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The State of Small Cell Litigation, Cable and Right-of-Way Issues, and Threats and Opportunities in the 11th Congress and Biden Administration

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OUTLINE

Wireless

Cable and Rights-of-Way

Broadband & Policy Issues

Wireless Update

Small Cell Order – lessons from recent cases

RF Emissions regulation– update on recent cases

Changes to Section 6409 (EFR) Rules – litigation update

FCC Small Cell Order (2018)

- "a state or local legal requirement constitutes an effective prohibition if it 'materially limits or inhibits the ability of any competitor or potential competitor to ***compete in a fair and balanced legal and regulatory environment***'" (para. 35)
- "…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)

FCC Small Cell Order (2018)

- FCC rejects gap-based approaches developed under Section 332 case law as outdated (Para.40)
  - "…***we reject*** both the version of the "coverage gap" test followed by the First, Fourth, and Seventh Circuits (requiring applicants to show "not just that this application has been rejected but that further reasonable efforts to find another solution are so likely to be fruitless that it is a waste of time even to try") and the version endorsed by the Second, Third, and Ninth Circuits (requiring applicants to show that the proposed facilities are the "least intrusive means" for filling a coverage gap) (FN 94)

FCC's 5G Effective Prohibition Standard Upheld by Ninth Circuit

- Ninth Circuit held:
  - The differences in the FCC's new approach are reasonably explained by the differences in 5G technology. The FCC has explained that it applies a little differently in the context of 5G, because state and local regulation, particularly with respect to fees and aesthetics, is more likely to have a prohibitory effect on 5G technology than it does on older technology. The reason is that when compared with previous generations of wireless technology, 5G is different in that it requires rapid, widespread deployment of more facilities.

Small Cell Order Challenges

City of Portland v. FCC, 969 F.3d 1020 (9th Cir. 2020)

Petitioners' Supreme Court brief included an argument based on *Chevron and Brand X* that Ninth Circuit affirmance of FCC Order is inconsistent with other circuits:

- *Agency cannot trump a court's "plain language" determination.*
- *Some parties will surely claim that the Order, having been upheld in the Ninth Circuit, is the definitive nationwide interpretation of the statute. But at least one circuit court has concluded that an agency's revision to existing circuit precedent is "not legally effective . . . until [the circuit court] discharge[s] its obligation under Chevron step two and Brand X to determine that the statutory provisions at issue were indeed ambiguous." Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1145 (10th Cir. 2016) (Gorsuch, J.).*
- *SCOTUS denied cert.* 210 L.Ed.2d 962 (2021)

Second Circuit

New Cingular Wireless. v. Town of Colonie, 2022 WL 1009436 (N.D.N.Y. March 31, 2022)

- Numerous claims raised including failure to act, moratorium, effective prohibition
- Regarding effective prohibition, materially inhibits standard in FCC Small Cell Order applied
- Town had told applicant they needed to apply under zoning code procedures
- Court found that applying zoning code procedure to "a single small cell facility on an existing structure in a public right-of-way, materially inhibits Plaintiff's efforts to improve its services" violating the TCA's ban on prohibiting provision of personal wireless services.

Second Circuit-plain language

ExteNet Sys., Inc. v. Village of Flower Hill, 2022 WL 3019650 (E.D.N.Y. July 29, 2022)

- Court found that the Village's denial of Plaintiff's permit application did not violate the TCA's ban on prohibiting personal wireless services
  - ExteNet argued Court must give *Chevron* deference to the FCC's Small Cell Order applying the "materially inhibits" standard.
  - Court followed Second Circuit Court's opinion in *Sprint Spectrum L.P. v. Willoth,* 176 F.3d 630 (2d Cir. 1999) (significant gap/least intrusive means)
    - Although the Second Circuit found the phrase "personal wireless services" "opaque", it ultimately relied on the plain statutory language to define it. Therefore, the phrase was not ambiguous as *Chevron* deference requires.
  - Court noted the circuit court may wish to reconsider its definition in light of new technology, but the district court is not in a position to ignore its binding pronouncement .
- Appeal was filed to Second Circuit, and then parties stipulated to withdraw with prejudice and case was dismissed.

Third Circuit-plain language/retroactivity

- Several district court cases have found the FCC's materially inhibits standard is substantive change, not to be applied retroactively
- *T-Mobile v. City of Wilmington* 2020 WL 1245306 (D. Del.)
  - Court holds FCC "new rule" not a "mere clarification" but a "substantive change" and an "abrupt departure" from a well-established practice.

