

Preparing and Planning for Changes in Telecommunications Law (and Potential Budget Impacts)

2015 IMLA Annual Meeting
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PRESENTED BY

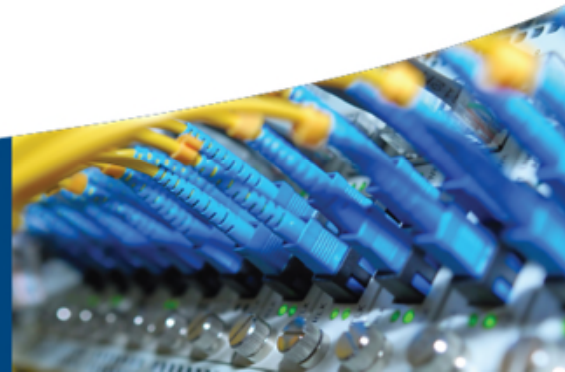
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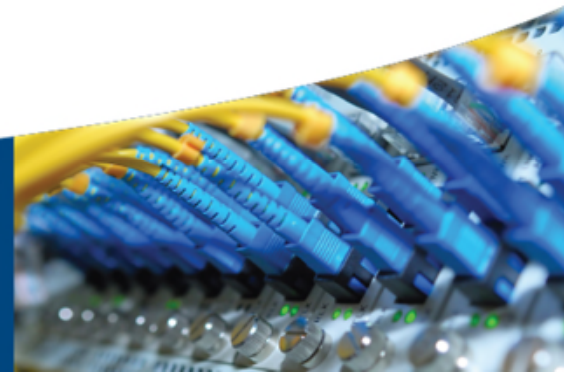


Telecommunications Law



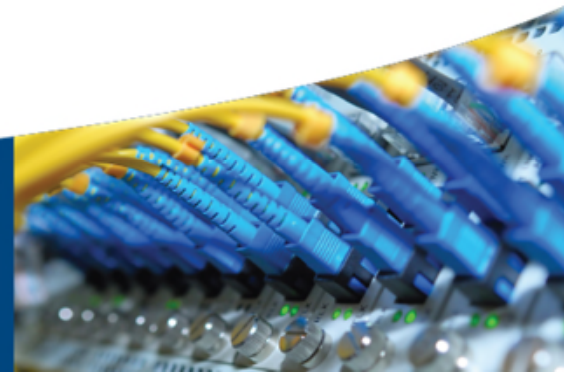
Key Points

- Federal communications laws, combined with changes in technology, increasingly affect:
 - Local authority to obtain fair compensation for use of valuable public property (the rights of way), and other key revenue streams (tax laws).
 - The availability of adequate communications services to every member of your community, and the adequacy of public safety networks.
 - Local ability to incentivize deployment of broadband facilities, and to deploy municipal networks.



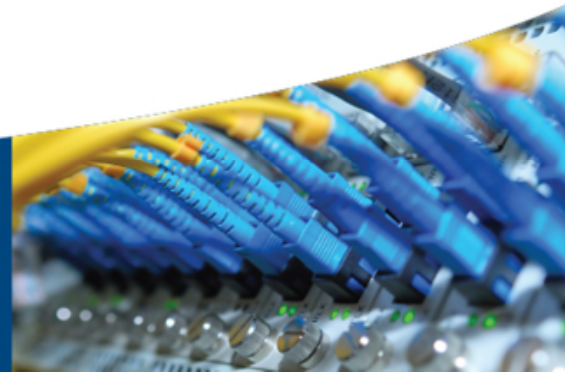
A Short Bit of History...

- Communications law was divided into “silos” – different rules applied to different types of communication:
 - Television/radio services (licensed and subject to public interest obligations such as “Fairness Doctrine”);
 - Common carrier, or telecommunications services like telephony (user controlled all content; carrier simply carried) – important rights granted to providers in return for duties to provide universal service via the public switched telephone network;
 - Information services (services ancillary to telecom services, or services that involved computer storage and forwarding (virtually unregulated); and
 - Cable television services.

