

Federal Public Policy Update

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Acknowledgements and notes

- This presentation draws on a presentation that was presented by BB&K and Spiegel and McDiarmid's Tilman Lay at NATOA. Mr. Lay's slides are included to provide a complete report and acknowledge his work.
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PROGRAM

- Anything Happening in Congress?
- Who are the Masters of our Fate?
- Populating the FCC
- PEG –
  - Registration
  - Closed Captioning
    - FCC
    - DOJ
- Video Franchising
- Effective Competition
- Wireless and Wireline NPRMs and BDAC – Offspring of Mobilitie Petition
- OTMR
- Net Neutrality
  - Court
  - FCC
  - Congress
- Privacy
  - FCC
  - FTC
  - Court



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- Legislation repealing of FCC BB privacy rules approved
- MOBILE NOW Act (S. 19) – Passed by Senate
  - Watch out for possible ROW/wireless preemption add-ons in House
- Gigabit Opportunity Act. (S 1013/ HB 2870)
  - Sen. Capito (R-WV)/Rep. Collins (R-GA)
- Community Broadband Act (S. 742)
  - A bill to promote competition, to preserve the ability of local governments to provide broadband capability and services, and for other purposes

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- Balancing the Rights of Web Surfers Equally and Responsibly (BROWSER) Act of 2017 – HR 2520
- Rep. Blackburn (R-TN) introduces Internet privacy legislation –
- HR 2479 (Leading Infrastructure for Tomorrow's America Act) – which includes $40 billion for broadband deployment
  - Again, watch out for ROW/wireless, or "GO Act"-like add-ons.
- Sens. Booker (D-NJ) and Hoeven (R-ND) introduce legislation (Commercial UAS Modernization Act) dealing with interim operating guidelines for small commercial unmanned aircraft systems (UAS)



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PEG: CC Obligations

- ***Obligations***
  - ***Absent an exemption*** Television channels, including PEG, must be captioned.
    - See 47 CFR 79.1(d) for a number of exemptions available to PEG stations, including 47 CFR 79.1(d)(12), which captures almost all PEG channels, because it exempts from closed captioning channels that "…produce revenue less than $3,000,000."

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PEG: CC Registration

- Recent FCC Order establishes:
  - No change in exemption rules, but
  - Creates a Reporting system for all video channels and video producers so the Commission can:
    - Refer consumer complaints; and
    - Document exemption status of channels and producers.
- ACM asks for PEG channel to serve as single registrant.
- FCC has yet to create platform – question is will it?



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Captioning and ADA (Justice Dept.)

- Justice target, as I understand, was streaming of Council meetings that were not captioned. If you carry G channel, likely that ADA applies.
  - "Covered entities are required to provide aids and services unless doing so would result in an 'undue burden,' which is defined as significant difficulty or expense."
- Obama Justice opened a docket to clarify –
  - NATOA and others filed.
  - Will Trump Justice complete or let go quiet?
- *Eddie Sierra v. School Board of Broward County*, Case No. 16-cv-63021-BLOOM/Valle, (S.D. FL 4/20/17)

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Recurring Theme at the FCC: Local Government as Part of Problem, Not Solution, to Broadband Deployment

Multiple FCC items describe local government policies as "barriers to entry and investment"

- Mobilitie wireless siting petition
- Wireless and wireline infrastructure proceedings
- Preemption Petition Targeting San Francisco MDU Ordinance
- Mutlple Tenants Environment Proceeding
- Section 706 Inquiry



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Deadlines

Due Date	Proceeding and Deadline
Oct. 6	Reply Comments on 706 (Docket No. 17-199)
Oct. 24*	FCC OPEN MEETING
Nov. 9	BDAC Meeting
Nov. 6	FCC OPEN MEETING
Dec. 8	Government runs out of money and borrowing authority
Dec. 14	FCC OPEN MEETING

* Moved forward two days.

