

Telecommunications Update

IMLA Annual Conference

September 24, 2020

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Overview

Wireless (Joe)	Cable (Gerry)

• Small Cell / Moratoria (9th Cir.)
  • Decision on 8/12/20
• Section 6409 Clarification Order (9th Cir.)
  • Awaiting briefing
  • Intervention until 9/9/2020
	• Cable Order (6th Cir.)
	  • Stay Denied
	  • NPRM

The Hill/States (Gerry)	Local Response (Andrew)
• Wireless (S. 2012; H.R. 530) • Cable (H.R. 5659; S. 3218) • State Resiliency Requirements	• Ordinance • Design Standards • Master License Agreement • Other documents



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How Many ROW Small Cell Applications Has Your Community Received?

- More than 1,000
- 500 to 999
- 100 to 499
- Less than 100
- none

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Has Your Client Received Pressure to:

- Ban 5 G small cells from residential areas?
- Ban 5 G small cells from schools and libraries?
- Ban 5 G small cells from public parks?
- All of the above



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Moratoria & Small Cell Orders

- **August 2018 Moratoria Ruling**
  - Preempts express and *de facto* state and local moratoria on acceptance, processing, or approval of telecommunications facility or service permits

- **September 2018 Small Cell Order**
  - Primarily relates to SWFs; applies to muni vertical infrastructure in public ROW, including light poles, muni electric utility poles
  - Shot clocks for SWFs – 60 days (collocation) or 90 days (new)
  - Applies shot clocks to all permits and authorizations



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Small Cell Order (*cont'd*)

- **FCC on effective prohibition:**
  - "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…an effective prohibition includes materially inhibiting additional services or improving existing services." (Para. 37)
  - "[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



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Small Cell Order (*cont'd*)

- Small Cell Order stated that aesthetic requirements (and undergrounding and spacing) *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." (Paras. 84-89)



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Small Cell Order (*cont'd*)

- FCC reviewed its pole attachment rate formula, small cell legislation in 20 states, local legislation, and comments in the record to determine "safe harbor" fees that do not violate federal law
- "…we presume that the following fees would not be prohibited by Section 253 or Section 332(c)(7):
  a) $500 for non-recurring fees, including a single up-front application that includes up to five Small Wireless Facilities, with an additional $100 for each Small Wireless Facility beyond five, or $1,000 for non-recurring fees for a new pole (i.e., not a collocation) intended to support one or more Small Wireless Facilities;
  b) $270 per Small Wireless Facility per year for all recurring fees, including any possible ROW access fee or fee for attachment to municipally-owned structures in the ROW."
  (Para. 79)

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Small Cell Order (*cont'd*)

- The FCC acknowledged that there are limited circumstances in which a local government can charge fees in excess of the FCC's "safe harbor" amounts and still comply with federal law
- "…a locality could prevail in charging fees that are above this level by showing that such fees nonetheless comply with the limits imposed by Section 253—that is, that they are (1) a reasonable approximation of costs, (2) those costs themselves are reasonable, and (3) are non-discriminatory."
  (Para. 80)





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Sprint Corp. v. FCC

- ***Sprint Corp. v. FCC*, No. 19-70123 (9th Cir.)**
  - Ninth Circuit Decision: 8/12/2020
- **In Favor of Local Governments**
  - Court vacated portions of FCC aesthetic standards requirements
  - Aesthetic requirements (and undergrounding and spacing) *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
  - Rejected industry request for "deemed granted" remedy for FCC shot clocks
    - This decision does **not** impact state shot clock rules or remedies



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Sprint Corp. v. FCC (cont'd)

- **In Favor of Status Quo** – Court upheld portions of the Order:
  - Limiting fees to cost recovery (2 to 1 vote)
  - Adopting "materially inhibits" standard and rejecting significant gap/least intrusive means test
  - Requiring aesthetic standards to be published in advance and be reasonable (technically feasible)
  - Adopting shortened shot clocks for small wireless facilities
  - Applying FCC shot clocks to all permits and authorizations
- Court also:
  - Upheld ban on moratoria (under certain conditions)
  - Dismissed as moot Montgomery County's challenge based on FCC's failure to act on RF standards



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What's Next?

