Local Gov’t Telecommunications Practice: The State of Small Cell Litigation, Cable and Right-of-Way Issues

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OUTLINE

Wireless
Cable and Rights-of-Way
Broadband & Policy Issues
Off the Books – Broadband franchising

ALWAYS CHECK UTAH LAW FIRST.

Wireless Update

- Small Cell Order – lessons from recent cases
- RF Emissions regulation– update on recent cases
- Changes to Section 6409 (EFR) Rules – litigation update

What Is a Small Cell?
Not Definition in Utah

(1) The facilities—

(i) are mounted on structures 50 feet or less in height including their antennas …, or

(ii) are mounted on structures no more than 10 percent taller than other adjacent structures, or

(iii) do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater;

(2) Each antenna associated with the deployment, excluding associated antenna equipment … is no more than three cubic feet in volume; (Note: no limit)

(3) All other wireless equipment associated with the structure, including the wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than 28 cubic feet in volume...

******** Exceptions in Utah law 28 cubic fee plus ******

(4)… (5) … and

(6) The facilities do not result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified in section 1.1307(b).

NO DEEMED GRANTED

According to FCC -- A Fee Is Permitted If…

(1) The fees are a reasonable approximation of the state or local government's costs,

(2) Only objectively reasonable costs are factored into those fees, and

(3) Fees are no higher than the fees charged to similarly-situated competitors in similar situations.

Fees Include . . .

- One-time and recurring charges made by State or local government in either a regulatory or proprietary capacity
- Application review fees, hearing fees, appeal fees, permit issuance fees, plan check fees, inspection fees, etc.
- Lease rent, franchise fees, pecuniary value of in-kind consideration, signing bonuses, etc.

Presumptively Reasonable Fees (caveat: check your state laws):

- Non-recurring fees =
  - $500 for first 5 nodes/$100 for each additional----Utah $100 or $250.
  - $1,000 for new pole -- Utah $1,000
- Recurring fees = $270.00 per facility including RoW fee and fee for attachment to municipal infrastructure

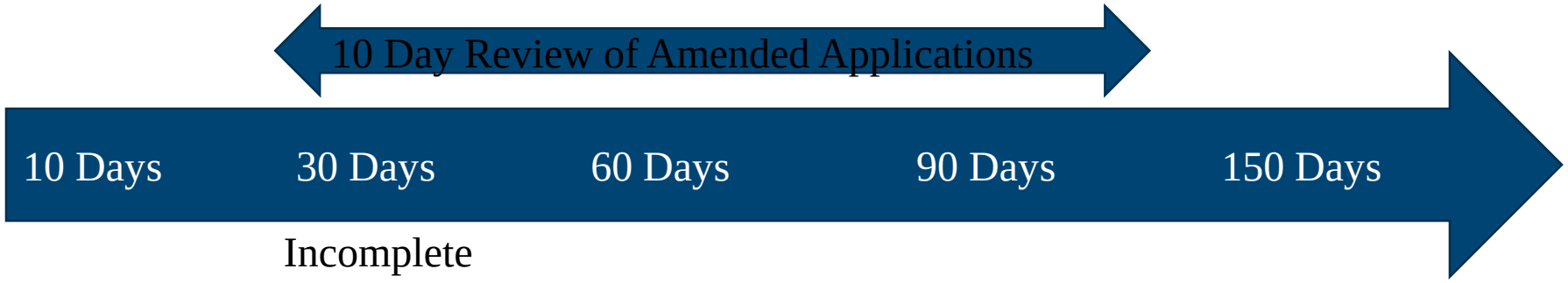
  Utah provides for $250 for use of ROW and 50 for access.– Gross Rev (3.5% may be preempted) (Anyone charging?)
- Specifically rejects claim that localities are exempt from 253(c)'s fair and reasonable standard in setting rates for ROW infrastructure (See paras. 92-97.)

Batched Applications

- Locality must accept "batched" applications.
  - Time frame is same for one as it is for hundreds (Paras. 114, 115) Utah law creates caps and homogeneity – not sure they are effective
  - "…[I]n extraordinary cases, a siting authority …can rebut the presumption of reasonableness of the applicable shot clock period where a batch application causes legitimate overload on the siting authority's resources." Para. 115
- Utah – divided by category – (65k in population)
  - 75 or three consolidated apps for Bigs
  - 25 or one consolidated app for smalls

Utah creates post denial program for reapplication – 30 days for free and 30 day response.