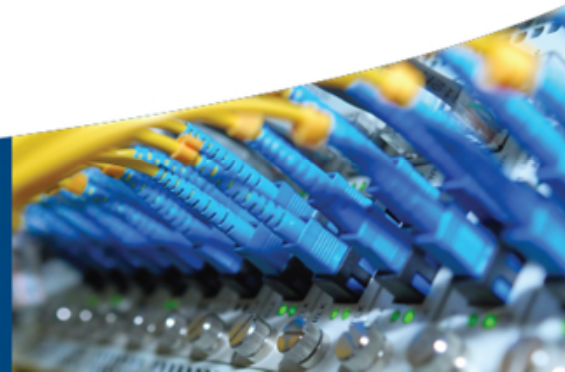


A Short Bit of History...

- Legal obligations tied to definitions, but technology is making the “silos” obsolete:
 - Video now delivered over many platforms;
 - Operators are seeking relief from all common carrier obligations, and to abandon the public switched telephone network (PSTN) at state and federal levels.
- There is a strong national push for deployment of broadband facilities where rights/obligations of providers are unclear.

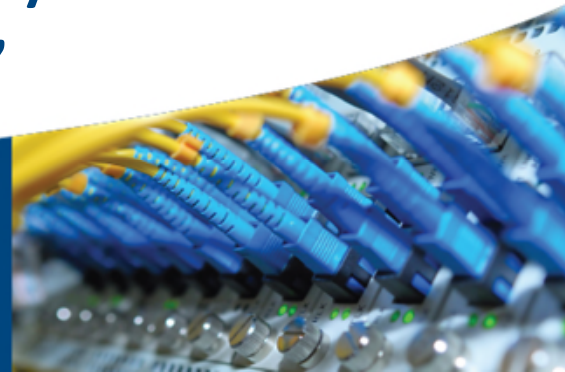


Examples of Issues Created By Changes In Technology and Classifications



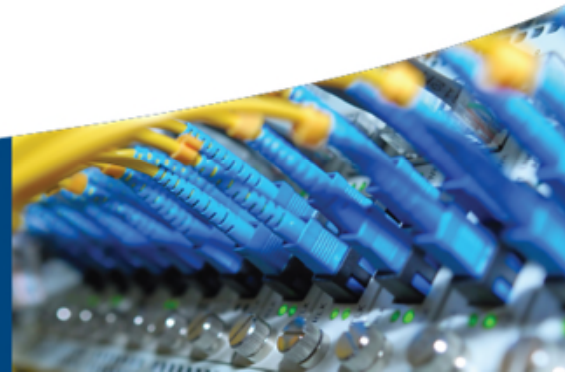
FCC Notice of Proposed Rulemaking

- Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, Docket No. MB 14-261
- <https://www.fcc.gov/document/commission-adopts-mvdpd-definition-nprm>
- Formal pleading cycle closed, *ex partes* permitted.
- Possible decision late this year/next year.
- Colloquially – the “OTT Proceeding.”



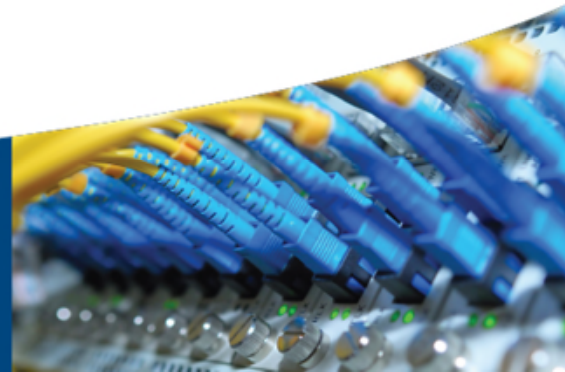
What Is OTT?

- FCC definition in rulemaking: “linear video services that travel over the public Internet and that cable operators do not treat as managed video services on any cable system.”
- Linear = scheduled and virtually simultaneous with transmission - not like (traditional) Netflix or iTunes.



