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Telecommunications 2016: The Challenges Facing Local Government and its Counsel

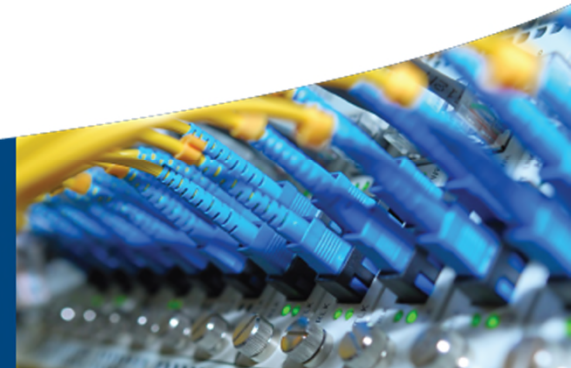
IMLA Spring Meeting
Washington DC – April

PRESENTED BY

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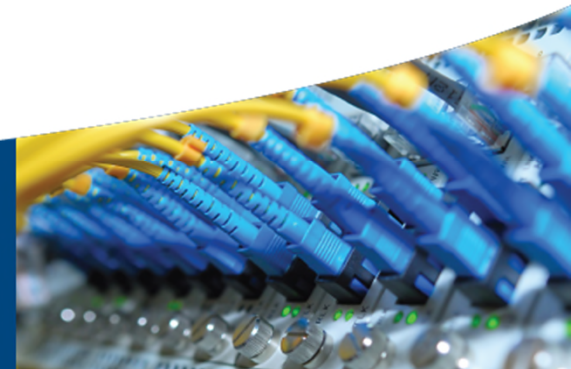
Summary of Key Areas of Activity

- Legislative
 - Internet Tax
 - Mobile Now
 - Dig Once
 - Rewrite of 332(c)(7)
 - FCC Reauthorization
 - Broadband Regulation
 - FCC Confirmation Votes
 - Broader Rewrite of Federal Law?
- The Courts
 - Net Neutrality
 - Section 621
 - Municipal Provision of Services
- FirstNet
- FCC
 - Set Top Boxes
 - Independent Programmers
 - Universal Service (E-Rate and Lifeline)
 - OTT
 - Fees and carriage
 - Wireless
 - 6409
 - OTARD
 - In Writing
 - Special Access/Business Data
- Local Application of Federal and State Rules
 - Wireless siting
 - Broadband Deployment
 - Franchising
 - Closed Captioning PEG



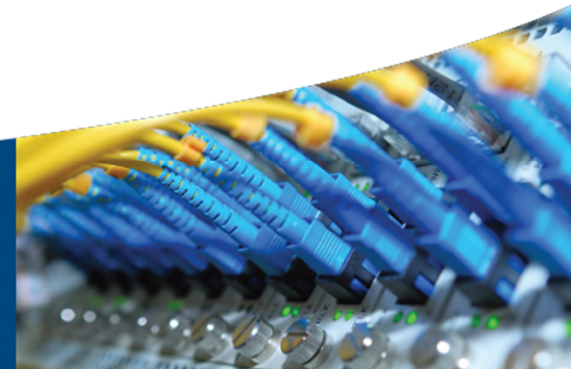
Federal Legislative Actions

- Pending/ Planned Legislation May:
 - Threaten/Enhance Local Revenue Streams
 - Further Limit Local Authority Over Wireless Siting
 - Create Potential for New Infrastructure Costs/Regulation
 - Remove Protections Created By FCC Net Neutrality Rules
 - Affect Ability of FCC To Function
 - FCC Reauthorization (S. 2644)
 - FCC Confirmations



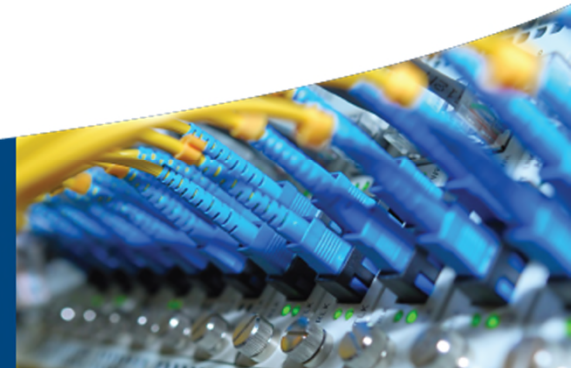
Federal Legislative Actions (cont'd)

