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Winning at Three Dimensional Chess: Telecommunications Law Today

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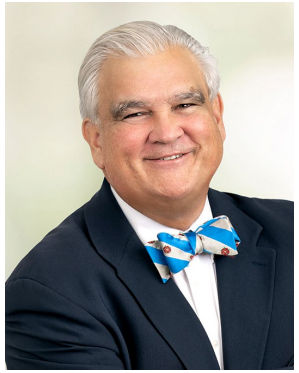
Introductions



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Overview of Topics

- Wireless Updates
- Cable/Video Updates
- ROW Compensation
- Government on Social Media
- Broadband Infrastructure Funding
- Congress

Wireless Updates

Legal Updates and Practical Guidance on Application Processing Pitfalls

- Effective Prohibition Claims
- Remedies for Failure to Timely Act
- Environmental Reviews
- Eligible Facilities Requests (EFRs)

Effective Prohibition Claims

Evaluating Effective Prohibition Claims

- Has an effective prohibition claim been made?
- What standard applies?
- What types of facilities does *Small Cell Order* standard apply to?
- What evidence is required?

Practical Considerations

- At local level, make sure effective prohibition claim is being raised before addressing it in a decision
  - Industry permitting consultants often use form language in applications that is unclear
  - Members of public often make claims the applicant hasn't shown a gap, etc.
  - BUT: Decisions need to be made first and foremost based on local law findings which may or may not require an effective prohibition showing
- If a claim is being made, address it (when in doubt, assume it is)
- Know your Circuit's standard

“Materially Inhibits” vs. “Significant Gap”

- In 2018 *Small Cell Order*, the FCC rejected the “significant gap/least intrusive means” standard adopted by many Circuit Courts under Section 332(c)(7)(B)(i)(II) as no longer relevant in era of 5G
- Favored its “materially inhibits” standard (in *California Payphone Ass'n*, 12 FCC Rcd. 14191 (1997)) to determine an effective prohibition of service under Sections 253(a) and 332(c)(7)(B)(i)(II):
  - Issue is whether denial “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”
  - Effective prohibition can occur “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.

Effective Prohibition Standard in the Courts

- Ninth Circuit upheld most of the *Small Cell Order* (*City of Portland v. FCC*, 969 F.3d 1020 (9th Cir. 2020)):
  - noting that with respect to the application of "materially inhibits" standard, the FCC's explanation that "5G is different in that it requires rapid, widespread deployment of more facilities" and
  - finding that "[t]he differences in the FCC's new approach are therefore reasonably explained by the differences in 5G technology."
- For other circuits, 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)).
- Current Circuit Status:
  - Materially Inhibits: 1st Circuit (253), 2nd Circuit (253) 3rd Circuit, 5th Circuit (253), 10th Circuit (253), 8th Circuit (253)
  - Significant Gap: 1st Circuit (332), 2nd Circuit (332), 4th Circuit, 6th Circuit (332), 7th Circuit (332), 9th Circuit, 10th Circuit (332)

Second Circuit: Lower Courts Still Using Significant Gap under Sec. 332

- *Crown Castle Fiber, LLC v. Town of Oyster Bay*. Magistrate recommendation (2024 WL 1051171) adopted by Judge (2024 WL 1090305) grants Crown Castle summary judgment on its claims that the Town violated Section 332(c)(7) in failing to grant Crown's applications to install 23 SWFs in the Town's ROW and Section 253 facial challenge to portions of code.
  - Evaluation of denial/effective prohibition under Section 332(c)(7) relies on existing 2nd Circuit precedent in *Sprint Spectrum v. Willo*th, 176 F.3d 630, 639 (2d Cir. 1999) using significant gap std., does not apply *Small Cell Order*'s "materially inhibit" standard.
  - Evaluation of facial challenge to application criteria and fees under Section 253 relies on existing 2nd Circuit precedent in *TCG New York v. White Plains*, 30 F.3d 67 (2002) and MetroPCS v. Mount Vernon, 739 F.Supp.2d 409 (SDNY 2010), using materially inhibits standard

Third Circuit Adopts Materially Inhibits Standard

- *Cellco Partnership v. White Deer Township*, 74 F.4th 96 (3rd Cir. 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.
  - per *TowerNorth Dev., LLC v. City of Geneva*, No. 22 C 4151, 2024 WL 621616, at *25 (N.D. Ill. Feb. 14, 2024), "the Third Circuit's recent decision in *Cellco Partnership* . . . appears to be the only application of the 'materially inhibits' standard so far in the context of a cell-tower placement[.]"