Eleventh Circuit-substantive/retroactivity

***T-Mobile South v. City of Roswell*, Georgia**, 2023 WL 2563227 (N.D. Ga. March 17, 2023)

- Challenge to denial of macro tower application (case previously went to Supreme Court on § 332(c)(7)'s "in writing" requirement).
- On cross-motions for summary judgment, the parties disagreed on the impact of the FCC's *Small Cell Order* on the "effective prohibition" issue.
- The court ruled that the *Small Cell Order* created a substantive, not an interpretive, rule and that it therefore could not be applied retroactively to the City's 2017 denial of of T-Mobile's application.
- But the court also "recognize[d] that this is a very close legal call, and the Court finds it appropriate to certify an interlocutory appeal under 28 U.S.C. § 1292(b)."

Roswell (con't)

- Noteworthy is the court's less-than-favorable view of the *Small Cell Order*'s "materially inhibit" standard:

> As a starting point, the Court is inclined to agree with the City that the 2018 [*Small Cell Order*] reflects an unreasonable interpretation of Section 332. Not only does the FCC's interpretation conflict with the interpretations of every Circuit that has addressed the issue and expand *California Payphone* to new contexts in which it had not been previously applied, it also appears to upset the balanced regulatory approach that was intended by Congress. … [T]he FCC's interpretation would "strip State and local authorities of their Section 332(c)(7) zoning rights" and "effectively nullify local authority by mandating approval of all (or nearly all) applications." …. [T]he FCC's new rule also potentially runs afoul of established Eleventh Circuit case law holding that when evaluating cell tower applications under Section 332, local governments are authorized to consider a variety of factors including "the proposed tower's negative aesthetic impact (as well as its effect on property values) and the proposed tower's effect on the health, safety, and welfare of the public," … , and whether "an alternative location [is] unavailable or unfeasible[.]"

- Court held only the 11th Circuit can determine if the *Order* is entitled to *Chevron* deference.
- Court also notes FCC's decision in *California Payphone* "did not address how anti-prohibition claims should be analyzed under Section 332 of the TCA."

Small Cell Order Challenges-Materially Inhibits

Capital Telecom v. Bethel Park *2022 WL 911762 (USDC, WD Penn)*

- No dispute as to application of materially inhibits standard of FCC Small Cell Order.
- But court notes parties mainly focused on “prior standard” (significant gap/least intrusive means) including plaintiff’s expert evidence on significant gap
- Defendant City contends a denial based on legitimate zoning restrictions can’t materially inhibit ability to compete in a fair and balanced regulatory environment.
- Court questions whether expert report would be admissible at summary judgment stage (because Defendant questioned admissibility) but finds even if report is admissible, plaintiff loses as they failed to articulate how the undisputed material facts support their effective prohibition claim under the new standard.

Small Cell Order Challenges-Materially Inhibits

Capital Telecom v. Bethel Park *2022 WL 911762 (USDC, WD Penn)*

- Further criticism of the FCC Small Cell Order:
  - "Here, if the Court were to accept the Telecom Plaintiffs' argument that every time a service provider is unable to meet their service and performance goals, a state or local authority necessarily prevented such provider from competing 'in a fair and balanced regulatory environment,'…that interpretation would short-circuit the state and local regulatory authority established in the TCA through a careful balancing of federal, state and local authority."
- Defendants "point to no facts regarding how the Denial "materially inhibits" any *current or potential competition* in a 'fair and balanced regulatory environment in the [given] market."

Small Cell Order Challenges-Materially Inhibits

Crown Castle Fiber v. Pasadena TX *2022 WL 3040417 (USDC, SD Texas)*

- Crown challenged 2 requirements in City's design manual for small cells in the public rights-of-way: 300 ft spacing between small cell support pole and existing utility poles and equipment undergrounding requirement.
- Relies on FCC Small Cell Order rule on aesthetic standards, but argues "effective prohibition" only under Section 253 (telecommunications services) and not Section 332(c)(7) (personal wireless services).
- Court finds both requirements preempted under Section 253:
  - Spacing prohibits construction of small cell poles in large swaths of City's streets
  - Undergrounding restriction due to feasibility

RF Emissions – FCC Authority

- Telecommunications Act of 1996, Pub. L. No. 104-104, § 704(b), 101 Stat. 56, 152 (directing FCC to "prescribe and make effective rules regarding the environmental effects of radio frequency emissions").
- 47 USC §332(c)(7)(B)(iv):

  "No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions."
- 47 USC § 414 (savings clause): "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

