

TELECOMMUNICATIONS UPDATE: Answering the Call

IMLA

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BEST BEST & KRIEGER LLP
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Presenters and Program



Andre Monette, Partner



Cheryl Leanza, Of Counsel

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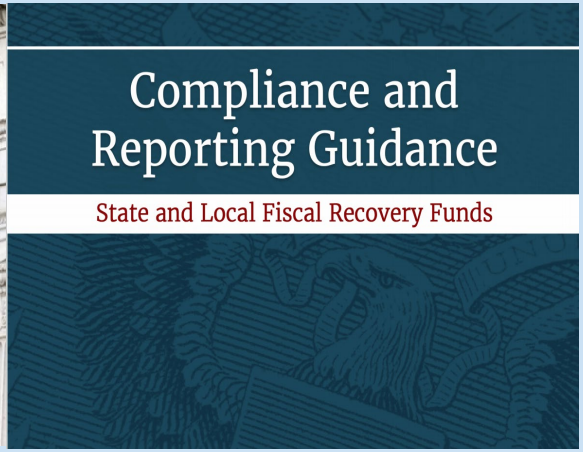
American Rescue Plan State and Local Fiscal Recovery Funds: Key Implementation, Compliance and Reporting Guidelines







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Eligible Uses

- Support public health expenditures
- Address negative economic impacts caused by the public health emergency
- Serving the hardest-hit communities and families
- Replace lost public sector revenue
- Provide premium pay for essential workers
- Invest in water, sewer, and broadband infrastructure



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Eligible Uses - Broadband

- Projects must reliably deliver minimum speeds of 100 Mbps download and 100 Mbps upload.
- Projects must also be designed to serve unserved or underserved households and businesses
- defined as those that are not currently served by a wireline connection that reliably delivers at least 25 Mbps download speed and 3 Mbps of upload speeds



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Eligible Uses - Broadband

- Designing infrastructure investments to provide service to unserved or underserved households or businesses means:
  - Prioritizing projects that will bring service to households or businesses that are not currently serviced by 25/3 connection.
  - Cities should use funds to deploy broadband infrastructure projects whose objective is to provide 25/3 service. These unserved or underserved households or businesses do not need to be the only ones in the service area funded by the project.



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Eligible Uses - Broadband

- Planning costs, studies etc:
  - pre-project costs associated with planning and engineering for an eligible broadband infrastructure build-out is considered an eligible use of funds, as well as technical assistance and evaluations that would reasonably be expected to lead to commencement of an eligible project



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Eligible Uses - Broadband

- Remaining issues:
  - What if a city already has 100 mbps and 25/3 service?
  - Can a city develop other projects and programs that involve access to broadband?
  - Is assistance limited to households or can projects involve businesses, libraries or schools?



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Broadband Funding Sources

https://www.bbklaw.com/Resources/Telecommunications-Resources

Question/Program/	Emergency Broadband Program Applications filing ongoing	Emergency Connection Fund New Window 9/28-10/13	CORONAVIRUS STATE AND LOCAL FISCAL RECOVERY FUND
Lead Federal Agency/Department	Federal Communications Commission EBB Report and Order Resource Page	Federal Communications Commission ECF Report and Order	Treasury Department Interim Final Rule Fact Sheet
What does the program do?	Funds are available to households that meet certain needs categories for a $50.00 per month subsidy for a broadband connection from an EBB program certified provider. (This is not just for traditional universal service providers.) Program is renamed "Affordable Connection Fund," extended and funded in Senate version of Infrastructure bill	Program is built on the existing E-Rate program that provides reimbursement of expenses associated with bringing advanced services to schools and librarians. Congress expanded the program to allow funds to be used to bring services to student, faculty and library patrons at locations other than schools or libraries. Nothing to extend or fund ECF in Infrastructure bill	American Rescue Plan provides funding directly to local governments, Providing citizens assistance to pay for internet services and digital appear an eligible expense. (p. 33 of Report) ***Investments in broadband. - Infrastructure that is scalable to 100 Mbps symmetrical for unserved or underserved areas are also eligible.***
How much	$3.2B – Potential additional $14.2B	$7.17B	Look to your community's allocation --- here
Status on Funding	Program went live May 12, 2021. Explanations and links for details and providers. Fact Sheet EBB enrollment & spending dashboard.	Eligible equipment or services purchased after March 1, 2020 can be reimbursed. First application window covers requests for funding for purchases between July 1, 2021 and June 30, 2022,	First tranche of funding to be receive from Treasury on May 12 – Second half will be in a year.
When does funding lapse	Until exhausted or six months after end of pandemic per HHS.	Until exhausted or 9/30/2030	12/31/2024
Who is eligible	Funding to eligible user for up to $50 per month ($75 on tribal land) for connection and $100 for device with $10-$50 copay.	Entities that are eligible under E-Rate program – Schools and Libraries ---	Money is sent directly to local government
Are funds available for construction	No	Likely No or limited	Yes, upon demonstration of the non-availability of **wireline service** of 25/3 speed.