Fifth Circuit Adopts Small Cell Order Materially Inhibits Standard in Sec. 253 Case

- *Crown Castle v. City of Pasadena, Texas*, 76 F.4th 475 (5th Cir. 2023) cert denied (Feb. 20, 2024). 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. Held:
  - The district court properly found it was bound by the FCC's *Small Cell Order*.
    - Reminder to raise arguments to avoid waiver—Court noted the City did not raise plain language argument until Reply brief.
  - Did not discuss Section 332; no established Fifth Circuit test for Section 332 claims.

What Evidence is needed under Section 332 Materially Inhibits Standard?

- *Cellco Partnership v. White Deer Township*, 74 F.4th 96 (3rd Cir. 2023). Cites three factors in its analysis before affirming summary judgment in provider's favor:
  - 1st Prohibition doesn't need to be complete/insurmountable to "run afoul of" 332.
  - 2nd local gov't action which either imposes unreasonable fees or requires a provider to accept unreasonable costs materially inhibits wireless services.
    - Cites example of imposing gross revenue fee resulting increased costs considered an effective prohibition (*Puerto Rico Tel. Co. v. Municipality Of Guayanilla*, 450 F.3d 9, 17–18 (1st Cir. 2006))
  - 3rd the "materially inhibit" standard requires court to consider the totality of the circumstances.
    - Ordinances that give unrestricted right to reject applications or impose extensive delays
    - *White Deer* court interpreted this broadly: "In light of our decision to adopt the 'materially inhibit' standard, not only does "insufficiency in coverage" ordinarily entitle a provider to a variance but so does insufficiency in network capacity, 5G services, or new technology."

What Evidence is needed under Section 332 Materially Inhibits Standard?

- *TowerNorth Dev., LLC v. City of Geneva*, No. 22 C 4151, 2024 WL 621616 (N.D. Ill. Feb. 14, 2024). Denied Plaintiff's motion for summary judgment after examining:
  - 1st Insufficiency of Coverage. Propagation maps showing alleged insufficient coverage w/out underlying data not enough when contested with residents claiming adequate coverage.
  - 2nd Alternative Sites. Ruled plaintiff had not sufficiently shown why alternative locations were not available, but noted that "the FCC's 2018 Order rejected any test that requires no alterative sites exist."
  - 3rd Other considerations. Here the court considered delays caused by discovery that the site was in a Planned Unit Development that prohibited special uses, including wireless facilities, late in the application process (and who was at fault for not discovering the condition sooner), and that the City's failure to render a decision within the FCC shot clock period noting "materially inhibit" standard requires court to consider the totality of the circumstances.

Remedies for Failure to Timely Act

Failures to Timely Act, Denials and Deemed Granted Remedies

- Appropriate remedy for failure to act is typically an order directing the locality to render a decision, and arguably considered a "harmless error" if decision has been issued.
  - *T-Mobile S., LLC v. City of Roswell*, 574 U.S. 293, 309 (2015) (Alito, concurring) ("[E]ven if a locality has erred, a court must not invalidate the locality's decision if the error was harmless.")
- No federal deemed granted remedy *except for* eligible facilities requests.
  - But check state law remedies.
- Pending federal legislation (HR 3557) may expand deemed granted remedies.
- Be wary that applicants may argue for permit grant as remedy in the face of an untimely *denial*.

When is an Action “Final”?

- Recent Case: *New Cingular Wireless PCS, LLC v. Lane Cnty.*, No. 6:22-CV-01635-MK, 2023 WL 7020126, at *4 (D. Or. Oct. 25, 2023) (appeal filed Feb. 15, 2024).
  - County denied AT&T’s application to build a 150-foot tower on the grounds that the County Code prohibits telecommunications towers within 1200 feet of any residential dwelling unless the affected homeowner(s) consent, and none did. AT&T challenged the denial under Sections 332(c)(7) and 253.
  - The County successfully argued that the federal court lacked jurisdiction because the County’s decision was a not a “final action” within the meaning of section 332(c)(7) because AT&T failed to exhaust its state law administrative remedy for reviewing the County hearings official’s decision denying ATT’ application. The court’s decision turned on a unique aspect of Oregon law: Under Oregon law, the Land Use Board of Appeals (LUBA) has exclusive jurisdiction to review any local land use decision.
  - Among AT&T’s arguments was the claim that awaiting the LUBA appeal process would be inconsistent with Section 332(c)(7)’s requirement that review of local decisions be expedited.
  - Effect of FCC shot clock conflict with local/state procedures to be decided on appeal.