RF Emissions - Cases

- Cell phone warnings at point of sale:
  - (1) Conflict with federal law?
  - (2) Violate retailers First Amendment rights?
- ***CTIA--The Wireless Assn v. City and County of San Francisco***, 494 Fed. Appx. 752 (9th Cir. 2012)
- ***CTIA - The Wireless Assn. v. City of Berkeley***, 854 F.3d 1105 (9th Cir. 2017); cert. granted and remanded 201 L. Ed. 2d 1092 (June 28, 2018)
- ***CTIA--The Wireless Assn v. City of Berkeley***, 928 F.3d 832 (9th Cir. 2019); cert. den., 205 L.Ed.2d 387 (2019) [Ok'd on First Amendment issue]
- ***CTIA v. City of Berkeley*, 487 F. Supp. 3d 821 (N.D. Cal. 2020)**

RF Emissions - Cases

***CTIA v. City of Berkeley*, 487 F. Supp. 3d 821 (N.D. Cal. 2020)**

- Plaintiff's motion for judgement on the pleadings, after FCC's RF Order issued.
- FCC filed "Statement of Interest" in support of CTIA.
- Court found that the Berkeley ordinance as drafted was preempted:
  - "The Statement of Interest is consistent with the 2019 RF Order in recognizing that additional disclosures pose a risk of overwarning. Furthermore, even if the Berkeley ordinance specifically is (as the Ninth Circuit indicated) literally true and not misleading, it does not necessarily follow that there is no risk of "overwarning" – especially given that the FCC is tasked with balancing the competing objectives of ensuring public health and safety and promoting the development and growth of the telecommunications network and related services."
  - "Given the specificity of the warning required by the Berkeley ordinance, the implied risk to safety if the warning is not followed (a risk the FCC has concluded does not exist), and the acknowledged "controversy concerning whether radio-frequency radiation from cell phones can be dangerous if the phones are kept too close to a user's body over a sustained period," CTIA, 928 F.3d at 848, the FCC could properly conclude that the Berkeley ordinance – as worded – overwarns and stands as an obstacle to the accomplishment of balancing federal objectives by the FCC."
  - "Court does not opine whether an ordinance stripped of any implication about public safety would be preempted."

RF Emissions - Cases

State tort and consumer fraud

Cohen v. Apple Inc., 46 F.4th 1012 (9th Cir. 2022); petition for cert. (Jan. 26, 2023)

- Plaintiffs alleged that Apple breached state tort and consumer-fraud laws by misrepresenting and failing to disclose the dangers of RF radiation emitted by iPhones (handheld devices)
- Issue Framed by Court: can there be state-law causes of action premised on RF emission standards more protective than those prescribed by the FCC?
- Held: Plaintiffs' concession that Apple's iPhone complies with FCC RF emission levels prescribed is fatal to their appeal
  - FCC's adoption of specific RF radiation limits for cell phones is the result of the agency's striking a balance between the conflicting policies of public safety and the public's access to telecommunications technologies
  - FCC's upper limits on the levels of permitted RF radiation preempt state laws that impose liability premised on lower levels
  - Allowing state tort law to prescribe lower levels of RF radiation would interfere with the nationwide uniformity of regulation that is the aim of the Act, and would render the FCC's statutorily mandated balancing essentially meaningless
  - Savings clause in § 414 of the 1934 Act does not help plaintiffs.

RF Emissions - Cases

Cohen v. Apple Inc., 46 F.4th 1012 (9th Cir. 2022); petition for cert. (Jan. 26, 2023)

- **Petitioner and Amici** focuses on circuit split on "preemptive power" of FCC
  - Note debate is over FCC preemptive authority regarding RF emissions of devices
  - Acknowledge federal preemption in Section 332(c)(7)(B)(iv) related to siting of personal wireless services facilities
- **City of Berkeley** filed Amicus Brief penned by Lawrence Lessig, recounting the impact of the FCC General Counsel's "statement of interests" letter on the City's litigation over cell phone warnings at point of sale vs. preemption through comment and rulemaking proceeding

RF Emissions - Cases

- ADA and FHA Claims

Wolf v. City of Millbrae, 2021 WL 3727072 (N.D. Cal)

- Plaintiff claimed that RF emissions from a cell tower above his housing complex caused him to suffer from "electromagnetic hypersensitivity" (EHS), and requested that City order accommodations be made under the ADA and FHA by either turning the tower off or requiring the company to relocate the tower site
- Court held that Plaintiff's claims against the City for violation of the ADA and FHA were unreasonable because his requests would require the City to violate § 332(c)(7)(B)(iv).
  - Court found that “it would be improper under the ADA to subject a defendant to the threat of litigation for the purpose of accommodating a plaintiff under the ADA.”
  - Court applied the same reasoning for Plaintiff's FHA claim—”granting Plaintiff's accommodation request would require the City to regulate RF emissions in violation of the TCA and its implementing regulations. This accommodation would require the City to face liability for violating federal law and is thus not reasonable.”
- Affirmed without oral argument by Ninth Circuit, No. 21-16649 (Feb. 16, 2023).