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Compliance Requirements

"It is the recipient's responsibility to ensure all SLFRF award funds are used in compliance with these requirements. In addition, recipients should be mindful of any additional compliance obligations that may apply – for example, additional restrictions imposed upon other sources of funds used in conjunction with SLFRF award funds, or statutes and regulations that may independently apply to water, broadband, and sewer infrastructure projects. Recipients should ensure they maintain proper documentation supporting determinations of costs and applicable compliance requirements, and how they have been satisfied as part of their award management, internal controls, and subrecipient oversight and management."





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Compliance Requirements

Recipients must follow:

- Uniform Administrative Requirement
- Cost Principles
- 2 CFR Part 200
  - Including provisions on Procurement and Audit Requirements for Federal Awards
- Terms and Conditions of the SLFRF Assistance

Recipients and subrecipients who expend more than $750,000 in Federal awards during their fiscal year are subject to an audit under the Single Audit Act and 2 CFR Part 200, Subpart F

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Procurement

Recipients are responsible for ensuring that any procurement using SLFRF funds, or payments under procurement contracts using funds, are **consistent with the procurement standards** set forth in the Uniform Guidance at 2 CFR 200.317 through 2 CFR 200.327.

Must follow **2 CFR 200 Subpart D** procurement provisions

- This provision also applies to the purchase of equipment or real property

Assistance Listing Number 21.027 @ beta.SAM.gov

- 200.320: **Methods of Procurement**:
  - Micro (<$50K)
  - Informal (<$250K)
  - Formal (>$250K)
- 200.324: **No cost plus % construction contracts**



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General Procurement Standards

Must maintain written standards of conduct covering **conflicts of interest**

Procedures must **avoid** acquisition of **unnecessary** or **duplicative items**

Non-federal entities are encouraged to:

- Enter into state & local **intergovernmental** agreements
- Use Federal **excess & surplus** property in lieu of purchasing new equipment & property when feasible
- Use **value engineering** clauses in construction contracts

Only award contracts to **responsible** contractors

Eligible contractors **must <u>not</u> be suspended** or **debarred** (check sam.gov)

Maintain **records** sufficient to detail the history of procurement:

- Rationale for procurement method
- Selection of contract type
- Contractor selection/rejection
- Basis for contract price:
  - Cost reasonableness
  - Independent Cost Estimate
  - Price/Cost Analysis
  - Negotiation of Profit

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General Procurement Standards (cont.)

Do not restrict competition

- Placing **unreasonable requirements** in order for firms to qualify
- Requiring unnecessary experience & excessive bonding
- Noncompetitive pricing practices between firms or between affiliated companies
- Noncompetitive contracts to consultants that are on retainer contracts
- Organizational conflicts of interest
- Specifying only a “brand name” product
- **Any arbitrary action** in the procurement process





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General Procurement Standards (cont.)