Putting Time Frames Together… New Concept of Collocation



Incomplete Small Cell with Reset

Incomplete Non-Small Cell, But No Reset*

Utah provides for incomplete and 90 days for applicant to act

Small Cell On Existing Structure

6409 Co-location

Small Cell On New Structure // Any Cell on Existing Structure

New Cell on New Structure

Utah says you have to be operational in 270 days

FCC Small Cell Order (2018)

- "a state or local legal requirement constitutes an effective prohibition if it 'materially limits or inhibits the ability of any competitor or potential competitor to ***compete in a fair and balanced legal and regulatory environment***'" (para. 35)
- "…an effective prohibition occurs where a state or local legal requirement *materially inhibits* a provider's ability to engage in any of a variety of activities related to its provision of a covered service. This test is met not only when filling a coverage gap but also when densifying a wireless network, introducing new services or otherwise improving service capabilities…an effective prohibition includes materially inhibiting additional services or improving existing services." (Para. 37)

FCC Small Cell Order (2018)

- FCC rejects gap-based approaches developed under Section 332 case law as outdated (Para.40)
  - "…***we reject*** both the version of the "coverage gap" test followed by the First, Fourth, and Seventh Circuits (requiring applicants to show "not just that this application has been rejected but that further reasonable efforts to find another solution are so likely to be fruitless that it is a waste of time even to try") and the version endorsed by the Second, Third, and Ninth Circuits (requiring applicants to show that the proposed facilities are the "least intrusive means" for filling a coverage gap) (FN 94)

FCC's 5G Effective Prohibition Standard Upheld by Ninth Circuit

- Ninth Circuit held:
  - The differences in the FCC's new approach are reasonably explained by the differences in 5G technology. The FCC has explained that it applies a little differently in the context of 5G, because state and local regulation, particularly with respect to fees and aesthetics, is more likely to have a prohibitory effect on 5G technology than it does on older technology. The reason is that when compared with previous generations of wireless technology, 5G is different in that it requires rapid, widespread deployment of more facilities.

Small Cell Order Challenges

City of Portland v. FCC, 969 F.3d 1020 (9th Cir. 2020)

Petitioners' Supreme Court brief included an argument based on *Chevron and Brand X* that Ninth Circuit affirmance of FCC Order is inconsistent with other circuits:

- *Agency cannot trump a court's "plain language" determination.*
- *Some parties will surely claim that the Order, having been upheld in the Ninth Circuit, is the definitive nationwide interpretation of the statute. But at least one circuit court has concluded that an agency's revision to existing circuit precedent is "not legally effective . . . until [the circuit court] discharge[s] its obligation under Chevron step two and Brand X to determine that the statutory provisions at issue were indeed ambiguous." Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1145 (10th Cir. 2016) (Gorsuch, J.).*
- *SCOTUS denied cert.* 210 L.Ed.2d 962 (2021)

Second Circuit

New Cingular Wireless. v. Town of Colonie, 2022 WL 1009436 (N.D.N.Y. March 31, 2022)

- Numerous claims raised including failure to act, moratorium, effective prohibition
- Regarding effective prohibition, materially inhibits standard in FCC Small Cell Order applied
- Town had told applicant they needed to apply under zoning code procedures
- Court found that applying zoning code procedure to "a single small cell facility on an existing structure in a public right-of-way, materially inhibits Plaintiff's efforts to improve its services" violating the TCA's ban on prohibiting provision of personal wireless services.

Second Circuit-plain language

ExteNet Sys., Inc. v. Village of Flower Hill, 2022 WL 3019650 (E.D.N.Y. July 29, 2022)

- Court found that the Village's denial of Plaintiff's permit application did not violate the TCA's ban on prohibiting personal wireless services
  - ExteNet argued Court must give *Chevron* deference to the FCC's Small Cell Order applying the "materially inhibits" standard.
  - Court followed Second Circuit Court's opinion in *Sprint Spectrum L.P. v. Willoth,* 176 F.3d 630 (2d Cir. 1999) (significant gap/least intrusive means)
    - Although the Second Circuit found the phrase "personal wireless services" "opaque", it ultimately relied on the plain statutory language to define it. Therefore, the phrase was not ambiguous as *Chevron* deference requires.
  - Court noted the circuit court may wish to reconsider its definition in light of new technology, but the district court is not in a position to ignore its binding pronouncement .
- Appeal was filed to Second Circuit, and then parties stipulated to withdraw with prejudice and case was dismissed.

