

Alabama Association of Municipal Attorneys

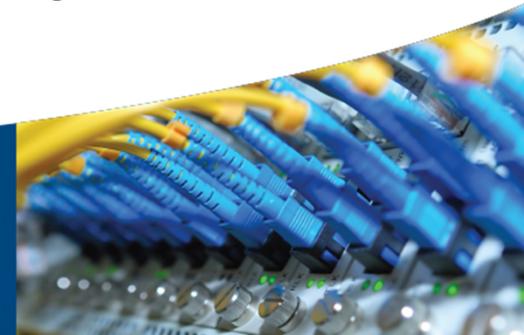
2016 Spring Municipal Law Conference

Birmingham, April 1, 2016

Telecommunications Law Update

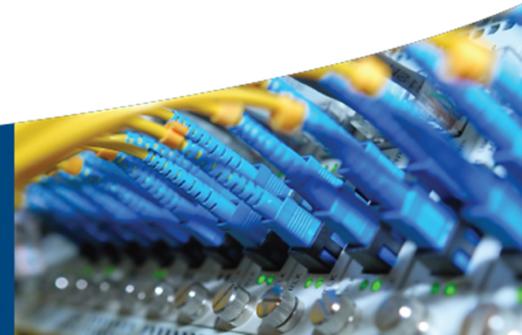
Gail A. Karish

Best Best & Krieger LLP



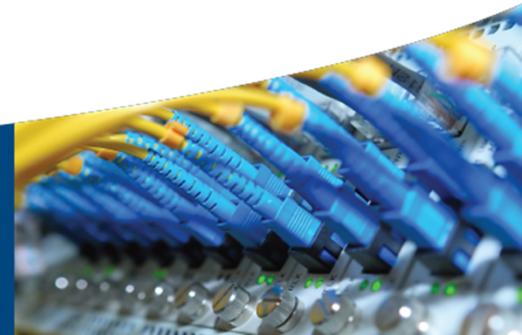
Agenda

- Industry overview
- Recent legal developments in:
 - Wireless
 - Cable/Video
 - Broadband
- What to watch for

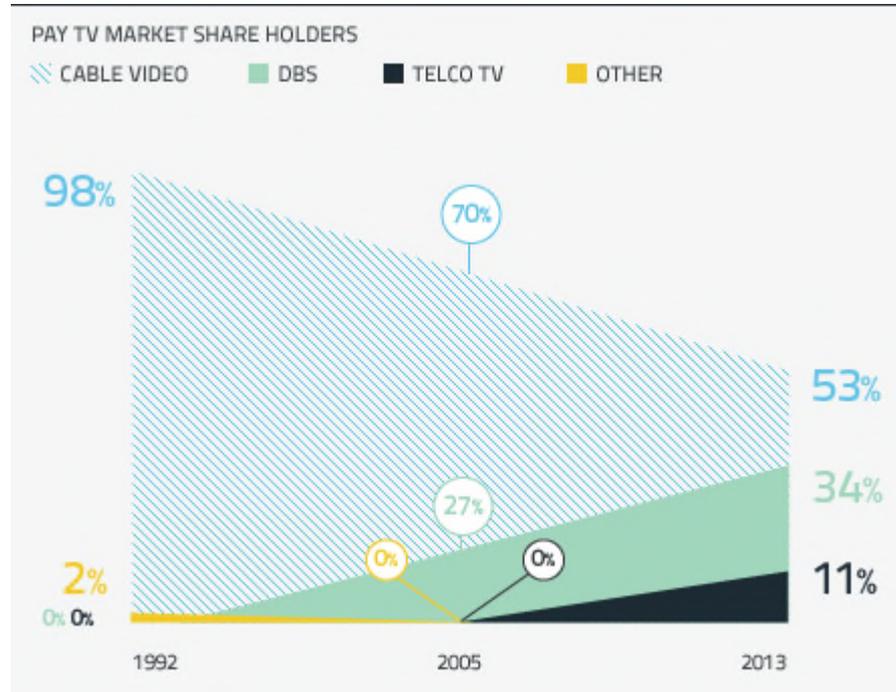


Industry Overview

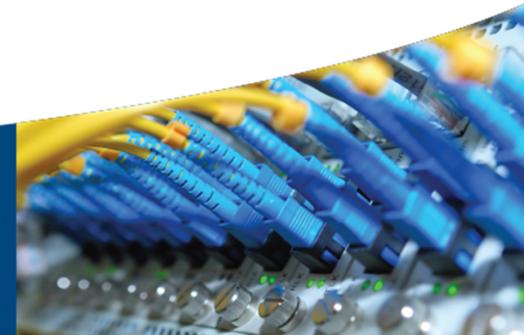
- *4 Major Wireless Networks*
 - Verizon, AT&T, Sprint, T-Mobile
 - 95% wireless subs market share (2013)
- *3 Major Telephone Networks*
 - AT&T, Verizon, CenturyLink (former Qwest)
 - 90+% landline access line market share
- *4 (soon 3) Major Cable Networks*
 - Comcast, Time Warner Cable, Cox, Charter
 - 75.5% cable subs market share (2013)
 - Charter and Time Warner merger



