

Fees and Charges for Public Rights-of-Way and Public Property

IMLA 2022 Mid-Year Seminar

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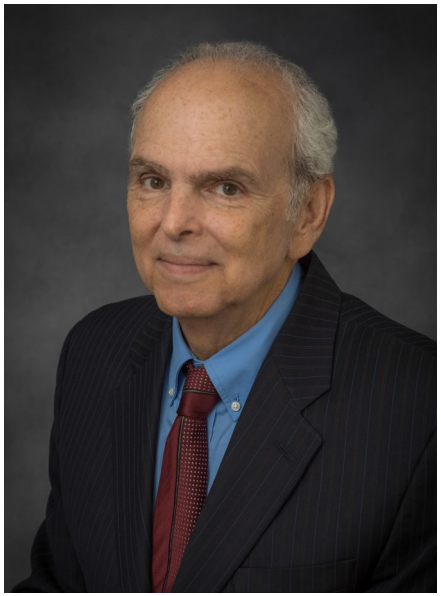

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Goals of Presentation

- Review federal limits on fees that can be charged for use of rights of way and municipal structures in rights of way under FCC decisions affirmed by 6th Circuit (Cable) and 9th Circuit (Small Cell).
- Identify issues NOT resolved by those decisions.
- Identify funding sources for Broadband and challenges facing urban communities.





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Wireless Fees



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Wireless Fees - Background

- 47 USC 253(c) permits states and local governments ”to require fair and reasonable compensation” “on a competitively neutral and nondiscriminatory basis,” for use of RoW
- FCC interpreted provision in *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, 33 FCC Rcd. 9088 (2018) *aff’d in part City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020)

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Wireless Fees - Background

- Fee decision *only* applies to small wireless facilities as defined at 47 CFR 1.6002(l) (industry argues same principles should limit fees for all facilities)
- One-time and recurring fees are limited to cost
- States and localities may set and recover fees that are (1) a reasonable approximation of costs, (2) those costs themselves are reasonable, and (3) are non-discriminatory
- FCC specifically mentioned as “unreasonable” excessive consultant fees



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Wireless Fees - Background

- FCC also defined “safe harbors” – fees that are presumptively consistent with Section 253(c)
- ***One-time fees*** [non-recurring fees for reviewing an application for placement of a small wireless facility]
  - For collocations on existing poles, $500 for up to five small wireless facilities PLUS $100 for any additional facility
  - For wireless facilities on new poles, $1,000 per pole
- ***Recurring fees*** [rents and other fees] “$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...”

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What Rules Do Not Address

- Wireless facilities require “backhaul” often in the form of fiber optics in RoW. Rules only reach fees for use of RoW at “fixed location” where antenna is located – not fees for placement of fiber optic and other equipment in RoW
- Rules do not reach fees for facilities that are not small wireless facilities – and many wireless facilities are not small wireless facilities
- Rules only reach charges for facilities located in RoW – not rooftop facilities, or facilities located outside of RoW
- FCC left open possibility that some facilities (e.g. utility poles and light poles owned by muni utility) might be proprietary facilities and not subject to 253(c)’s limits





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Practice Pointers

- Wireless providers and providers of wireless facilities will want to fix fees at safe harbors
- Subject to limits established by state law, counsel will want to ensure that community can charge appropriate fees for use of RoW for backhaul; negotiated fees for facilities that are not subject to federal (or state) limits; and can recover all costs
- This requires careful crafting of agreements for use of RoW; agreements for use of muni facilities; and fee schedules for permitting





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Practice Pointers

- Typically, cost of reviewing applications for wireless facilities will far exceed one-time safe harbor costs [third party consultants charge $1600-2000 per node]
- In addition, use of muni facilities may affect maintenance costs; costs for managing facility, and costs associated with training personnel to avoid excessive RF exposures
- A RoW cost study may justify higher rates for backhaul, even where RoW use is limited to cost; a cost study applying principles consistent with FCC pole attachment rules may justify higher fees for use of municipal structures in RoW



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Changing Video Marketplace



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Cable Franchise Fees - Background

- The FCC has been re-interpreting provisions governing local actions pursuant to the Cable Act, focused on Section 621 of the Cable Act, 47 U.S.C. § 541
- Franchise fees are typically 5 % of gross cable revenue
- The incremental cost to cable operators of a variety of franchise obligations now count as franchise fees. (The In-Kind Rule)
- If you want more details, please see bbk.law/6thcircuitorder





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FCC Mixed-Use Rule

- Attempts to reduce all state/local authority to that of local cable franchise authorities
- Cannot charge a cable operator a fee based on broadband revenue for right-of-way use
- Court and FCC concluded a cable franchise includes right to offer broadband





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Open Issues

- Court did not address whether a telecommunications revenue based fee is permissible.
- Fees not related to the use of the right-of-way may be permissible.
- Right-of-way fees for broadband-only systems with no cable franchise not addressed.





