Out With the Old and In With the New:



How the Election May Change Federal Communications Policy Affecting Local Government Authority and Funding Opportunities

Telecommunications Update

BB&K

April 22, 2021

Best Best & Krieger LLP
Attorneys at Law

Overview

- New Players and New Policy = New Directions
- Small Cell Rules
- 6409
- Cable
- Broadband Grants
- Fund Opportunities
- Miscellaneous
  - Robo Calls
  - OTARDs
- Q&A



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Poll Question #1
What is the leading communications issue in your community?

1. Small Cells in Rights of Way
2. Wireless Deployments other than Small Cells in ROW
3. Cable Franchising Issues/Renewal?
4. Broadband Funding
5. Other – and please email issue to Gerard.Lederer@bbklaw.com



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POLICY PRIORITIES

Biden Administration Priorities

- COVID-19
- Stimulating Economy
- Infrastructure Investment
- Climate Change
- Racial Equity/Inclusion
- Economy

- *Common thread to many of these is broadband.*



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FCC LEADERSHIP

Leadership



Jessica Rosenworcel
Acting Chairwoman

Bio | Staff | Speeches | Statements | Testimony | Podcast | Email | Notes from the Acting Chairwoman | Editorials | Press and Meeting Inquiries | Twitter



Brendan Carr
Commissioner

Bio | Staff | Speeches | Statements | Testimony | Email | Twitter | Op-Eds the News



Geoffrey Starks
Commissioner

Bio | Staff | Speeches | Statements | Testimony | Email | Op-Eds | Twitter Press and Meeting Inquiries



Nathan Simington
Commissioner

Bio | Staff | Statements | Email | Twitter

Who will be 5th Commissioner

- Will they be Chair?
- Outlook on local gov't?

Chair and Comm. Starks dissented from orders on:

- 6409 621 (Cable)
- Small cell Net neutrality

HOUSE COMMITTEE ON ENERGY & COMMERCE

COMMUNICATIONS & TECHNOLOGY SUBCOMMITTEE

REPUBLICAN MEMBERS


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Brett Guthrie
Kentucky ~ 02


Adam Kinzinger
Illinois ~ 16


Gus M. Bilirakis
Florida ~ 12


Bill Johnson
Ohio ~ 06


Billy Long
Missouri ~ 07


Markwayne Mullin
Oklahoma ~ 02


Richard Hudson
North Carolina ~ 08


Tim Walberg
Michigan ~ 07


Earl L. "Buddy" Carter
Georgia ~ 01


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Virginia ~ 04


Darren Soto
Florida ~ 09


Tom O'Halleran
Arizona ~ 01


Kathleen M. Rice
New York ~ 04


Angie Craig
Minnesota ~ 02


Lizzie Fletcher
Texas ~ 07

KEY (NEW) PLAYERS

Senate Leadership

Commerce Committee

- Chair: Maria Cantwell (WA)
- Ranking Member: Roger F. Wicker (MS)

Subcommittee on Communications, Technology, Innovation and the Internet

- Chair: Ben Ray Lujan (NM)
- Ranking Member: John Thune (SD)

New Members

Democrats

Sen. Ben Ray Lujan (NM)

Sen. John Hickenlooper (Colo)

Sen. Raphael Warnlock (GA)

Republicans

Cynthia Lummis (Wyo.)



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WIRELESS ISSUES



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Question Number 2
Small Cells

My community has updated our code to deal with small cells in the rights-of-way.

1. Yes
2. No

My community has received applications from _____ providers.

1. Zero
2. 1 to 5
3. More than 5



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SMALL CELL ORDERS:

- Preempted moratoria on wireless permits (de facto or de jure)
- Adopted new standard for "effective prohibition" to reach requirements that "materially limits or inhibits" ability of provider of services or wireless infrastructure to compete;
- Found that fees for use of RoW and for muni-owned property in RoW are not prohibitory if cost-based, but fees exceeding costs are prohibitory (FCC presumes all RoW and all structures are managed by communities only in regulatory capacity); leaves open case-by-case challenges to this finding;
- Ruled that aesthetics standards are not effectively prohibitory if objective, no more burdensome than imposed on other structures, technically feasible and published in advance;
- Codified new shot clocks for small wireless facilities.



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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 rights of localities to act as a landlord in setting rates for RoW infrastructure (See paras. 92-97.)