- Possible re-hearing, en banc or certiorari?
  - En banc: 9/28/2020
  - Certiorari: 1/11/2021
- FCC remand?



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Section 6409 Orders

- Section 6409(a) of the 2012 Spectrum Act
  - "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."
- FCC 2014 implementing order set detailed parameters for EFRs (47 CFR 1.6100)
- **Clarifications**
  - On 6/9/2020, in response to industry petitions FCC adopted "clarifications" to Section 6409 rules



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Section 6409 Clarifications Order

- **Concealment Elements** – protections for concealment elements *only apply to stealth facilities*
- **Aesthetic Conditions** – placement of a facility behind or beneath surrounding structures is aesthetic condition that *cannot* prevent a non-substantial increase in height
- **Equipment Cabinets** – limit of 4 ground-mounted cabinets applies separately to each EFR and is *not cumulative*
- **Height Increases** – for towers outside of PROW, height can increase 20 feet *plus* the height of new antenna, and there is **no limit** on new antenna's height
- **Shot Clock Rules** – shot clock triggered if applicant: (1) takes first procedural step; and (2) submits documentation addressing EFR criteria
- **Environmental Assessments** – under certain circumstances, an environmental assessment is not needed if applicant and the FCC have entered into a memorandum of agreement

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Section 6409
Clarifications Order Appeal

- Filing deadline for appeals was: 8/10/2020
- Appeals were filed by local governments:
  - Ninth Circuit Court of Appeals
  - D.C. Circuit Court of Appeals
  - Appeals will be consolidated in the Ninth Circuit
- Deadline to file interventions: 9/9/2020





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Section 6409 NPRM

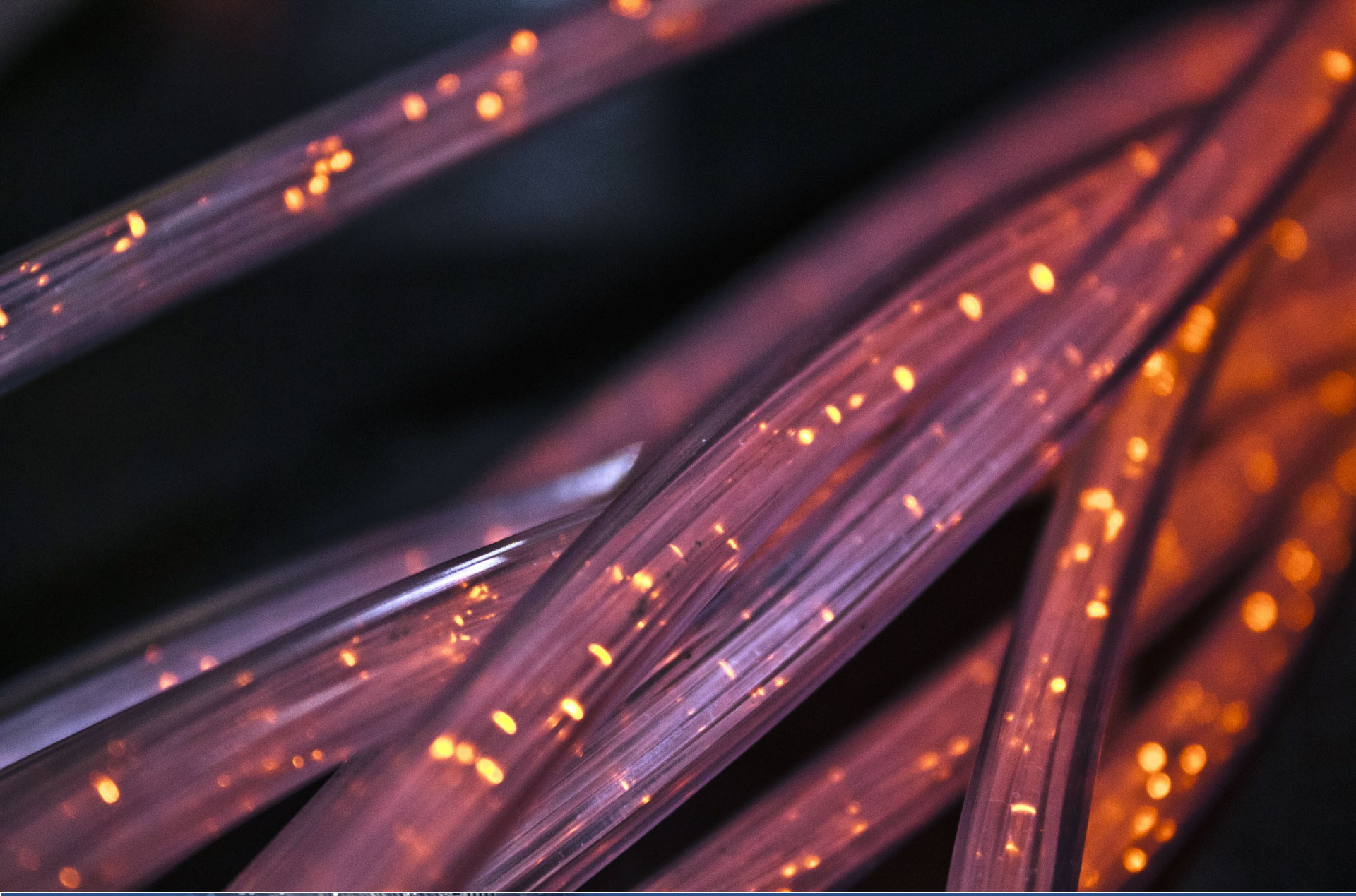
- NPRM (WT Docket 19-250) – FCC seeking input on whether:
  - It should change its rules to allow deployment or excavation of up to 30 feet outside of an existing site
  - It should define "site" as the boundary of the leased or owned property surrounding the tower and any related easements "as of the date that the facility was last reviewed and approved by a locality" ***or*** "as of the date an applicant submits a modification request"
  - Formal comment period is closed