Third Circuit-plain language/retroactivity

- Several district court cases have found the FCC's materially inhibits standard is substantive change, not to be applied retroactively
- *T-Mobile v. City of Wilmington* 2020 WL 1245306 (D. Del.)
  - Court holds FCC "new rule" not a "mere clarification" but a "substantive change" and an "abrupt departure" from a well-established practice.

Eleven Circuit-substantive/retroactivity

***T-Mobile South v. City of Roswell*, Georgia**, 2023 WL 2563227 (N.D. Ga. March 17, 2023)

- Challenge to denial of macro tower application (case previously went to Supreme Court on § 332(c)(7)'s "in writing" requirement).
- On cross-motions for summary judgment, the parties disagreed on the impact of the FCC's *Small Cell Order* on the "effective prohibition" issue.
- The court ruled that the *Small Cell Order* created a substantive, not an interpretive, rule and that it therefore could not be applied retroactively to the City's 2017 denial of T-Mobile's application.
- But the court also "recognize[d] that this is a very close legal call, and the Court finds it appropriate to certify an interlocutory appeal under 28 U.S.C. § 1292(b)."

Roswell (con't)

- Noteworthy is the court's less-than-favorable view of the *Small Cell Order*'s "materially inhibit" standard:

> As a starting point, the Court is inclined to agree with the City that the 2018 [*Small Cell Order*] reflects an unreasonable interpretation of Section 332. Not only does the FCC's interpretation conflict with the interpretations of every Circuit that has addressed the issue and expand *California Payphone* to new contexts in which it had not been previously applied, it also appears to upset the balanced regulatory approach that was intended by Congress. … [T]he FCC's interpretation would "strip State and local authorities of their Section 332(c)(7) zoning rights" and "effectively nullify local authority by mandating approval of all (or nearly all) applications." …. [T]he FCC's new rule also potentially runs afoul of established Eleventh Circuit case law holding that when evaluating cell tower applications under Section 332, local governments are authorized to consider a variety of factors including "the proposed tower's negative aesthetic impact (as well as its effect on property values) and the proposed tower's effect on the health, safety, and welfare of the public," … , and whether "an alternative location [is] unavailable or unfeasible[.]"

- Court held only the 11th Circuit can determine if the *Order* is entitled to *Chevron* deference.
- Court also notes FCC's decision in *California Payphone* "did not address how anti-prohibition claims should be analyzed under Section 332 of the TCA."

Small Cell Order Challenges-Materially Inhibits

Capital Telecom v. Bethel Park *2022 WL 911762 (USDC, WD Penn)*

- No dispute as to application of materially inhibits standard of FCC Small Cell Order.
- But court notes parties mainly focused on “prior standard” (significant gap/least intrusive means) including plaintiff’s expert evidence on significant gap
- Defendant City contends a denial based on legitimate zoning restrictions can’t materially inhibit ability to compete in a fair and balanced regulatory environment.
- Court questions whether expert report would be admissible at summary judgment stage (because Defendant questioned admissibility) but finds even if report is admissible, plaintiff loses as they failed to articulate how the undisputed material facts support their effective prohibition claim under the new standard.

Small Cell Order Challenges-Materially Inhibits

Capital Telecom v. Bethel Park *2022 WL 911762 (USDC, WD Penn)*

- Further criticism of the FCC Small Cell Order:
  - "Here, if the Court were to accept the Telecom Plaintiffs' argument that every time a service provider is unable to meet their service and performance goals, a state or local authority necessarily prevented such provider from competing 'in a fair and balanced regulatory environment,'…that interpretation would short-circuit the state and local regulatory authority established in the TCA through a careful balancing of federal, state and local authority."
- Defendants "point to no facts regarding how the Denial "materially inhibits" any *current or potential competition* in a 'fair and balanced regulatory environment in the [given] market."