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The FCC Cost Rule Is Leading To Significant Litigation …

- *Crown Castle* contending that where fees exceed those charged in other cities, they are by definition unreasonable, even where local fee is based on a cost study; also arguing that fees above $270 are unreasonable
- *Pittsburgh* sued by AT&T
  - City imposed $850 annual fee;
  - AT&T refused to agree to fee;
  - AT&T argues City failure to issue permits notwithstanding its failure to agree to fee violates the law
  - New Cingular Wireless PCS LLC, d/b/a AT&T Mobility v. City of Pittsburgh, Commonwealth of Pennsylvania, case 2:21-cv-443. Western District of PA.



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CHALLENGES TO SMALL CELL ORDERS:

- *Portland v. U.S.*, 969 F.3d 1020 (9th Cir. 2020)
  - Upheld most of the Orders
  - Vacated rule that aesthetic requirements must be objective and no more burdensome than requirements imposed on other users in the right of way
  - Petition for Certiorari filed March 22, 2021
    - Questions presented ask court to review "effective prohibition rule;" classification of interests in RoW property as regulatory; and fee limit



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SUPREME COURT
OF THE UNITED STATES

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Search documents in this case: Search

No. 20-1354

Title:	City of Portland, Oregon, et al., Petitioners v. Federal Communications Commission, et al.
Docketed:	March 25, 2021

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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

Resubmission = time locality has to notify applicant that its resubmission is incomplete; federal law does not set a deadline for response to an NOI

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Question No. 3
6409 & Deemed Granted

- Has your community received 6409 or "eligible facilities requests"?
  1. Yes
  2. No
- If yes, have you seen an increase of such claims?
  1. Yes
  2. No
- Are you familiar with San Francisco case on limitations of affirmative obligations under 6409?



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SECTION 6409 ORDERS

- Section 6409(a) of the 2012 Spectrum Act (47 U.S.C. Sec. 1455)
  - "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)
- Included six elements which would result in a change being deemed "substantial":
  - Where change defeated concealment elements;
  - Where change involved excavation or deployment outside of site
  - Where change added ground-based cabinets where there were none, or added more than four;
  - Where change increased height by more than specified amount



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SECTION 6409 ORDERS

- **Two Substantial Expansions of 6409 Rules**
  - Concealment Order (BB&K Legal Alert: 6/22/20)
    - On 6/9/2020, in response to industry petitions FCC adopted what they called "clarifications" to Section 6409 rules. We believe it is a whole new rule.
    - *Declaratory Ruling and Notice of Proposed Rulemaking* –WT Docket No. 19-250 and RM-11849 (June 9, 2020)
  - Site Expansion Order
    - FCC declared existing site can be expanded 30 feet on each side and refused to limit size of facilities in expanded area.
    - Order is subject to a Petition for Reconsideration
    - *Report and Order - WT Docket No. 19-250, RM-11849* (December 3, 2020)

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SECTION 6409 CONCEALMENT 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 Concealment Order Appeal

- Filing deadline for appeals was 8/10/2020
- Appeals were filed by local governments and consolidated in the Ninth Circuit
- Opening Briefs filed by local government in January
- On March 19 the **court granted the FCC a 120-day delay** to "allow the newly constituted Commission an opportunity to determine how it plans to proceed with respect to this case" in light of "recent changes in the membership and leadership of the Commission."
    - 120 days ends on July 19, 2021

- **IMLA Member Action Items for 2021**:
    - Monitor litigation
    - Ensure your code addresses EFRs
    - Update design standards and/or permitting process to require concealment elements not just "stealth" facilities.
    - Watch for opportunities at the FCC



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SECTION 6409 EXPANSION ORDER

Expansion Order adopted: 10/27/2020

- Allows excavation up to 30 feet outside of site
- Only applies to towers (no base stations)
- Expansion is limited to transmission equipment, but no limit on size of equipment
- Baseline size of "site" as of 2/22/2012 (Spectrum Act)
- Not to be used in public right-of-way or on municipal property
- Local governments can still enforce setbacks, health codes, and public safety codes

IMLA Action Items for 2021:

- Monitor Local Governments' Petition for Reconsideration
- Ensure that your staff understands that this order does not grant any property rights expansion – only regulatory authority
- Review municipal code or design standards to see if means to protects with expanded set backs and other safety measures



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Limitations on Deemed Granted

Judge declined to force San Francisco to issue permits for certain T-Mobile co-locations infrastructure that were "deemed granted" under 6409 but did allow T-Mobile to proceed with construction without a permit.

