  - Net Neutrality
  - Section 621
  - Municipal Provision of Services
- FirstNet
- FCC
  - Set Top Boxes,
  - Independent Programmers
  - Universal Service (E-Rate and Lifeline)
  - OTT
    - Fees and carriage
  - Wireless
    - 6409
    - OTARD
  - In Writing
  - Special Access/Business Data
- Local Application of Federal and State Rules
  - Wireless siting
  - Broadband Deployment
  - Franchising
  - Closed Captioning PEG



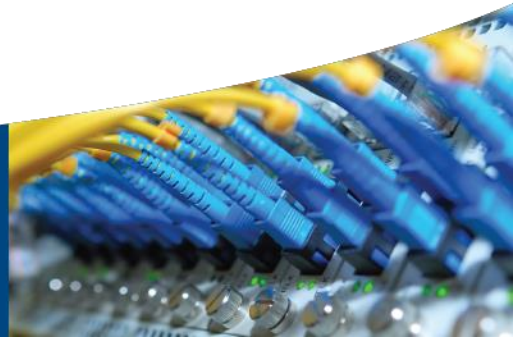
Federal Legislative Actions

- Pending/ Planned Legislation May:
  - Threaten/Enhance Local Revenue Streams,
  - Further Limit Local Authority Over Wireless Siting,
  - Create Potential for New Infrastructure Costs/Regulation
  - Remove Protections Created By FCC Net Neutrality Rules
  - Affect Ability of FCC To Function
    - FCC Reauthorization (S. 2644)
    - FCC Confirmations



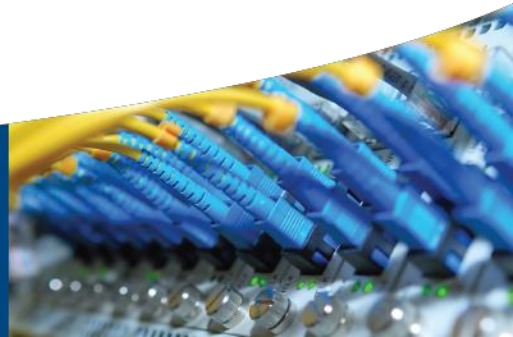
Federal Legislative Actions (cont'd)

- Examples:
  - Permanent Internet Tax Freedom Act (47 U.S.C. § 151 *note*) – became law 2/2016
  - Taxation of Sales of Services/Products Via the Internet (S. 851) or Wireless Services (H.R. 4287)
  - Broadband Regulation
  - Mobile Now (S. 2555)
    - Dig Once
    - Rewrite of 332(c)(7)
- Prospects – 2016 and Beyond



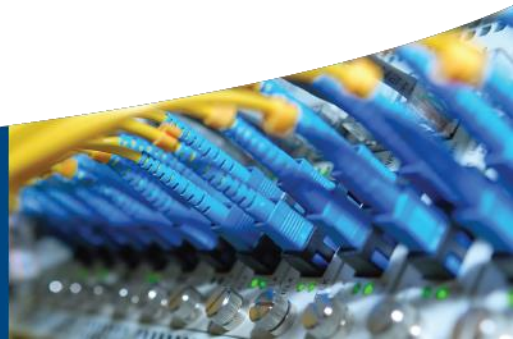
FCC Actions

- Overview: pending proceedings have significant potential impact on consumers and competition; industry consolidation; localities as service buyers; the digital divide and muni broadband provision



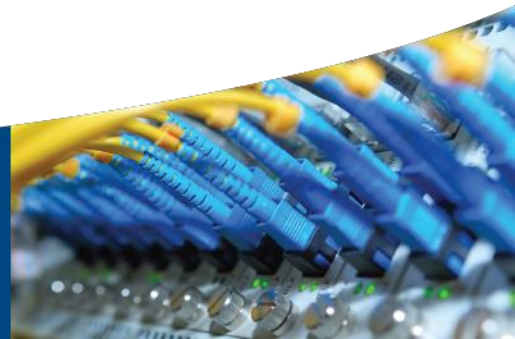
Consumers and Competition

- "Set Top Box" Notice of Proposed Rulemaking: *In the Matter of Expanding Consumers' Video Navigation Choices Commercial Availability of Navigation Devices* MB Docket No. 16-42 CS Docket No. 97-80 (released Feb. 18, 2016)
  - FCC proposes to require cable industry to provide information that would allow third parties to sell fully functional set top boxes, eliminating significant costs associated with equipment rental
  - Highly controversial – industry is seeking from local govs
  - May reduce cable service prices – but adversely affect franchise fees
- Independent Programmers Notice of Inquiry: *In the Matter of Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41 (released Feb. 18, 2016)
  - Asks how FCC should promote independent programming – including PEG
  - PEG/Municipal interests are seeking rights to HD, and to placement on channel guides (particularly important in state franchising states)



"Over the Top" – what rules apply to Internet video?

