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88th Annual Conference
INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION
LA QUINTA, CA - 2023

Dialing for Answers:

Telecommunications Law Speed Dating

IMLA's 88th Annual Conference
September 27 - October 1, 2023
La Quinta, California

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Agenda

- Introductions and Overview
- Wireless Ordinance Updates and Cell Site Leases
- Wireless cases
- Cable and ROW compensation
- Broadband funding

Introductions



Gail Karish

PARTNER

gail.karish@bbklaw.com



Bennett Givens

ASSOCIATE

bennett.givens@bbklaw.com



Gregory Caffas

ASSOCIATE

gregory.caffas@bbklaw.com



Tillman “Tim” Lay

PARTNER

tillman.lay@bbklaw.com



Gerry Lavery Lederer

PARTNER

gerard.lederer@bbklaw.com

Overview

- Litigation over recent FCC rules is mostly resolved.
  - *California Cities et al v. FCC* (Ninth Circuit, case no. 20-71765). Challenge to the FCC's June 2020 eligible facilities requests declaratory ruling was argued in July 2023. Appellant local governments challenged the FCC's interpretations of the FCC's existing rules regarding (1) facility concealment elements (2) equipment cabinets, (3) express evidence requirements/retroactivity and (4) shot clocks.
  - *City of Eugene v. FCC*, 998 F.3d 701 (6th Cir. 2021). Importantly, remand rejected FCC's market rates for cable exactions in favor of incremental costs. FCC may consider soon as it is close to having fifth Commissioner.

Overview

- But threats of further preemption on the horizon.
  - Congress: In the spring of 2023, the House Commerce Committee approved HR 3557, the “American Broadband Act of 2023,” by a party line vote. The bill would preempt a wide swath of local authority over right-of-way management and compensation, land use and zoning, and cable franchising. Given Republican control of the House, there is a significant risk that HR 3557 might pass the House later this year or in 2024.
  - States are still active, e.g. CA AB 965 (batch broadband permit processing).

Senate Commerce

Democratic leadership remains the same.

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

Biggest Issues:

- Keeping Government Open
- 5th FCC Commissioner
- Oversight of Broadband Infrastructure
- “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:

- Keeping Government Open
- FCC Oversight
- Oversight of Broadband Infrastructure/NTIA
- Potential Preemption Language

H.R. 3557



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

Federal Communications Commission

2 years in – finally at full strength.

2 to 2 tie did not prevent rolling out IIJA programs, BUT did delay undoing some of the damaging Pai FCC rules.

Biggest Issues:

- Broadband Map Accuracy
- Internet For All
  - Digital Discrimination – ACP EBT
  - Broadband Label & Billing Accuracy (“All In”)
- Reversing Pai FCC
  - Net Neutrality – (Sept. 28 Draft NPRM proposing reclassification of broadband as Title II Service)
  - 621 Order
  - Updates to RF guidance?



Comm. Nathan Simington | Comm. Brendan Carr | Chair Jessica Rosenworcel | Comm. Geoffrey Starks

Sworn in on Sept. 25th



Anna Gomez

Absent a vote – must leave at end of 2023, and 2024.



Updating Your Wireless Ordinances & Getting the Most Out of Your Cell Site Leases

Bennett Givens

Don’t Forget to Update Your Wireless Ordinance

- Inside the Right of Way Updates
- Zoning Code Updates

Issues to Be On the Lookout For

- Definitions:
  - Restate federal law or use references only.
  - Avoid conflicting definitions elsewhere in the code.
- OTARDS and Amateur Radio Antennas:
  - Account for substantial federal preemption.
  - Account for recent changes in federal law.
- Eligible Facilities Requests

Streamlining Permit Processes:

- Shot Clocks and Deemed Approved Remedies
- Administrative Processes vs. Discretionary Review by Commissions/ Councils
- Appeals

Flexible Application Requirements:

- Consider removing set requirements from code and placing in a separately published application form.
- Give staff authority to update from time to time.

Development Standards:

- Small Wireless Facilities –
  - Small Cell Order:
    - Objective
    - Technically feasible
    - No more burdensome than other similar infrastructure
    - Published in advance
  - Changes under *City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020).