Small Cell Order Challenges-Materially Inhibits

Crown Castle Fiber v. Pasadena TX *2022 WL 3040417 (USDC, SD Texas)*

- Crown challenged 2 requirements in City's design manual for small cells in the public rights-of-way: 300 ft. spacing between small cell support pole and existing utility poles and equipment undergrounding requirement.
- Relies on FCC Small Cell Order rule on aesthetic standards, but argues "effective prohibition" only under Section 253 (telecommunications services) and not Section 332(c)(7) (personal wireless services).
- Court finds both requirements preempted under Section 253:
  - Spacing prohibits construction of small cell poles in large swaths of City's streets
  - Undergrounding restriction due to feasibility

RF Emissions – FCC Authority

- Telecommunications Act of 1996, Pub. L. No. 104-104, § 704(b), 101 Stat. 56, 152 (directing FCC to "prescribe and make effective rules regarding the environmental effects of radio frequency emissions").
- 47 USC §332(c)(7)(B)(iv):

  "No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions."
- 47 USC § 414 (savings clause): "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

RF Emissions - Cases

- Cell phone warnings at point of sale:
  - (1) Conflict with federal law?
  - (2) Violate retailers First Amendment rights?
- ***CTIA--The Wireless Assn v. City and County of San Francisco***, 494 Fed. Appx. 752 (9th Cir. 2012)
- ***CTIA - The Wireless Assn. v. City of Berkeley***, 854 F.3d 1105 (9th Cir. 2017); cert. granted and remanded 201 L. Ed. 2d 1092 (June 28, 2018)
- ***CTIA--The Wireless Assn v. City of Berkeley***, 928 F.3d 832 (9th Cir. 2019); cert. den., 205 L.Ed.2d 387 (2019) [Ok'd on First Amendment issue]
- ***CTIA v. City of Berkeley*, 487 F. Supp. 3d 821 (N.D. Cal. 2020)**

RF Emissions - Cases

***CTIA v. City of Berkeley*, 487 F. Supp. 3d 821 (N.D. Cal. 2020)**

- Plaintiff's motion for judgement on the pleadings, after FCC's RF Order issued.
- FCC filed "Statement of Interest" in support of CTIA.
- Court found that the Berkeley ordinance as drafted was preempted:
  - "The Statement of Interest is consistent with the 2019 RF Order in recognizing that additional disclosures pose a risk of over warning. Furthermore, even if the Berkeley ordinance specifically is (as the Ninth Circuit indicated) literally true and not misleading, it does not necessarily follow that there is no risk of "overwarning" – especially given that the FCC is tasked with balancing the competing objectives of ensuring public health and safety and promoting the development and growth of the telecommunications network and related services."
  - "Given the specificity of the warning required by the Berkeley ordinance, the implied risk to safety if the warning is not followed (a risk the FCC has concluded does not exist), and the acknowledged "controversy concerning whether radio-frequency radiation from cell phones can be dangerous if the phones are kept too close to a user's body over a sustained period," CTIA, 928 F.3d at 848, the FCC could properly conclude that the Berkeley ordinance – as worded – overwarns and stands as an obstacle to the accomplishment of balancing federal objectives by the FCC."
  - "Court does not opine whether an ordinance stripped of any implication about public safety would be preempted."

RF Emissions - Cases

State tort and consumer fraud

Cohen v. Apple Inc., 46 F.4th 1012 (9th Cir. 2022); petition for cert. (Jan. 26, 2023)

- Plaintiffs alleged that Apple breached state tort and consumer-fraud laws by misrepresenting and failing to disclose the dangers of RF radiation emitted by iPhones (handheld devices)
- Issue Framed by Court: can there be state-law causes of action premised on RF emission standards more protective than those prescribed by the FCC?
- Held: Plaintiffs' concession that Apple's iPhone complies with FCC RF emission levels prescribed is fatal to their appeal
  - FCC's adoption of specific RF radiation limits for cell phones is the result of the agency's striking a balance between the conflicting policies of public safety and the public's access to telecommunications technologies
  - FCC's upper limits on the levels of permitted RF radiation preempt state laws that impose liability premised on lower levels
  - Allowing state tort law to prescribe lower levels of RF radiation would interfere with the nationwide uniformity of regulation that is the aim of the Act, and would render the FCC's statutorily mandated balancing essentially meaningless
  - Savings clause in § 414 of the 1934 Act does not help plaintiffs.