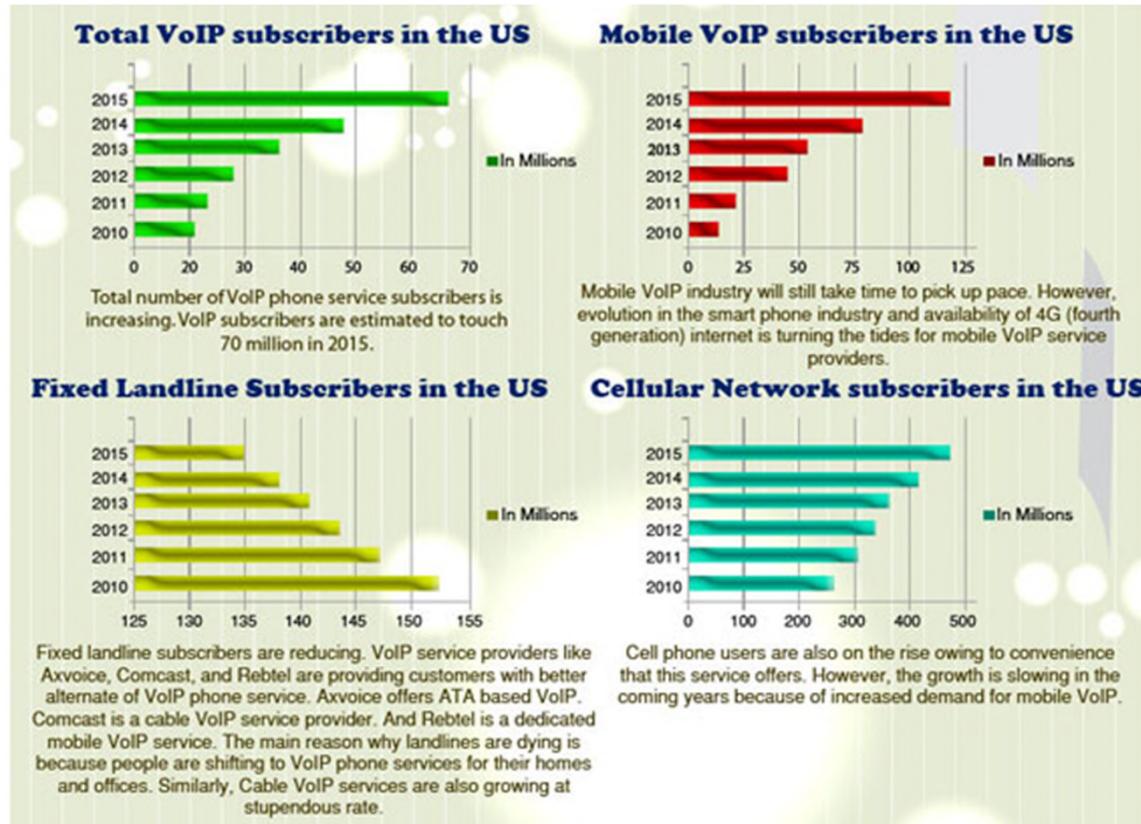
Services Markets - Video



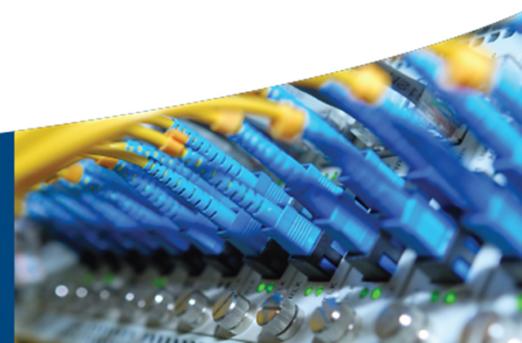
Source: <https://www.ncta.com/industry-data>



Services Markets - Voice



Source, AXVoice, <http://blog.axvoice.com/us-telecom-industry-from-2010-to-2015-a-research-by-axvoice/>



Services Markets - Broadband

Broadband Internet	Subscribers at end of 2Q 2012	Net Adds in 2Q 2012
Cable Companies		
Comcast	18,738,000	156,000
Time Warner	11,208,000	72,000
Cox*	4,555,000	25,000
Charter	3,839,000	37,000
Cablevision	3,032,000	25,000
Suddenlink	979,400	(3,200)
Mediacom	894,000	7,000
Cable ONE	462,426	(1,017)
Other major private cable companies**	1,951,000	10,000
Total Top Cable	45,658,826	327,783
Telephone Companies		
AT&T	16,434,000	(96,000)
Verizon	8,776,000	2,000
CenturyLink^	5,763,000	18,000
Frontier^^	1,751,000	5,000
Windstream	1,361,600	(2,200)
FairPoint	320,812	2,302
Cincinnati Bell	257,600	400
Total Top Telephone Companies	34,664,012	(70,498)
Total Broadband	80,332,838	257,285

Sources: The Companies and Leichtman Research Group, Inc.

* LRG estimate

** Includes LRG estimates for Bright House Networks, and RCN

^ CenturyLink modified broadband reporting to include wholesale subscribers

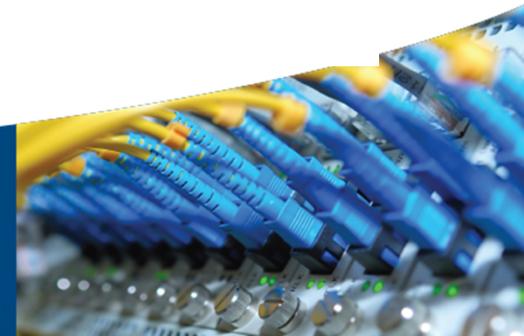
^^ LRG estimate, does not include wireless subscribers

Company subscriber counts may not represent solely residential households

Totals reflect pro forma results from system sales and acquisitions

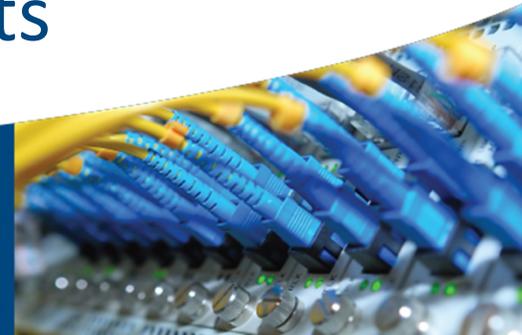
Top cable and telephone companies represent approximately 93% of all subscribers

Source: <http://bbpmag.com/wordpress2/2012/08/net-u-s-broadband-additions-at-a-record-low-in-2q-2012/>



Industry Trends

- Broadband is the anchor wireline network (not telephone, not cable)
- Competition is in services, less so in networks
- Wireless data demand drives increases in capacity (not so much coverage)
- Wireless deployments of distributed antenna systems (DAS) and small cells in public rights of way to fill gaps/lower operating costs