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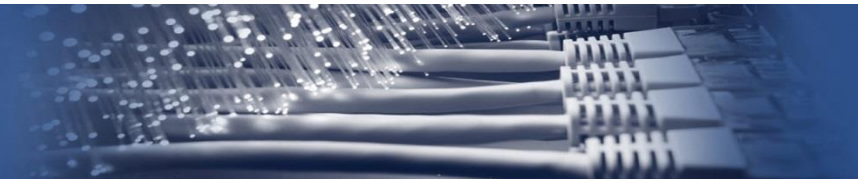
Section 706 Inquiry

- Annual Report on Progress of Broadband Deployment
- FCC wants to consider wireless or wireline coverage together – if either exists, community deemed served
- Wireless coverage adequate even at slower speeds
- Wireless-wireline equivalency indicates push to emphasize wireless over wireline
- Video over wireless means less wireline plant, supporting argument for abandoning franchise fees





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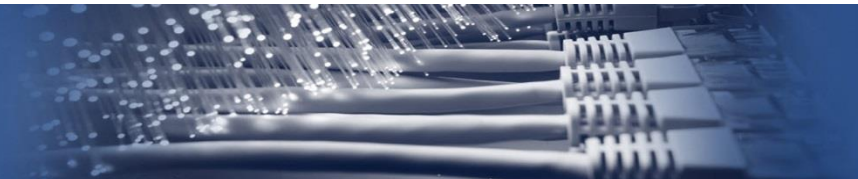
Cable Television Technical and Operational Standards Report and Order– MB Docket No. 12-217

- Order specifies the SCTE 40 standard;
- Declines to require proof of performance testing at the Federal level.
- Streamline (read: reduce) signal quality certification and testing requirements.
- Reserves ability of franchising authority to require testing in franchise – (How many folks thought to do – and none of the state laws require.)



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Video Franchising

- *Montgomery County v. FCC* (6th Circuit)
  - Appeal of FCC's 2d *Video Franchising Order and Recon Order*.
  - Court vacates, as inadequately justified, FCC's rulings that:
    - Costs of cable-related in-kind franchise requirements are a "franchise fee."
    - LFAs cannot regulate provision of non-cable services over a cable system ("mixed use" rule).
  - Court upholds FCC's ruling on franchise MFN clauses.
  - Case is a major victory for locals; what will FCC do on remand?



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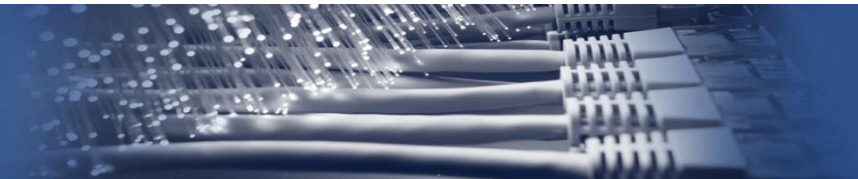
Effective Competition

- *NATOA v. FCC* (DC Circuit)
  - Upholds FCC decision that flipped effective competition presumption.
  - Effective competition presumed.



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Small Cell Mania at the FCC

- *Mobilitie Petition, Wireless Barriers NPRM*, and *Wireline Barriers NPRM*
  - What industry wants (and FCC seems sympathetic):
    - Shorter (60-day) shot clock.
    - "Deemed granted" remedy.
    - Fees limited to costs.
    - Application of §§ 253/332(c)(7) to ROW access and municipal pole access.
  - Other issues (in Wireline NPRM):
    - Pole attachment rule revisions (including possibly OTMR).
    - Streamlined service discontinuance and copper retirement requirements.