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Other Dockets of Interest

- **Over-the-Air Reception Devices (OTARD)** (WT Docket No. 19-71)
  - Traditionally consumer-end satellite dishes
  - Existing federal law bars local zoning authority over OTARD
  - NPRM: Proposes expanding OTARD rules to cover hub and relay antennas, the equivalent of small cell towers outside the public ROW
- **VZW/Clark County Petition** (WT Docket No. 19-230)
  - Asks FCC to rule that Clark County's fees violate FCC's Small Cell Order
- **RF Order** (ET Docket No. 18-295)
  - Maintains existing RF standards
  - On Appeal: *Environmental Health Trust v. FCC*, No. 20-1025 (D.C. Cir.); *Children's Health Defense v. FCC*, No. 20-70297 (9th Cir.)
  - NPRM: examining localized RF exposure limits above 6 GHz for portable devices
- Formal comment periods are closed

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Has Your Cable Operator Requested an Offset Against Franchise Fees for Non-Financial Franchise Obligations?

- Yes
- No
- Not sure as we are in a state franchise state

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Cable Franchising
Third Report and Order

- **Effective Date**
  - September 26, 2019
- **Summary:**
  - Reinterprets what is and is not a franchise fee to count the value of most franchise requirements as franchise fees
  - Limits LFA authority over cable operators' non-cable services
  - Applies this new standard to local and state-issued franchises
- **Application**
  - Not retroactive
  - Should not result in automatic offset against fees

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Cable Franchising
Third Report and Order (*cont'd*)

- **Franchise Fees**
  - Redefined to include most non-monetary cable franchise obligations
- **"In-kind" Franchise Obligations**
  - Valued at "fair market value"
  - Includes, but not limited to:
    - Free or discounted service, including I-Net services
    - "Maintenance cost" for PEG transport (not FMV)
    - Excludes:
      - PEG capital
      - Customer service
      - Buildout
- **PEG Channel Capacity**
  - LFAs "may only require 'adequate' PEG access channel capacity, facilities, or financial support"
  - Adequate = satisfactory or sufficient



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Cable Franchising
Third Report and Order (*cont'd*)

- **Franchise Modification Process**
  - "encourages" parties to negotiate franchise modifications and grant LFA choice
  - Reasonable time = 120 days, but could be longer in complex areas (last position surrendered by FCC in 6th Circuit Stay argument)
- **Mixed Use**
  - LFAs cannot regulate non-cable (services, facilities, equipment)
  - LFAs cannot impose fees on non-cable (including telecom, broadband, Wi-Fi and small cell antennas)
- **Preemption**
  - Broadly preempts "any state or local requirement, whether or not imposed by a franchising authority, that would impose obligations on franchised cable operators beyond what Title VI allows."