Judge found law does not require the City to do anything more than to accept a carrier's deemed-granted notice and not interfere with installations.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

T-MOBILE WEST LLC, Plaintiff, v. THE CITY AND COUNTY OF SAN FRANCISCO, et al., Defendants.	Case No. 20-cv-08139-SI **ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT; GRANTING IN PART PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION** Re: Dkt. Nos. 29, 31

City asserted that requiring it to issue a permit could expose the city to liability as a permit is the city's way of ensuring deployment is done safely and the City could not make that representation in a deemed granted scenario

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CABLE ISSUES

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Question No. 4
Cable Issues

- Has your community received any demands for offsets under FCC's 621 Order?
  1. Yes
  2. No
- Has your community entered into a franchise renewal that incorporates the FCC's new 621 rulings?
  1. Yes
  2. No



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CABLE FRANCHISING ORDER:

- Redefines "franchise fee" to mean that the fair market value of any non-monetary franchise requirement must be deducted from the franchise fee (or paid for directly).
  - Residential build out, customer service not counted against the fee; new I-Nets are counted
  - Narrowed what may be collected above the fee as a PEG capital cost –not all PEG transport, reserved channel capacity TBD
- Preempts state and local authority over cable operators' non-cable services and facilities
  - Preempted Eugene, OR broadband franchise fee; limited authority over I-Nets
- Applied all rules to state franchise regimes



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CABLE FRANCHISING ORDER:

- *City of Eugene v. FCC*:
  - Appeal of Order pending before the 6th Circuit;
  - Oral Argument held April 15, decision expected in 2021
  - The FCC had sought, but was denied, a delay similar to the one it requested in the 6409 9th Circuit docket.

IMLA Action Items:

- Monitor litigation and FCC.
- Consider carefully any requests or franchise agreements made under current FCC ruling...avoid locking in order as rule may change



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FUNDING/BROADBAND FUNDING

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Question No. 5
Municipal Role in Broadband

2020 has demonstrated how important broadband has become in the life of a community. My community is doing the following (click all that matter):

1. Working with private sector parties to deploy broadband.
2. Sponsoring connections in school families' homes.
3. Providing outreach, training and equipment for broadband adoption.
4. Exploring Municipal provisioning of services.



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EMERGENCY BROADBAND BENEFIT

- Low-income households can receive up to $50 per month to purchase broadband ($75 in tribal areas) and up to $100 to purchase a device from an ISP.
- Broad eligibility includes SNAP, Medicaid, recent loss of income, Pell grants and more.
- Launch likely next week. Total funding $3.4 Billion with more possibly to come.
- https://www.fcc.gov/broadbandbenefit



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General Revenue Sharing in America Rescue Plan

Funding will be dispersed to counties, metropolitan cities (larger cities entitled to receive direct Community Development Block Grants) and smaller cities and towns with fewer than 50,000 people.

- Counties will receive $65.1 billion;
- Metropolitan cities will receive $45.6 billion; and
- Smaller cities and towns will receive $19.5 billion.

https://www.democrats.senate.gov/final-state-and-local-allocation-output-030821.

Metro City Allocation Projections, 03.08.21

(all totals in millions)

Note: *Estimates use FY2020 HUD data to identify populations eligible for assistance, and may not include localities that relinquished their CDBG allocation in that year. Funding to localities on this list would be reduced to the extent that such cities apply for and receive funding as a metro city under this proposal.*

State	Name	Allocation
Alabama	Anniston	13.81
Alabama	Auburn	16.10
Alabama	Bessemer	14.72
Alabama	Birmingham	148.82
Alabama	Decatur	12.04
Alabama	Dothan	12.53
Alabama	Florence	8.17
Alabama	Gadsden	26.35
Alabama	Huntsville	35.11
Alabama	Mobile	60.21
Alabama	Montgomery	42.14
Alabama	Opelika	6.78
Alabama	Tuscaloosa	20.52
Alaska	Anchorage	45.34
Arizona	Avondale	18.09
Arizona	Casa Grande	10.87

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Process For Receiving Direct Assistance Funds

Round 1 – by May 10, 2021

- Secretary of the Treasury to send 50% of funds directly to metropolitan areas.
- Smaller communities funds will go to State Treasury.
  - The State is required to disburse funds within 30 days of receipt;
  - State can request an extension of another 30 days. Treasury will.
- For small cities, this means the first half of the funds could take upwards of 120 days to receive.

