

FirstNet Status: What a City Attorney Needs to Know

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FirstNet

This Ohio Public Safety Video explains in 3 minutes what is FirstNet is and the choice to opt in or out that your governor will face this fall.



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Opt In/Opt Out

This Video from FirstNet explains why a state might choose not to “Opt Out.”

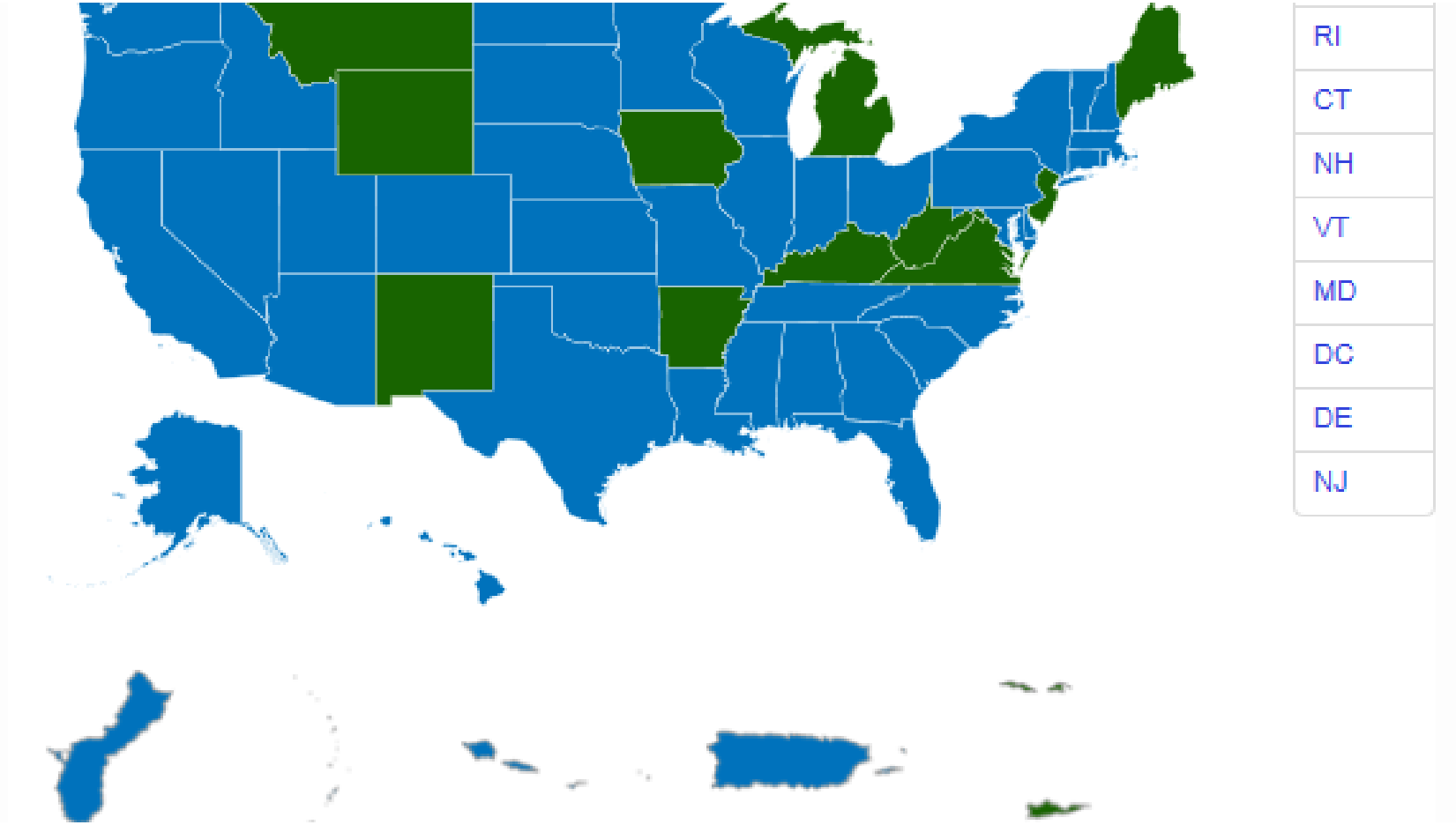
https://www.youtube.com/watch?v=8GhLZB4z7sY whole thing



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States Opting In or Out

(Current as of 8/10/17 – New map will be shared in Niagara falls)



RI
CT
NH
VT
MD
DC
DE
NJ

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Local Government Counsel's Checklist

What You Need to Know

- Be aware of FirstNet.
- Who is your State's Point of Contact. https://firstnet.gov/consultation/spoc
- What does your public safety community know?
- Are there regional collaborations being discussed in your state?
- What is your state thinking regarding Opt-In and Opt-Out decisions
- What contracts for service -- radio and cell do you have now? When are they due for renewal? What are you paying?

What You Should be Doing

- Inventory your potential assets – hardware, software and infrastructure
- Monitor FirstNet's deployment timeline and its implications for local decision making processes.
- Be aware of timeline and prices for your communications contracts.
- Consider the appropriate procurement mechanism and approvals required to purchase goods and services from FirstNet
- Remember that local agencies may "opt-out" by declining to purchase services from FirstNet





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FirstNet Checklist for Local Governments

- ✓ Be aware of FirstNet.
- ✓ Contact your State Point of Contact to understand your state's decision-making process.
- ✓ Coordinate with your public safety community — they may be very aware of status, but may not be sharing details or budget implications
- ✓ Consider regional collaboration with nearby agencies for recommendations and governance
- ✓ Understand the costs vs. benefits of Opt-In and Opt-Out decisions
- ✓ Carefully review your State Plan when it becomes available
- ✓ Inventory your potential assets – hardware, software and infrastructure
- ✓ Monitor FirstNet's deployment timeline and its implications for local decision making processes.
- ✓ Be aware of timeline and prices for your communications contracts.
- ✓ Consider the appropriate procurement mechanism and approvals required to purchase goods and services from FirstNet
- ✓ Remember that local agencies may "opt-out" by declining to purchase services from FirstNet

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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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