RF Emissions - Cases

Cohen v. Apple Inc., 46 F.4th 1012 (9th Cir. 2022); petition for cert. (Jan. 26, 2023)

- **Petitioner and Amici** focuses on circuit split on "preemptive power" of FCC
  - Note debate is over FCC preemptive authority regarding RF emissions of devices
  - Acknowledge federal preemption in Section 332(c)(7)(B)(iv) related to siting of personal wireless services facilities
- **City of Berkeley** filed Amicus Brief penned by Lawrence Lessig, recounting the impact of the FCC General Counsel's "statement of interests" letter on the City's litigation over cell phone warnings at point of sale vs. preemption through comment and rulemaking proceeding

RF Emissions - Cases

- ADA and FHA Claims

Wolf v. City of Millbrae, 2021 WL 3727072 (N.D. Cal)

- Plaintiff claimed that RF emissions from a cell tower above his housing complex caused him to suffer from "electromagnetic hypersensitivity" (EHS), and requested that City order accommodations be made under the ADA and FHA by either turning the tower off or requiring the company to relocate the tower site
- Court held that Plaintiff's claims against the City for violation of the ADA and FHA were unreasonable because his requests would require the City to violate § 332(c)(7)(B)(iv).
  - Court found that “it would be improper under the ADA to subject a defendant to the threat of litigation for the purpose of accommodating a plaintiff under the ADA.”
  - Court applied the same reasoning for Plaintiff's FHA claim—”granting Plaintiff's accommodation request would require the City to regulate RF emissions in violation of the TCA and its implementing regulations. This accommodation would require the City to face liability for violating federal law and is thus not reasonable.”
- Affirmed without oral argument by Ninth Circuit, No. 21-16649 (Feb. 16, 2023).

Section 6409 Rules Update

Section 6409 (a) Facility modifications

(1) In general

Notwithstanding section 704 of the Telecommunications Act of 1996 (Public Law 104–104) or 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.

Section 6409 Rules Update

- Implementing rules are codified in 47 CFR § 1.6100 (formerly § 1.40001)
  - EFR rules renumbered in 2018 when FCC codified other shot clock rules.
- FCC orders adopting rules are critical to understanding requirements.
  - *In re Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 29 FCC Rcd. 12865 (Oct. 17, 2014), amended by 30 FCC Rcd. 31 (Jan. 5, 2015) ("Original Order").
  - *Implementation of State & Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, 35 F.C.C. Rcd. 5977 (2020) ("Clarifications Ruling").
  - *Implementation of State & Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012,* 35 F.C.C. Rcd. 13188 (2020) ("Expansions Order").

Section 6409 Rules Update

- *Clarifications Ruling* (2020)
  - Interprets FCC rules, does not change their wording.
  - Re-defines “concealment” to exclude ordinary concealment (such as hiding an antenna on the back of a roof or installing it under a tree line).
  - Protections for concealment elements only apply to stealth facilities.
  - Limit of 4 ground-mounted cabinets applies separately to each EFR and is not cumulative.
  - Excludes from definition of “cabinet” smaller pieces of equipment in their own housing.
- Order is in effect
- Appeal pending: *League of Cal. Cities et al. v. FCC*, No. 20-71765 (9th Cir. 2021).
  - Fully briefed; Oral Argument on July 11, 2023

Cable and Right-of-Way Update

- Remand of FCC's 3rd §621 Order
- State Video Franchising Law Fee Litigation
- Other Video Streaming Service Issues
- "Fair and Reasonable" ROW Compensation

Remand of FCC's 3rd §621 Order

Third Section 621 Order

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

Remand of FCC's 3rd §621 Order

What the Sixth Circuit Sent Back to the FCC

- In-Kind Rule: Upheld the rule, *except* only the "marginal cost" of fulfilling a franchise obligation – *not* fair market value – constitutes a "franchise fee"
  - FCC must revise the rule on remand.
- Mixed-Use Rule: Questioned the rule as written, saying it "does not follow from the Act's terms," and concluded LFAs may regulate a cable operator's non-cable services unless inconsistent with the Cable Act. But it found a cable operator's franchise included the right to use its system, located in the ROW, to provide information services.
  - The FCC should address the rule's textual inconsistency with the Act.