Section 6409 Rules Update

Section 6409 (a) Facility modifications

(1) In general

Notwithstanding section 704 of the Telecommunications Act of 1996 (Public Law 104–104) or any other provision of law, 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.

(2) Eligible facilities request

For purposes of this subsection, the term “eligible facilities request” means any request for modification of an existing wireless tower or base station that involves—

(A) collocation of new transmission equipment;

(B) removal of transmission equipment; or

(C) replacement of transmission equipment.

Section 6409 Rules Update

- Implementing rules are codified in 47 CFR § 1.6100 (formerly § 1.40001)
  - EFR rules renumbered in 2018 when FCC codified other shot clock rules.
- FCC orders adopting rules are critical to understanding requirements.
  - *In re Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 29 FCC Rcd. 12865 (Oct. 17, 2014), amended by 30 FCC Rcd. 31 (Jan. 5, 2015) ("Original Order").
  - *Implementation of State & Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, 35 F.C.C. Rcd. 5977 (2020) ("Clarifications Ruling").
  - *Implementation of State & Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012,* 35 F.C.C. Rcd. 13188 (2020) ("Expansions Order").

Section 6409 Rules Update

- *Clarifications Ruling* (2020)
  - Interprets FCC rules, does not change their wording.
  - Re-defines “concealment” to exclude ordinary concealment (such as hiding an antenna on the back of a roof or installing it under a tree line).
  - Protections for concealment elements only apply to stealth facilities.
  - Limit of 4 ground-mounted cabinets applies separately to each EFR and is not cumulative.
  - Excludes from definition of “cabinet” smaller pieces of equipment in their own housing.
- Order is in effect
- Appeal pending: *League of Cal. Cities et al. v. FCC*, No. 20-71765 (9th Cir. 2021).
  - Fully briefed; awaiting a date for oral argument.

Cable and Right-of-Way Update

- Remand of FCC's 3rd §621 Order
- State Video Franchising Law Fee Litigation
- Other Video Streaming Service Issues
- "Fair and Reasonable" ROW Compensation

Remand of FCC's 3rd §621 Order

Third Section 621 Order

- In-Kind Rule: Most in-kind franchise obligations (other than buildout and PEG capital cost obligations) count against the Cable Act's 5% fee cap; in-kind obligations valued at "fair market value" (47 CFR §76.42(a))
- Mixed-Use Rule: 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. (47 CFR §76.43)

Remand of FCC's 3rd §621 Order

What the Sixth Circuit Sent Back to the FCC

- In-Kind Rule: Upheld the rule, *except* only the "marginal cost" of fulfilling a franchise obligation – *not* fair market value – constitutes a "franchise fee"
  - FCC must revise the rule on remand.
- Mixed-Use Rule: Questioned the rule as written, saying it "does not follow from the Act's terms," and concluded LFAs may regulate a cable operator's non-cable services unless inconsistent with the Cable Act. But it found a cable operator's franchise included the right to use its system, located in the ROW, to provide information services.
  - The FCC should address the rule's textual inconsistency with the Act.

Remand of FCC's 3rd §621 Order

- FCC expected to conduct a short rulemaking on remand, but may be hung up by 2-2 FCC.
- Comment and reply comment period will provide an opportunity for local governments to persuade the FCC to address key issues left open or subject to dispute.

State Video Franchising Law Fee Litigation

- Between 2005 and 2015, over 20 states enacted laws giving the state (rather than local governments) franchising authority over cable operators and “video service providers.”
- Generally, the laws require “video service providers” to (1) obtain a franchise from the state, and (2) pay a 5% franchise fee to local governments.
- “Video service” is defined to include video programming in IP, but excludes video provided over the “public internet.”
- “Video service provider” is defined as a provider of video service that “uses” the ROW.

State Video Franchising Law Fee Litigation

- Beginning in 2021, lawsuits have been filed by municipalities in 13 states against Netflix and Hulu, the leading “over the top” (OTT) providers of video streaming services.
- The claim: Netflix, Hulu and other OTT providers (1) provide “video service” and “use” the ROW to provide the service (via other parties’ broadband networks in the ROW), and therefore (2) must obtain a state video franchise and owe the plaintiff municipalities 5% video franchise fees.