- EFRs and Protecting Existing Concealment Requirements

Standard Conditions of Approval:

- Prepare for Deemed Approved Remedy
- Provide Flexibility for Approval Authority
- Consider Including:
  - RF Compliance Certifications
  - Build-Out Periods
  - Performance Bond
  - Maintenance, Graffiti Abatement & Noise Compliance

Waiver and Exception Process – Design and Location Standards:

- Avoid codifying legal tests (significant gap vs. materially inhibits)
- Consider granting exceptions or limited waivers of design and location standards if the applicant demonstrates that the requirement:
  - Prohibits or effectively prohibits the provision of personal wireless services, within the meaning of federal law; or
  - Otherwise violates applicable laws or regulations; or
  - Involves only minor non-compliance with a requirement, provided such non-compliance either results in no increase in visual harms to the community or provides other benefits.

Acting as the Landlord/Licensor – Cell Site Agreements:

- Know your worth
- Control the form of agreement
- Site Specific Requirements:
  - Rooftops vs. Water Tanks vs. Standalone Towers vs. Landlord Owned Towers
- Modifications to tenant facilities
- Access Limitations
- Subleasing
- Relocation at Tenant's Cost

Acting as the Landlord/Licensor – ROW Infrastructure Agreements:

- Understand the impact of the *Small Cell Order* on fees
- Be mindful of state law restrictions

Updates in Wireless Litigation

Gregory Caffas

Updates in Wireless Litigation

- “Materially Inhibits” vs. “Significant Gap”
  - Shifts in Third and Fifth Circuits
- Failures to Act, Denials and Deemed Granted Remedies
- Community Member Intervenors

“Materially Inhibits” vs. “Significant Gap”

- Background:
  - 2018 *Small Cell Order*, the FCC rejects the “significant gap” standard adopted by many Circuit Courts in favor of its “materially inhibits” standard to determine an effective prohibition of service under Sections 253(a) or 332(c)(7)(B)(i)(II).
  - More expansive test, effective prohibition occurs “not only when filling a coverage gap but also when densifying a wireless network, introducing new services or otherwise improving service capabilities.”
  - Materially inhibits standard includes inhibiting a provider from deploying the “performance characteristics” of its choosing.

“Materially Inhibits” Considerations

- Ninth Circuit upheld most of the *Small Cell Order* but some argue court did not uphold the materially inhibits standard for wireless and significant gaps (*City of Portland v. FCC*, 969 F.3d 1020 (9th Cir. 2020)).
- Petitioners’ Supreme Court brief included an argument 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)

“Materially Inhibits” Considerations

- Arguably, under the Hobbs Act, only federal courts of appeal, not district court, can determine whether the *Small Cell Order* is entitled to *Chevron* deference. (*T-Mobile South v. City of Roswell*, 2023 WL 2563227 (N.D. Ga. March 17, 2023)).
- Do courts apply FCC’s 2018 *Small Cell Order*?
- Does the standard apply only to small cell or also macro facilities or ROW compensation more generally?
- What do providers have to show for “materially inhibits” standard?

Third Circuit: Adopts Materially Inhibits Standard

- *Cellco Partnership v. White Deer Township*, No. 22-2392 (3rd Cir. July 14, 2023).
  - Held that Township's denial of Verizon's variance requests for a 195-foot monopole constituted a prohibition of service under 47 USC Sec. 332(c)(7)(B)(i)(II).
  - Upheld district court's decision that Township's denial constituted a prohibition under the Third Circuit's "*APT Pittsburgh*" standard – which required showing of significant gap in coverage (and filling the gap in the least intrusive manner).
  - But the Court continues, noting the denial *also* ran afoul of FCC's "materially inhibits" standard.

