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Telecommunications - Managing Rights-of-Way: The New Hub for Wireless, Internet of Things and Smart City Applications

Joseph Van Eaton, Gail Karish and Gerry Lederer

October 19, 2018

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("NEPA/NHPA Order")

- *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment,* WT Docket No. 17-79, Second Report and Order (Mar. 30, 2018)
- **Holding**: Deployment of small cells (28 cu. ft.) not a federal undertaking and therefore do not trigger federal obligation to examine historical/environmental impacts
- **Generally**: Small cell deployments will not impact historical sites
- **Insight:** State and local governments can protect historical and environmental interests
- **Status:** Order was appealed and in briefing today.





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Moratoria Ban

- August 3: FCC releases *In the Matter of Accelerating Wireless Broadband Deployment By Removing Barriers to Infrastructure Investment,* FCC 18-111, Third Report and Order and Declaratory Ruling, WT Docket No. 17-79
- **Holding:** *de jure* moratoria and *de facto* moratoria on deployment generally "prohibit or effectively prohibit" provision of telecom services in violation of federal law, and are not saved from preemption as a form of RoW management
- **Examples**: freeze and frost laws, South Carolina hurricane path
- **Insight:** Effective immediately/not self-effectuating





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Small Cell Order

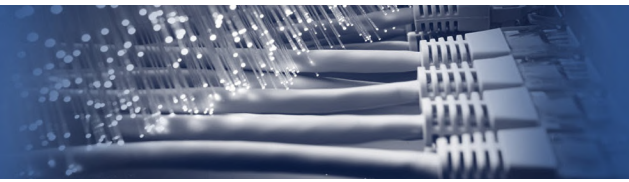
- September 26: FCC Adopts *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment,* Declaratory Ruling and Third Report and Order, FCC WT Docket No. 17-79
- Building on August 3 Order, adopts:
  - New deadlines for actions on small cell applications
  - Limits on fees and rents that can be charged for small cells
  - New standards governing when a locality can say "no"
  - New standards for permissible aesthetic/undergrounding/spacing requirements
- Effective 90 days after Fed. Reg. publication – January 13, 2019




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Cable In-Kind

- September 26: FCC Adopts *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992 Second Further Notice of Proposed Rulemaking (Second FNPRM)* FCC MB Docket 05-311
- Comments due Nov. 14, 2018
- Reply Comments due Dec. 14, 2018



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Due Date	Proceeding and Deadline
	NHPA\NEPA Order – Appeal Briefing Ongoing/NATOA Recon pending
Nov. 13 / 23	Moratorium Order – Reconsideration opp./replies Appeal filed by Portland in 9th Cir.
Oct. 25	Lottery for Small Cell Appeal
Nov. 14	Comments Due in Cable In-Kind
Dec. 14	Reply Comments in Cable In-Kind Deadline to Appeal Small Cell Order
Jan. 13, 2019	Effective Date of Small Cell Order

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Cable In-Kind Order

Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992 Second Further Notice of Proposed Rulemaking (Second FNPRM) FCC MB Docket 05-311

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Proposal: In-Kind

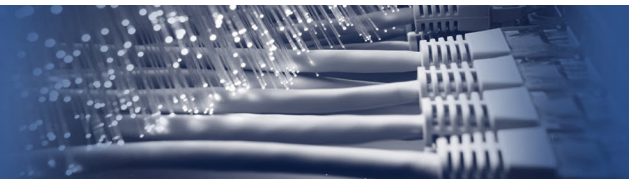
- Allow a cable operator a credit against franchise fees for "in-kind" contributions required under cable franchise agreements, unless
  - PEG Capital expense
    - Asks are "costs for studio equipment" capital costs
  - Build Out Expense.
- Suggests In-Kind contributions to be valued for at "fair market value," but does ask parties if it should be limited to costs borne by cable operator.