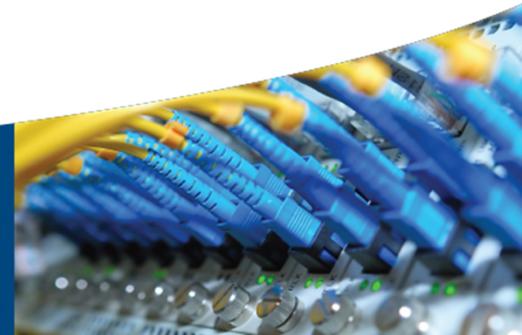


Wireless



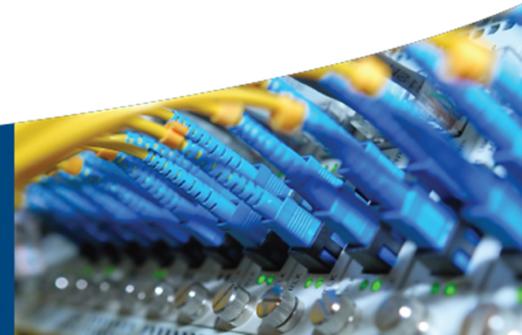
Telecommunications Law

The
Meaning of



Wireless Facilities Siting

- Federal law (and sometimes state law) puts constraints on local authority over placement of wireless facilities.
- Federal rules reach not only traditional cell towers but also small cells and DAS installed in the public rights of way.
- A favored constraint is to impose “shot clocks” and “deemed granted” remedies to speed up processing and approvals.
- So far these constraints have not been applied to any actions taken acting in a proprietary capacity.
- Challenge for localities is to serve the community’s land use goals while complying with federal laws (and state laws) that limit local authority.



Key Fed'l Statutes / Orders / Cases

- 47 USC § 332(c)(7)
- 47 USC § 1455(a) (Sec. 6409)
- 47 C.F.R. § 1.40001

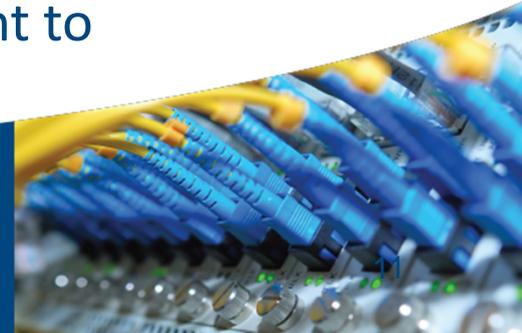
- *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B)*, 24 FCC Rcd. 13994 (2009)
- *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 29 FCC Rcd 12865 (2014)

- *City of Arlington, Tex. v. FCC*, 668 F.3d 229 (5th Cir. 2012), aff'd 133 S. Ct. 1863 (2013)
- *Montgomery County et al v. FCC*, 811 F.3d 121 (4th Cir. 2015)



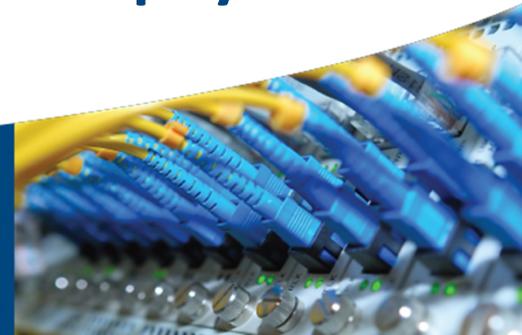
Section 332(c)(7)

- Applies to “personal wireless service facilities” (includes commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services)
- Generally preserves local zoning authority, but imposes five limitations:
 - Locality shall not “unreasonably discriminate” among providers of functionally equivalent services
 - Locality shall not prohibit or effectively prohibit provision of PWS
 - Locality must act on request within “reasonable period of time”
 - Denials must be “in writing” and supported by “substantial evidence”
 - No regulation of RF – except may require applicant to demonstrate compliance with FCC rules



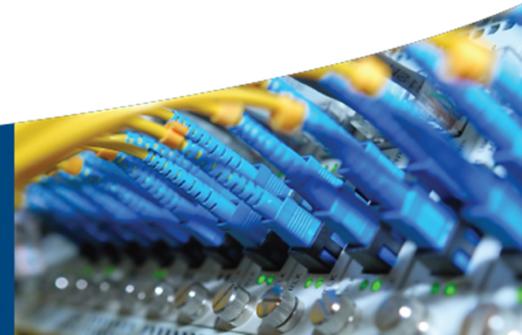
Section 6409(a) (47 U.S.C. §1455)

- 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.



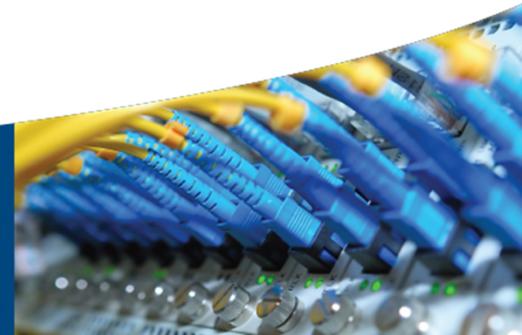
FCC Rules 47 CFR § 1.40001

- Tower
 - Structure built for sole or primary purpose of supporting FCC licensed or authorized antennas and associated facilities.
- 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 (walls, rooftops are support structures).



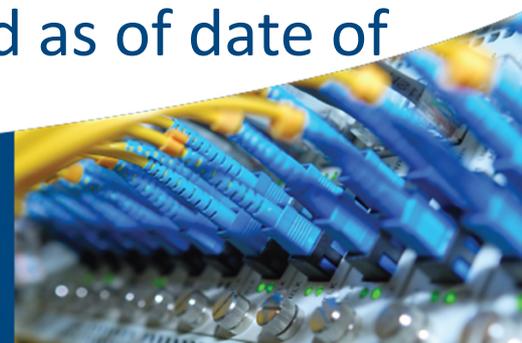
FCC Rules 47 CFR § 1.40001

- 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

- Substantial Change (Height/Width)
 - Towers other than Right of Way (ROW) towers, modification:
 - Increases height by more than 10% or 20 feet whichever is greater; or
 - 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% or 10 feet, whichever is greater; or
 - Appurtenance added protrudes more than 6 feet.
 - Height measured from facility as it existed as of date of passage of Act (2012).