Remedy for Failure to Act

- Absent a deemed granted statutory remedy, courts continue to find the appropriate remedy for a failure to act is the issuance of a local decision on an application.
  - *See New Cingular Wireless PCS LLC v. City of Jennings*, No. 2:22-CV-06025, 2023 WL 6209078, at *4 (W.D. La. Sept. 22, 2023) (City ordered to render decision, approval of application was not appropriate remedy)

Practical Considerations

- Local governments generally know about the FCC shot clocks but sometimes still get caught with denials because they lack a clear or timely process for issuing denial decisions
- Denials must be issued in in writing, based on substantial evidence, and denial and reasons must be issued contemporaneously.
  - How does your City deny applications? – in meeting minutes, in a resolution, is there a subsequent denial notice?
  - What is the timeline for appeals?
  - If you enter into tolling agreements, is the tolling long enough to issue the denial in writing?
- While there is no formal notification/delivery requirement under federal law today, it is advisable to deliver timely written denial to avoid shot clock challenges.
  - 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)).*

Environmental Reviews

Federal Review

- Background: *United Keetoowah Band of Cherokee Indians in Oklahoma v. Fed. Commc'ns Comm'n*, 933 F.3d 728 (D.C. Cir. 2019)
  - Vacated FCC rules from March 2018 exempting small wireless facilities from NEPA/NHPA review, finding the exemption arbitrary and capricious
  - FCC chose not to revisit its analysis of the justification for the exemption

Update on Federal Review

National Information and Technology Administration (NTIA) Adoption of First Responder Network Authority Categorical Exclusions Under the National Environmental Policy Act, Docket Number 240325-0085 (March 26, 2024)

- Notice identifies the FirstNet Authority categorical exclusions (CEs) and NTIA's categories of proposed actions for which it intends to use FirstNet Authority's CEs.
  - Construction of buried and aerial telecommunications lines, cables, and related facilities.
  - Changes to existing transmission lines that involve less than 20 percent pole replacement, or the complete rebuilding of existing distribution lines within the same right-of-way. Changes to existing transmission lines that require 20 percent or greater pole replacement will be considered the same as new construction.
  - Changes or additions to telecommunication sites, substations, switching stations, telecommunications switching or multiplexing centers, buildings, or small structures requiring new physical disturbance or fencing of less than one acre (0.4 hectare).
  - Rebuilding of power lines or telecommunications cables where road or highway reconstruction requires the Applicant to relocate the lines either within or adjacent to the new road or highway easement or right-of-way.
  - Phase or voltage conversions, reconductoring, or upgrading of existing electric distribution lines or telecommunications facilities.
  - Deployment of Cells on Wheels, Systems on Wheels, or another deployable architecture intended for temporary placement (no more than two years) on an impervious surface.

Local Environmental Review

Fiber First Los Angeles et al. v. County of Los Angeles (CA Superior Court, March 27, 2024)

- Spectrum Act, Section 6409(a) preempts application of state environmental law to EFRs (CEQA)
- Environmental review of other wireless applications not preempted, but may be limited (eg. environmental effects of RF emissions exposure)

Eligible Facilities Requests

47 U.S.C. 1455(a) (Sec. 6409)

- Applies to “eligible facilities requests”
  - 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.
- 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.

3 FCC Orders Implementing Sec. 6409(a)

Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, 29 FCC Rcd 12865 (2014) set the basic rules

- Specific criteria set for EFRs:
  - Involving purpose-built structures ("towers") and other structures with wireless ("base stations")
  - Within and outside the public right-of-way
- 60-day shot clock for eligible facilities requests (EFRs)
- Deemed approved remedy in federal law

Two more Orders in 2020

2020 FCC Orders on EFRs

Implementation of State & Loc. Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012, 35 FCC Rcd. 13188 (2020)

- **new rule:** any excavation or deployment within 30 feet or less of existing site = not a substantial change
- applies only to towers outside the ROW

2020 FCC Orders on EFRs cont'd

Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012, 35 FCC Rcd. 5977 (2020)

- Declaratory ruling "clarifies" rules
  - reduces protections for existing concealment of "non-stealth" facilities, among other industry-favorable interpretations
- Appeal pending in Ninth Circuit (*League of Cal. Cities, et al. v. FCC*, No. 20-71765 (9th Cir.)):
  - Concealment – does it mean disguise structure but not hide it as the FCC claims?
  - Do the FCC's new rules about height changes and cabinet definitions mean there are no effective limits?
  - What evidence is needed to maintain permitting conditions when an EFR is sought?
  - What is needed to "file" an application and initiate an EFR?
  - Any limits on what the FCC can do with a declaratory ruling?
- Cheryl Leanza argued on behalf of BBK clients and is here to answer questions about status

EFR Processing Pitfalls

- Don’t fall in trap by applicants asking if their application qualifies as an EFR BEFORE they submit the complete application
- 2014 Order is clear: Applicant requests, you decide
  - In pre-filing discussions
    - Be wary of questions like, can I apply for EFR based on this scope of work?
    - Be clear that the applicant has not yet applied
  - Proper evaluation requires an examination of all of the factors in 47 C.F.R. § 1.6100(b)(7)