White Deer Township Cont'd

- It gets worse: Court abandons *APT Pittsburgh* standard because *APT Pittsburgh* didn't find that Section 332(c) was unambiguous, and the FCC's "material inhibits" standard was reasonable under *Chevron*. it was now adopting the FCC's standard and (impliedly at least) abandoning its own *APT Pittsburgh* standard:
- Third Circuit recognized that it expanded the reach of what constitutes a "prohibition":
  - In light of our decision to adopt the "materially inhibits" standard, not only does "insufficiency in coverage" ordinarily entitle a provider to a variance but so does insufficiency in net-work capacity, 5G services, or new technology. In the TCA, Congress recognized that "[t]he telecommunications interests of constitutions are . . . statewide, national and international." Local zoning boards, like White Deer Zoning Board, are prohibited from preventing providers from meeting those broader interests.

Second and Fourth Circuits

- *ExteNet Sys., Inc. v. Village of Flower Hill*, 2022 WL 3019650 (E.D.N.Y. July 29, 2022). Settled while case pending appeal in Second circuit.
  - District court followed *Willoth*'s holding that federal ban on prohibiting personal wireless services precludes denying an application for a facility that is the least intrusive means for closing a significant gap in a remote user's ability to reach a cell site that provides access to land-lines; 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.
- Third Circuit in *White Deer* also relied on Second Circuit authority in *Sprint Spectrum v. Willo*th, 176 F.3d 630, 639 (2d Cir. 1999) for significant gap findings, noting that *Willoth*, like *ATP Pittsburgh*, found that Section 332(c) was not unambiguous and application of significant gap test was "somewhat opaque," implying it would be appropriate to follow in the adoption of the FCC's "materially inhibits" standard.

Second and Fourth Circuits

- But Second Circuit remains “plain language” jurisdiction, along with Fourth Circuit.
  - *See, e.g., AT&T Wireless PCS, Inc. v. City Council of City of Virginia Beach*, 155 F.3d 423, 427 (4th Cir. 1998)): “There is no evidence that the City Council had any intent to favor one company or form of service over another. In addition, the evidence shows that opposition to the application rested on traditional bases of zoning regulation: preserving the character of the neighborhood and avoiding aesthetic blight. If such behavior is unreasonable, then nearly every denial of an application such as this will violate the Act, an obviously absurd result.”

Fifth Circuit

- *Crown Castle v. City of Pasadena, Texas*, No. 22-20454, 2023 WL 4994300 (5th Cir. Aug. 4, 2023); Fifth Circuit affirmed the district court's ruling that Pasadena's small cell node regulations were preempted by 47 U.S.C. § 253 because they had the effect of prohibiting the provision of telecommunications services.
  - The district court properly found it was bound by the FCC's Small Cell Order.
  - Crown Castle is a telecommunications provider that can seek relief under Section 253 because it provides service via T-Mobile.
  - Reminder to raise arguments to avoid waiver—Court noted the City did not raise plain language argument until Reply brief.
  - Did not discuss § 332; no established Fifth Circuit test for § 332 claims.

Pasadena Cont'd

- Densification is protected under Section 253, court rejected claim that the proposed nodes would merely "augment" service.
  - "Just because a provider can provide some limited level of service does not mean that it cannot improve that level, expand its capacity, or otherwise offer an upgraded or additional form of telecommunications service. All those boons seem to fall within the scope of the statute's text."
- Found that a City Manual that imposed spacing and undergrounding rules only on small cells were not "competitively neutral and nondiscriminatory" defensible under Section 253(c).

General Takeaways

- Don’t assume the *Small Cell Order* applies
- Use roadmap set by Fifth Circuit in *Pasadena*, encouraging City arguments relating to the Hobbs Act and that district courts are not bound by the FCC’s *Small Cell Order* or err in its application.
- Know applicable alternatives – the fewer alternatives considered the more unreasonable, even under the materially inhibits standard.
- Keep an eye on when cases are going up to the circuits from the trial court.