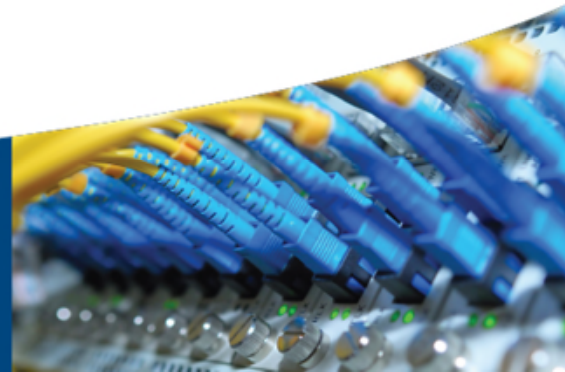
Main Issues Have Nothing To Do With Localities

- Main issue: What is a multi-channel video service provider?
- If companies providing video via the public Internet are MVPDs, they can obtain access to programming not otherwise available.
- Supporters see this as a way to introduce competition into video marketplace.



Good News...

- FCC concludes that an entity that uses “Internet Protocol” to deliver managed video services (AT&T, CenturyLink and so on) ARE cable operators and ARE subject to cable regulations and requirements.



When Cable Operator Provides Service

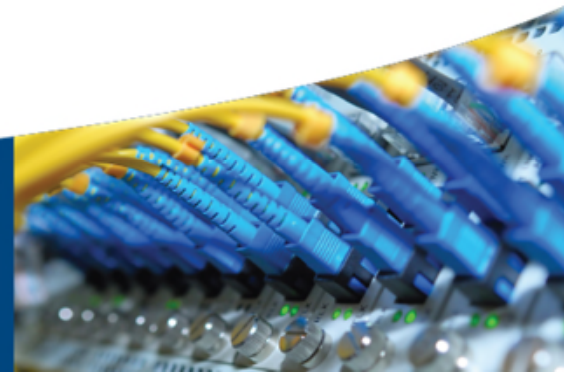
OTT Is Service a Cable Service?

- “Video programming services that a cable operator may offer over the Internet should not be regulated as cable services.”
- “If a cable operator delivers video programming service over the Internet, rather than as a managed video service over its own facilities, we tentatively conclude... this entity would be... a non-cable MVPD under our proposed Linear Programming Interpretation with respect to its OTT service.”
- An OTT service, if provided to consumers without regard to whether they subscribe to the cable operator’s managed video service, would be a non-cable MVPD service inside and outside of the operator’s footprint....



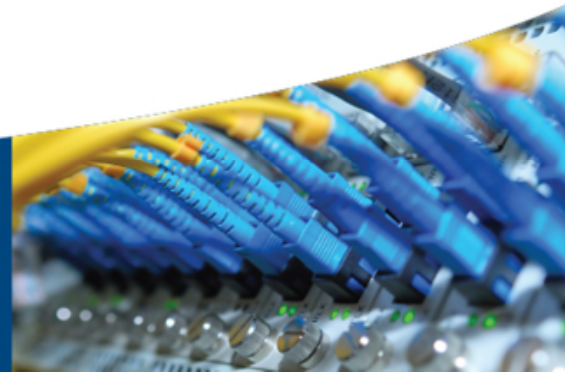
Is OTT Provided by Third Party Subject To Franchise Fees?

- Traditional federally authorized franchise fees reach “Cable Operators”: entities that own or control cable systems; fee reaches revenues derived by from operation of the cable system to provide cable services.
- Cable Act says: nothing in Cable Act limits right of locality “to impose a... fee...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...” if fee NOT received by cable operator 47 USC Section 542(h) - but may be other state and federal limits



Why We Care

- If not “cable service,” then no franchise fees or PEG support under Cable Act.
- If not cable service, PEG fees can’t be used to support OTT.
- If not cable service not subject to consumer protections – at least if the **Section 621 Order** on reconsideration is upheld.
- Emphasizes importance and risk of defining terms critical to franchise benefits (the term “channel,” for example).
- Complicates enforcement issues.