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Over-The-Top (OTT) Meets Cable

- Cable operator provision of IPTV/streaming video could count as gross cable revenue, depending on circumstances
- Untested law protects ability to charge tax/fee/assessment on a communications service provided over a cable system where revenues are not received by cable operators





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OTT – Netflix & Hulu litigation

- Outcomes highly fact specific, depending on state law wording and court interpretations:
  - Definition of video programming and whether programming touches the public internet
  - Which court and which entity has authority to enforce the law?
  - NATOA has produced an excellent summary
- This litigation *does not* resolve the case where a facilities owner in the right-of-way provides streaming services, or receives revenues from them



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Taxation?

- Federal Internet Tax Freedom Act prohibits:
  - (1) taxes on internet access and
  - (2) multiple and discriminatory taxes on electronic commerce
- City of Chicago 9% amusements tax upheld under ITFA, *Labell v. City of Chicago*, 2019 IL App (1st) 181379 (2019)
- State or local limits on taxing authority
- According to NCSL, 33 of 45 states include streaming services in their general sales tax





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Lessons

- Avoid concessions on franchise renewal fees—the law is still in flux
  - For example, don't concede "information services" as a blanket category
- Keep an eye on state legislation on taxes or fee
  - Pay attention to terms like "the public internet" or "video provider" and whether local government can enforce their rights





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NTIA's Broadband Programs

Understanding the threat to Urban America's access to $42B



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Former City Attorney – FCC Chief of Staff

Narda Jones becomes Chief of Staff.

- Coming back to FCC from White House. Spent a over a decade in senior roles in the Federal Communications Commission's Wireline and International Bureaus.
- Ms. Jones previously worked at the Minneapolis City Attorney's Office.
- In addition, she was part of the inaugural class of the AmeriCorps Legal Fellowship program and spent her fellowship time aiding homeless families secure housing and public St. Paul, Minnesota.



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Reminders of Broadband Resources and Status

- ARPA Spending Tracker (Brookings, NLC and NACo) – gives you an idea how people are spending ARPA funds.
- Common Sense Broadband Funding Chart (Outlines all the Broadband funding programs and use criteria.)
- Benton Foundation Write-up





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What's the Threat

- There are some in DC and in State Capitals that believe none of the money should end up in urban America.
  - "We must reject calls for government-subsidized overbuilding, which jeopardizes the operations of businesses that risked their own capital to serve local communities. Instead we need to direct funding to communities that have been left behind, rather than those that already benefit from high-speed Internet services today."
    - Comm Brendan Carr (3/16/22)





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What's at Stake

INFRASTRUCTURE ACT* CREATES ~$65B IN BROADBAND FUNDING

NTIA will administer ~$48B of this new funding

B.E.A.D.

$42.45B

Formula-based grant program for U.S. states and territories. BEAD aims to close the access gap for unserved & underserved areas of the country.

DIGITAL EQUITY

$2.75B

Title III – Digital Equity Act

Three programs, established for planning & implementation of programs that promote digital equity, support digital inclusion activities, and build capacity related to the adoption of broadband.

TRIBAL

$2.00B

Title II - Tribal Connectivity Technical Amendments

Furthers current Tribal Broadband Connectivity Program by investing an additional $2B to fund broadband adoption and infrastructure projects.

MIDDLE MILE

$1.00B

Title IV - Enabling Middle Mile Broadband Infrastructure

Provides funding to extend middle mile capacity to reduce cost of serving unserved and underserved areas and enhance network resilience.

FCC to administer ~$14B

$14.2B

For Affordable Connectivity Program, which will replace the EBB program

USDA to administer $2B

$2.0B

Via the Rural Utilities Service

Private Activity Bonds $600M

$600M

Authorizes State/local gov'ts to use private activity bonds for rural broadband

** Infrastructure Investment and Jobs Act, Division F, Pub. L. 117-58 (Nov. 15, 2021)*
Note: funding amounts inclusive of all administrative set-asides.





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Who Is Eligible

(II/II) STATES AND U.S. TERRITORIES ARE ELIGIBLE FOR FUNDING, WITH LEGISLATION SPECIFYING ELIGIBLE ACTIVITIES

"Eligible entity" for this program refers to **all 50 U.S. States and U.S. Territories** (including the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands)

*If an eligible entity fails to submit, or fails to gain approval for, a 'covered application' (LOI, initial proposal or final proposal) by the relevant deadline, a **political subdivision, or consortium of political subdivisions** of the entity, may submit a covered application*

Planning / pre-deployment funds (no more than 5% of min. allocation)

- Research & data collection
- Budget development
- Publications, outreach & communication support
- Provision of technical assistance
- Employee training for eligible entity or political subdivision staff
- Establishing capacity in the eligible entity's office responsible for program

Grant / deployment funds

- Unserved & underserved area service projects
- Connecting eligible community anchor institutions
- Data collection, broadband mapping & planning
- Broadband adoption (incl. affordable device provision)
- Installing internet/Wi-Fi infrastructure (or providing reduced cost broadband) in multi-family residential building

Eligible entities can use no more than 2% for administrative purposes

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Local Government Savings Clause