Failures to Act, Denials and Deemed Granted Remedies

- Local government should be aware of requirements and have clear process for issuing decisions on applications (especially denials, which must be in writing and contemporaneous) to avoid claims for failure to act within a reasonable period of time under 47 U.S.C. § 332(c)(7)(B)(ii).
- "The Supreme Court has noted that in the TCA there is 'no verb at all to describe the conveying of information from a locality to an applicant,' and thus no notification burden on municipalities." *GTE Mobilnet of California Ltd. P'ship v. Carmel-by-the-Sea,* No. 22-CV-00347-NC, 2022 WL 2357005, at *4 (N.D. Cal. June 30, 2022)(quoting *T-Mobile S., LLC v. City of Roswell, Ga.*, 574 U.S. 293, 295 (2015)).
- While there is no formal delivery requirement, it is wise to provide timely written denial to avoid shot clock challenges.

Failures to Act, Denials and Deemed Granted Remedies

- Appropriate remedy for failure to act is typically an order directing the locality to render a decision on the application, and arguably considered a “harmless error” if decision has been issued.
- Nevertheless, be wary that applicants may argue for permit issuance remedy even in the face of a denial.
- No federal deemed granted remedy except for eligible facilities requests.
- HR 3557 may expand deemed granted remedies.
- Also check state law.

Community Member Intervenors in Wireless Litigation

- Trend of cases involving community members intervening in Section 253 and 332 litigation per Fed. R. Civ. P. 24.
  - *See*, *e.g. GTE Mobilnet of California Ltd. P'ship v. City of Berkeley*, No. 20-CV-05460-DMR,(N.D. Cal. 2023); *New Cingular Wireless PCS LLC v. Kootenai County*, Case No. 2:23-cv-124-AKB (D. Id. 2023); *GTE Mobilnet of California Ltd. P'ship v. Carmel-by-the-Sea*, No. 5:22-cv-347-NC,(N.D. Cal. 2023); *Extenet Sys., LLC v. Vill. of Kings Point*, No. 21-CV-5772 (E.D.N.Y. 2022).
  - This presents a difficult political situation for the local government. It may be politically unpopular to oppose the will of community members. However, community member intervenors can increase litigation costs and complicate litigation strategy for the local government.

Community Member Intervenors in Wireless Litigation

- Additionally, this undermines local governments' authority; under Fed. R. Civ. P. 24(a)(2), intervenors need to show the local gov't does not adequately represent their interest. And individual residents are in no sense beneficiaries of Sections 253 or 332.
- Even if local government desires to settle because it believes success at trial is unlikely, it may not be possible to structure a settlement to dismiss lawsuits absent intervenors' agreement. *See Indus. Commc'ns & Elecs., Inc. v. Town of Alton, N.H.*, 646 F.3d 76 (1st Cir. 2011) (consent judgment not permitted between town and communications provider due to intervenor residents' standing to act as independent litigants).

Cable and Broadband/Telecom Right-of-Way Use Update

Tim Lay

Cable and Broadband/Telecom Right-of-Way Use Update

- Cable Franchise Fee Issues
- Video Streaming Service Issues
  - Undecided Federal Cable Act Issues
  - State Video Franchising Law Litigation and Amendments
- Cable Franchise Renewal Issues
- “Fair and Reasonable” ROW Compensation and Other Wireline Section 253 Issues

Cable Franchise Fee Issues

FCC's 3rd Report & Order, 34 FCC Rcd 6844 (2019)

- In-Kind Rule: The value of most non-monetary franchise agreement obligations (other than buildout, customer service and PEG capital cost requirements) counts against the Cable Act's 5% fee cap, and in-kind franchise obligations are valued at "fair market value." 47 CFR 76.42(a).
- Mixed-Use Rule: An LFA may not regulate the provision of any non-cable services offered by a cable operator over a cable system, with the exception of channel capacity on I-Nets. 47 CFR 76.43.

City of Eugene v. FCC, 998 F.3d 701 (6th Cir. 2021) – appeal of the 3rd Report & Order

- In-Kind Rule: Upheld the rule *except that* only the marginal cost of complying with an in-kind franchise obligation, *not* its fair market value, constitutes a "franchise fee." This means:
  - FCC must revise the rule on remand, and
  - The amount of offset against the 5% fee payments cable operators can take for in-kind franchise obligations will be much smaller, in some cases close near zero.
- Mixed-Use Rule: Questioned the rule as written, concluding that LFAs may regulate an operator's provision of non-cable service unless inconsistent with the Cable Act, *but* ruled that a Cable Act franchise included the right to use an operator's system to provide information services (broadband service).