State Video Franchising Law Fee Litigation

- Key issues:
  - Whether local governments have a right of action under the state video franchising law to sue OTT providers for failing to obtain a state video franchise.
  - Whether OTT providers' video streaming services are a "video service" or instead fall within the "public internet" exception to the "video service" definition.
  - Whether OTT providers "use" the ROW when they own no ROW facilities.
- So far, municipalities have not fared well, largely losing at the trial court level.
- Two circuits have ruled that state video franchising laws do not provide local governments with a right of action against OTTs for fees:
  - *City of Reno v. Netflix and Hulu*, 52 F.4th 874 (9th Cir. 2022) (Nevada video franchising law).
  - *City of Ashdown, AR v. Netflix and Hulu*, 52 F.4th 1025 (8th Cir. 2022) (Arkansas video franchising law).

Other Video Streaming Issues

- There are strong, but unresolved, arguments that revenues a cable operator receives from streaming services over its system are subject to cable franchise fees:
  - Delivering video or other programming services in IP does not change a cable service into a non-cable service.
  - Delivering those programming services via the public Internet (as is claimed by most cable operators) is not dispositive (nor is it clear all streaming services are delivered via the public Internet).
  - Efforts to draw a line between what an operator calls “managed cable services” and other video services are also not dispositive.

Other Video Streaming Issues

- Whether any particular revenues should be subject to cable franchise fees is likely to turn on specific facts regarding the relationship between the cable operator and the streaming service, including:
  - Any common ownership relationship between cable operator & OTT provider?
  - How is the OTT service provided?
  - How is the OTT service marketed?
  - Under what compensation arrangement (if any) does the operator (or its affiliate) receive or collect revenues for the OTT service or for promoting that service?
  - To what degree are the OTT services integrated with traditional linear cable services?

Other Video Streaming Issues

Governing Law

- Local franchising authorities are entitled to assess a franchise fee on a "cable operator's gross revenues derived … from the operation of the cable system to provide cable services." 47 U.S.C. § 542(b).
- Questions to be answered:
  - Is the revenue of the cable operator, and
  - Is the revenue derived from the operation of the cable system to provide cable services.
- Strong argument that the revenue need not be revenues *from* a cable service per se; the revenue need only be derived in connection with the operation of the system to provide cable services.

Other Video Streaming Issues

Cable Service Definition

"Cable service" is defined as:

- (A) the one-way transmission to subscribers of (i) video programming, or (ii) ***other programming service***, and
- (B) subscriber interaction, if any, which is required **for the selection or use** of such video programming or other programming service." 47 U.S.C. §522(6).

Other Video Streaming Issues

Video Programming Definitions

"Video programming" means

- programming provided by, or generally considered comparable to programming provided by, a television broadcast station," 47 U.S.C. §522(20).

"Other programming service" means

- **information that a cable operator makes available to all subscribers generally**, §522(14).

Other Video Streaming Issues

Don’t Surrender OTT Fee Revenue Issues In Your Renewal Franchise

A community can contractually agree in a franchise to impose a franchise fee that is less than the maximum the Cable Act allows -- for example, by agreeing to exclude from the franchise fee revenue base classes of revenues on which the Cable Act would allow the fee to be imposed. LESSONS --

- Do not agree to broad gross revenue exemption language excluding revenues received from services delivered via the Internet, or revenues from information services.
- Consider adding language stating that your franchise’s “gross revenue” definition is to be construed as broadly as applicable law permits.

Other Video Streaming Issues

Preserve Rights Over Other Users of Cable System

Cable Act provides that "Nothing in this chapter shall be construed to limit any authority of a franchising authority to impose a tax, fee, or other assessment of any kind on any person (other than a cable operator) with respect to cable service or other communications service provided by such person over a cable system for which charges are assessed to subscribers but not received by the cable operator." 47 U.S.C. § 542(h).

* This language makes clear that the Cable Act does not prohibit the imposition of a 5% fee or tax on the subscription revenues of OTT service providers unaffiliated with the operator.

BUT … whether subscription revenues received by a OTT provider that does not bill through the cable company can be taxed is a distinct question that depends significantly on other federal and state laws

Other Video Streaming Issues

Don’t Forget Your ROW Authority

- For non-cable services and systems in the ROW that are not subject to the Cable Act (e.g., broadband-only providers), authority over use of ROW is largely a state law issue.
- Do you have options under state law to manage & obtain compensation for use of the ROW by these non-cable providers?
  - ROW fees applicable to all communications service providers (Oregon).
  - ROW fees applicable to all utilities & other ROW users.
  - Other communications & entertainment tax options (Virginia, Chicago).
- Is there work to do at the state level to preserve ROW authority over non-cable companies?

Other Video Streaming Issues

Beware Of State Laws

- Texas Law -- Pay for One, Get One for Free
- Louisiana and Kansas Laws -- Barring OTT Fees
  - Similar bills have been introduced in many, if not most, state video franchising law states.