Round 2 –

- Second round of direct assistance, not to exceed 50% of the funding, is to be disbursed by the Secretary of the Treasury, "no earlier than 12 months from the date of the first payment being made."
- The legislation does not provide a deadline as to when the Secretary of Treasury must disburse the second round of funding.



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Treasury Guidance

You need:

1. **A Valid DUNS number.** A DUNS number is a unique nine-character number used to identify an organization and is issued by Dun & Bradstreet. The federal government uses the DUNS number to track how federal money is allocated.
2. **Active SAM registration.** SAM is the official government-wide database with which an agency must register to conduct business with the U.S. government. All federal financial assistance recipients must register on SAM.gov and renew their SAM registration annually.

BB&K Alert

3. **Gather payment info**:
   - Entity Identification Number, or EIN, name and contact information
   - Name and title of an authorized representative of the entity
   - Financial institution information (e.g., routing and account number, financial institution name and contact information)



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Use Of Direct Assistance Funds

Like Cares, funds can be used to respond to:

- Public health emergency with respect to COVID-19 or its negative economic impacts, on households, small businesses and nonprofits;
- Pay for workers performing essential work during the COVID-19 public emergency, including premium pay for eligible workers.

Funds can also:

- Cover lost revenue due to the COVID-19 public health emergency relative to revenues collected in the most recent full fiscal year, and
- Make necessary investments in water, sewer or broadband infrastructure.

States, counties and municipalities have authority to transfer the funds to private nonprofit organizations, public benefit transportation corporations and a special-purpose unit of state or local government.

Funds cannot be used to support any pension fund.

Funds must be used by **December 31, 2024.**



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Reporting and Record Retention Requirements

Direct assistance recipient must report use of the funds to Treasury, as well as any additional information the Secretary should require.

Until Treasury issues guidance on the reporting requirements, there is no guidance on how funds may be spent nor accounted for.

CARES Act reporting requirements provide a general example of what may be required.

CAVEAT: ARP guidance could be different from the CARES requirements.

Still, our best advice is that until ARP guidance is issued, CARES compliance provides a model for how to track spending and what will be important to the federal government.



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BROADBAND GRANTS

ARPA

- $7.17B for E-rate
- $10B for state-level broadband and other infrastructure projects

2021 Approp. Bill

- $3.4B for Emergency Broadband Programs.
- NTIA Grants

AMERICAN JOBS PLAN

- $100B – details are being developed.



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BroadbandUSA News
April 2021

- $285M for Connecting Minority Communities
- $1B --Tribal Broadband Connectivity Program
- $300M -- Promote Broadband Expansion Grant Program

Workshops

https://broadbandusa.ntia.doc.gov/event

- Tribal
  - April 21 & 22
- Broadband
  - April 28 & 29
- Minority Comm.
  - May 5 & 6

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MISCELLANEOUS ISSUES

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Question 6
Familiarity with OTARD and Robo Call Rules

At the end of 2020, early 2021, the FCC extended Robo Call limitations to state and local governments – were you aware?

1. Yes
2. No

The FCC has rewritten its OTARD Rules, have you reflected these changes in your code?

1. Yes
2. No



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ROBO CALLS AND OTARDS

In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order. CG Docket No. 02-278 (December 30, 2020)

https://www.bbklaw.com/newsevents/insights/2021/legal-alerts/01/fcc-further-regulates-artificial-or-prerecorded-vo

Updating the Commission's Rule for Over-the-Air Reception Devices, Report and Order. WT Docket No. 19-71 (January 7, 2021)

https://gateway.on24.com/wcc/eh/2173244/lp/3003652/regulating-otards%3A-the-other-small-cell/



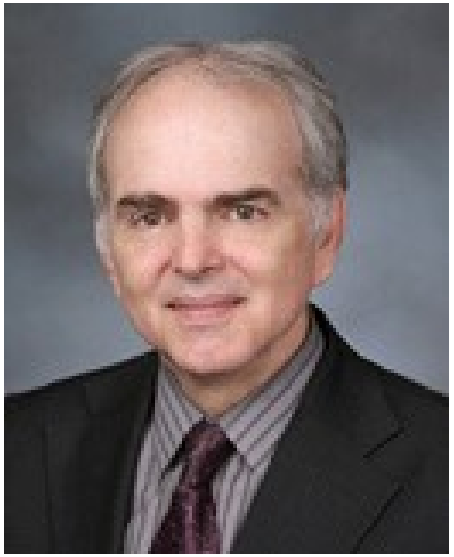
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Questions



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