FCC Rules 47 CFR § 1.40001

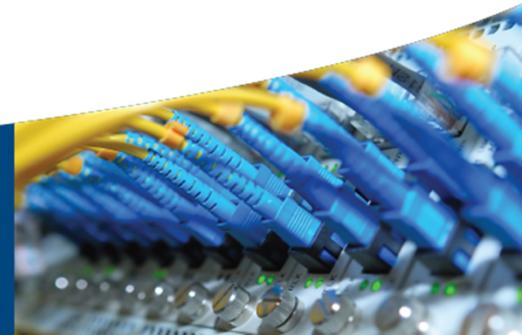
- Substantial Change (other)
 - for towers and base stations in ROW:
 - New equipment cabinets if there are none, or involves placement of cabinets 10% greater in height or overall volume than other cabinets associated with structure.
 - All other eligible support structures:
 - Installation of more 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

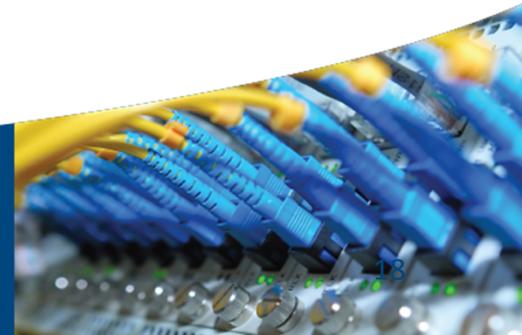
Key Notes:

- Does not preempt generally applicable safety and health codes.
- Does not apply to proprietary (non ROW) property of community.
- Reaches *all* wireless facilities – including Wi-Fi deployments.
- Reaches DAS and Small Cells.



FCC Wireless Shot Clocks

- Rules adopted in 2009, clarified in 2014
- By adopting explicit timelines that apply to different types of wireless facilities applications, FCC has:
 - created a presumption of what is a “reasonable time” to act under 47 USC 332(c)(7)
 - implemented Sec. 6409(a)’s requirement that local governments shall approve certain applications



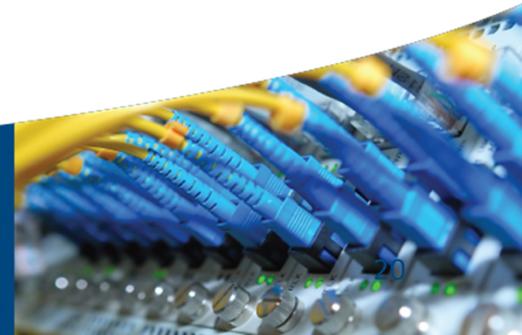
Categories of Applications

- Eligible facilities requests (6409)
 - FCC created very broad definition
- Collocations
 - typically adding facilities to existing sites
- Other applications
 - principally new sites
- An application that is NOT eligible under Section 6409 may still be subject to Section 332(c)(7) and the other shot clocks.



FCC Wireless Shot Clocks

- Timelines:
 - 60 days for “eligible facilities requests”
 - 90 days to process collocation applications
 - 150 days for other siting applications
- Shot Clocks exist independently of any state-imposed clocks
 - other shot clocks are not preempted

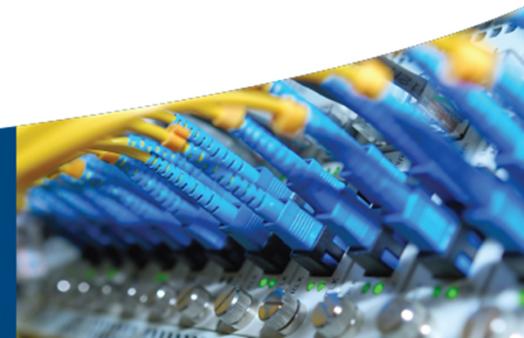


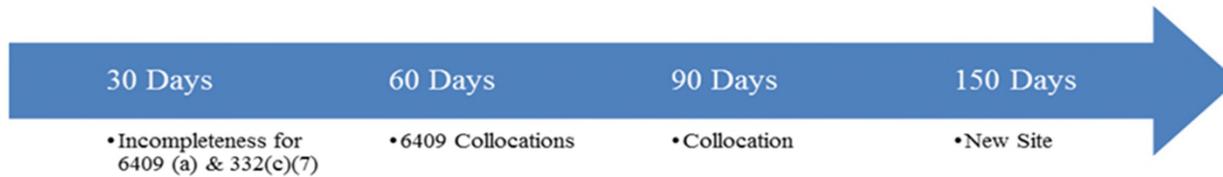
Shot Clocks



“shot clocks” within the Shot Clocks

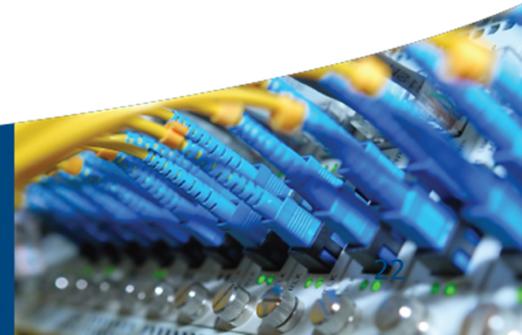
- 30 days to review application and issue incompleteness notice
- 10 days to review responses and issue further incompleteness notice

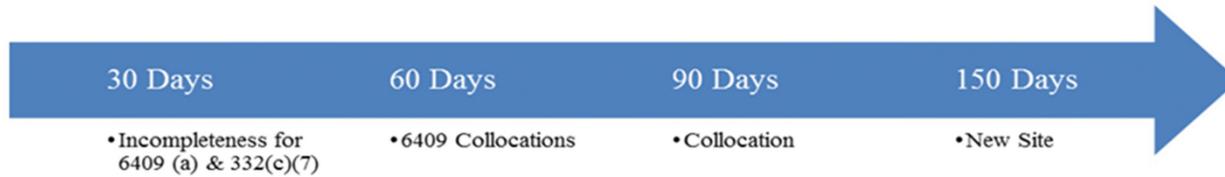




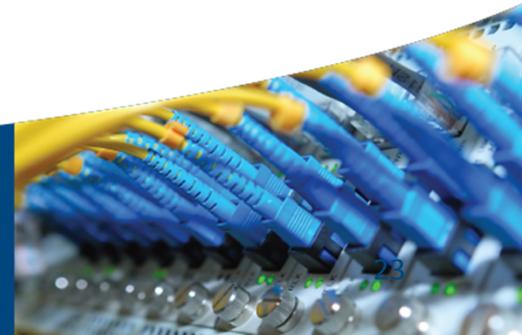
Shot Clocks operate in five important ways:

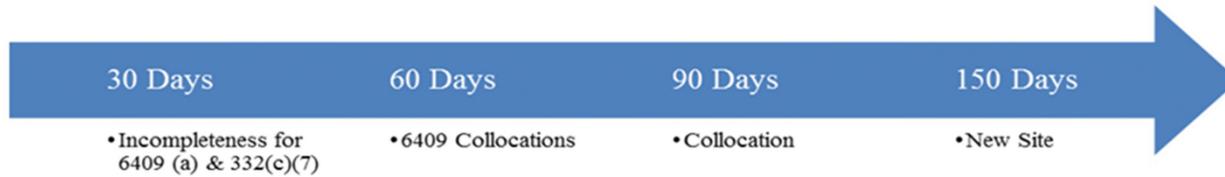
1. Clock starts to run when application submitted, not when deemed complete



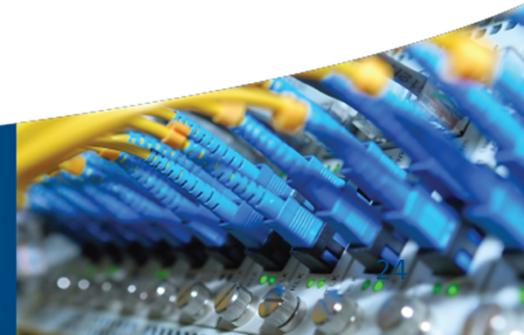


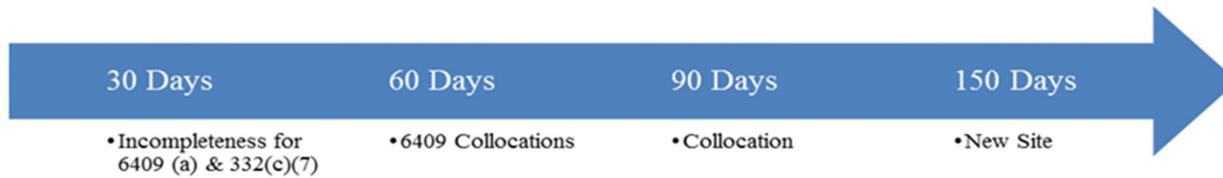
2. Issuing a timely notice of incompleteness (30 days), or further notice (10 days) will toll the shot clock



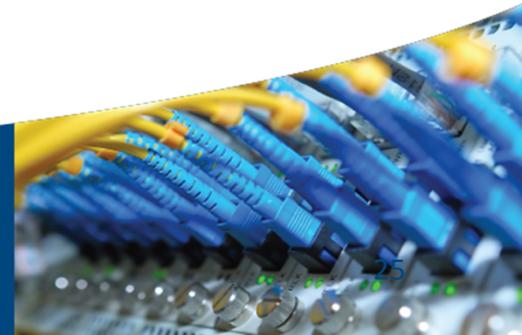


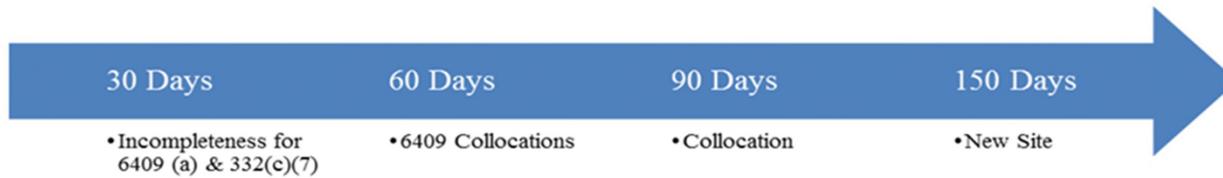
3. Locality must specify the code provision, ordinance, or other publicly-stated procedure that requires the missing info.



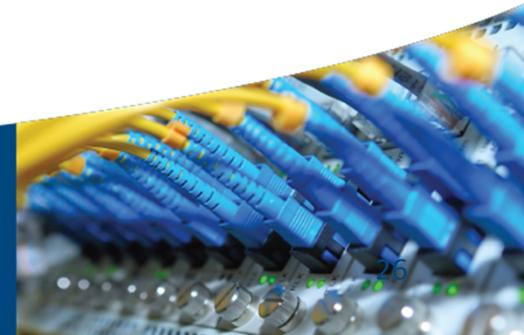


4. Shot clocks run regardless of local moratoria



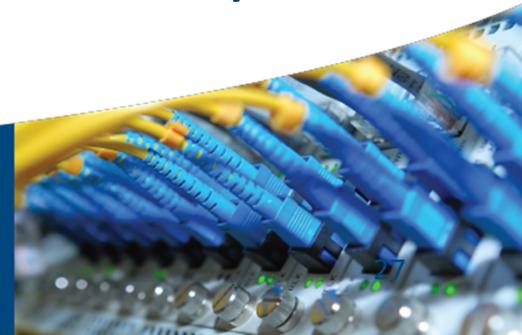


5. Shot clocks apply to DAS and small cells, if the facilities are used for personal wireless service



FCC Shot Clock (Remedies)

- Under federal law, remedies for missing the deadlines are:
 - **Non-6409 Applications:** *presumption* that agency has not met the reasonable time requirement of Sec. 332(c)(7).
 - Applicant has 30 days to sue.
 - Locality may present evidence to rebut presumption.
 - **6409 Applications:** “deemed granted” remedy.



Sec. 6409 Remedy

- Applicant notifies locality of “deemed grant”.
- Locality has 30 days to file appeal in court after notified.
- Grounds for appeal:
 - Application did not meet Section 6409(a) mandatory approval criteria, or
 - Would not comply with applicable building codes or other non-discretionary structural and safety codes, or
 - For other reasons is not appropriately “deemed granted.”