Other Video Streaming Issues

Factors That May Be Relevant

- Whether the cable operator exerts sufficient control over what programming is delivered to subscribers, and how it is delivered to them, such that it can be considered to be "transmitting" the programming to subscribers.
- Whether the services are so interactive in nature, beyond interaction "for the selection or use" of the service, that the services cannot be treated as a cable service, and must instead be treated as non-cable services.
- Whether the electronic pathways used to deliver streaming services are legally distinct from the elements of the network that are treated as the "cable system."

Whether, Outside Small Cell Context, § 253 Limits Fees to Costs

CNSP, Inc. v. Webber, et. al (City of Santa Fe), 2022 WL 4536132 (D.N.M., Sept. 28, 2022).

- Challenge to 2% franchise fee for use of PROW for telecommunications (fiber internet only; not wireless internet or VoIP phone service revenue).
- CNSP urged court to adopt FCC's *Small Cell Order* rule that any fee imposed must be cost-based.
- Court acknowledged Tenth Circuit had adopted a "materially inhibits" standard for effective prohibition (like the FCC *Small Cell Order*).
- But Court rejected FCC's "hardline statement against revenue-based fees" on two grounds:
  - FCC *Small Cell Order* applies only to 5G wireless networks, and CNSP's franchise excludes wireless from any fee.
  - Controlling precedent in Tenth Circuit binds D.N.M.
  - "…the Court, despite the norm for deference to agencies found in [*Chevron]*, is not persuaded that an administrative "Declaratory Ruling" expressing a preference on a split in caselaw controls the courts…... The Tenth Circuit has taken a view opposite of the FCC's preference, concluding that when assessing fairness and reasonableness of fees, the Court does not measure by the city's cost, but rather uses a totality of the circumstances test… This Court remains bound by the Tenth Circuit—which has not adopted a view antagonistic to revenue-based fees for wireline infrastructure." (citations omitted)
- Decision has been appealed to the 10th Circuit; fully briefed, with argument scheduled for first week in June.

Broadband and Policy Issues

Venues: Congress; FCC, Dept. of Commerce (NTIA); Treasury and Home Land Security.

Congress/FCC

Do New Players = New Order or Stalemate?

Senate Commerce

Democratic leadership remains the same.

New Ranking Member in Cruz, return to long term leader in Thune.

Biggest Issues:

- 5th FCC Commissioner

  (Hearing on 2/14)
- Oversight of Broadband Infrastructure
- Social Media/ Tick Tock
- “Saucer” to House



House Commerce

Role Reversal at the Top.

New Player (Matsui) at the Subcommittee level.

Historically bi-partisan on most issues.

Biggest Issues:

- FCC Oversight
- Oversight of Broadband Infrastructure/NTIA
- Social Media/ Tick Tock
- Potential Preemption Language



Chairman

Rep. Cathy McMorris Rodgers

R-WA-05



Ranking Member

Rep. Frank Pallone

D-NJ-06

Balance of Power

23 Democrats

29 Republicans



Bob Latta

(R-OH-05)

Chairman



Doris Matsui

(D-CA-07)

Ranking Member

Two Simple Thoughts

"Need a Program as there a New Players and some old Players in New Roles."

"Let NLC, USCM, NACo and IMLA watch DC – Please be active at the state and local level."

Reversing the Trump/Pai FCC??

Its 27 months into Biden Administration and we don't even have a Nominee for 5th Chair

5th Vote: Biggest Issue Facing Local Government at FCC

FCC as of 1/21/21



FCC TODAY



Federal Communications Commission

2 years in – still not at full strength.

2 to 2 tie has not prevented rolling out IIJA programs, BUT

Has delayed undoing some of the damaging PAI FCC rules in cable and small cells.

Still failing to provide updates RF guidance.

Biggest Issues:

- Achieving a Majority
- Broadband Map Accuracy
- Internet For All
  - Digital Discrimination – ACP EBT
  - Broadband Label
- Funding For the Future
- Reversing Pai FCC
  - Net Neutrality
  - Small Cells – ROW regulation
  - Cable



Commissioner Nathan Simington, Commissioner Brendan Carr, Chairwoman Jessica Rosenworcel, and Commissioner Geoffrey Starks.



Gigi Sohn

Broadband (Internet) for All

Make sure to attend Ana Schwab's Wonk Table

Broadband Money For Cities\Citizens

- ARPA
- IIJA
  - BEAD
  - Digital Inclusion
  - Emergency Connection Fund
  - DHS Cybersecurity Grant Program
- FCC’s Affordable Connection Program
  - Benefits per household
  - Outreach Grants (awaiting release from FCC.)