- Examples:
 - Permanent Internet Tax Freedom Act (47 U.S.C. §151 *note*) – became law 2/2016
 - Taxation of Sales of Services/Products Via the Internet (S. 851) or Wireless Services (H.R. 4287)
 - Broadband Regulation
 - Mobile Now (S. 2555)
 - Dig Once
 - Rewrite of 332(c)(7)
- Prospects – 2016 and Beyond



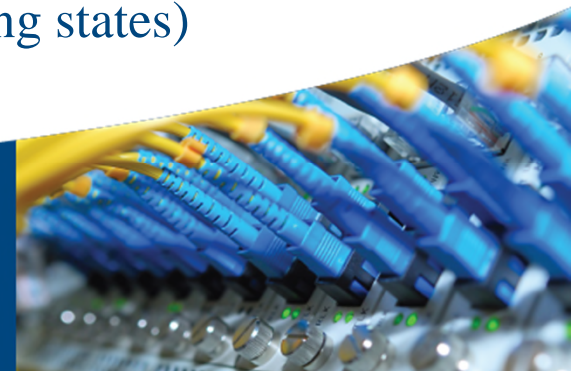
FCC Actions

- Overview: pending proceedings have significant potential impact on consumers and competition; industry consolidation; localities as service buyers; the digital divide and muni broadband provision



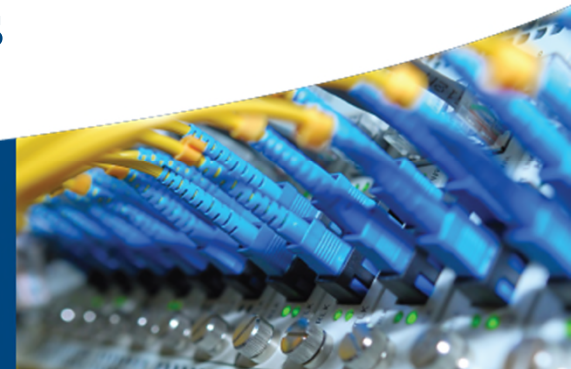
Consumers and Competition

- “Set Top Box” Notice of Proposed Rulemaking: *In the Matter of Expanding Consumers’ Video Navigation Choices Commercial Availability of Navigation Devices* MB Docket No. 16-42 CS Docket No. 97-80 (released Feb. 18, 2016)
 - FCC proposes to require cable industry to provide information that would allow third parties to sell fully functional set top boxes, eliminating significant costs associated with equipment rental
 - Highly controversial – industry is seeking from local govts
 - May reduce cable service prices – but adversely affect franchise fees
- Independent Programmers Notice of Inquiry: *In the Matter of Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41 (released Feb. 18, 2016)
 - Asks how FCC should promote independent programming – including PEG
 - PEG/Municipal interests are seeking rights to HD, and to placement on channel guides (particularly important in state franchising states)



“Over the Top” – what rules apply to Internet video?

- *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, Docket No. MB 14-261 (when is OTT a video service/cable service)?
- *Petition for the FCC to Enforce Merger Conditions and its Policies*, MB Docket 10-56, GN Docket 14-28 (March 2, 2016)
 - FCC asked to declare Comcast’s “Stream” service violates net neutrality
 - Comcast argues Stream is a cable service
- Decisions may determine whether cable op video delivered to cable modems is subject to franchise fees



Mergers

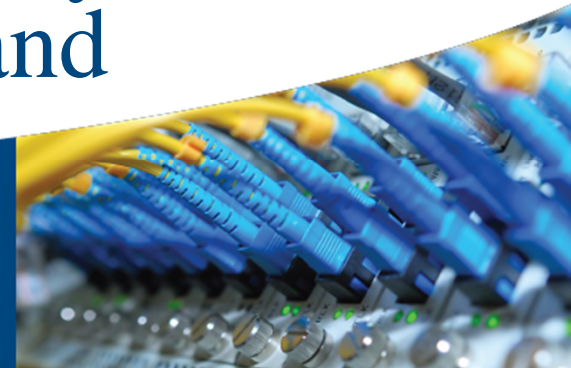
Two major pending mergers:

- Charter/Time Warner (MB Docket 15-149);
- Altice/Cablevision (WC Docket 15-257);
 - FCC could require significant upgrades, and address digital divide if mergers approved;
- Locals can affect conditions (but FCC may issue decisions soon)
 - Key for locals: be familiar with conditions and insist on compliance.