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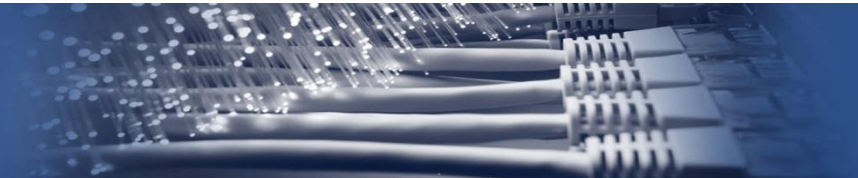
Small Cell Mania at the FCC

- BDAC
  - Membership heavily tilted to industry
  - 3 key working groups
    - Removing State and Local Regulatory Barriers Working Group
    - Model Code of Municipalities Working Group
    - Model Code for States Working Group
  - BDAC recommendations as early as November 9



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Small Cell Mania – the States

- Many states have enacted various forms of small-cell legislation. Details vary, but legislation typically –
  - Grants ROW access.
  - Limits fees.
  - Sets shot clock-like deadlines.



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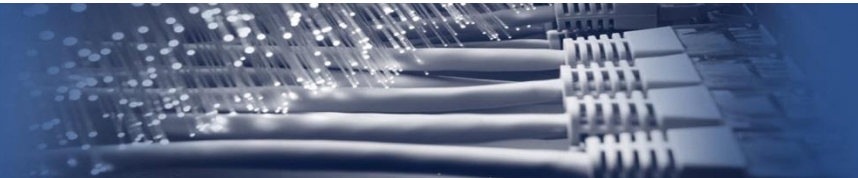
One-Touch Make-Ready

- District court upholds Louisville Metro's OTMR ordinance against AT&T's challenge.
- Other pending OTMR litigation:
    - Charter challenges Louisville Metro's OTMR ordinance.
    - AT&T and Comcast are challenging Metro Nashville's OTMR ordinance.
    - Frontier is challenging West Virginia's OTMR requirement.



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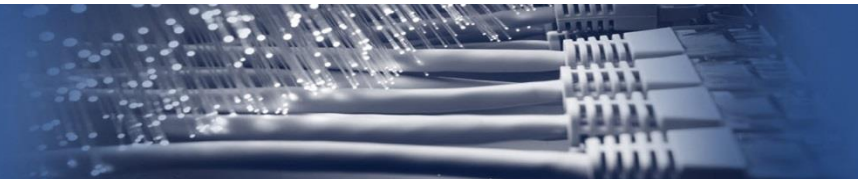
Net Neutrality

- In the courts –
  - DC Circuit upholds 2015 Open Internet Order and denies rehearing.
  - Industry still deciding whether to seek cert.
- Before the FCC –
  - The Pai FCC issues an NPRM proposing to undo the *2015 Open Internet Order* and reclassify broadband as an "information service."
  - Likely to act by year's end.
- On the Hill –
  - Talk of "compromise" net neutrality legislation; but action seems unlikely until dust settles on appeal of anticipated Pai FCC undoing of *2015 Open Internet Order*.





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Broadband Privacy --

- Congress “un-does” the Wheeler FCC’s broadband privacy rules.
- Pai FCC believes broadband privacy should be handled by the FTC, not the FCC.
- 9th Circuit is rehearing *AT&T v. FTC* on the scope of the “common carrier” exemption in the FTC Act.
  - 9th Circuit panel had ruled that exemption applies to carrier and all of its services, not just common carrier services.
  - That interpretation would deprive FTC of all jurisdiction over any entity that provides any common carrier service.

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Strategies

- Show up at FCC/Congress/courts/state legislatures
- Form coalitions at state level
- Be prepared to face multiple challenges, at multiple levels
- …Think about creating a counter narrative – and changing the legal facts on the ground





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Top Telecommunications Issues to Watch for in 2017

Protecting Local Rights to Manage and Obtain Fair Compensation for Use of the Rights of Way

As the rights of way become ever more valuable for locating communications infrastructure, localities will face more intense efforts at the state, local and federal level (some discussed below) to limit local control over, and charges for use of, the rights of way. Those efforts may be accelerated as legislatures push to promote infrastructure to support autonomous vehicles.

- **What you need to do:** Understand the threats and put your community in a positon to protect its interests.

Rewrite of Communications Act

2017 will mark the beginning of efforts to rewrite the Telecommunications Act to address broadband services. A review of the Act will present opportunities but also risks for local governments. It is likely to be a multi-year process.