Next Steps/Decisions

How To Spend Your Money

- Will you dedicate ARPA funds for Broadband?
- Are you watching the clock (see next slide.)

How to Ensure your Client's residents are Being Served Near Term

- What are you doing to drive up Affordable Connectivity Subscribership?

How to Ensure that your Client is treated Fairly for Infrastructure and Digital Inclusion Funds

- You must contact your state's broadband office to determine the status of the state's: (1) Broadband plan, (2) Digital Inclusion Plan and (3) Cyber Security Plan to explore how your community's needs are being addressed.
  - BEAD
  - Middle Mile
  - Digital Inclusion
  - Cyber Security

Be Prepared to challenge plans at state and federal level

Timeline for the Use of ARPA Funds

Funds are able to be used to cover eligible costs incurred during the period of March 3, 2021 and ends on December 31, 2024

Funds may be used in a retrospective way when being used to provide premium pay, and in some instances for assistance to households, and businesses

Funds must be obligated by December 31, 2024 and must be expended by December 31, 2026

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).)

But Only If We are Proactive

- **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…."
  - "The Assistant Secretary shall establish local coordination requirements for eligible entities to follow, to the greatest extent practicable"
  - "[A]t 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**
  - 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).

American Rescue Plan Act (ARPA)

Coronavirus State and Local Fiscal Recovery Funds

ARPA was signed into law on March 11, 2021

Sections 602 and 603 provides $350 billion in support to state, local, and tribal governments to respond to COVID-19's impact on their communities, residents, and businesses

On May 10, 2021, the U.S. Treasury released the Interim Final Rule which outlines the terms for use and preliminary reporting obligations

On June 17, 2021, the U.S. Treasury released the Compliance and Reporting Guidance for the State and Local Fiscal Recovery Funds

On January 27, 2022, the U.S. Treasury published the Final Rule for the State and Local Fiscal Recovery Funds in the Federal Register

On April 11, 2023, the U.S. Treasury Proposes New Rules to differentiate between ISP as Sub Recipient and Contractor which impacts procurement obligations .

ARPA Funds Dedicated To Broadband Services Or Infrastructure

- ARPA Funds can be used to support broadband services.
  - Funds under those categories may be used to provide assistance to households facing negative economic impacts due to COVID-19, including digital literacy training and other programs that promote access to the Internet.
- Broadband infrastructure investments, like water infrastructure should be able to report how the funds have been used to achieve the goals and types of projects being pursued.
- Projects eligible for infrastructure investments must provide reliable minimum speeds of 100 Mbps download and 100 Mbps upload.
  - Where impracticable, projects must reliably deliver at least 100 Mbps download speed, at least 20 Mbps upload speed, and be scalable to a minimum of 100 Mbps download speed and 100 Mbps upload speed.

Broadband Planning Resources for Local Governments

Below are broadband planning resources for local governments can utilize to enhance broadband connectivity and promote digital inclusion across their communities.

1 Indicators of Broadband Need Map



The Indicators of Broadband Need map is an interactive tool that allows users to explore various datasets and see areas across the country that lack access to high-quality internet.

The map uses public and private data to show broadband availability on county, census tract, and census block levels. Layers in this map were created using data sourced from the American Community Survey collected by the U.S. Census, Ookla, Measurement Lab (M-Lab), Microsoft, and the Federal Communications Commission (FCC).

How Can This Help My Community? The map can help you plan *how* and *where* to improve broadband services for your community. The data can also be used to help policymakers make informed decisions to expand broadband access and close the digital divide.

2 Interactive Federal Funding Guide



NTIA's Interactive Federal Funding Guide provides a step-by-step format which filters through more than 90 broadband-related programs compiled from 12 federal agencies and the Federal Communications Commission. It highlights key information about each program, including program descriptions, important dates, contact information, and links to program websites.

How Can This Help My Community? Use the guide to identify federal funding opportunities relevant to your community.

3 State Broadband Programs



BroadbandUSA has compiled information on state broadband programs of all 50 states and 6 territories. Click on the interactive map to find links to each state's broadband website, contact information, program and funding opportunities, and the state broadband plan.

How Can This Help My Community? Learn about your home state's broadband program, connect with local contacts, and identify funding opportunities to help expand broadband access and meaningful use.

Explore additional BroadbandUSA resources online:

www.broadbandusa.ntia.doc.gov

BroadbandUSA@ntia.gov

About Us: The U.S. Department of Commerce's National Telecommunications and Information Administration (NTIA) promotes innovation and economic growth by working to expand broadband connectivity and use across America.