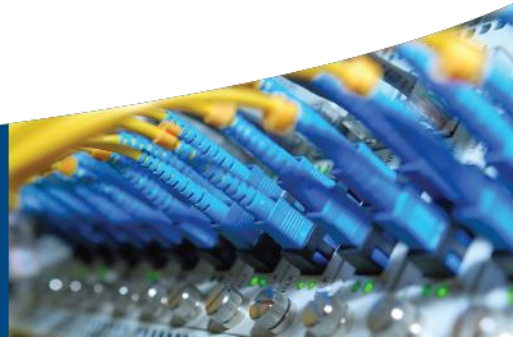
- *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, Docket No. MB 14-261 (when is OTT a video service/cable service)?
- *Petition for the FCC to Enforce Merger Conditions and its Policies*, MB Docket 10-56, GN Docket 14-28 (March 2, 2016)
  - FCC asked to declare Comcast's "Stream" service violates net neutrality ;
  - Comcast argues Stream is a cable service
- Decisions may determine whether cable op video delivered to cable modems is subject to franchise fees



Mergers

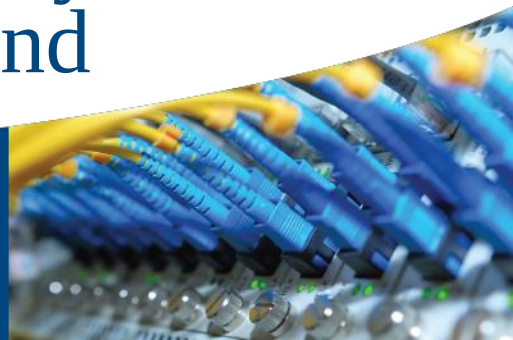
Two major pending mergers:

- Charter/Time Warner (MB Docket 15-149);
- Altice/Cablevision (WC Docket 15-257);
  - FCC could require significant upgrades, and address digital divide if mergers approved;
- Locals can affect conditions (but FCC may issue decisions soon)
  - Key for locals: be familiar with conditions and insist on compliance.



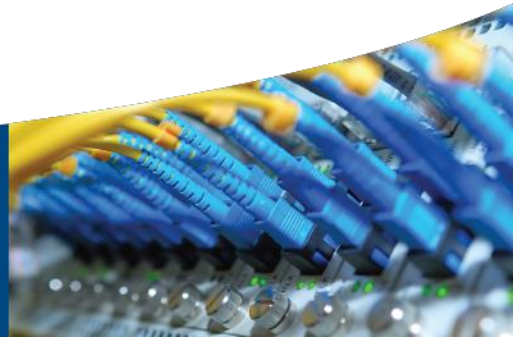
Lifeline

- Lifeline Broadband Service: Lifeline and Link Up Reform and Modernization, WC Docket No. 11-42 (Mar 31, 2016)(decision not yet released)
  - FCC announced decision subsidizing low-income Internet access
  - May be important to muni deployment; may allow aggregation of demand



Localities as Consumers

- FCC expected to issue a Further Notice of Proposed Rulemaking on April 28 that may deregulate rates for business data services
- Revision may remove rate protections now benefitting some local governments as consumers of communications services