Required Contract Provisions

- Administrative & Legal Remedies for Breach of Contract
- Termination for Cause & for Convenience
- Equal Employment Opportunity
- Davis-Bacon Act*
  - Only applies to the District of Columbia
  - State prevailing wage laws may apply
- Domestic Preference
- Copeland Anti-Kickback Act
- Contract Work Hours & Safety Standards
- Rights to Inventions made under a contract
- Clean Air Act and Clean Water Act
- Debarment & Suspension
- Byrd Anti-Lobbying Amendment
- Access to records, Retention of records
- Require affirmative steps for Small/Minority/Women's Businesses

See Appendix II to Part 200



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Procurement Best Practices

Plan ahead

- Periodically reviewing record of prior purchases, and future needs, to find patterns to make purchases more efficiently or economically.
- Use pre-event established contracts
- Some entities are evening procuring assistance with planning

Determine most **economical** approach

- Consolidating or breaking out procurements
- Analysis of lease vs purchase alternatives

Institute a **competitive** process

Employ proper procurement methods only

Avoid prohibited contracts (cost + percentage of cost)

Document, document, document!



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Understanding and Integrating the Sixth Circuit's Cable Order

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Federal Rules on Cable Franchising

- The Federal Communications Commission has been interpreting the provisions governing local government actions take pursuant to the Cable Act.
- Series of orders referencing Section 621 of the Cable Act, 47 U.S.C. § 541, as well as other sections.
- Current state of the law; pending litigation; what to expect at the Federal Communications Commission.
- If you want more details, please see bbk.law/6thcircuitorder
- Questions?



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The Current Effective Rules Adopted by FCC's 3rd 621 Order

On August 27, 2019, by a party line 3-2 vote, the FCC issued a Third 621 Order (84 Fed. Reg. 44,725-801).

- Most "in-kind" franchise obligations count against the Cable Act's 5% franchise fee cap.
- Forward-looking only. (Benefits received before 9/26/2019 are not in jeopardy.)
- The "in-kind" obligations are valued at marginal cost.
  - The Sixth Circuit rejected the FCC's decision to value these obligations at fair market value.
  - The franchise fee has exceptions, including that capital costs associated with PEG channels, facilities or equipment are not franchise fees. 47 U.S.C. 542(g)(2).

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FCC's 3rd 621 Order (cont.)

- Parties are to negotiate franchise modifications within a reasonable period of time (120 days), and any franchise provision that is inconsistent with the Order is subject to preemption.
- LFAs may not regulate the provision of any non-cable services, including broadband, provided over a cable operator's cable system, with the exception of channel capacity on institutional networks (I-Nets).
- FCC ruled cable operators cannot be charged any fee, other than the 5% cable franchise fee, for use of the rights-of-way.
- "[T]he rules and decisions adopted in this Order apply to state-level franchising actions and regulations." Order at ¶ 113



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What Is "In-Kind?"

- Regulation appears at 47 CFR §76.42, "In-kind contributions"
- **Any non-monetary contributions** related to the provision of cable service by a cable operator as a condition or requirement of a local franchise, **including but not limited to**:
  - **…**Costs attributable to the provision of **free or discounted cable service** to public buildings, including buildings leased by or under control of the franchising authority;
  - **…Non-capital costs in support of public, educational, or governmental access facilities;** and
  - **…**Costs attributable to the **construction of institutional networks**.
- **But "**In-kind, cable-related contributions do not include the **costs of complying with build-out and customer service requirements**.



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In-Kind Issues/Examples

- Cost of maintaining lines used to transport PEG signals from studios to cable operator count against franchise fees; cost of providing lines are capital costs and *do not* count against fees.
- FCC determined that cost of providing PEG capacity *would* count against fee *unless* that capacity was treated as a capital cost…but agency deferred any decision on whether provision of capacity was a capital cost.
- Free service to public buildings counts against fee, but what about senior discounts, and discounts for persons with disabilities?
- Cost of construction of an I-Net counts against fee, but what about costs of I-Net capacity maintenance? Not consistent with build-out decision.
- What falls within the ambit of customer service requirements?
  - PEG listings on program guide?
- Where do ROW requirements/requirements for ROW restoration, relocation and maintenance fit in?