The Digital Equity Act - Three Programs to Promote Digital Equity and Inclusion

Funding pool
$2.75B

Three programs that provide funding to promote digital inclusion and advance equity for all. They aim to ensure that all communities can access and use affordable, reliable high-speed Internet service to meet their needs and improve their lives.

PROGRAMS HIGHLIGHTS

The Digital Equity Act created three programs:

State Planning
- $60M formula funding program to develop digital equity plans

State Capacity
- $1.44B formula funding program to implement plans & promote digital inclusion

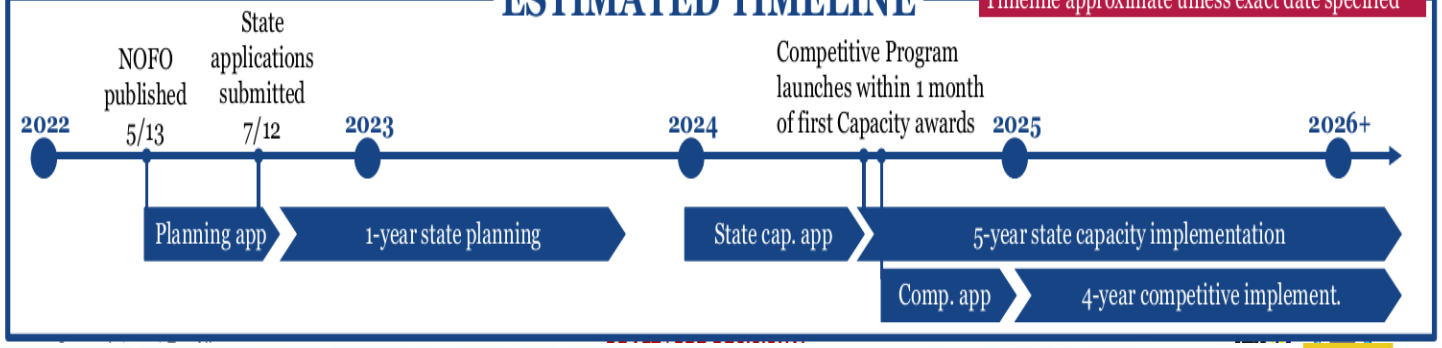
Competitive
- $1.25B to implement digital equity and inclusion activities

Example eligible uses of funds across three programs include:

- Developing digital equity plans; states must develop a plan to be eligible for state capacity grants
- Making awards to other entities to help make digital equity plans
- Improving accessibility and inclusivity of public resources
- Implementing plans related and activities
- Providing digital literacy and digital skills education
- Facilitating the adoption of high-speed Internet service

ESTIMATED TIMELINE

Timeline approximate unless exact date specified



Homeland Security Unveils State, Local and Cybersecurity Grant Program

- **Annual Application Process & Timeline:**
  - Estimated total funding of $1 billion budget in 2022: $185,024,069
  - Minimum award size: $500,000
  - A total of 56 grants are anticipated — one for each state and territory.
  - Only states and territories are eligible to apply for grant awards under the SLCGP. (The tribal grant NOFO has yet to announced.)
  - Local entities receive sub-awards through their states. At least 80% of funds awarded to states must go to local governments, with a minimum of 25% of the allocated funds distributed to rural areas.
  - Eligible entities can submit an application via Grants.gov. Applications appear to have two minimum requirements: creation of a state Cybersecurity Planning Committee and a completed state Cybersecurity Plan.

Cybersecurity Grant Program: Committee

The Planning Committee will identify and prioritize statewide efforts, including identifying opportunities to consolidate projects to increase efficiencies through partnership with at least one representative from relevant stakeholders, including:

- The eligible entity;
- If the eligible entity is a state, then representatives from counties, cities and towns within the jurisdiction of the eligible entity;
- Public education within the jurisdiction of the eligible entity;
- Public health; and
- Rural, suburban and high-population jurisdictions.

Cybersecurity Grant Program: Plan

Cybersecurity Plan is a statewide planning document that must be approved by the Cybersecurity Planning Committee and the CIO/CISO equivalent, be updated in fiscal 2024 and 2025, and contain the following components:

- Incorporate, to the extent practicable, any existing plans to protect against cybersecurity risks and cybersecurity threats to state, local or territorial owner or operated information systems.
- Demonstrate input from local governments and associations of local governments, and outline individual responsibilities of the state and local governments in implementing the Plan.
- Include all required elements outlined in Appendix C of the NOFO
- Outline the necessary resources and a timeline for implementing the plan and summary of associated projects.
- Outline metrics to measure progress.

Questions?

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