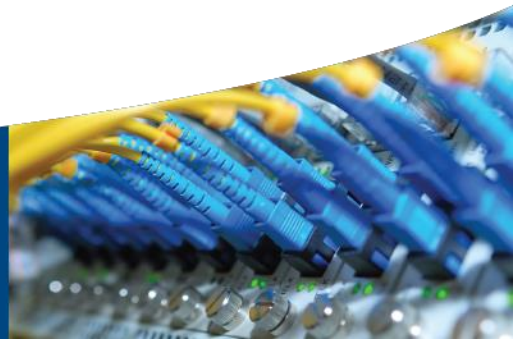


FCC Composition – and Effect on Commission Agenda



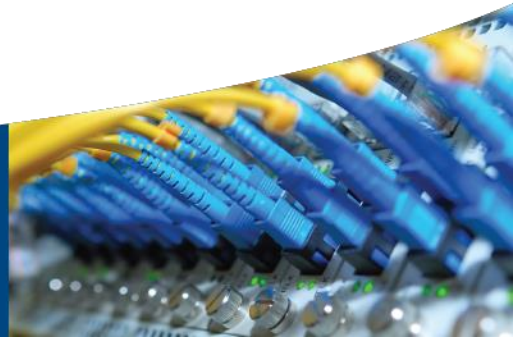
Time Table

DATE	EVENT
April 19	Independent Programmer NOI Reply Comments
April 22 **May 23** **June 6-10**	Comments in STB Reply Comments in Set Top Box Ex Parte Dates for Set Top Box
April 28 Release	Rewrite of Special Access Rules/Business Data Services Comments and Reply Dates to be Determined
May 26, 2016. **June 10, 2016.**	In Writing Proceeding Comments are due Reply comments due



FirstNet

- Created by the Middle Class Tax Relief and Job Creation Act. (2/22/12)
- Mission: For no more than $7 billion to build, operate and maintain a high-speed public safety nationwide wireless broadband network. (Ops funded by user fees.)
- Goal: provide a single interoperable platform for broadband emergency and daily public safety communications
- States should be coordinating with localities on issues surrounding FirstNet



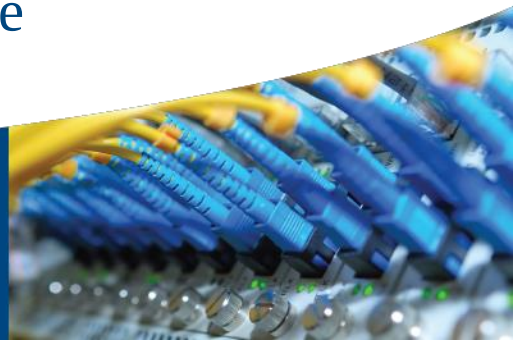
FirstNet (cont'd)

- On January 13, 2016 FirstNet issued a Request for Proposals (RFP) for nationwide public safety broadband network.
- Deadline for responses has been extended until May 31.
- Once Network and pricing are established and shared with each Governor, states will have 90 days to opt in, or build their network to coordinate with FirstNet.
- This could happen rapidly – with state decision by July 2017, state RFPs by July 2018, and deployment beginning on fed system by Fall 2017.
  - Following state's decision, locals may have to determine what rights/obligations are with respect to purchasing services
  - Potentially significant budget impacts



Judiciary: Key Cases To Watch

- Net Neutrality - *U.S. Telecom Association, et al. v. FCC, et al.*, (D.C. Cir. No. 15-1063) – argued December, 2015
  - Many observers believe decision may be mixed
  - Decision likely imminent; likely to go to Sup. Ct.
  - Outcome may affect local debates regarding whether to build publicly owned broadband networks
- Municipal Provisioning: *State of Tennessee et. al. v. FCC*, (6th Circuit No. 15-3291) – argued March 2016
  - Challenges FCC order preempting TN and NC state laws restricting municipal competition in provision of broadband services
  - If FCC affirmed, may assist muni entry elsewhere



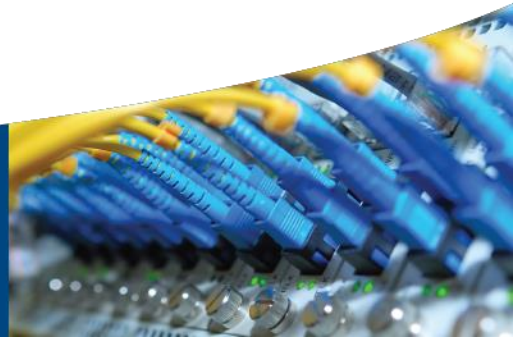
Judiciary: Key Cases To Watch (cont'd)

- **Franchising:** *Montgomery County Md. V. FCC* No. 08-3023 (6th Cir. appeal of FCC 2d Order and Recon Implementing Section 621) – May Decide:
  - Can operators treat value of services to schools as a franchisee fee?
  - Are localities limited to regulating "cable services" in cable franchises?
  - Are level playing field clauses enforceable?
- **Franchise Fees:** *City of Eugene v. Comcast of Oregon II, Inc.*. S062816 (pending decision before Or Sup Ct); decision below, 263 Or App 116, 333 P3d 1051 (2014).
  - Appeal upheld RoW fee on Internet; Comcast claims Cable Act preempts
- **Rate Regulation:** *NATOA et al. v. FCC*, D.C. Cir. , appeal of *FCC Order Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act, Final Rule*, MB Docket No. 15–53, FCC 15–62, 80 Fed. Reg. 38001 (July 2, 2015). (Order effectively deregulated rates even where cable ops do not face effective competition)
- **Broadband:** *Cox Communications Arizona v. Tempe*, Case 2:15-cv-01829-JJT, (U.S.D.C. Az)(filed September 14, 2015)*:* Tempe (Cox claims) inter alia violates first amendment and equal protection by providing favorable permitting to Google Fiber