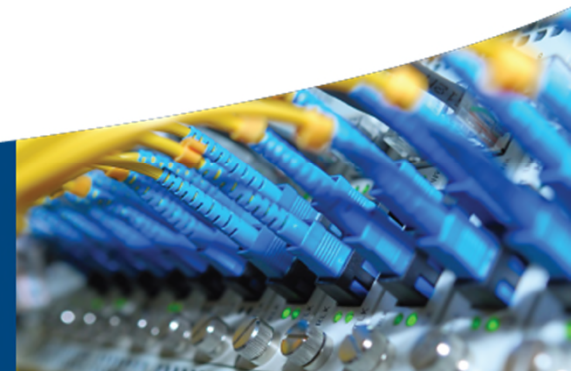
Lifeline

- Lifeline Broadband Service: Lifeline and Link Up Reform and Modernization, WC Docket No. 11-42 (Mar 31, 2016) (decision not yet released)
 - FCC announced decision subsidizing low-income Internet access
 - May be important to muni deployment; may allow aggregation of demand

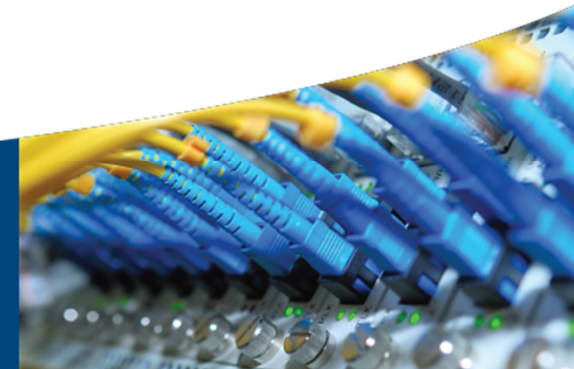


Localities as Consumers

- FCC expected to issue a Further Notice of Proposed Rulemaking on April 28 that may deregulate rates for business data services
- Revision may remove rate protections now benefitting some local governments as consumers of communications services



FCC Composition – and Effect on Commission Agenda



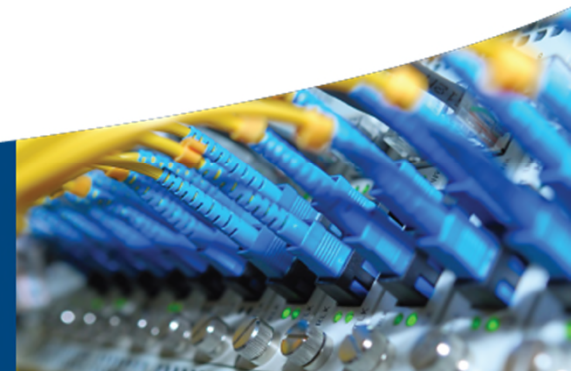
Time Table

<u>DATE</u>	<u>EVENT</u>
April 19	Independent Programmer NOI Reply Comments
April 22 May 23 June 6-10	Comments in Set Top Box Reply Comments in Set Top Box Ex Parte Dates for Set Top Box
April 28 Release	Rewrite of Special Access Rules/Business Data Services Comments and Reply Dates to be Determined
May 26, 2016. June 10, 2016.	In Writing Proceeding Comments are due Reply comments due



FirstNet

- Created by the Middle Class Tax Relief and Job Creation Act. (2/22/12)
- Mission: For no more than \$7 billion to build, operate and maintain a high-speed public safety nationwide wireless broadband network. (Ops funded by user fees.)
- Goal: provide a single interoperable platform for broadband emergency and daily public safety communications.
- States should be coordinating with localities on issues surrounding FirstNet.