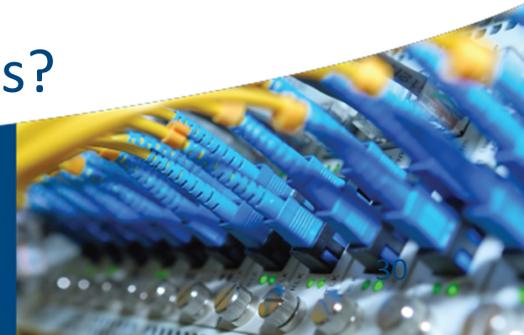
Recent Sec. 332(c)(7) Cases

- *T-Mobile South, LLC v. City of Roswell*, 135 S.Ct. 808 (2015)
 - Denial and substantial evidence need not be in same document, but must be essentially contemporaneous.
- *Global Tower Assets, LLC v. Town of Rome* 810 F.3d 77 (1st Cir. 2016)
 - “Final action” triggering appeal rights under Sec. 332 requires completion of all admin. appeals
 - (suggests reasonable time for action shot clocks stop after final action)
 - Not binding on other circuits but expect similar arguments
- **Impact:** potentially harder to meet shot clocks



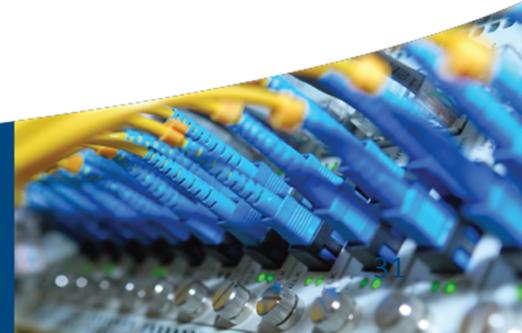
How to Comply with the Shot Clocks

- Processing existing applications
 - Can you complete that review within the applicable Shot Clock?
 - If not, is the carrier willing to enter into a tolling agreement?
 - Is denial possible/advisable?
 - Are there standard conditions that apply if the application is capable of being deemed granted?
 - What public review process is required?
 - Will you issue reasons with decision?
 - Will you have time to complete all appeals?



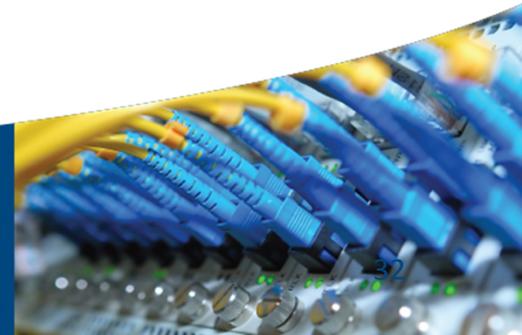
How to Comply with the Shot Clocks

- What you should be doing now...before you receive another application
 - Discuss with staff and elected officials
 - Consider designating a point person for wireless applications
 - Ensure applications are time stamped
 - Ensure all contacts with applicants are being documented



How to Comply with the Shot Clocks

- When you receive an application
 - Is the application complete?
 - If not, prepare notice of incompleteness that includes cites to code provision, ordinance, or other publicly-stated procedure within 30 days of receipt
 - Respond to any submittals within 10 days
 - Which shot clock applies?
 - Calendar the deadlines
 - Ensure other reviewers are aware



How to Comply with the Shot Clocks

- What you should be doing as soon as possible
 - Review your application forms
 - Do they solicit the info you need to determine whether shot clock applies and which one?
 - Do you need to revise/create checklists?
 - Standardize letters or forms for incomplete applications?
 - Review your code
 - Does it substantively comply with applicable law?
 - Should its procedures for reviewing applications be revised?



DAS and Small Cells

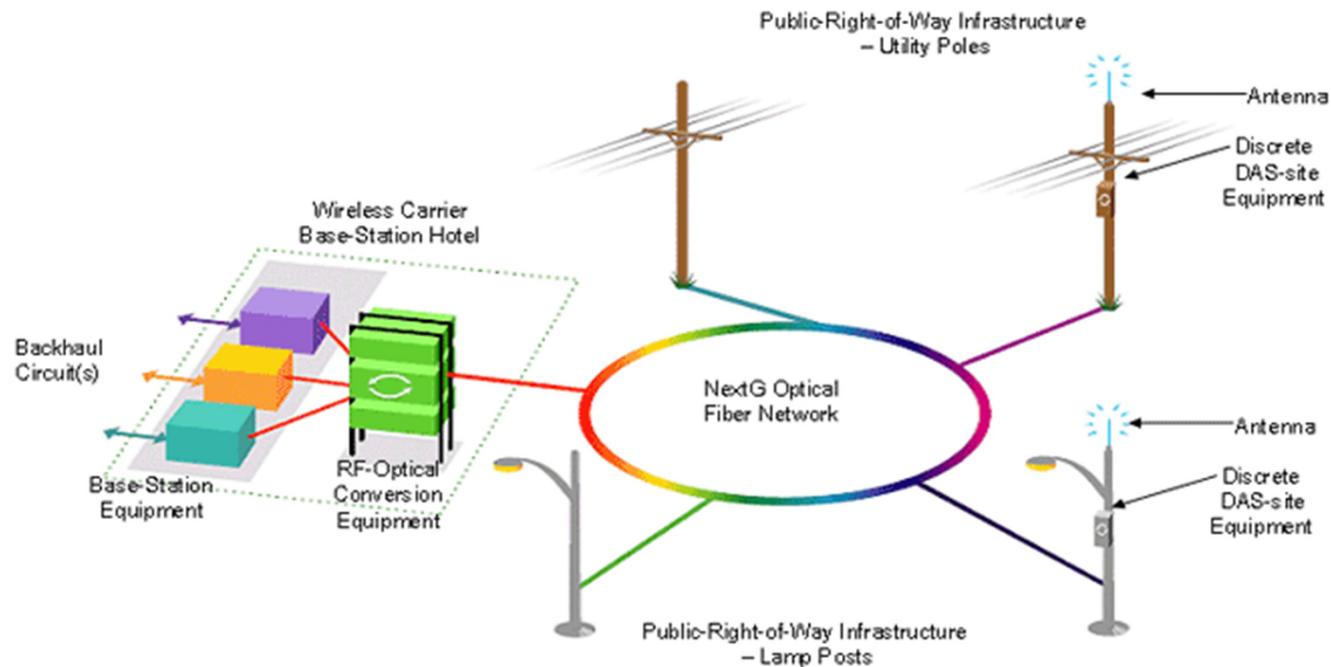
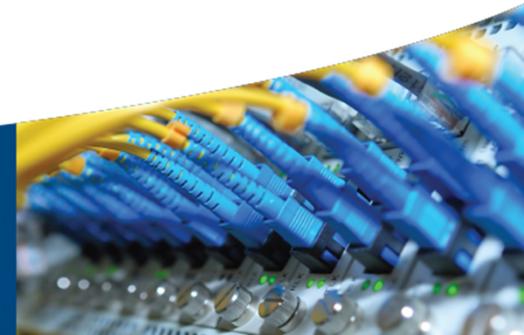