- **What you need to do:** Place your community in a position to actively work for positive legislation over the long term.

Municipal Broadband, Public-Private Partnership and New Approaches for Networks

Municipalities throughout the country are searching for the best way to ensure that their communities are served by advanced networks that offer high-speed Internet at reasonable prices.

- **What you need to do:** Encourage your community to actively engage in broadband planning and identify the best approach for your community to speed broadband deployment, consistent with legal limits on your own local authority.

New Technologies and Applications Will Add to Inclusion and Other Challenges Facing Communities

As communities look for ways to improve delivery of services by becoming "smart cities," it is important to ensure that the city itself has access to adequate infrastructure for its own services, that all residents and businesses are in a position to take advantage of those services, and that equitable and social challenges created in an era of big data (where algorithms may compound existing social divisions) are addressed. There are new ways to address the digital divide: the Federal Communications Commission recently provided for use of universal service subsidies to pay for broadband and may permit local governments and housing authorities (among others) to aggregate demand so that the subsidies result in service to more eligible families. HUD is issuing regulations that may require broadband infrastructure in federally supported housing.

- **What you need to do:** Keep a close eye on federal regulations and understand how those regulations can be used to address broadband deployment at the local level. In addition, think crisply about what roles localities must and must not play in the "big data" infrastructures of the future.

Internet Protocol Transition

Copper wire networks that provided Plain Old Telephone Service are being replaced with all-fiber networks that deliver services using IP transmission technology. These new networks have different (and in some cases, lesser or differently priced) capabilities and vulnerabilities. The transition, overseen principally by the states and FCC, is being accompanied by significant deregulation. As a tax collector… as a key customer for reliable services … as the front line for public safety … and as the agency closest to the public and most concerned about ensuring your community has communications infrastructure necessary for economic development, local governments have critical interests in the transition.

- **What you need to do:** Participate at the federal and state level to ensure that IP transition does not result in less responsive, more expensive networks.

The Rights of Way as a Hub for New Wireless Communications Services

"Densification" of the cellular network is resulting in more antennas and requests for placement of thousands of new or replacement poles in the rights of way – potentially dramatically affecting local landscapes. Can localities control placement in a way that allows services to be deployed while protecting against undue intrusion? And do existing local laws adequately address the issue?

- **What you need to do:** Work with your community to develop a proactive approach to planning for wireless entry into the rights of way, including thorough legal reviews of existing requirements.

Getting Ready for FirstNet

The National Broadband Public Safety Network (FirstNet) is about to come online. FirstNet is currently reviewing bids to construct the network and, as early as first quarter of 2017, states will have to decide to opt in or out.

- **What you need to do:** Understand the FirstNet timetable and its potential budgetary impacts, and ensure local interests are protected in your state. BB&K has a "FirstNet Checklist" for localities.

Over The Top Video Programming

The delivery of video programming via the Internet may create new competition and lower prices for consumers – or it could result in a way for existing providers to avoid PEG, franchise fee, consumer protection and other obligations. The outcome may depend on the result of FCC rulemakings.

- **What you need to do:** Participate in ongoing FCC proceedings to ensure that OTT can be implemented in a consumer-positive way that does not harm local interests.

Closed Captioning

In 2017, the FCC will implement a registration and certification program that will require PEG channels and potential PEG programmers to demonstrate that they qualify for exemption from closed captioning. The U.S. Department of Justice is accepting comments on whether municipal webpages are making reasonable accommodations by including closed captioning, including the streaming of PEG programming, on the community's webpage.

- **What you need to do:** Ensure your community understands, and is prepared to address, these requirements.

Please contact one of the following Best Best & Krieger Telecommunications attorneys if you'd like more detail on these issues and how your community can address them: BBKlaw.com/Telecommunications.

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In addition, BB&K attorneys represent local governments on a myriad of municipal issues including, but not limited to: water, education law, labor and bonding issues. Please visit www.bbklaw.com for more information on any of these issues.