FCC Remand

- Revise the in-kind rule to conform to the court's limitation of value to marginal cost.
- Address the court's finding that the text of the rule is inconsistent with the Cable Act.
- Action slowed by lack of a 3-2 FCC, which should be resolved this fall.
- FCC likely to address remand issues in short rulemaking, giving local governments an opportunity to persuade the FCC – one much less hostile to local governments than the one that adopted the 3rd R&O – to address issues left open and subject to dispute.

Video Streaming Service Issues

(Like Netflix, Hulu, Peacock, Max and many other; also known as “over-the-top” video, or “OTT” services.)

Unresolved Cable Act Issues

- Key Act provisions:
  - Definitions:
    - Cable service is "(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 USC 522(6) (emphasis added).
    - Video programming is "programming provided by, or generally considered to be comparable to programming provided by, a television broadcast station." 47 USC 522(20).
    - Other programming service is "information that a cable operator makes available to all subscribers generally." 47 USC 522(14).

Unresolved Cable Act Issues

- Key Act provisions (cont'd):
  - Scope of franchise fee revenue base: "5 percent of [a] cable operator's gross revenues derived … from the operation of the cable system to provide cable services." 47 USC 542(b). Note that the base is not necessarily limited to "cable service" revenue. If an operator receives other revenue as a result of its operation of the system to provide cable service, the revenue counts.
  - Cable Act also permits imposition of fees or taxes (not exceeding 5%) on cable and non-cable services provided by non-cable operators over a cable system:
    - Nothing in [the Cable Act] 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 USC 542(h)(1) (emphasis added).

Unresolved Cable Act Issues

- Key Act provisions (cont'd):
  - Whether OTT services are a "cable service" is an unresolved question. There are good arguments both ways. Do not agree to language in your cable franchise agreement excluding such services. Better to leave the agreement silent on the issue, with language saying that your gross revenue definition and franchise fee is to be construed to be the maximum permitted by the Cable Act.
  - Even if OTT service is not a "cable service" and revenue from it can't be reached in your franchise agreement, nothing in the Cable Act prevents a locality from imposing a fee or tax, not to exceed 5%, on OTT service providers other than the cable operator. State or local law may or may not permit such a tax, but the Cable Act does not bar such a tax.

State Video Franchising Law Litigation and Amendments

Background

- 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 cable operators and 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 delivered 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.

Municipal lawsuits against video streaming services

- Beginning in 2021, lawsuits have been filed by municipalities in at least 13 states against Netflix and Hulu (and sometimes Disney), the leading OTT service providers. The lawsuits claim that OTT providers (1) provide “video service” and “use” local ROW to provide that service (via other parties’ broadband networks in the ROW) , and therefore (2) must obtain a state video franchise, and (3) owe the municipalities the 5% video franchise fee.

Municipal lawsuits against video streaming services

- Key issues in these cases:
  - Whether local governments have a right of action under the state video franchise law to sue OTT providers for failing to obtain a state 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 but instead ride over the ROW facilities of others.

Municipal lawsuits against video streaming services

- So far, municipalities have not fared well, largely losing at the (predominantly state) trial court level.
- Two federal courts of appeals 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 v. Netflix and Hulu*, 52 F.4th 1025 (8th Cir. 2022) (Arkansas video franchising law).

New State Video Streaming Laws and Other Limiting State Laws.

- At least three states (Louisiana, Arkansas and Tennessee) have enacted amendments to their state video franchising laws explicitly excluding video streaming services from the “video service” definition (and thus the franchise fee base).
- Similar bills have been (or will be) introduced in most, if not all, states with video franchising laws.
- Texas’s “pay for one, get one free” law.

New State Video Streaming Laws and Other Limiting State Laws.

- California Reforms to DIVCA
  - SB 28 and CPUC customer service proceeding
  - AB 41
  - Is CA an outlier?