EFR Processing Pitfalls cont'd

- Know what materials are needed as part of a complete application vs. what can be examined later in a different permit application. Be wary of:
  - Applicant claiming its lease granting an easement for access and utilities to place fiber within existing conduit satisfies EFR requirements
  - Plans that don't show any utilities
    - These approaches mischaracterize EFR requirements and do not allow proper evaluation
    - To qualify as EFR, applicant must show there is no excavation or deployment outside the existing site/easements

EFRs Processing Pitfalls cont'd

- Denials – "[I]f the reviewing State or municipality finds that Section 6409(a) does not apply (because, for example, it proposes a substantial change), we provide that the presumptively reasonable timeframe under Section 332(c)(7) will start to run from the issuance of the State's or municipality's decision that Section 6409(a) does not apply." *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 29 FCC Rcd. 12865, 12958 ¶ 220 (2014).
- If application does not qualify as an EFR:
  - *Make sure the denial is in writing, based on substantial evidence* (non-EFR case: *Cellco P'ship d/b/a Verizon Wireless v. City of Milwaukee*, No. 23-CV-1581-BHL, 2024 WL 329001 (E.D. Wis. Jan. 29, 2024) ("The City did not give Verizon even a basic explanation for the denials that was tied to anything in the record. This failure makes any judicial review (beyond mere "rubber-stamp" review) virtually impossible."))
  - *Note any appeal rights*
  - *Identify the new applicable FCC shot clock*
  - *Include an NOI for any missing items in the "new" application to stop the clock*

FCC: Cable Franchise Fee Policy & Consumer Regulation

New Federal Cable Consumer Protections

The Television Viewer Protection Act of 2019, 47 U.S.C. § 562, requires MVPDs to:

- "[G]ive consumers a breakdown of all charges related to the MVPD's video service" before entering into a consumer contract;
- Transmit by email, online link, or reasonably comparable means, a breakdown of all charges;
- Give consumers 24 hours after receipt to cancel without penalty.

New FCC rule, *All-In Pricing for Cable and Satellite Television Service*, MB Docket No. 23-203:

- Requires cable ad DBS to state, in promotional materials and on subscriber bills, the aggregate cost of video programming (including for broadcast retransmission consent and regional sports programming) in an easy-to-understand, accurate single line item. Permits a supplemental itemized explanation of the elements composing the line item.

Proposed FCC rule, *Promoting Competition in the American Economy: Cable Operator and DBS Provider Billing Practices, MB Docket No. 23-405*:

- Proposes to prohibit cable and DBS from charging consumers early termination fees and billing cycle fees that require payment for a full billing cycle regardless of when a service is cancelled.

FCC Section 621 Order - Sixth Circuit Review

- The Sixth Circuit reviewed, and partially overturned the Federal Communications Commission's Section 621 Third Report and Order, 34 FCC Rcd. 6844 (2019), in *City of Eugene, Oregon v. Federal Communications Commission*, 998 F.3d 701 (6th Cir. 2021), *cert. den.* 142 S.Ct. 1109 (2022).
  - In-Kind Rule: Upheld the rule that cable operators can request an offset for their 'in-kind' franchise obligations against the 5 percent franchise fee, *but only at marginal cost* (rejecting fair market value as in the FCC rule). 47 CFR §76.42(a). In many cases, marginal cost may be near zero.
  - Mixed-Use Rule: Court 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 gave cable operators the right to use its system to provide information services (including broadband). 47 CFR § 76.43.

FCC Action on 621 Remand Needed This Summer

- We are seeing cable operators ask for market prices and the errors are amplified as the importance of and regulatory treatment of broadband evolves.
- **FCC must now act on remand; it has been *almost three years***. National associations and local governments are asking the FCC to fully implement the court decision **by summer 2024**.
- One page talking points available. Outreach to members of Congress needed.

Video Streaming Service Issues

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.):
  - 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 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 U.S.C. § 542(h)(1) (emphasis added).

Unresolved Cable Act Issues

- Key Act provisions (cont.):
  - 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.
  - As noted, even if OTT service is not a “cable service” and revenue from it can’t be reached in your franchise agreement, the Cable Act does not prohibit a loca fee or tax, not to exceed 5%, directly on service providers that are not cable operators. 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 typically defined to include video programming delivered in IP, but excludes video provided over the "public internet."
- "Video service provider" is typically 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

- Municipalities have not fared well, largely losing at the (predominantly state) trial court level.
- Four 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).
  - *City of East St. Louis, Ill. v. Netflix, Inc.*, et al. (7th Cir. Oct. 13, 2023) (Illinois franchising law).
  - *Borough of Longpoint v. Netflix*, No. 22-2139 (3rd Cir. Feb. 29, 2024) (New Jersey franchising law).