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In-Kind: Examples

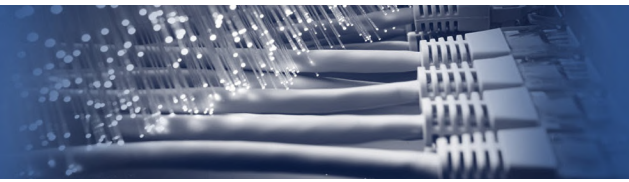
- Free service to schools, libraries, and other government buildings,
- Value of channel capacity dedicated to public, educational, and government programming.
- Electronic Programming Guide.
- Discounts on Internet Service as part of the cable franchise



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Proposal: Mixed Use

- "..prohibit [local franchising authorities] from using their video franchising authority to regulate non-cable services offered over cable systems by incumbent cable operators."
  - The FCC excludes I-Nets from this restriction.
- Cable operators are trying to argue that cable franchise authorizes any equipment deployments in RoW.



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"Pre-Summer" Federal Rules Impacting Local Authority over Wireless/Wireline

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Federal Laws Impacting Local Authority Over Wireless/Wireline

47 U.S.C. § 253 (1996)

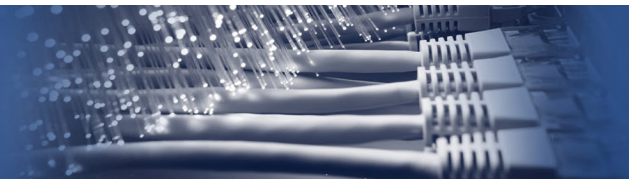
- Preempts local regs that prohibit or have effect of prohibiting ability of any entity to provide telecommunications services
- But does not reach nondiscriminatory PROW management or compensation requirements

47 U.S.C. § 332(c)(7) (1996)

- Generally preserves local authority to control placement of personal wireless service facilities, subject to certain substantive and procedural limits (including action within reasonable period of time, no effective prohibition, denials in writing, and no consideration of RF emissions if meet FCC standards)

47 U.S.C. § 1455(a) [Sec. 6409] (2012)

- Applies to all "wireless" applications
- Preempts local discretion over certain collocations and modifications to existing wireless sites; i.e., must approve



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FCC Wireless Rules and Orders

FCC Shot Clocks & Deemed Grant (2009, 2014)

- Sec. 332 (c)(7): 90 and 150 day shot clocks apply to local review of collocations and new sites whether macro or small cells/DAS in PROW.
  - No federal deemed grant.
- Sec. 6409(a): "eligible facilities requests" 60 day shot clock and deemed granted remedy apply to local review; specific parameters for EFR affecting structures within and outside PROW.
  - Federal deemed grant.



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FCC's Moratoria Order

In the Matter of Accelerating Wireless Broadband Deployment By Removing Barriers to Infrastructure Investment, FCC 18-111, Third Report and Order and Declaratory Ruling, WT Docket No. 17-79

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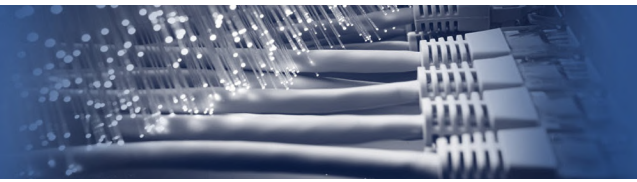
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Ban on Moratoria

On August 2nd the FCC's adopted a Third Report and Order and Declaratory Ruling which:

(1) creates a One-Touch Make-Ready ("OTMR") regime for pole attachments and

(2) declares that state or local moratoria, when applied to the deployments of wired and wireless telecommunications equipment, violate § 253(a).



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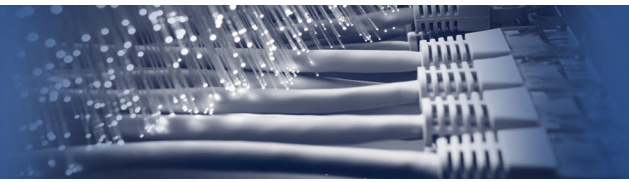
What the Order Does

- Bans "moratoria," both express and *de facto* moratoria that effectively halt or suspend the acceptance, processing, or approval of applications or permits (¶134);
- Moratoria are *generally* not protected by the exceptions Congress made available to states in Section 253(b) or local governments in Section 253(c) and perhaps 332(c)(7)(A) (¶¶134, 143-150); and
- Invites impacted carriers to file petitions under Section 253(d) with the FCC challenging specific alleged moratoria and directs the FCC staff to act promptly on such petitions.