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Mixed-Use Rule & Impact

- An LFA may not regulate the provision of any services other than cable services offered over the cable system of a cable operator, with the exception of channel capacity on I-Nets. (New 47 CFR §76.43). (Sixth Circuit eliminated the rule but the impact remains.)
  - As adopted, rule:
  - Preempts regulation of any facilities and equipment used in the provision of any services other than cable services;
  - Adopts cable operators' argument that a cable franchise authorizes installation of any equipment in ROW, even if it is not used for cable service, including Wi-Fi and small cell facilities;
  - Impedes local authority to ensure consistent regulations apply to providers of similar services using similar facilities.
- FCC also ruled that Eugene's generally applicable telecom fee is a "franchise fee" and preempted by the Cable Act – and that cable operator could only be charged cable franchise fee for use of ROW to provide non-cable services. (Sixth Circuit disagreed on the legal point, but the practical impact is not much changed.)

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6th Circuit Decision

- On May 26, 2021, the 6th Circuit:
  - Largely upheld FCC's "in-kind" decision, but found that the operator was limited to offsetting (or being paid) for the marginal cost of providing the benefit – NOT fair market value;
  - Rejected the FCC's codified mixed-use rule as written, but in applying the Act appeared to adopt the FCC's conclusion that a state or local government, "cannot do indirectly what it is prohibited from doing directly."
  - Specifically concluded that the City of Eugene's broadband franchise fee was not a Cable Act "franchise fee," but nonetheless found that other provisions of the Cable Act prevent LFAs from charging a cable operator any fee for use of the ROW use to provide non-cable broadband service.



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In-Kind

6th Circuit affirmed FCC's ruling that most in-kind franchise obligations count against the Cable Act's 5 percent cap on cable franchise fees, but did so on different grounds.

- FCC found that franchise fee definition reached all costs the operator was required to incur to comply with franchise obligations except for customer service standards (because those were regulatory), and except for build-out requirements (because the Cable Act requires that the cost of the installation, construction, operation, or removal facilities necessary to the cable system be borne by the cable operator or subscriber).
- Sixth Circuit agreed customer service requirements were regulatory, but otherwise decided that franchise requirements mandated by federal law did not count against the franchise fee, but all discretionary franchise requirements do. Court found that "anti-redlining" provisions in Cable Act mandated build-out.
- The court ignored the ramifications of the FCC's conclusion that cable operators must pay for the whole cable system, which includes PEG capacity and I-Nets.



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In-Kind (cont.)

- The court reversed the FCC's ruling that in-kind franchise obligations should be valued at fair market value and affirmatively ruled that "for purposes of § 542(b), noncash cable-related exactions should be assigned a value equal to the ***cable operator's marginal cost*** in providing them."
    - Ruling appears to stem from statutory interpretation, which means we would have a good argument the FCC could not reinterpret the Act to undo this finding.
- In some cases, marginal cost may prove to be zero, or near-zero – costs of free service, for example, or costs of maintenance of portions of the cable system.
- There is no guidance, however, as to how marginal costs are to be calculated, and operators can be expected to seek the right to take significant offsets.



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Mixed Use

6th Circuit Overturned:

- FCC's Mixed Use Rule: As codified, stated a "franchising authority may not regulate the provision of any services other than cable services offered over the cable system of a cable operator," 47 C.F.R. § 76.43.
- Court stated it agreed with localities' challenge "[t]o a significant extent," because "the Act nowhere states or implies that franchisors may regulate cable operators only as 'expressly permitted in the Act.'"
- Court criticized the FCC's broad language and the FCC's reliance on what the FCC called the cable franchise "bargain."
- But court agreed with the FCC that LFAs may "not 'end-run' the Act's limitations by using other governmental entities or other sources of authority to accomplish indirectly what franchising authorities are prohibited from doing directly."