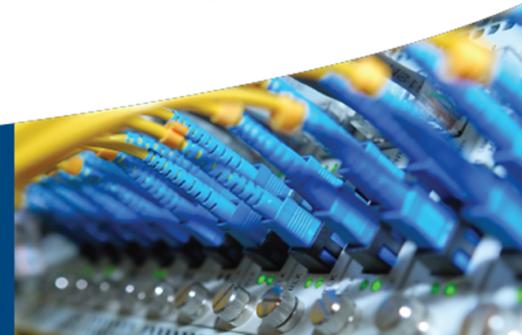
Figure 2: Distributed Antenna System



DAS and Small Cells

FCC/industry estimates:

- More than 37 million small cells will be deployed by 2017.
- 16 million DAS nodes will be deployed by 2018.
- One study projects that aggregate small-cell capacity will overtake macrocell capacity by 2016-2017.
- Source: <http://nathpo.org/wp/wp-content/uploads/2015/09/7-NATHPO-FCC-Summit-DAS-Small-Cell-FINAL.pdf>



DAS and Small Cells

- Applications should be reviewed closely
- Applicants may or may not be wireless carriers
 - May be (or claim to be) state-authorized telephone companies with CPCNs seeking to install utility pole
 - May not plan to use “utility pole” for their wires
 - May not have any immediate plans to place antennas (no customers)
 - May be planning wireless or wireline backhaul (or both)
- Applications may go to Public Works or Engineering, not Planning
- May not have CPCN that allows installation of wireless facilities
 - Do you have authority to require a franchise, collect a franchise fee?
- If installing antenna on existing pole, who owns it and who can collect rent for use?

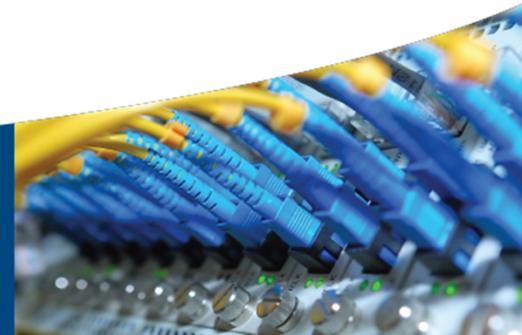


Cable



Telecommunications Law

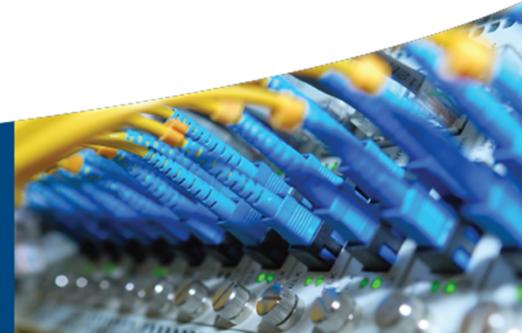
The
Meaning of



Cable Franchising

47 USC § 521 *et seq.* establishes certain parameters, including

- Ban on exclusive franchises/unreasonable refusals
- Franchise fee capped at 5 % of gross revenues
- Public, Educational and Government (PEG) fees used for capital expenditures
- Rate regulation/charge regulation
- Franchise renewal rights
- Transfers shot clock



Cable Franchising

- Avoided state cable franchising in Alabama
- BUT subject to FCC's Section 621 Orders
- Sec. 621 of Cable Act (47 USC 541) prohibits:
 - exclusive franchises *and*
 - unreasonable refusals to award competitive franchises
- FCC issued orders in 2006, 2007 and 2015
 - 1st Order upheld on review *Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008)
 - 2nd and 3rd orders now on appeal in 6th Circuit, *Montgomery County, MD et al v. FCC*



Section 621 Orders

1st Order

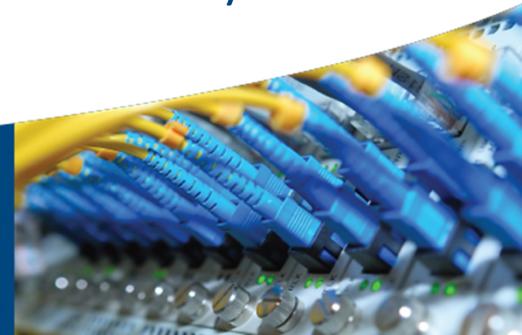
- Focused on new entrants to video services market (telcos)
- Shot Clock for grant or denial of application:
 - 90 days for applicants with authority to be in PROW
 - 180 days for other applicants
 - Failure to meet deadline = interim franchise deemed temporarily granted
- Incidental fees in addition to 5% franchise fee
 - OK: payments for bonds, security funds, letters of credit, insurance, indemnification, penalties or liquidated damages.
 - Not OK: attorney fees, consultant fees, application or processing fees that exceed the reasonable cost of processing the application, acceptance fees, non-cable related free or discounted services, in-kind payments
- Build Out
 - Not OK: several including build out beyond telco footprint



Section 621 Orders

1st Order (cont'd)

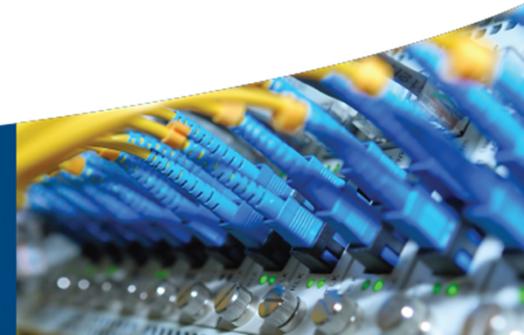
- PEG requirements
 - OK: Capital costs (operating costs count against franchise fee)
 - Not OK: requiring more PEG channel carriage than incumbent
- I-Net requirements
 - Not OK: duplicative, payments in lieu of I-Net that would never be build
 - OK: additional functionality would be reasonable through financial support or actual equipment to supplement existing I-Net facilities
- Most favored nation clauses not ok – because tend to impose same requirements on new entrant as incumbent
- Telco mixed use networks
 - Not OK: control over Title II “non-cable services or facilities” or any attempt to regulate a telephone company’s entire network “beyond the provision of cable services”