- *If an eligible entity fails to submit, or fails to gain approval for, a 'covered application' (LOI, initial proposal or final proposal) by the relevant deadline, a* ***political subdivision, or consortium of political subdivisions*** *of the entity, may submit a covered application*





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Locals Are Protected

A state's plan must be developed in coordination with, and be sensitive to the needs of local governments. The Act specifically requires:

- "5 years plan shall … be informed by collaboration with local and regional entities" (Section 60102(e)(1)(D)(i)(I).)
- "[A]ddress local and regional needs in the eligible entity with respect to broadband service" (Section 60102(e)(1)(D)(ii)(I)) and;
- State plans must "include localized data with respect to the deployment of broadband service in the eligible entity, including by identifying locations that should be prioritized for Federal support with respect to that deployment." (Section 60102(e)(1)(D)(ii)(III).)



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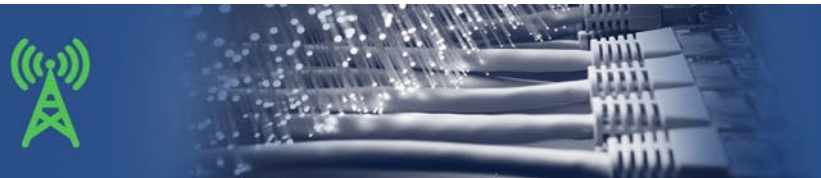
But Only If We are Proactive

Congress provide local input at every stage

- **Initial State Plan** – Act requires plan "…identifies, and outlines steps to support, local and regional broadband planning processes or ongoing efforts to deploy broadband or close the digital divide; and … describes coordination with local governments, along with local and regional broadband planning processes…." Moreover, "The Assistant Secretary shall establish local coordination requirements for eligible entities to follow, to the greatest extent practicable" and these requirement shall include, "at a minimum, an opportunity for political subdivisions of an eligible entity to … submit plans for consideration by the eligible entity; and … comment on the initial proposal of the eligible entity before the initial proposal is submitted to the Assistant Secretary." Section 60102(e)(3)(A)(ii)(aa), (bb).
- **Final Proposal** must also address local needs through local coordination. NTIA "… to the greatest extent practicable, [but in no case less] an opportunity for political subdivisions of an eligible entity to …submit plans for consideration by the eligible entity; and …comment on the final proposal of the eligible entity before the final proposal is submitted…" Section 60102(e)(3)(A)(ii)(I), (II).
- **Challenge Process** – Act reserves to local governments the right to challenge any initial proposal that fails to include in a plan a particular location or community anchor institution that is eligible for the grant funds as it is unserved or underserved. The Act further provides that the challenge takes place before any funding is allocated and that the state "shall ensure a transparent, evidence-based, and expeditious challenge process under which a unit of a local government … can challenge a determination" on non-eligibility for funding. Section 60102(e)(4).



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Call to Action

THE UNITED STATES CONFERENCE OF MAYORS

1620 EYE STREET NORTHWEST
WASHINGTON, D.C. 20006
TELEPHONE (202) 293-7330
FAX (202) 293-2352
URL: www.usmayors.org

…

Please reach out to the Commerce Secretary, Administration officials, and/or your Congressional leaders to make sure the Commerce Department requires states to address the needs of unserved and underserved city residents in adopting statewide broadband spending plans.

- Ensure that state broadband plans seek to support unserved and underserved locations without prejudice as to where they are located.
- Ensure affordability is used as a metric to identify the unserved and underserved.
- Require state broadband plans to document how affordability is used to identify populations and how obstacles to broadband affordability are addressed without prejudice as to where those populations live.
- Ensure that state digital plans demonstrate how they will support communities historically disproportionately affected without prejudice as to where they reside.
- Require that state broadband plans document that they invest in human infrastructure programs as provided for in the Act, investments that can make a real difference to in the lives of the unserved and underserved.
- Meet the needs of unserved, underserved and historically excluded communities in urban America by mandating local government consultation in state broadband plans and implementation.
- And, finally, resist industry led efforts to undercut state and local authority and property rights.

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Questions?



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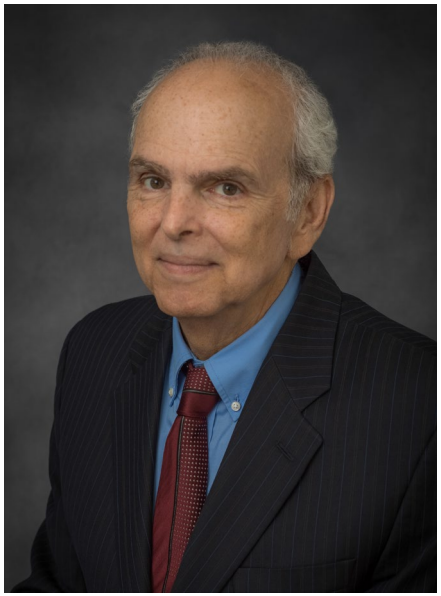

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