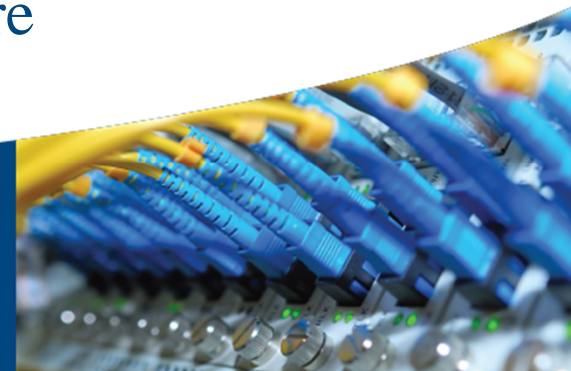
FirstNet (cont'd)

- On January 13, 2016 FirstNet issued a [Request for Proposals \(RFP\)](#) for nationwide public safety broadband network.
- Deadline for responses has been extended until May 31.
- Once Network and pricing are established and shared with each Governor, states will have 90 days to opt in, or build their network to coordinate with FirstNet.
- This could happen rapidly – with state decision by July 2017, state RFPs by July 2018, and deployment beginning on fed system by Fall 2017.
 - Following state's decision, locals may have to determine what rights/obligations are with respect to purchasing services
 - Potentially significant budget impacts



Judiciary: Key Cases To Watch

- Net Neutrality - *U.S. Telecom Association, et al. v. FCC, et al.*, (D.C. Cir. No. 15-1063) – argued December, 2015
 - Many observers believe decision may be mixed
 - Decision likely imminent; likely to go to Sup. Ct.
 - Outcome may affect local debates regarding whether to build publicly owned broadband networks
- Municipal Provisioning: *State of Tennessee et. al. v. FCC*, (6th Circuit No. 15-3291) – argued March 2016
 - Challenges FCC order preempting TN and NC state laws restricting municipal competition in provision of broadband services
 - If FCC affirmed, may assist muni entry elsewhere



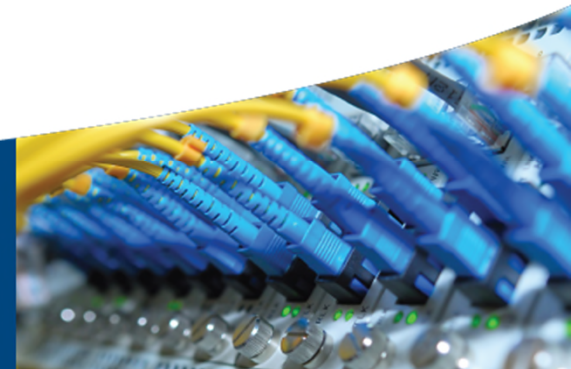
Judiciary: Key Cases To Watch (cont'd)

- **Franchising:** *Montgomery County Md. V. FCC* No. 08-3023 (6th Cir. appeal of FCC 2d Order and Recon Implementing Section 621) – May Decide:
 - Can operators treat value of services to schools as a franchisee fee?
 - Are localities limited to regulating “cable services” in cable franchises?
 - Are level playing field clauses enforceable?
- **Franchise Fees:** *City of Eugene v. Comcast of Oregon II, Inc.* S062816 (pending decision before Or Sup Ct); decision below, 263 Or App 116, 333 P3d 1051 (2014).
 - Appeal upheld RoW fee on Internet; Comcast claims Cable Act preempts
- **Rate Regulation:** *NATOA et al. v. FCC*, D.C. Cir. , appeal of *FCC Order Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act, Final Rule*, MB Docket No. 15–53, FCC 15–62, 80 Fed. Reg. 38001 (July 2, 2015). (Order effectively deregulated rates even where cable ops do not face effective competition)
- **Broadband:** *Cox Communications Arizona v. Tempe*, Case 2:15-cv-01829-JJT, (U.S.D.C. Az)(filed September 14, 2015): Tempe (Cox claims) inter alia violates first amendment and equal protection by providing favorable permitting to Google Fiber



Local Application of State and Federal Rules

- Wireless Siting:
 - 4th Circuit upheld FCC rules/federal law requiring localities to approve modifications to base station and towers that do not involve a significant change in physical dimension of base station or tower.
 - Decision: *Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015)
 - Advisable for practitioners to read FCC briefs



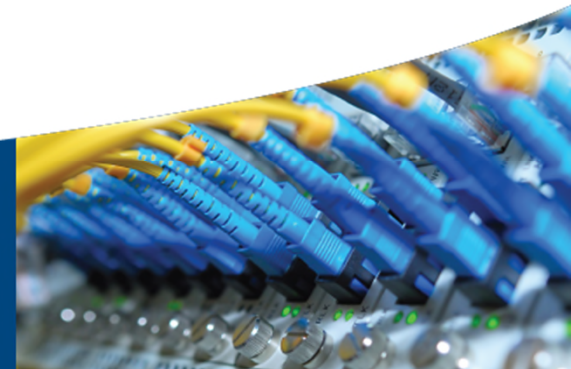
Section 6409(a) (47 U.S.C. §1455)

(a) Facility modifications.