Remand of FCC's 3rd §621 Order

- FCC expected to conduct a short rulemaking on remand, but may be hung up by 2-2 FCC.
- Comment and reply comment period will provide an opportunity for local governments to persuade the FCC to address key issues left open or subject to dispute.

State Video Franchising Law Fee Litigation

- 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 “video service providers” to (1) obtain a franchise from the state, and (2) pay a 5% franchise fee to local governments.
- “Video service” is defined to include video programming in IP, but excludes video provided over the “public internet.”
- “Video service provider” is defined as a provider of video service that “uses” the ROW.

State Video Franchising Law Fee Litigation

- Beginning in 2021, lawsuits have been filed by municipalities in 13 states against Netflix and Hulu, the leading “over the top” (OTT) providers of video streaming services.
- The claim: Netflix, Hulu and other OTT providers (1) provide “video service” and “use” the ROW to provide the service (via other parties’ broadband networks in the ROW), and therefore (2) must obtain a state video franchise and owe the plaintiff municipalities 5% video franchise fees.

State Video Franchising Law Fee Litigation

- Key issues:
  - Whether local governments have a right of action under the state video franchising law to sue OTT providers for failing to obtain a state video 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.
- So far, municipalities have not fared well, largely losing at the trial court level.
- Two circuits 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, AR v. Netflix and Hulu*, 52 F.4th 1025 (8th Cir. 2022) (Arkansas video franchising law).

Other Video Streaming Issues

- There are strong, but unresolved, arguments that revenues a cable operator receives from streaming services over its system are subject to cable franchise fees:
  - Delivering video or other programming services in IP does not change a cable service into a non-cable service.
  - Delivering those programming services via the public Internet (as is claimed by most cable operators) is not dispositive (nor is it clear all streaming services are delivered via the public Internet).
  - Efforts to draw a line between what an operator calls “managed cable services” and other video services are also not dispositive.

Other Video Streaming Issues

- Whether any particular revenues should be subject to cable franchise fees is likely to turn on specific facts regarding the relationship between the cable operator and the streaming service, including:
  - Any common ownership relationship between cable operator & OTT provider?
  - How is the OTT service provided?
  - How is the OTT service marketed?
  - Under what compensation arrangement (if any) does the operator (or its affiliate) receive or collect revenues for the OTT service or for promoting that service?
  - To what degree are the OTT services integrated with traditional linear cable services?

Other Video Streaming Issues

Governing Law

- Local franchising authorities are entitled to assess a franchise fee on a "cable operator's gross revenues derived … from the operation of the cable system to provide cable services." 47 U.S.C. § 542(b).
- Questions to be answered:
  - Is the revenue of the cable operator, and
  - Is the revenue derived from the operation of the cable system to provide cable services.
- Strong argument that the revenue need not be revenues *from* a cable service per se; the revenue need only be derived in connection with the operation of the system to provide cable services.

Other Video Streaming Issues

Cable Service Definition

"Cable service" is defined as:

- (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 U.S.C. §522(6).

Other Video Streaming Issues

Video Programming Definitions

"Video programming" means

- programming provided by, or generally considered comparable to programming provided by, a television broadcast station," 47 U.S.C. §522(20).

"Other programming service" means

- **information that a cable operator makes available to all subscribers generally**, §522(14).

Other Video Streaming Issues

Don’t Surrender OTT Fee Revenue Issues In Your Renewal Franchise

A community can contractually agree in a franchise to impose a franchise fee that is less than the maximum the Cable Act allows -- for example, by agreeing to exclude from the franchise fee revenue base classes of revenues on which the Cable Act would allow the fee to be imposed. LESSONS --

- Do not agree to broad gross revenue exemption language excluding revenues received from services delivered via the Internet, or revenues from information services.
- Consider adding language stating that your franchise’s “gross revenue” definition is to be construed as broadly as applicable law permits.

Other Video Streaming Issues

Preserve Rights Over Other Users of Cable System

Cable Act provides that "Nothing in this chapter 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).

* This language makes clear that the Cable Act does not prohibit the imposition of a 5% fee or tax on the subscription revenues of OTT service providers unaffiliated with the operator.