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What is a Moratorium?

- Order captures express and *de facto* moratoria.
- Express moratoria are "…state or local statutes, regulations, or other written legal requirements that expressly, by their very terms, prevent or suspend the acceptance, processing, or approval of applications or permits necessary for deploying telecommunications services and/or facilities." (¶135)
- *De Facto* moratoria are "…state or local actions that are not express moratoria, but that effectively halt or suspend the acceptance, processing, or approval of applications or permits for telecommunications services or facilities in a manner akin to an express moratorium." (¶139)
- NOTE – "… not all street cut regulations are illegal moratoria."
  - Street cut requirements which are designed to promote "dig-once" policies "would not qualify as unlawful moratoria if the state or locality imposing such street-cut requirements does not bar alternative means of deployment such as aerial lines or sublicensing existing underground conduits" (¶142)



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The FCC's Small Cell Order – What It Says and How It Affects You

Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Declaratory Ruling and Third Report and Order, FCC WT Docket No. 17-79

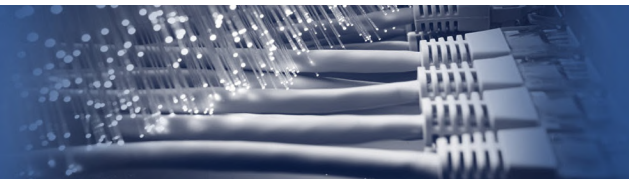
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Time Periods – What's Next?

- **Effective Date**
  - 90 days following publication in Federal Register.
    - January 13, 2019
      - *Consolidated forms and Aesthetic Standards.*
- **Appeal**
  - Heard by U.S. Ct. of Appeals (not trial court) –
  - Time to file an appeal runs from date summary published in the Federal Register.*
    - 10 days for lottery;
    - 60 days for non-lottery
    - Reconsideration – 30 days after summary published (Please ask NATOA before filing.)
- Order is not automatically stayed on appeal

** Thanks to Commissioner Carr for uniform appeal date.*



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Major Elements of Order

- Establishes "materially inhibit" as what Section 253 and 332 mean to prohibit or effectively prohibit.
- Finds Congress did not include a blanket proprietary exception to Section 253 (a) and therefore rents for government property in RoW must be "fair and reasonable."
- Creates tests to see if local government action exceeds "materially inhibit" standard:
  - Tests for when fees, aesthetics, undergrounding & spacing, "act in a timely manner," and other requirements materially inhibit service.
  - Creates 2 new shot clocks for "small cells" with "cost caps" for regulatory fees both inside and outside of rights-of-way; caps rent within RoW.
- "Enhanced" remedy for failing to meet shot clocks
- Redefines "Collocate"



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What Is a Small Cell?

(1) The facilities—

(i) are mounted on structures 50 feet or less in height including their antennas …, or

(ii) are mounted on structures no more than 10 percent taller than other adjacent structures, or

(iii) do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater;

(2) Each antenna associated with the deployment, excluding associated antenna equipment … is no more than three cubic feet in volume; (Note: no limit)

(3) All other wireless equipment associated with the structure, including the wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than 28 cubic feet in volume...

(4)… (5) … and

(6) The facilities do not result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified in section 1.1307(b).