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City of Eugene v. FCC, et al.

- *City of Eugene, OR v. FCC, et al*, No. 19-4161 (6th Cir.)
- Appeal of the Third Report and Order
  - Approximately 100 municipalities and organizations
  - NATOA and New York have joined as Intervenors
  - FCC successful in having case transferred to Sixth Circuit
  - Stay Motion denied
  - Final briefs due 10/13/2020

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What's Next?

- **Franchise Modifications**
  - Order is in effect pending appeal
  - Anticipate action from cable operators
  - What the FCC describes as "In-kind contributions" are not prohibited; LFAs get to decide whether to waive these contributions or accept a franchise fee reduction (if necessary)
  - Check your franchise
    - Change of law/preemption clauses
    - Definition of "gross revenues"
      - Neither the Cable Act nor the Third Report and Order address deductions from gross revenues, so make sure you are at the 5% cap in the Act before offsetting

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What's Next?

- **Franchise Modifications – Franchise Fee Impacts**
  - (Franchise Fees + PEG Grants (cash) + Fair market value of in-kind contributions, including construction of I-Nets)

Minus

  - (PEG Capital Costs [including franchise fees used to pay for PEG Capital Costs] + Costs of complying with build-out or customer service requirements, if included in above

Must Be Less Than

  - (5% of Gross Revenues from Cable Service)

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What's Next?

- **Franchise Modifications – Franchise Fee Impacts**
  - Does the Order allow for the deduction of the contribution?
    - Industry mentioned ROW-related issues like relocation, but FCC did not expressly address it
    - PEG Transport: maintenance and operation costs are "fees" but construction is not
    - Customer Service and Buildout are not "fees"
  - How did the cable operator calculate FMV?
    - Is documentation or information required to verify the calculation?
    - Is there a more appropriate FMV (*e.g.*, which rate is applicable for free service to public buildings)?
    - How did they calculate the 5% cap?

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What Can We Do?

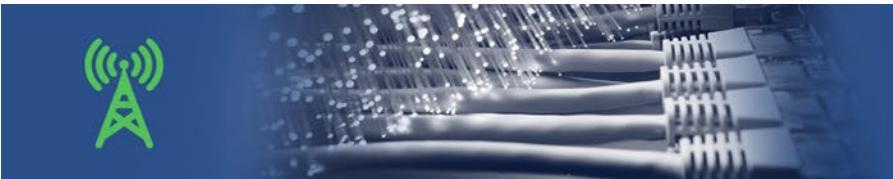
- **Cable**
  - Ask your delegation to support bills that effectively revert to long-standing interpretations of the law
  - Ensure you are prepared to act if operator takes offsets – or notifies community that it intends to take offsets
  - Do NOT "lock" FCC ruling into your franchise
- **PEG Channel Capacity Issue**
  - Prepare to file in the docket and litigate should the issue move forward



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Other FCC Dockets of Interest

- **USTelecom COVID-19 Relief Request**
  - USTA seeks various changes to the four universal service fund (USF) programs.
- **Keep America Connected Pledge (EXPIRED)**
  - Over 500 companies have taken an FCC Pledge for 60 days to (1) not terminate service to any residential or small business customers because of nonpayment; (2) waive any late fees; and (3) open its Wi-Fi hotspots to any American who needs them.
- **Rural Digital Opportunity Fund (WC 19-126)**
  - Established at the January 30, 2020 FCC meeting, with a two-phase reverse auction mechanism to distribute up to $20.4 billion over ten years.