Local Application of State and Federal Rules

- Wireless Siting:
  - 4th Circuit upheld FCC rules/federal law requiring localities to approve modifications to base station and towers that do not involve a significant change in physical dimension of base station or tower.
  - Decision: *Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015)
  - Advisable for practitioners to read FCC briefs



Section 6409(a) (47 U.S.C. §1455)

(a) **Facility modifications.**

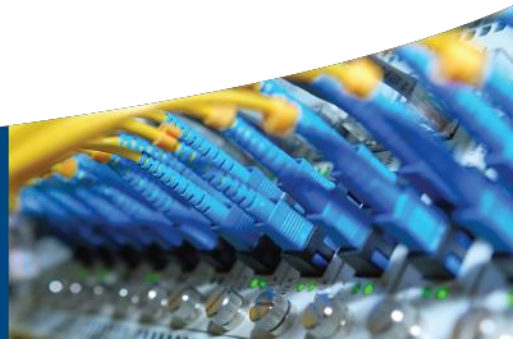
(1) In general. Notwithstanding… any other provision of law, a State or local government **may not deny, and shall approve**, any eligible facilities request for a modification of **an existing wireless tower or base station** that does not **substantially change** the **physical dimensions** of such tower or base station.

(2) Eligible facilities request. For purposes of this subsection, the term "eligible facilities request" means any request for modification of an existing wireless tower or base station that involves—

(A) collocation of new transmission equipment;

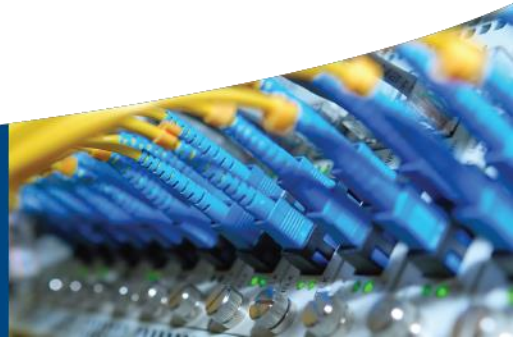
(B) removal of transmission equipment; or

(C) replacement of transmission equipment.



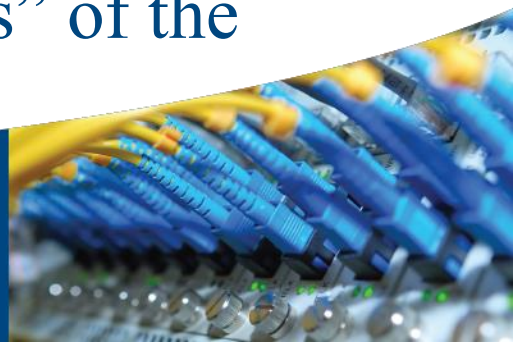
FCC Rules 47 CFR § 1.40001 – Definitions

1. Substantial Change
   - Towers other than RoW towers, modification:
     - Increases height by more than 10% or 20 feet whichever is greater
     - Appurtenance added protrudes from body of structure more than 20 feet or width of tower at pt. of attachment
   - All other support structures, modification
     - Increases height by 10 feet or 10%, whichever is greater
     - Appurtenance added protrudes more than 6 feet
   - Height measured from facility as it exists as of date of passage of Act (2012)



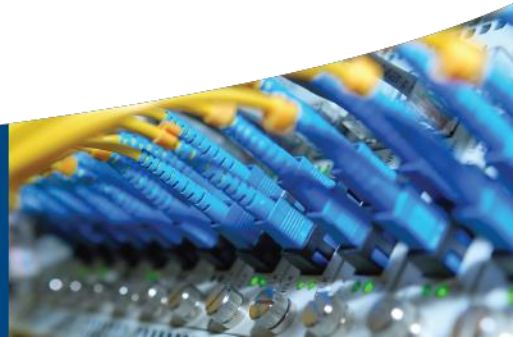
FCC Rules 47 CFR § 1.40001 – Definitions (cont'd)

1. Substantial Change For towers and base stations in RoW:
   - New equipment cabinets if there are none, or involves placement of cabinets 10% greater in height or overall volume than other cabinets associated with structure
   - All other eligible support structures:
     - Installation of more than four equipment cabinets
   - It entails any excavation or deployment outside of site
   - It would defeat "concealment elements" of the "eligible support structure"



FCC Rules 47 CFR § 1.40001 – Definitions (cont'd)

1. Substantial Change
   - It does not comply with conditions associated with siting approval…but limitation does not apply to any modification that is non-compliant only in a manner that would not exceed thresholds identified in (i)-(iv).
2. Tower: structure built for sole or primary purpose of supporting FCC licensed or authorized antennas and associated facilities.