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Redefinition of Effective Prohibition (Para 34-43)

- "[P]rior approaches erred by requiring coverage gaps…"
  - "Significant gap" (9th Cir.) and "least intrusive alternative" (2nd, 3rd and 9th Cir.) appear abandoned – *See n.* 94
- A state or local legal requirement constitutes an effective prohibition if it "materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." (Para. 35 quoting *California Payphone*.)
- "We clarify that an effective prohibition occurs where a state or local legal requirement materially inhibits a provider's ability to engage in any of a variety of activities related to its provision of a covered service. This test is met not only when filling a coverage gap but also when densifying a wireless network, introducing new services or otherwise improving service capabilities…also by materially inhibiting the introduction of new services or the improvement of existing services." (Paragraph 37)




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According to FCC A Fee Is Permitted If…

(1) The fees are a reasonable approximation of the state or local government's costs,

(2) Only objectively reasonable costs are factored into those fees, and

(3) Fees are no higher than the fees charged to similarly-situated competitors in similar situations.

(4) Presumptively reasonable:

- Non-recurring fees =
  - $500 for first 5/$100 for each additional
  - $1,000 for new pole
- Recurring fees = $270 per facility including RoW fee and fee for attachment to municipal infrastructure

(5) Specifically rejects claim that localities are exempt from 253(c)'s fair and reasonable standard in setting rates for RoW infrastructure (See paras. 92-97.)





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Existing Agreements (Para 66)

- "… [T]his Declaratory Ruling's effect on any particular existing agreement will depend upon all the facts and circumstances of that specific case. Without examining the particular features of an agreement, including any exchanges of value that might not be reflected by looking at fee provisions alone, we cannot state that today's decision does or does not impact any particular agreement entered into before this decision…."





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Aesthetics (para 84-89)

- Aesthetics requirements not preempted if:
  (1) reasonable,
  (2) no more burdensome than those applied to other types of infrastructure deployments, and
  (3) objective and published in advance.
- "…aesthetic requirements that are reasonable in that they are technically feasible and reasonably directed to avoiding or remedying the intangible public harm of unsightly or out-of-character deployments are also permissible."
- Focuses on cost of aesthetics?




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Undergrounding (para 90)

- "…[You don't have to]…go so far as requiring that all wireless facilities be deployed underground, [to] …be considered an effective prohibition of service."
- Test: "same criteria of aesthetics generally…"
  - (1) reasonable,
  - (2) no more burdensome than those applied to other types of infrastructure deployments, and
  - (3) objective and published in advance.



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Spacing Requirements (Par. 91)

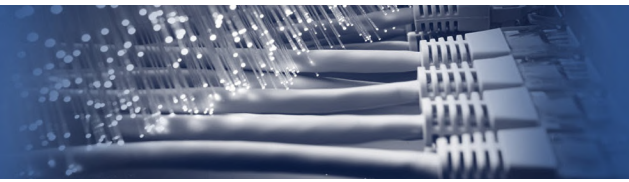
- "…a minimum spacing requirement that has the effect of materially inhibiting wireless service would be considered an effective prohibition of service." Para 87
- "Some parties complain of municipal requirements regarding the spacing of wireless installations… ostensibly to avoid excessive overhead "clutter" that would be visible from public areas. We acknowledge that while some such requirements may violate 253(a), others may be reasonable aesthetic requirements." Para. 91
- "For example, under the principle that any such requirements be reasonable and publicly available in advance, it is difficult to envision any circumstances in which a municipality could reasonably promulgate a new minimum spacing requirement that, in effect, prevents a provider from replacing its preexisting facilities or collocating new equipment on a structure already in use." Para. 91




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Shot Clocks

- Apply to all permits required for deployment, not just wireless permits
- Pre Application Meetings
  - "We conclude that if an applicant proffers an application, but a…locality refuses to accept it until a pre-application review has been completed, the shot clock begins to run when the application is proffered…" Para 145
- Locality must accept "batched" applications and time frame is same for one as for many. Para 114, 115
  - "…[I]n extraordinary cases, a siting authority …can rebut the presumption of reasonableness of the applicable shot clock period where a batch application causes legitimate overload on the siting authority's resources." Para. 115
- Failure to meet shot clocks deemed an "effective prohibition"
- NO DEEMED GRANTED.