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Intergovernmental Advisory Committee (IAC)

- FCC appointed new IAC members
  - Municipal Representatives: 12
  - State Executive Representatives: 3
  - County Representatives: 3
  - City Attorney Representative: 1
  - Tribal Representatives: 4
  - State Legislative Representatives: 5
  - State Public Utility Commission Representatives: 2

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The Hill/States



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Bills of Interest to Local Gov't

CARES Act Signed by President Trump on 3/27/20. The broadband-related funding provisions include

> $200,000,000 for telecommunications services, information services, and devices necessary to enable the provision of telehealth services, which the FCC can administer.
>
> $100,000,000 for grants under a pilot program to prevent, prepare for, and respond to coronavirus where at least 90 percent of the households to be served by a project receiving a grant shall be in a rural area without sufficient access to broadband.
>
> $50,000,000 for grants to States, territories and tribes to expand digital network access, purchase internet accessible devices, and provide technical support services.
>
> $25,000,000 for a ''Distance Learning, Telemedicine, and Broadband Program'.'

In addition to the broadband-related funding, there is funding for States, Tribes and local governments for COVID-19-related costs: $150,000,000,000 for payments to States and locals 500k and larger.

Secure 5G and Beyond Act of 2020 (H.R. 2881) (S. 893) – Signed by President Trump on 3/23/20. Requires the President to develop a strategy to ensure the security of next generation mobile telecommunications systems and infrastructure in the United States and to assist allies and strategic partners in maximizing the security of next generation mobile telecommunications systems, infrastructure, and software, and for other purposes.

Broadband DATA Act (S. 1822) – Signed by President Trump on 3/23/20. Requires the FCC to issue rules relating to the collection of data with respect to the availability of broadband services, Includes language from the Mapping Accuracy Promotes Services Act (H.R. 4227), which prohibits companies from knowingly giving the FCC inaccurate broadband coverage data.

Protecting Community Television Act (H.R. 5659) (S. 3218) – Would modify the definition of "franchise fee" in the Cable Act to effectively reverse the FCC's interpretation of that term to allow "in-kind" deductions from cable franchise fees. Currently 35 co-sponsors in the House; 17 co-sponsors in the Senate.

Accelerating Broadband Development by Empowering Local Communities Act of 2019 (H.R. 530**)** – Bill states that the FCC's August moratorium order and September small wireless order would have no force or effect. Introduced by Rep. Eshoo; 59 co-sponsors to date.
Restoring Local Control Over Public Infrastructure Act (S. 2012) – Sen. Feinstein companion to H.R. 530. 8 co-sponsors to date.



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Bills of Interest to Local Gov't

Connecting Communities Post-Disasters Act (S.2645) (H.R. 4741) – Introduced by Sen. Blackburn and Rep. Olson. Provides a five year categorical exclusion for communications service providers from certain provisions of the National Environmental Policy Act of 1969 and the National Historic Preservation Act with respect to the construction, rebuilding, or hardening of communications facilities following a major disaster or an emergency declared by the President.

Don't Break Up the T-Band Act (S. 2748) (H.R. 451) – Refiled in the Senate on 10/30; repeals provision of the Middle Class Tax Relief and Job Creation Act of 2012 that requires public safety users to relocate from the T-Band spectrum by 2021.

Broadband Speed Act (H.R. 4641) (S. 3093) – Requires broadband providers to annually report to the FCC broadband speeds with data to demonstrate that the provider is capable of performing at the speed reported to the Commission on Form 477; also requires any broadband infrastructure built with USF funds provide broadband service with a download speed of at least 100 mbps.

Community Broadband Mapping Act (H.R. 4642) – Allows RUS grants to be provided to certain units of local government, economic development or other community organizations, and electric cooperatives to collect data on where broadband infrastructure is located and homes served.

STREAMLINE Act (Thune/Schatz) (S. 1699) has been reintroduced. No additional cosponsors and no action in Senate.

Improving Broadband Mapping Accuracy Act (S. 842) – Introduced by Sens. Capito, Klobuchar, Manchin and Hoeven. Directs the FCC to initiate a rulemaking to consider using consumer-reported data and data from state, local and tribal government entities to improve broadband mapping accuracy and to consider ways coverage data can be challenged.

Transparency for Cable Consumers Act (H.R. 1555) – Rep. Brendisi (D-NY) introduced bill to require cable operators that are fined by a state utility/service commission to disclose certain information on a county-wide basis, including average cable and broadband charges and broadband speeds.

Digital Equity Act – (S. 1167) – Introduced by Sen. Murray (D-WA). Funds grants for digital equity planning and implementation. 17 co-sponsors to date.