Wireless Tower and Antenna Siting







Local governments have dealt with radio towers since the inception of broadcast radio in the early 20th Century. Business and amateur radio and broadcast TV followed soon after. The early rollout of consumer wireless (cellular) telephony in the 1980s likewise was taken in stride by most local zoning authorities.

Not until the Telecommunications Act of 1996, massively amending the Communications Act of 1934, did Congress find it necessary to take special account of "personal wireless" (47 U.S.C. § 332(c)(7)). The wireless industry petitioned the Federal Communications Commission to adopt national rules for the siting of towers and antennas. Congress disagreed, instead choosing the "preservation of local zoning authority," found at paragraph 7(A) (see other side), and ordered the FCC to shut down the national rulemaking. Congress left federal and state courts to resolve personal wireless facility siting disputes, except those involving the FCC's radio frequency radiation rules adopted in the 1970s under the National Environmental Policy Act. In such cases, the FCC and the courts share jurisdiction.

Despite the statute's structure, the FCC has expanded its regulatory presence in this area—often at local governments' expense. In 2008, the principal wireless industry trade association, CTIA, asked the FCC to limit the time for local governments to process wireless siting applications, and to "deem granted" those not meeting the deadlines. CTIA also asked the FCC to resolve differences among U.S. Courts of Appeals as to whether a wireless carrier would be unlawfully "prohibited" from providing service in a given area if that area were already served by another carrier. In 2009, the FCC established a time limit but refused to consider a missed deadline a grant by default. It agreed with CTIA that denying an application solely because another entity served the area was a prohibition. When local governments challenged the FCC's authority to adopt the order, the Fifth Circuit ruled for the FCC, a decision that the Supreme Court affirmed in 2013.

Most recently, Congress has limited local authority over modifications of existing facilities. A 2012 statute provides that a state or local government "may not deny, and shall approve" certain modification requests, provided that they do not "substantially change the physical dimensions" of a tower or base station (47 U.S.C. § 1455(a)(1)). Congress left almost all of the statute's key terms undefined. In 2013, the FCC offered non-binding "guidance" on the statute. In 2014, the agency commenced rulemaking on how best to interpret the statute.

On Oct. 17, 2014, the FCC issued a Report and Order (In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies) published in the Federal Register a rulemaking that provided definitions for the congressional terms. BB&K has provided a series of tutorials on the rulemaking that may be downloaded at http://www.bbknowledge.com/telecommunications/. BB&K is also representing a collection of local governments that have challenged the legality of the rules in the United States Court of Appeals for the 4th Circuit. Ask any BB&K lawyer for additional information.

47 U.S.C. § 332(c)(7)

(7) Preservation of local zoning authority.

(A) General authority. Except as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations.

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof-

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and
(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

47 U.S.C. § 1455(a)

(a) Facility modifications

(1) In general. Notwithstanding section 704 of the Telecommunications Act of 1996 (Public Law 104-104) or 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.

(3) Applicability of environmental laws. Nothing in paragraph (1) shall be construed to relieve the Commission from the requirements of the National Historic Preservation Act [16 USCS §§ 470 et seq.] or the National Environmental Policy Act of 1969 [42 USCS §§ 4321 et seq.].

The Special Case of DAS

As the numbers of cell phone subscribers and their capacity needs grew beyond voice to high-speed data and streaming video, "distributed antenna systems" began to be deployed, both by the principal providers and by third parties, such as NextG, NewPath and others. These systems typically seek access to the public right-of-way, and their applicants sometimes claim that Section 332(c)(7) does not apply. Instead, they want PROW access on the same terms as conventional telephony or other wired services. These applications may bring into play Section 253 of the Communications Act. We invite you to contact one of the listed BB&K attorneys on this subject as well. The FCC's recent 6409 (a) rulemaking provides that DAS and small cells are eligible for protections under sections 332(c)(7) and 6409(a).

Please contact your BB&K attorney or any of our telecommunications attorneys.

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