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Small Cell Shot Clock Reset

- Siting authority must:
  - Notify the applicant on or before the 10th day after submission that the application is ***materially*** incomplete.
  - Clearly and specifically identify the missing documents or information and the specific rule or regulation creating the obligation to submit such documents or information,
- Shot clock date calculation "shall restart at zero on the date on which the applicant submits all the documents and information required…"
- But…operators will argue shot clock starts on resubmission. Additional incompleteness notice is required if resubmission is inadequate





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Collocation

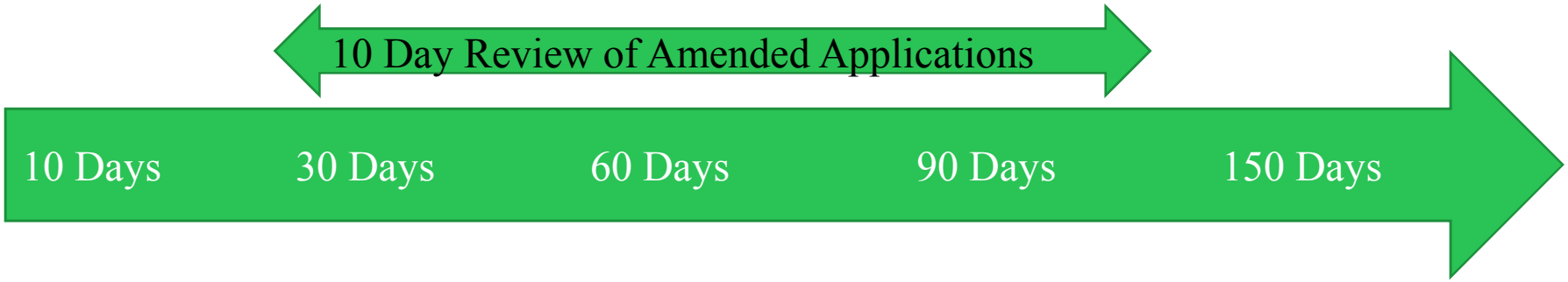
- Two meanings:
  - Non 6409 context – there is a structure present, but not a wireless device. This provides 60 day shot clock for small cell and 90 day shot clock for all others
  - 6409 Context – there is a structure and the structure has a permitted wireless device.





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Putting Time Frames Together…
New Concept of Collocation



Incomplete Small Cell with Reset

Incomplete for Non-Small Cell

Small Cell On Existing Structure

Small Cell On New Structure // Any Cell on Existing Structure

New Cell on New Structure

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Requested Changes Not Made

- Batching Time Frames
  - No Additional Time Regardless of number of applications. – See exceptional circumstances reference.
  - Only relief is that if one application is for new pole, it makes batch a 90 day shot clock
  - Exceptional Circumstances could buy you additional time – not defined.
- Application of 6409 to Small Cells
  - Small cells are eligible to grow.
  - How do you try and protect against such growth?





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How To Respond

Nationally
Locally

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Near Term – No help from Hill on Small Cell but help on In-Kind

- Congress has gone home until after elections
- In March, they approved a large number of telecommunications bills. Only one impacted government property rights –

Issue	Ray Baum Act (Applies to Federal Property)	FCC Rules
Time to Act	270 days	As short as 60 days
Valuation	Market Value	Approximation of Costs
Failure to Act	Silent	Presumed Finding for Failure to Act in timely manner

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Due Date	Proceeding and Deadline
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Dec. 14	Reply Comments in Cable In-Kind Deadline to Appeal Small Cell Order
Jan. 13	Effective Date of Small Cell Order




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Strategies

- Show up at FCC/Congress/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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National Response to Moratoria

- Smart Communities and Special Districts (except Portland) filed a petition for reconsideration.
- Portland filed an appeal of the order in the 9th Circuit.



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National Response to Small Cell

- No less than two coalitions will file an appeal of the Small Cell Order.
  - Join us.
- If you plan to appeal and you are going to appeal other than in 9th Circuit, please wait until lottery time period has passed.
- Please do not file a petition for reconsideration as we believe it will give FCC a delaying tool



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Thinking Through Impacts, i.e., Lots of Open Questions

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What and Where

- **Non-Fee Based Impairment Standard*** (aesthetics, undergrounding, spacing, etc.) clearly apply to small cells in RoW.
  - BUT, are the same standards applicable to non-small cells? Expect industry to say "yes," and localities to argue "the ruling is based on the Commission's findings regarding the economics of small cell deployment.