Save the Internet Act of 2019 (H.R. 1644) (S. 682) – Would restore FCC's 2015 net neutrality rules and bar the FCC from repealing the rules again unless specifically authorized by law to do so. House passed H.R. 1644 April 10th; no action in Senate.

State Cyber Resiliency Act (H.R. 2130) (S. 1065) – Would provide grants to assist states in developing and implementing plans to address cybersecurity threats or vulnerabilities; portions of implementation grants would be available to local and tribal governments.



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State Resiliency Requirements

- **California Bills/Actions:**
  - AB 2421 (Quirk): 60-day shot clock for permits for emergency standby generator and fuel storage tank at macro cell sites
  - SB 431 (McGuire): 72 hour back up power requirement for mobile and landline telecommunications in high fire threat areas
  - California Public Utilities Commission (CPUC)
    - 7/16/2020 adopted a decision instituting a 72 hour emergency backup power and resiliency plan requirement for wireless providers in high fire threat areas
    - 8/19/2020 wireless industry requested rehearing challenging legality of state mandate
    - CPUC currently considering backup power requirements and resiliency for telecommunications and cable service providers



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Local Response



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How is Your Client Addressing Small Cell in Rights-of-Way?

- Small Cell Wireless Ordnance
- Design Manual
- Master License Agreement
- Small Cell Application
- All of the above



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Has Your Client Amended its Wireless Code to Address Section 6409 or Eligible Facility Requests?

- Yes
- No
- I don’t know



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Overview

- Presentation focuses on FCC Small Cell Order
- But local actions must also account for other applicable federal *and* state laws
- Implementation may require multiple documents
  - Ordinance (possibly addressing private property and rights of way separately)
  - Design Standards for Wireless Facilities
  - Master License Agreement
  - Wireless Application Form



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COVID-19 Impacts on the Processing of Wireless Applications

- Any moratorium poses a legal risk (see FCC Moratorium Order for uses of moratoria in emergencies) – do not forget state law!
- If a moratorium is adopted, stronger case if moratorium is applied to all non-essential infrastructure projects
- Remember that most of the FCC shot clocks create rebuttable presumptions
- Governmental entities and private organizations have issued and updated guidance:
  - **Department of Homeland Security**: CISA guidance on essential critical infrastructure workforce (Version 4.0)
  - **CTIA**: Best practices for managing wireless siting during COVID-19



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Small Cell Ordinance

- **What It Does**
  - Establishes the permitting process for wireless facilities in the public right-of-way
  - Typically updates portion of a municipal code that regulates streets and sidewalks
- **Key questions to answer:**
  - Which person or department has the authority to make findings and decisions on applications?
  - How will the design standards be set?
  - Will public notice be required?
  - Will there be an appeals process?
  - What are the general conditions of approval?
  - How will fees be set?

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Design and Location Standards

- These Can Either Be:
  (1) Set in the Small Cell Ordinance;
  (2) Adopted by Resolution; or
  (3) Published by a city department
- Given frequent changes in technology and law, it is important to maintain flexibility
- SWF definition vs. Aesthetic Regulations
  - SWF definition is for shot clocks
  - Aesthetic regulations can further limit size
- Undergrounding and minimum spacing requirements may be ok
- Consider whether special limits justified in sensitive areas (viewsheds, historic districts)
- Require stealth facilities – at least for replacement and new poles
- Municipalities often request industry feedback on the standards prior to adoption

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Master License Agreement

- A master license agreement (MLA) is used when an applicant proposes to install a SWF on city-owned poles in the public right-of-way
- An MLA is another authorization to be completed within the shot clock period
- The MLA should contain all necessary terms for the installation of SWFs on city-owned poles, including the following topics:
  - Compensation (one-time and recurring fees)
  - Construction (responsibility for make-ready work, maintenance, repairs, and replacements)
  - Indemnification and waiver
  - Performance bond (if required)
  - Insurance (various types and required coverage amounts)
  - Site by site approvals through supplements



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Master License Agreement (*cont'd*)