(1) **In general.** Notwithstanding... 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—

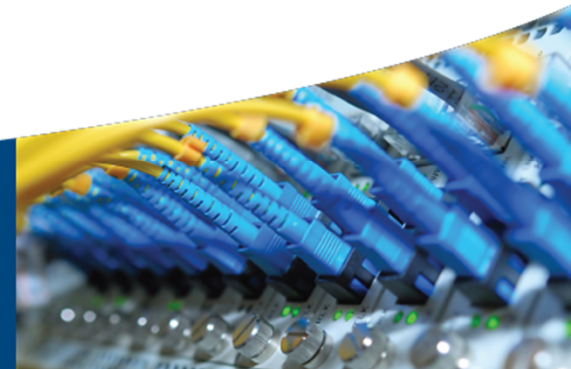
- (A) collocation of new transmission equipment;
- (B) removal of transmission equipment; or
- (C) replacement of transmission equipment.



FCC Rules 47 CFR § 1.40001 – Definitions

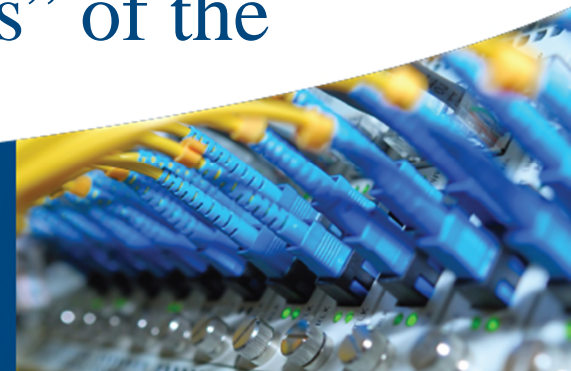
1. Substantial Change

- Towers other than RoW towers, modification:
 - Increases height by more than 10% or 20 feet whichever is greater
 - Appurtenance added protrudes from body of structure more than 20 feet or width of tower at pt. of attachment
- All other support structures, modification
 - Increases height by 10 feet or 10%, whichever is greater
 - Appurtenance added protrudes more than 6 feet
- Height measured from facility as it exists as of date of passage of Act (2012)



FCC Rules 47 CFR § 1.40001 – Definitions (cont'd)

1. Substantial Change For towers and base stations in RoW:
 - New equipment cabinets if there are none, or involves placement of cabinets 10% greater in height or overall volume than other cabinets associated with structure
 - All other eligible support structures:
 - Installation of more than four equipment cabinets
 - It entails any excavation or deployment outside of site
 - It would defeat “concealment elements” of the “eligible support structure”

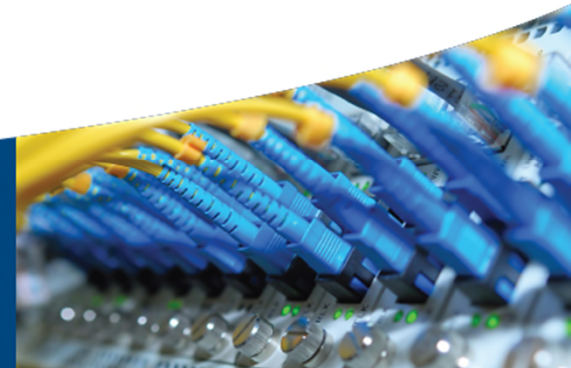


FCC Rules 47 CFR § 1.40001 – Definitions (cont'd)

1. Substantial Change

- It does not comply with conditions associated with siting approval...but limitation does not apply to any modification that is non-compliant only in a manner that would not exceed thresholds identified in (i)-(iv).

2. Tower: structure built for sole or primary purpose of supporting FCC licensed or authorized antennas and associated facilities.



FCC Rules 47 CFR § 1.40001 –

Definitions (cont'd)

3. Base Station

- Equipment associated with wireless comm. service
- Antennas, coax, backup power supplies
- “any structure other than a tower” that at time of application was supporting or housing the above.

4. Existing: A constructed tower or base station that has been “reviewed and approved under the applicable zoning or siting process or under another State or local” process, except towers not in a zoned area when built, but lawfully constructed (non-conforming uses?).