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Mixed Use – Application to Fees On Non-Cable Services

- Rejecting the FCC's position, the court agreed with Eugene that its generally applicable telecom fee was not a "franchise fee" within the meaning of the Cable Act, 47 U.S.C. 542(g).
- But the court went on to rule that Eugene's fee, as applied to a cable operator's provision of broadband service, was a "requirement … for information services" prohibited by the Cable Act, 47 U.S.C. 544(b)(1).
- Court believed that because Eugene's fee was for use of the ROW to provide non-cable services, it was an "end run" around the Act's limitations.
- Court never explained how imposing a fee that is not a "franchise fee" is an "end run" around the Act, and overlooked the Act's tax savings clause.
- Court declined to reach question whether application of Eugene's fee to a cable operator's telecommunications (i.e., non-information) services was permissible.
- Court suggested additional fees (reaching broadband and other services) *might* be imposable if not done as an effective exercise of the franchising authority (i.e., in return for right to use RoW).
    - FL. Uniform Tax? Impact of Internet Tax Freedom Act?



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What Happens Next? – The Courts & FCC

In the Courts

- Three petitions for en banc and panel rehearing were denied August 3, 2021.
- If Supreme Court review is sought, petitions for certiorari are due November 1.

At the FCC

- Clarifications possible, timing fluid.
- Current leadership is in Acting capacity, but does not fully support the FCC's order – dissents originally, litigation tactics.



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Possible FCC Steps

Goals could include:

- Making clear “customer service obligations” reach issues like compliance with customer service standards, privacy, EEO, or any rule affecting customer-cable operator relationship which would remove them from the franchise fee;
- Clarifying treatment of PEG capacity to treat it as capital cost;
- Clarifying no cost associated with construction, operation or maintenance of the cable system counts against franchise fee;
- Re-construing the Act to clarify that if a fee is not a “franchise fee”, it is not preempted by the Cable Act.



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How Should You Respond to In-Kind Now?

- **Rules might change: protect yourself by ensuring you can take advantage of future changes.**
- No need for LFA to raise issue – FCC rules contemplate notice before offsets.
- If you agree to an offset, you may be bound by offset even if the FCC/courts change course. *Possible: include provisions for terminating/altering offsets.*
- Know the rules! Costs limited to marginal costs – seek proof, where appropriate. Unless the amount proposed is small, do not take operator's word for it.
- Remember that Cable Act requires any costs recovered through franchise fee offset (i.e., a reduction in franchise fees) must be passed through to subscribers.
- Be careful not to lock in current fee rule to franchise agreement, or to agree *not* to regulate non-cable services.
- Understand rule gives operators incentives to shift revenues to "non-cable" services. This may be a significant issue to watch for in franchise fee audits.

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How Should You Respond to "Mixed Use" Now?

- Rules do not prevent settlements of past performance/franchise non-compliance issues that provide benefits, which are not a "franchise fee."
- Rules do not address what happens where a capital obligation is imposed, but operator is given voluntary option of satisfying obligation through provision of a service: e.g. rather than build a line to carry PEG programming, operator provides funds or services that allow for more cost-effective transport. *Alternative performance requirements may not trigger offsets.*
- Because operators are including WiFi and true wireless radios on strand, it is important to ensure your franchise does not exempt any portion of the system from ROW/zoning rules as applicable – and to make sure your wireless rules take into account the position taken by the operator with respect to
  - Whether additional franchises/fees may be required;
  - Whether additional regulatory approvals may be required before installation.



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Two Practitioners' Small Cell Operational Insights

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2018 Small Cell Order

Sept. 26, 2018: FCC Adopts *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, WT Docket No. 17-79

- Establishes special rules for small wireless facilities (SWFs)
  - Defines "small wireless facility" (SWF)
  - Redefines "effective prohibition" (materially inhibit)
  - Sets new 60-day and 90-day shot clocks for action
  - Limits fees and rents that can be charged for use of public right-of-way and municipal infrastructure for placement of small cells to reasonable, cost-based fees, and creates "safe harbors" ($500, $1000, and $270)
  - Adopts new standards for limiting aesthetic regulations
- Also holds:
  - All permits/authorizations subject to FCC shot clocks
  - Collocation does not require existing wireless facilities, only an existing structure



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2018 Moratoria Ban

August 3, 2018: FCC released *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

- *De jure* moratoria and *de facto* moratoria on wireless and wireline 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 rights-of-way management
- *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)
- *Example*: street cut moratoria that don't allow alternative means of deployment such as aerial lines
- Went into effect immediately



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Sprint Corp. v. FCC (9th Cir)

- **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
- **Action Item for 2021-22**: revisit aesthetic standards



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Sprint Corp. v. FCC (cont.)