Is There A Way To Protect Local Compensation/the Public?

- In many cases, state law limits ability to obtain compensation for certain types of systems (telephone and telegraph systems) – but classic telephone system may be abandoned.
- Cable companies argue Cable Act permits operator to build a cable system and provide any service desired over that cable system without paying any additional compensation.
 - Hundreds of thousands of wireless devices are being installed mid-strand.



Case to Watch...

- *City of Eugene v. Comcast of Oregon II, Inc.* S062816 (pending decision before Oregon Supreme Court) *appeal from City of Eugene v. Comcast of Oregon II, Inc.*, 263 Or App 116, 149, 333 P3d 1051 (2014).
- Eugene imposes fee under *state law* for use of rights of way to provide Internet services *in addition* to cable franchise fee under cable franchise.
- Appeals court upheld that fee.
- Comcast contends cable franchise prohibits any additional fees for use of rights of way by cable system – and that fee is barred by Internet Tax Freedom Act.



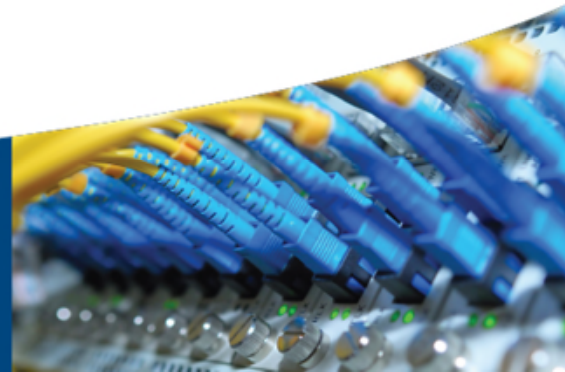
Other Threats To Local Authority

- FCC has been asked to declare that right of way compensation is limited to cost.
- “...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.” Footnote 1285, *Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601 (2015), *app. Pending, USTA v. FCC*, No. 15-1063 (D.C. Circuit).



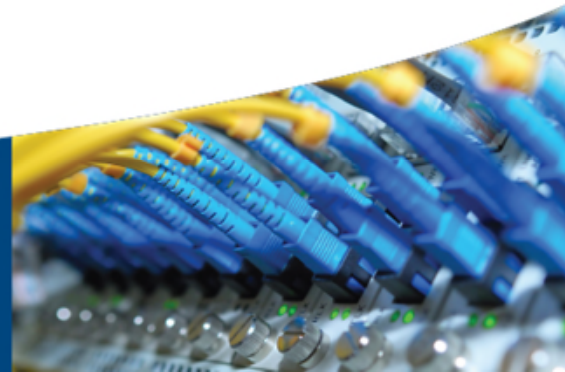
Other Threats/Opportunities

- The Internet Tax Freedom Act (ITFA), enacted in 1998 and extended five times will sunset in December, 2015. The House passed H.R. 235, the Permanent Internet Tax Freedom Act (PITFA), and goes to the Senate for consideration. The Marketplace Fairness Act. (S. 698; H.R.2775), provides state and local government with the authority to impose local sales tax on remote sales.



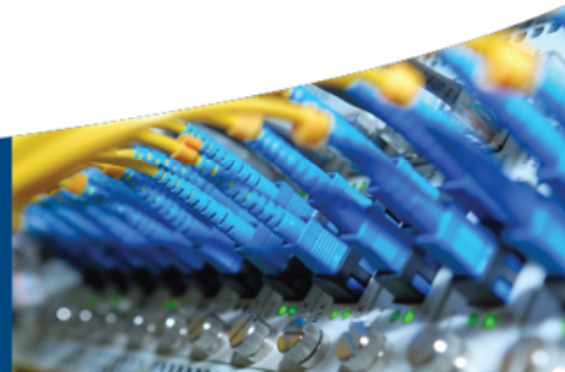
That Translates To...