Cable Franchise Renewal Issues

Cable Franchise Renewal Issues

- Marginal cost issues relating to PEG transport and I-Nets.
- Living with an expired franchise.
- Franchise renewals vs. extensions.
- Key questions: Do you like your current franchise? What would you like to improve? What is crucial to preserve? What is at risk of losing in light of the FCC's Order and *Eugene v. FCC*?

Cable Franchise Renewal Issues

- Unilateral Operator Termination Issue: Some franchisees (typically former telephone companies but also smaller cable operators) seek to include in their renewal franchise a provision giving them the unilateral right to terminate their cable franchise on notice to the local government. The reason: They wish to respond to cord-cutting by abandoning the offering of traditional cable service and instead move former cable customers to broadband services, encouraging them to rely on streaming services for their video service needs. Presents difficult issues:
  - Potential loss of fees and PEG.

Cable Franchise Renewal Issues

- Potential fight over whether offering of video streaming services is a ”cable service.”
- If operator seeking to exit the franchise is not the incumbent, exit could trigger “competitive equity” provision in incumbent’s franchise.

“Fair and Reasonable” ROW Compensation and Other Wireline Section 253 Issues

Background

- 47 USC 253(a) preempts any state or local requirement that prohibits or has the effect of prohibiting the ability of any entity to provide telecommunications service. But 47 USC 253(c) has a safe harbor for nondiscriminatory “fair and reasonable” right-of-way compensation.
- Largely in the context of disputes over fees imposed on wireline facilities, courts have divided over what level of fees are so excessive as to be prohibitive within the meaning of Section 253(a), as well as what Section 253(c)’s “fair and reasonable” compensation means. Some have ruled that gross revenue-based and other forms of rent-based fees qualify as “fair and reasonable” compensation, while others have ruled that compensation must be based on the amount of ROW used. Still others have concluded that fees should be limited to cost recovery, while others have stated that both “prohibition” and “fair and reasonable compensation” are fact-specific.

Background (cont'd)

- In its 2018 *Small Cell Order*, the FCC ruled that, in the case of small wireless facilities placed in the ROW, any ROW fee imposed on those facilities that is above costs is a "prohibition" within the meaning of Section 253(a) and also not "fair and reasonable" within the meaning of Section 253(c). The Ninth Circuit affirmed those rulings in *Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020).
- Whether the FCC's ruling that ROW fees must be limited to costs applies outside the context of small cells, and specifically, to wireline ROW fees, is unsettled. In August, however, a federal court of appeals addressed the issue. In upholding the City of Santa Fe's 2% ROW fee on landline telecom and broadband networks, the Tenth Circuit rejected a wireline broadband provider's argument that the *Small Cell Order*'s reasoning concerning cost-based fees should be extended to landline networks. *NMSurf v. Webber*, 2023 WL 5217859 (10th Cir. filed Aug. 15, 2023). Although the case is far from the last word on this question, it is a helpful start for local governments.

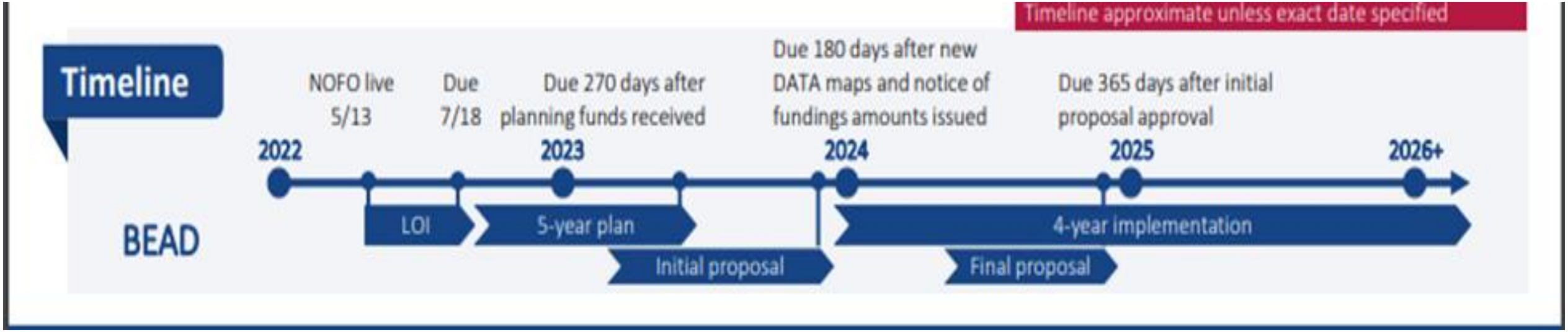
Capitalizing on Broadband Funding Opportunities

2024 is the "Year of Broadband Funding"

But the funds will come primarily from your state.