New State Video Streaming Laws and Other Limiting State Laws

- At least nine states 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).
  - Louisiana: HB276 (2022)
  - Arkansas: HB 1338 (2023)
  - Tennessee: SB 456 (2023)
  - Ohio: HB 66 (2023)
  - Illinois: HB 3808 (2023)
  - Arizona: AB 1179 (2022)
  - Kansas: SB 144 (2023)
  - Oklahoma: SB 460 (2024)
  - Nevada: AB 146 (2023)
- Similar bills can be expected to be introduced in most, if not all, states with video franchising laws.
- Texas - “pay for one, get one free” law.

Maine LD 1967: A Different Approach

- Became law without the Governor's signature on February 18, 2024.
- Updates Maine franchise obligation beyond cable system operators to all "video service providers," which includes entities that provide access to any "video, audio or computer-generated or computer-augmented entertainment" and owns facilities located in public rights-of-way that are used to provide those services, irrespective of technology.
  - Includes a common carrier that operators a cable television system but does not include Netflix, CMRS providers and internet access providers.
  - Comcast opposes because any streaming service provided by Comcast or its affiliates (like Peacock) would be subject to franchise fees, PEG support fees, and other legacy cable franchising authority regulation, but other streaming services would not.
  - *Does not* fit squarely into the Cable Act exception for taxes or fees on non-cable providers, but not precluded by it either.
  - Comcast and NBC Universal allege that this violates the First Amendment by imposing a tax that singles out facilities-based content creators.

Maine LD 1967 (cont.)

- Provider responsible for all PEG costs shown by franchising authority "to be reasonably necessary in light of community needs and interest for the capture, processing and delivery to the provider" of PEG access channels within the franchising authority, including "upgrade costs of signal quality improvement"
  - "A video service provider may not offset any such costs through the payment of [franchise fees] but may recover such costs from subscribers to the extent permitted by applicable law and as negotiated with the municipality."
  - As long as PEG costs are capital costs under the Act, this is permitted by the federal Cable Act.
- Requires all video service providers (including streamers) to retransmit PEG signals.

Maine LD 1967 (cont.)

- Includes a number of “best practices” cable provisions.
  - Authorizes the use of franchise fees for any purpose; sets interest for late payments at 12%; defines failure to pay as a material breach; requires every payment to be accompanied by a verified financial statement; clarifies and eases PEG access to electronic program guides.
  - Not as great: sets time limits on challenging the accuracy of a franchise fee payment (36 months if the required financial statement is provided).
- Makes a violation of the cable provisions a violation of the Maine Unfair Trade Practices Act.
- Provides processes to resolve disputes between municipalities and video service providers at the state PUC.
- Increases build out requirements by mandating any new, renewed or amended franchise to impose a minimum density of 15 residences per linear strand mile.

Broadband Affordability

Affordable Connectivity Program

- ACP offers a subsidy up to $30 (or $75 in tribal or high cost areas) for wireless or wired broadband service for eligible low-income households. ACP enrolled over 23 million households.
- Letter from 174 Mayors supported expanded funding from Congress (Jan. 16, 2024).
- The original Congressional appropriation has run out. ACP stopped accepting new applicants in February 2024, and the last full month of support is April 2024.
- Congress has been considering various solutions:
  - Short term clean funding – Welch/Vance (S. 3565) & Clarke/Fitzpatrick (H.R. 6929);
  - Short term funding with changes to ACP to limit participation and cost;
  - Long-term broad reform of USF developed by the Senator Luján/Thune USF working group, including changes to contributions (who pays), ACP and e-rate programs.

E-Rate and Emergency Connectivity Fund

- Emergency Connectivity Fund (ECF) is expiring June 30, 2024.
- For the 2024 funding year, however, the FCC will permit Wi-Fi, or other similar access point technologies, on school buses to receive E-Rate funding.
- Broad USF reform could save ACP but also *potentially* impose new rules on schools such as:
  - Prohibit using e-rate funds for dark fiber;
  - Require internet use policies for schools using e-rate funds;
  - Prohibit access to social media on internet access funded by e-rate funds.

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.