- A need to review and revise local ordinances (such as zoning codes) to protect local interests.
- A need to participate in federal proceedings and make local interests known to elected officials through a long-term strategy that:
 - explains why local interests should be protected (it is just about money?);
 - explains why protecting and enhancing local authority could advance national interests in broadband deployments;
 - challenges inappropriate intrusions on local authority legislatively and through the courts.
- Devoting the effort and resources required to take advantage of existing rights, and to develop policy goals that reflect the new communications environment.

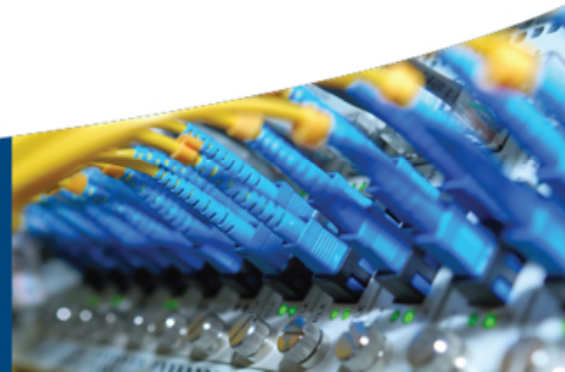


Franchise Q's You Should Be Asking

- What is our approach to franchising – at federal, state and local levels
- How are we dealing with technology changes?
- Are we preserving rights to add'l compensation
- Are we including escape clauses that essentially force requirements DOWN?
- How does this fit in with long-term plans for communicating with constituency? [not a one medium solution]

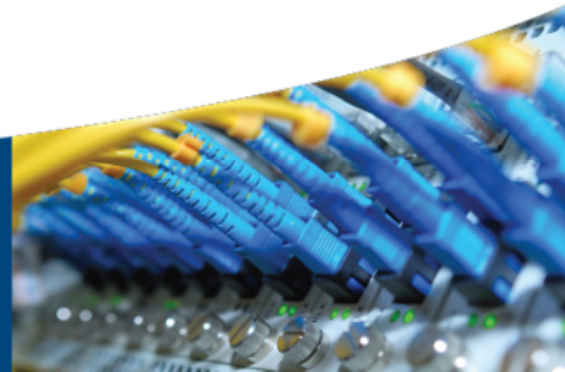


Opportunities for Ensuring Your Community Has Access To Broadband Infrastructure



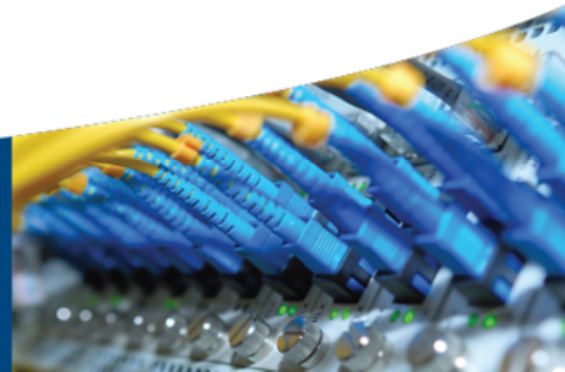
The Availability of Adequate Communications Services

- Federal proceedings underway to permit interstate carriers to abandon public, switched telephone network.
- Open issue: will it be replaced by systems that integrate with public safety/911 networks; or support basic comm. functions without significant extra charges?
- Open issue: will there be widespread deployment of advanced communications networks to rural areas?
- FCC has ongoing proceedings to define what should be treated as the “lifeline” minimum communications service available to the public.



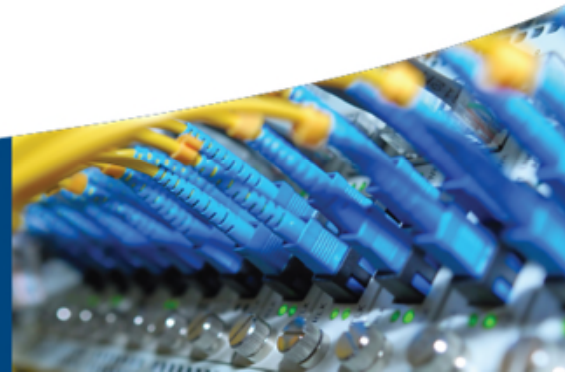
Will the Internet Be Open?