FCC Rules 47 CFR § 1.40001 – Definitions (cont'd)

3. Base Station
   - Equipment associated with wireless comm. service
   - Antennas, coax, backup power supplies
   - "any structure other than a tower" that at time of application was supporting or housing the above.
4. Existing: A constructed tower or base station that has been "reviewed and approved under the applicable zoning or siting process or under another State or local" process, except towers not in a zoned area when built, but lawfully constructed (non-conforming uses?).



FCC Rules 47 CFR § 1.40001 – Definition (cont'd)

5. Eligible Support Structure is any Tower or Base Station

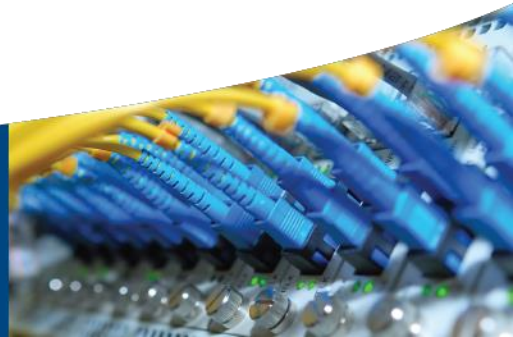
Key Notes:

- Does not preempt generally applicable safety and health codes
- Does not apply to proprietary property of community
- Reaches *all* wireless facilities – including Wi-Fi deployments
- Does reach Distributed Antenna Systems (DAS) & Small Cells



Real World Issues Facing Localities

- Wireless networks are densifying; there is a growing demand for WiFi; new technologies combine WiFi and cell technologies
  - How should ordinances address siting of wireless facilities v. cell facilities
  - How do you manage and control process for obtaining access to RoW and other property?
  - How will developments in other areas (connected vehicles) affect polici



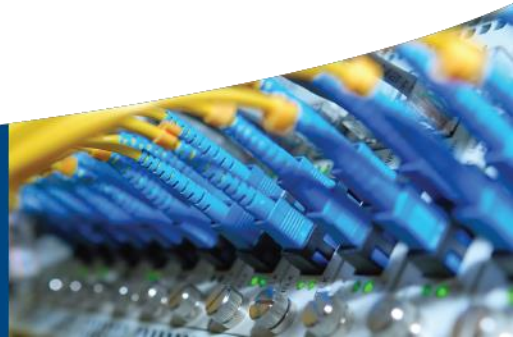
Real World Issues Now Facing Localities

- How do you implement new FCC regulations?
  - Can localities allow sensible deployment of DAS and small cells in a way that protects against expansion of facilities that were meant to be unobtrusive?
  - In areas that are underground, is there a way to provide for deployment that is fair to providers, but limits deployment?
  - How should localities respond to real estate plays?



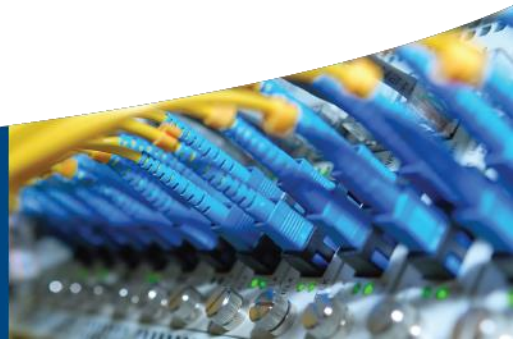
Franchising Issues

- Who Needs a Franchise: wireless? Cable? Telephone? Data Networks?
- What fees can be imposed?
- Can franchising be used as a way to address digital divide/deployment issues?
  - Philadelphia: as part of resolution of past issues, Comcast agrees to expand programs for provision of Internet access to low income households



Conclusions

- There are many significant developments that could impact local planning/economic development/financial resources
- Those developments will require local counsel to carefully review existing ordinances and policies (reactive), but local counsel and communities may also benefit from a proactive approach, by participating in major proceedings and shaping legislative agendas





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Questions?