- Develop a template and request industry feedback on the template prior to receiving applications
- If you choose to use a safe harbor for rent, consider a fallback market rate if the Ninth Circuit decision on the FCC Small Cell Order is appealed and cost-based requirement is overturned
- Be sure to charge for other non-recurring costs (e.g., inspections, make ready)
- Costs escalate – include escalators or process for escalation
- Make all supplements coterminous with MLA
- Be careful about language in any change of law provision



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Wireless Application Form

- Request all pertinent information about proposed wireless facility
- Have applicant identify all required approvals/permits and the status of the application for each of them
- Tailor requests for information depending on application type (SWF vs EFR)
- Post online and make available to applicants in the same manner as other forms
- Using a form is preferable to listing all application requirements in municipal code because a separate application form is more easily amended
- Basis for determining what information, if any, is missing and drafting an NOI





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Permitting Fees

- Safe Harbors vs. Cost-Based Fees
  - Most permit fees are already cost-based
  - Charging costs against a deposit is ok
- Must follow process for establishing fees under state and local laws



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Conditions of Approval

- Conditions of approval should accompany any wireless permit
- Examples include:
  - Permit duration
  - Public notice of construction
  - Timeline for beginning installation
  - Compliance with FCC RF emissions standards
  - Indemnification
  - Insurance
  - Abandonment



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Considerations for Small Cells Outside of Public ROW

- Small cell rules do not only set new shot clocks
- Need to determine whether your existing code is clear enough to apply to small cell applications and what changes may be required
- Shot clock issues:
  - Are the 60-day (small cell) and 90-day (collocations) shot clocks mutually exclusive?
  - Is a rooftop an “existing structure” for shot clock purposes?



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Overview of Wireless Facility Application Processing

1. Determine applicable shot clock (can request this information on application form)
2. Review application materials to determine if application is complete
3. Issue a Notice of Incompleteness, if needed
4. Ensure that any applicable notice requirements are met
5. Follow permitting process established by municipal code
   a) Review application materials to confirm that proposed facility complies with applicable local laws and standards
   b) Issue a decision and discuss findings in support
   c) Process any appeals, if applicable
   d) If approved, issue permit and conditions of approval
6. Reminder: State shot clocks apply independently



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Summary of FCC Shot Clocks

FCC Category		Applicable Shot Clock
Eligible Facilities Requests (EFR) **Must involve modification to existing wireless facility (tower or base station) and meet size and other requirements to qualify as EFR**		60 days
Small Cells (Small Wireless Facility (SWF)) **Must be personal wireless services facility that meets size and other requirements to qualify as SWF.**	Placement on existing structure (need not be existing wireless facility)	60 days
	New	90 days
Collocations **Must involve placement of personal wireless services facility (that does not qualify as EFR or SWF) on existing structure which need not have wireless facility already on it**		90 days
Other **Personal wireless services facility that does not fall in any other category**		150 days



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Summary of NOI Deadlines

FCC Category	NOI Deadlines
Eligible Facilities Requests (EFR)	Initial Submission: 30 days Resubmissions: 10 days
Small Cells (Small Wireless Facility (SWF))	Initial Submission: 10 days* Resubmissions: 10 days *First NOI resets shot clock
Collocations	Initial Submission: 30 days Resubmissions: 10 days
Other	Initial Submission: 30 days Resubmissions: 10 days

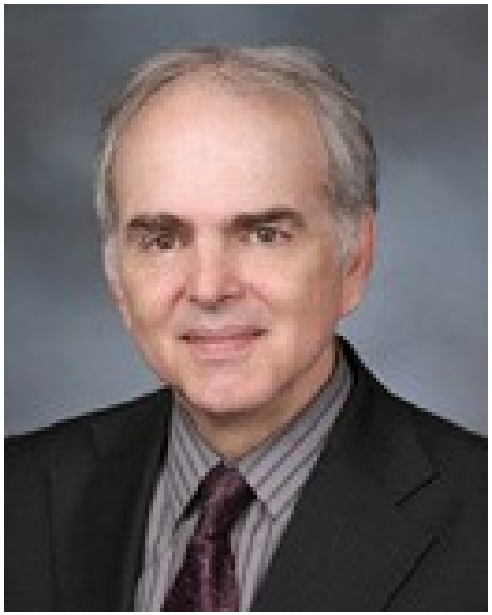


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Questions?



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