- FCC *Open Internet Order* designed to prevent providers from blocking access to websites; and to prevent network owners from favoring their own services when delivered via public Internet.
 - Appeal raises statutory and constitutional issues.
- FCC examining ways to allow consumers to avoid converters (CPE limits).



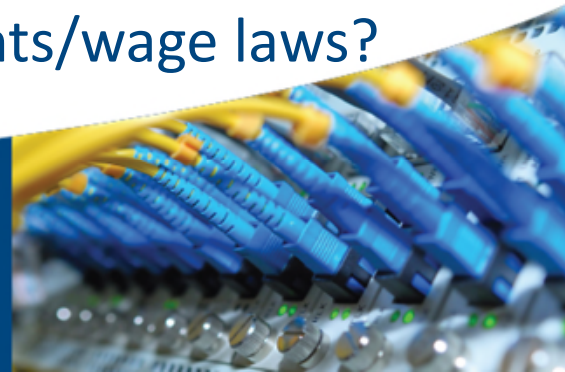
Controlling the Future: Broadband Planning

- Significant move by many communities to encourage deployment through:
 - muni ownership;
 - attracting private vendors;
 - public private partnerships.
- And often part of a broader plan for communications development – as important as master plans.
 - How am I using communications
 - How are businesses/residents using
 - What are my eco development issues
 - What risks do I face – as PSTN vanishes
 - How do I minimize risks



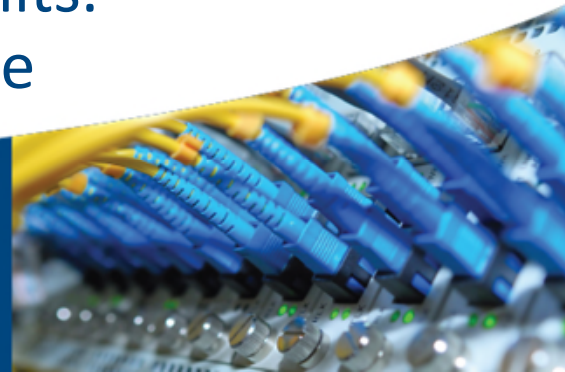
Broadband Planning Is A Legal Issue

- *Cox Communications Arizona v. Tempe*, Case 2:15-cv-01829-JJT, (U.S.D.C. Az)(filed September 14, 2015): Tempe (Cox claims) exempts Google Fiber from rules subject to cable systems by classifying Google Fiber as a non-cable system, and providing it favorable permitting treatment.
- Cox contends inconsistent with federal and law, and first amendment, due process and equal protection.
- *Among legal issues:*
 - Can discriminatory treatment be justified?
 - RoW fees, permitting requirements, zoning.
 - Proprietary v. other property.
 - Does characterization of project affect environmental review requirements?
 - Will project comply with contracting requirements/wage laws?



Broadband Planning Is a Legal Issue (cont'd)

- Is project consistent with state law limits?
 - FCC has asserted that it *can* preempt state law prohibiting localities from offering broadband services under Sec. 706
 - *In the Matter of City of Wilson, North Carolina Petition for Preemption of North Carolina General Statute Sections 160A-340 et seq.; The Electric Power Board of Chattanooga, Tennessee Petition for Preemption of a Portion of Tennessee Code Annotated Section 7-52-601* WC Docket No. 14-115, WC Docket No. 14-116 Memorandum Opinion and Order (March, 2015).
 - Wilson: state law “cumulatively” burdens entry by increasing costs/delaying entry; Chattanooga: may City offer services to public outside municipal limits.
 - Appeal filed by North Carolina and Tennessee



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