Gerard Lavery Lederer

Broadband Equity, Access, and Deployment (BEAD) Program



- $42 B distributed based on unserved /underserved households.
- Amount per state can be found at https://www.ntia.gov/press-release/2023/biden-harris-administration-announces-state-allocations-4245-billion-high-speed

Broadband Equity, Access, and Deployment (BEAD) Program

- Local Government Protection
  - 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).)

Broadband Equity, Access, and Deployment (BEAD) Program

- Local Government Protection (cont'd)
  - 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).

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

INTERNET FOR ALL

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

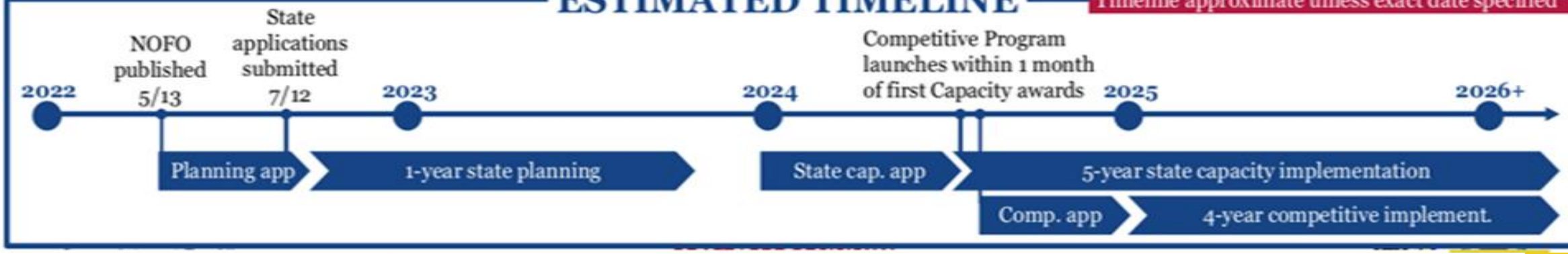
Competitive
- $1.25B to implement digital equity and inclusion activities

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



ARPA Coronavirus State & Local Fiscal Recovery Funds (Treasury)

- American Rescue Plan Act Funding was eligible for Broadband – money is likely soon exhausted.
  - 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 must be obligated by December 31, 2024 and must be expended by December 31, 2026
- On August 10, 2023 the Department of Treasury issued an interim 2023 ARPA Rule. This new rule provides for the expansion of ARPA funds for new eligible programs;
  - Emergency Relief from Natural Disasters; Surface Transportation Projects and Title I of the Housing and Community Development Act.
  - (See BBK alert https://bbklaw.com/resources/la-081123-us-department-of-treasury-updated-arpa-rule)

Other Broadband funds

NTIA

- Connecting Minority Communities
- Enabling Middle Mile Broadband Infrastructure
- Tribal Broadband Connectivity Program

Treasury

- Capital Improvement Grants (By way of states)

Rural Funds

- FCC E-Rate
- Dept of Agriculture (RUS Funds)

Cyber Security Grant:

- 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.)

Cyber Security Grant:

- 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.

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Questions?

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Contacts



Gail Karish

(213) 605-1603

gail.karish@bbklaw.com



Bennett Givens

(213) 617-7497

bennett.givens@bbklaw.com



Gregory Caffas

(202) 370-5302

gregory.caffas@bbklaw.com



Tillman "Tim" Lay

(202) 370-5299

tillman.lay@bbklaw.com



Gerry Lavery Lederer

(202) 370-5304

gerard.lederer@bbklaw.com

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