Reclassification of Broadband Internet Access Service

- FCC voted to adopt a net neutrality on April 15, 2024. Media attention has been focused on reinstatement of "net neutrality," but consequences are broader.
- 47 U.S.C. § 253, provides:
  - "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide **any interstate or intrastate telecommunications service**."
- Broadband Internet Access Service (BIAS) will now qualify as an interstate telecommunications service.
  - BIAS is "a mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all internet endpoints…" 47 C.F.R. § 8.1(b).
- Sixth Circuit *Eugene* Section 621 opinion footnote specifically excluded broadband as a telecommunications service from its ruling.
- Extensive litigation will follow on this FCC ruling. Stay tuned for possible stays or other action

FCC Draft Net Neutrality Order touches on Section 621

- In two footnotes in the draft (not final) order, the FCC tangentially addresses reclassification with respect to local cable franchising.
  - In footnote 1106: "[T]he reclassification decision made herein provides no justification for a state or local franchising authority to require a party with a franchise to operate a cable system under Title VI of the Act, to obtain an additional or modified franchise in connection with the provision of BIAS, or to pay any new franchise fees in connection with the provision of such services."
- The FCC declines requests "to categorically preempt all state or local regulation affecting broadband in the absence of any specific determination that such regulation interferes with our exercise of federal regulatory authority."
  - Footnote 1107 says, in part: "*But see* 47 CFR § 76.43, *City of Eugene v. FCC*, 998 F.3d 701, 710-716 (6th Cir. 2021). Because we think preemption decisions will, at least in general, best be reached on a record specific to whether and how a state or local regulation conflicts with our Federal requirements, we also decline at this time to preempt specific state or local regulations insofar as we lack a specific and robust record in this proceeding."

Government Officials on Social Media

Government Officials on Social Media

- The Supreme Court found in *Lindke v. Freed* that a City Manager who deleted comments and blocked some users on his ostensibly personal Facebook page may have violated their civil rights.
- The Court ordered a new "state-action" test:
- If a government official posts about job-related topics on social media, it constitutes state action if the official:

  (1) possessed actual authority to speak on the State's behalf, and

  (2) purported to exercise that authority when he spoke on social media.

- The test relies heavily on presumptions and guidance in dicta, few absolutes.

Government Officials on Social Media
Breaking down the test

- Step one is a threshold step.
  - Does the official "have **actual authority** rooted in written law or longstanding custom to speak for the State [which] … extends to speech of the sort that caused the alleged rights deprivation." Slip. op. at 12.
  - Clear policy, job descriptions and public information workflow can help articulate who speaks for the government and who does not.
  - For example, does a City Manager's portfolio include making public pronouncements? Who is tasked with interacting with members of the public?
- Step two.
  - "**[A]n official does not necessarily purport to exercise his authority simply by posting about a matter within it.**" Slip op. at 14.
  - If a "mayor merely repeats or shares otherwise available information—for example, by linking to the parking announcement on the city's webpage—it is far less likely that he is purporting to exercise the power of his office."
  - "The appearance and function of the social-media activity are relevant at the second step...." Slip. op. at 8.

Government Officials on Social Media
Best practices and presumptions

- Officials should "keep personal posts in a **clearly designated** personal account."
  - A simple label or disclaimer, such as "this is the personal page of [John Doe]" or "the views expressed are strictly my own" which "would be entitled to **a heavy (though rebuttable) presumption** that all of the posts on his page were personal."
- Nonetheless the Court indicated a single post on an otherwise personal account could trigger the state-action test.
  - The Court explained: "the bluntness of Facebook's blocking tool highlights the cost of a 'mixed use' social-media account: If page-wide blocking is the only option, a public official might be unable to prevent someone from commenting on his personal posts without risking liability for also preventing comments on his official posts."
  - **Blocking a user, particularly on some platforms, is risky.** Know your platform!

Government Officials on Social Media
Best practices and presumptions

- Some accounts or posts are presumed public.
  - "[C]ontext can make clear that a social-media account purports to speak for the government"—such as **accounts that belong to a political subdivision** or accounts that are passed down from user to user (e.g., @PHuronCityMgr).
  - A public official who **uses government staff to make a post** on a personal or public account "will be hard pressed to deny that he was conducting government business." Slip Op. at 14.
  - The opinion did not address directly whether these accounts are presumed to have "actual authority" to speak for the state under the first step of the test.

- Facts will matter as the lower courts apply this standard.

Capitalizing on Broadband Infrastructure Funding

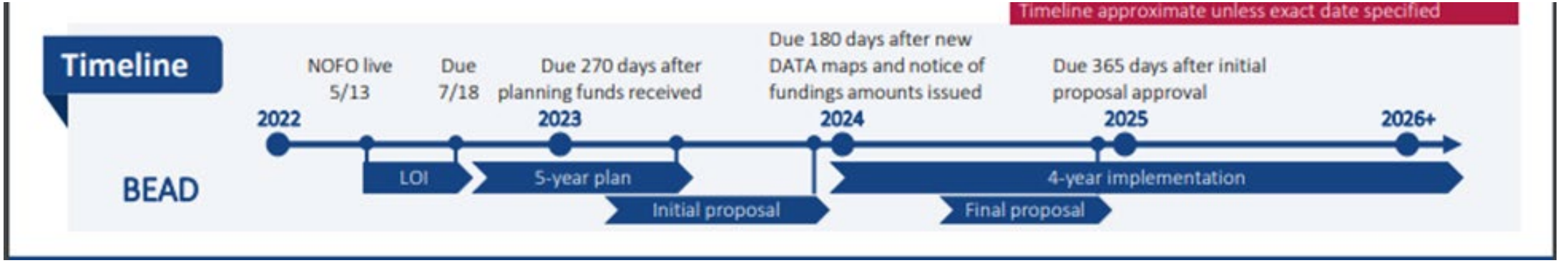
2024-5 will be "Year of Broadband Funding"