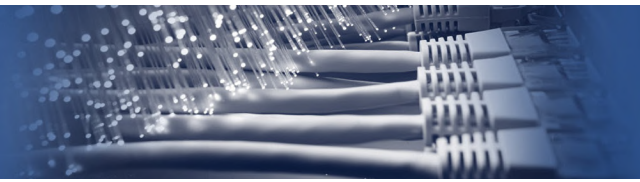
- Caveat: "…we do not attempt here to determine which of every possible non-fee legal requirements are preempted for having the effect of prohibiting service, although our discussion of fees above should prove instructive in evaluating specific requirements.



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What and Where?

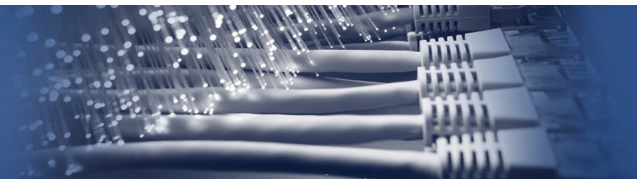
- **Cost-based rental fees** apply to small cells within RoW (¶50) and **cost based application and review fee** apply to any small cells inside and outside of RoW.
  - But expect industry to argue that if non-cost-based fees are unreasonable in RoW, they are unreasonable outside the RoW? (See Comm. O'Rielly speech and BDAC report)



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ACCESS TO LOCAL PROPERTY

- FCC SAYS IT IS NOT REQUIRING ACCESS TO PUBLIC PROPERTY – JUST NOTING THAT THERE IS NO BLANKET EXEMPTION TO SECTION 253(C)'S JUST AND REASONABLE STANDARD FOR MUNICIPAL PROPERTY(¶94)
- BUT, what does it mean to suggest that we must act on a demand for access within 60 days, or have presumptively prohibited entry?



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Local Response – Common Questions

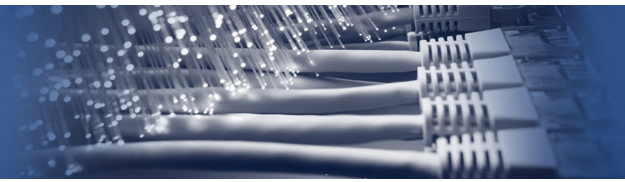
- Should you change your existing ordinance between now and January 11?
- What do I do if my ordinance refers to significant gaps?
- Should I be developing forms?
  - Do those have to be by ordinance?
- Do I need aesthetic standards?
  - Do those have to be by ordinance?




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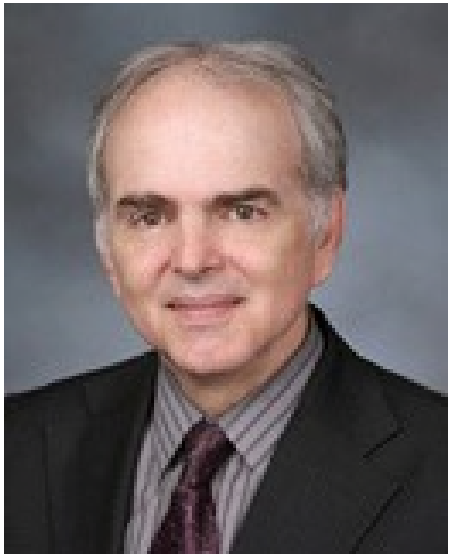
How to Respond Locally

- If you have an existing contract for light poles, should you be revising them if the lessee asks for a lower rate?
- If you do not have a contract yet, what rate should you request for *new contracts?*
- Is there anything you should be doing with your fee scheduled for permits?
- Should I be developing standardized contracts for light poles/traffic signals and other structures?
- How do I deal with the requirement that all authorizations required for deployment must be acted upon within the same period as the applications for a wireless facility?



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