Section 621 Orders

2nd Order

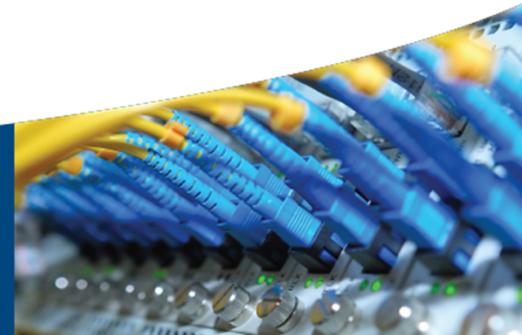
- Many findings from 1st Order extended to incumbents
 - Findings re what costs, fees, and other compensation to LFAs are subject to 5% cap
 - Findings re PEG costs (*not* PEG channel capacity; *not* I-Nets)
 - Findings re mixed-use networks
 - Incumbents could use MFN clauses to reduce their own otherwise valid franchise obligations



Section 621 Orders

3rd Order

- 3rd Order reconsidered aspects of 2nd Order
- Incidental fees in addition to 5% franchise fee
 - Extended to cable-related requirements as well as non-cable related requirements
 - Affirmed rulings on mixed use networks and MFNs
- Has serious implications for franchise fees (potential set off of value of free services)
- 2nd and 3rd orders now on appeal, *Montgomery County et al v. FCC* (6th Circuit)
 - FCC brief due March 30, 2016



Other FCC Proceedings

- Charter-TWC-BHN merger
 - Approval anticipated shortly
 - Will have important conditions
- Set top boxes NPRM (MB 16-42)
 - Opportunity to purchase boxes rather than rent
- Diversity of Programming Inquiry (MB 16-41)
 - Opportunity to educate re value and challenges faced by public access, educational and governmental channels
- Legal alert summarizing the two proceedings:
<http://www.bbklaw.com/?t=40&an=49969>

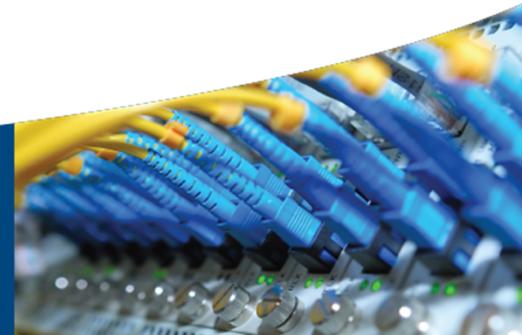


Broadband



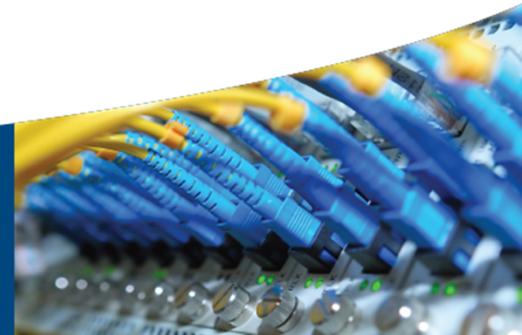
Telecommunications Law

The State
Meeting Call



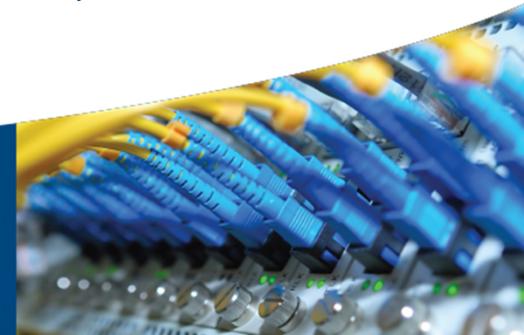
Broadband

- *2015 Redefinition* – FCC’s 2015 Broadband Progress Report - now 25 Mbps down/3Mbps up
 - Was 4 Mbps/1 Mbps (standard set in 2010)
 - 55 million Americans (17%) lack access to broadband
 - 50%+ rural Americans lack access to 25/3 broadband
- *2016 Funding* – Lifeline on March 30 FCC agenda
 - Financial support for broadband Internet access service for qualifying low income customers
 - Defined as 10/1 broadband



Broadband

- *2015 Reclassification (with heavy forbearance)*
 - Certain mass market wireline and wireless broadband Internet access services (“BIAS”) now interstate “telecommunications service” subject to Title II regulation (*Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601; order on appeal *USTA v. FCC*, D.C. Circuit).
 - (*no unbundling of last-mile facilities, no tariffing, no rate regulation, no cost accounting no new federal taxes or fees...*)
- *2015 Preemption*
 - FCC bars state and local requirements from which FCC has forbore, promising to preempt any state action inconsistent with FCC’s regulatory regime for broadband
 - Separate FCC Order preempted TN and NC laws intended to restrict municipal broadband (*City of Wilson*, 30 FCC Rcd 2408; order on appeal *Tennessee et al. v. FCC*, 6th Circuit).



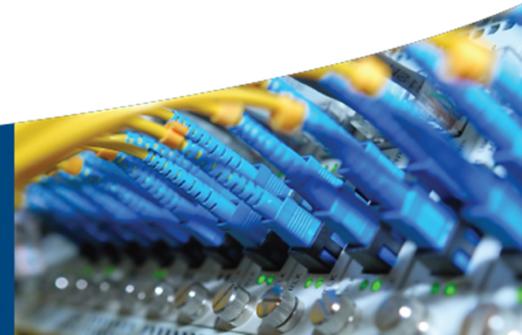
Broadband

- *2015/2016 Local Revenues*
 - *FCC Footnote*: “...we do not believe that the classification decision...would serve as justification for a state or local franchising authority to require [a cable operator]...to obtain an additional or modified franchise...or to pay any new franchising fees”
(quoting letter from cable association that no add’l fees appropriate as “broadband equipment that adds no appreciable burden to the rights of way.”)
 - *Congress*: permanent moratorium on tax on Internet access, H.R. 644, signed into law by Pres. Obama



What to Watch For

- More federal (or state) laws limiting local authority over wireless
- Opportunities for funding broadband service
- More competition in over the top services
- Threats to franchise fees, PEG
- Alternative ROW authority for cable operators
- Telecom Act reform



Questions?



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