The funds will come primarily from your state and use of term is to distinguish from ACP.

President Biden's 2025 Budget

- $6 billion for the Affordable Connectivity Program,
- $112 million for the ReConnect broadband grant and loan program,
- USDA's RUS (Rural Utilities Service,) would be at $335.7 million (- $17 million from 2023 budget.)
- How to Pay for it?
  - "Increasing the corporate minimum tax rate to 21% to align with the global minimum tax rate";
  - Implementing a billionaire minimum tax of 25% "to ensure the top 0.01 percent pay taxes on their income as they go, just like everyone who earns a paycheck";
  - "Raising the tax rate on corporate stock buybacks from 1% to 4% to reduce the differential tax treatment between buybacks and dividends and encourage businesses to reinvest profits in their workers and in the company's growth"; and
  - Denying corporate tax deductions "for employee compensation in excess of $1 million paid to any employee by both publicly and privately owned C corporations."

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

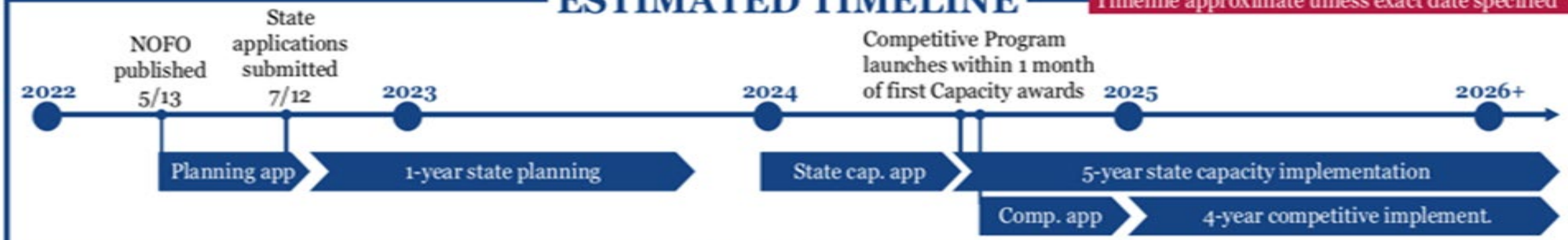
Competitive
- $1.25B to implement digital equity and inclusion activities

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;
  - (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.

Congress – Is It Done for 2024?

Senate – will there be a battle to replace Sen McConnell (R-KY)

Meet Mitch and the Johns



Mitch McConnell—flanked by John Barrasso, John Thune, and John Cornyn—at the Capitol in 201

Senate Commerce Committee

- Democratic leadership remains the same.
- New Ranking Member in Cruz, return to long term leader in Thune.





Biggest Issues:

- Keeping Government Open
- Oversight of Broadband Infrastructure
- Addressing ACP and perhaps rewriting how to subsidize broadband services.
- “Saucer” to House

House – Is there a working GOP majority? 217-213 until mid summer. Will we have a 3rd Different Speaker?

House Commerce

Role Reversal at the Top, but new GOP leadership in next congress.

New Player (Matsui) at the Subcommittee level.

Historically bi-partisan on most issues.

Biggest Issues:

- Keeping Government Open
- FCC Oversight or seek to overturn FCC actions in:
  - Net Neutrality/Reclassification
  - Digital Discrimination
- Oversight of Broadband Infrastructure/NTIA
- PEG Act H.R. 907
- 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

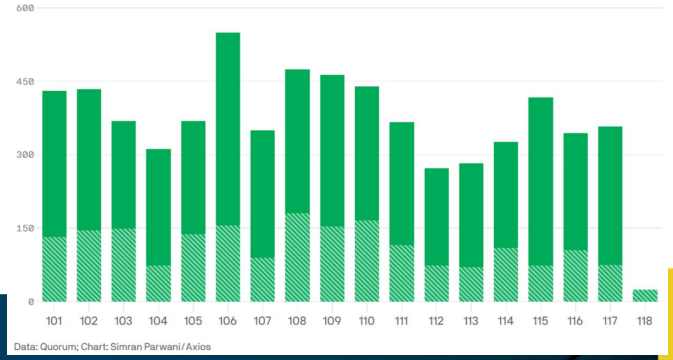


Bob Latta
(R-OH-05)
Chairman



Doris Matsui
(D-CA-07)
Ranking Member

Fewest Number of Bills (24) passed in First Session of any Congress. Second Session is same.