FCC Rules 47 CFR § 1.40001 –

Definition (cont'd)

5. Eligible Support Structure is any Tower or Base Station

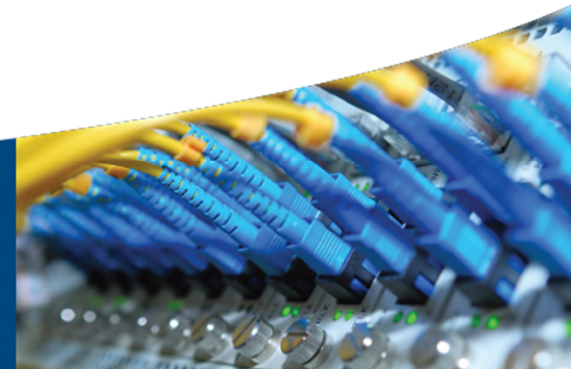
Key Notes:

- Does not preempt generally applicable safety and health codes
- Does not apply to proprietary property of community
- Reaches *all* wireless facilities – including Wi-Fi deployments
- Does reach Distributed Antenna Systems (DAS) & Small Cells



Real World Issues Facing Localities

- Wireless networks are densifying; there is a growing demand for WiFi; new technologies combine WiFi and cell technologies
 - How should ordinances address siting of wireless facilities v. cell facilities
 - How do you manage and control process for obtaining access to RoW and other property?
 - How will developments in other areas (connected vehicles) affect polici



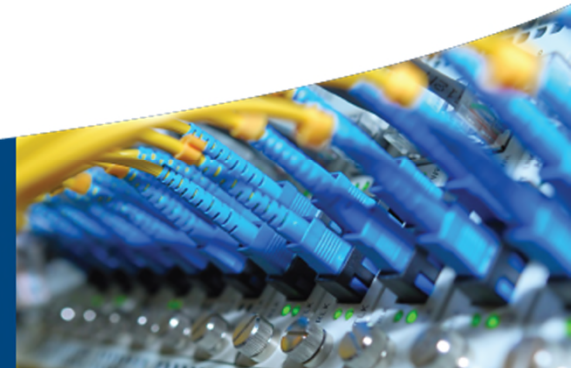
Real World Issues Now Facing Localities

- How do you implement new FCC regulations?
 - Can localities allow sensible deployment of DAS and small cells in a way that protects against expansion of facilities that were meant to be unobtrusive?
 - In areas that are underground, is there a way to provide for deployment that is fair to providers, but limits deployment?
 - How should localities respond to real estate plays?



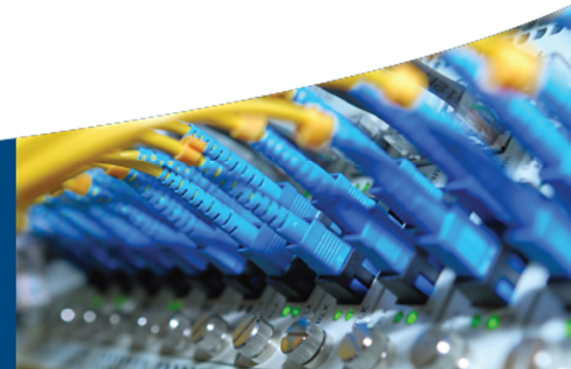
Franchising Issues

- Who Needs a Franchise: wireless? Cable? Telephone? Data Networks?
- What fees can be imposed?
- Can franchising be used as a way to address digital divide/deployment issues?
 - Philadelphia: as part of resolution of past issues, Comcast agrees to expand programs for provision of Internet access to low income households

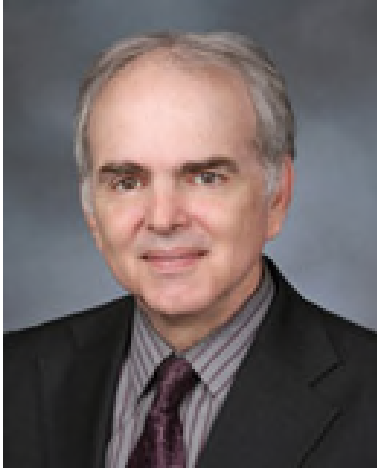


Conclusions

- There are many significant developments that could impact local planning/economic development/financial resources
- Those developments will require local counsel to carefully review existing ordinances and policies (reactive), but local counsel and communities may also benefit from a proactive approach, by participating in major proceedings and shaping legislative agendas



Questions?



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