- **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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Sprint Corp. v. FCC (cont.)

- **En banc petition** filed on 9/28/2020
  - Four main issues in petition:
    1. Ninth Circuit panel wrongly upheld the FCC's interpretation of the phrase "prohibit or have the effect of prohibiting" from 47 U.S.C. 253(a) and 332(c)(7)(B) because, in part, it overturns decisions adopted pursuant to plain language interpretations.
    2. Ninth Circuit panel adopted the FCC's cost-based limits on municipal fees and rents, including use of city-owned poles
    3. The FCC ignored established tests to distinguish proprietary and regulatory activities, and Ninth Circuit panel failed to heed Supreme Court guidance
    4. Ninth Circuit panel upheld an overly broad interpretation of Sections 253 and 332, which encroaches on the constitutional limits set by the Fifth and Tenth Amendments
- **En banc petition** denied on 10/22/2020
- **Petition for writ of certiorari** denied on June 28, 2021

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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)
- **Two substantial orders**
  - Clarifications Order
    - On 6/9/2020, in response to industry petitions FCC adopted "clarifications" to Section 6409 rules
  - Expansion Order



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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 have been consolidated in the Ninth Circuit
- Deadline to file interventions was 9/9/2020
- FCC sought and received delay until November 16, 2021.
- **Action Items for 2021**:
  - Monitor litigation
  - Update design standards and/or permitting process to require or encourage “stealth” facilities



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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
  - 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

- **Action Item for 2021**: consider whether any updates to existing municipal code or design standards are warranted to protect against future Section 6409 requests



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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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Taking On the Myths

Local Governments Cannot Establish Unlimited Set Backs and Separations

- *Sections 47 USC 253 and 332 prohibit actions that would prohibit or effectively prohibit a protected service.*
- *Small cell order prohibits actions that will materially inhibit provision of protected service.*
- *Suggestion – if you create a separation standard, make sure you have a out that provides for the waiver of the enforcement of any standard applicant can demonstrate violates federal or state law.*



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Taking On the Myths

FCC's RF Rules are still in effect and were not overturned by recent DC Circuit.

In ENVIRONMENTAL HEALTH TRUST, ET AL.v. FCC, the DC Circuit Court of Appeals remanded the FCC determination that it did not have to conduct a rule making, but simply reaffirm its current rules. The Court did not overturn the rules.

The Circuit court stated:

> …[W]e grant the petitions in part and remand to the Commission to provide a reasoned explanation for its determination that its guidelines adequately protect against harmful effects of exposure to radiofrequency radiation unrelated to cancer.
>
> …
>
> To be clear, we take no position in the scientific debate regarding the health and environmental effects of RF radiation—we merely conclude that the Commission's cursory analysis of material record evidence was insufficient as a matter of law.

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Taking On the Myths

FCC Order and 9th Circuit Opinion Have Impacted Significant Gap test.

- *Contrary to some claims, the traditional significant gap test was rejected by FCC in the Small Cell Order and 9th Circuit opinion was silent on issue leaving the FCC interpretation in effect.*

- Franchises, if permitted by state law, are valuable tools in addressing small cells.
  - *Franchises allow the local government to address issues from property owner standpoint. At a minimum can serve as a defense to EFR in the rights-of-way.*



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Suggestions to Affirmatively Address Small Cells in your ROW

FCC Rules permit local enforcement if your rules are reasonable and in writing!

- Update Code
- Update/Create Design Manual
- Update Application Process that reflects shot clock deadlines (and educate your clients on new shot clocks)
- Create MLA or Franchise terms
- Don’t Forget to Address EFRs in your Code



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Questions ?



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