Federal Communications Commission

Biggest Issues:

- Biden Consumer Protection Agenda
  - Digital Discrimination – ACP EBT
  - Broadband Label & Billing Accuracy
    - "All In"
    - Rebates for Outages and Blackouts
    - Early Termination Fees
    - Bulk Purchase Ban
- Reversing Trump-Pai FCC
  - Net Neutrality – (Sept. 28 Draft NPRM proposing reclassification of broadband as Title II Service)
  - 621 Order
  - Updates to RF guidance?
- IAC
  - How do we convert to be adv



Nathan Simington | Brendan Carr | Chair Jessica Rosenworcel | Geoffrey Starks | Anna Gomez

I.A.C.

Municipal Representatives (8)

- Tim Rosener, Mayor, Sherwood, Oregon
- Joseph Goldstein, Marietta City Council Member, Marietta, Georgia
- Chris Amorose Groomes, Mayor, Dublin, Ohio
- Susan Farber, City Council Representative, Dubuque, Iowa
- Dr. Alix Desulme, Mayor, City of North Miami, Florida
- Erik Sickinger, Town Council Member, Irmo, South Carolina
- Dr. Adriana Rocha Garcia, Town Council Member, San Antonio, Texas
- Ted Wheeler, Mayor, Seattle, Washington
- Designee: Andrew Speer, Franchise Utility Program Manager

City Attorney Representative (1)

- Victor Gordo, Mayor, Pasadena, California
- Designee: Javan Rad, Chief Assistant City Attorney

- **County Representatives (7)**
- Dr. Jonathan Todd Finnell, Superintendent of Schools, Imperial County, California
- Gregg Weiss, Commissioner, Palm Beach County, FL
- Tarryl Clark, Commissioner, Stearns County, Minnesota
- Alan Perdue, Commissioner, Guilford County, North Carolina
- Joanna Mackenzie, County Judge, Hudspeth County, Texas
- J.D. Clark, County Judge, Wise County, Texas
- Terry Cook, Commissioner, Williamson County, Texas

All In --

- Report and Order provides cable operators and DBS providers shall state in a clear, easy-to-understand, and accurate manner, on bills or promotional materials an aggregate price for the video programming. The All In Price excludes franchise fees, PEG support payments and equipment rental expenses.
- Rules can be found at 47 C.F.R. § 76.310
- Effective Date – Later of FCC receives OMB approval.

Large cable operators	December 19, 2024
Small cable operators (with annual receipts of $47 million	March 19, 2025

Blackout and Early Termination Fees

- The FCC has issued an NPRM in the "Blackout" Docket (24-20) requiring MVPDs (cable operators and DBS providers) to reimburse customers for programming affected by retransmission consent blackouts.
  - Reply Comments were filed April 8.
- The FCC has issued an NPRM in "Early Termination"Docket (23-405) that proposes cable operators and DBS service providers to adopt customer service protections that:
  - Protect consumers from early termination fees.
  - Provide subscribers a prorated credit or rebates for remaining whole days in a monthly or periodic billing cycle after the cancellation of service.
    - Reply Comments were filed March 5, 2024.

Bulk Purchase Plan

- Chairwoman Rosenworcel has circulated (i.e. sent around to other Commissioners' offices) an NPRM proposing to ban bulk billing arrangements in:
  - apartments,
  - condos,
  - ***public housing*** and
  - other multi-tenant buildings.
- Text has not yet been shared.
- Issue may be a bit more complex than assuming it is in consumers' best interests.



Questions?

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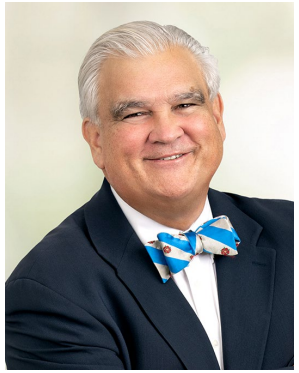
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About Us

BBK
BEST BEST & KRIEGER LLP
ATTORNEYS AT LAW



Best Best & Krieger serves as a trusted partner and strategist to public and private sector clients across the nation. With offices spanning from coast to coast, the firm's attorneys provide innovative legal solutions and cost-effective representation, working to protect and advance clients' interests at every turn. BB&K is recognized for decades of groundbreaking successes, loyal service, and a culture of inclusion and respect.