BUT … whether subscription revenues received by a OTT provider that does not bill through the cable company can be taxed is a distinct question that depends significantly on other federal and state laws

Other Video Streaming Issues

Don’t Forget Your ROW Authority

- For non-cable services and systems in the ROW that are not subject to the Cable Act (e.g., broadband-only providers), authority over use of ROW is largely a state law issue.
- Do you have options under state law to manage & obtain compensation for use of the ROW by these non-cable providers?
  - ROW fees applicable to all communications service providers (Oregon).
  - ROW fees applicable to all utilities & other ROW users.
  - Other communications & entertainment tax options (Virginia, Chicago).
- Is there work to do at the state level to preserve ROW authority over non-cable companies?

Other Video Streaming Issues

Beware Of State Laws

- Texas Law -- Pay for One, Get One for Free
- Louisiana and Kansas Laws -- Barring OTT Fees
  - Similar bills have been introduced in many, if not most, state video franchising law states.

Other Video Streaming Issues

Factors That May Be Relevant

- Whether the cable operator exerts sufficient control over what programming is delivered to subscribers, and how it is delivered to them, such that it can be considered to be "transmitting" the programming to subscribers.
- Whether the services are so interactive in nature, beyond interaction "for the selection or use" of the service, that the services cannot be treated as a cable service, and must instead be treated as non-cable services.
- Whether the electronic pathways used to deliver streaming services are legally distinct from the elements of the network that are treated as the "cable system."

Whether, Outside Small Cell Context, § 253 Limits Fees to Costs

CNSP, Inc. v. Webber, et. al (City of Santa Fe), 2022 WL 4536132 (D.N.M., Sept. 28, 2022).

- Challenge to 2% franchise fee for use of PROW for telecommunications (fiber internet only; not wireless internet or VoIP phone service revenue).
- CNSP urged court to adopt FCC's *Small Cell Order* rule that any fee imposed must be cost-based.
- Court acknowledged Tenth Circuit had adopted a "materially inhibits" standard for effective prohibition (like the FCC *Small Cell Order*).
- But Court rejected FCC's "hardline statement against revenue-based fees" on two grounds:
  - FCC *Small Cell Order* applies only to 5G wireless networks, and CNSP's franchise excludes wireless from any fee.
  - Controlling precedent in Tenth Circuit binds D.N.M.
  - "…the Court, despite the norm for deference to agencies found in [*Chevron]*, is not persuaded that an administrative "Declaratory Ruling" expressing a preference on a split in case law controls the courts…... The Tenth Circuit has taken a view opposite of the FCC's preference, concluding that when assessing fairness and reasonableness of fees, the Court does not measure by the city's cost, but rather uses a totality of the circumstances test… This Court remains bound by the Tenth Circuit—which has not adopted a view antagonistic to revenue-based fees for wireline infrastructure." (citations omitted)
- Decision has been appealed to the 10th Circuit; fully briefed, with argument scheduled for first week in June.

Broadband and Policy Issues

Venues: Congress; FCC, Dept. of Commerce (NTIA); Treasury and Home Land Security.

Congress/FCC

Do New Players = New Order or Stalemate?

Senate Commerce

Democratic leadership remains the same.

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

Biggest Issues:

- 5th FCC Commissioner
- Oversight of Broadband Infrastructure
- Social Media/ Tick Tock
- “Saucer” to House
- Action on Claw back?

House Commerce

Role Reversal at the Top.

New Player (Matsui) at the Subcommittee level.

Historically bi-partisan on most issues.

Biggest Issues:

- FCC Oversight
- Oversight of Broadband Infrastructure/NTIA
- Social Media/ Tick Tock
- Claw Back of Covid funds?
- Potential Preemption Language

  Cable / Small Cell / Muni-Provisioning

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

Two Simple Thoughts (+ 1)

“Need a Program as there a New Players and some old Players in New Roles.”

“Let NLC, USCM, NACo and IMLA watch DC – Please be active at the state and local level.”

- This bullet became less convincing after hearing this past Wednesday.

“Beware of Efforts to Claw Back Unobligated Covid Funds

Reversing the Trump/Pai FCC??

It’s 27 months into Biden Administration and we don’t even have a Nominee for 5th Chair

5th Vote: Biggest Issue Facing Local Government at FCC

FCC as of 1/21/21

FCC TODAY

Federal Communications Commission

2 years in – still not at full strength.

2 to 2 tie has not prevented rolling out IIJA programs, BUT

Has delayed undoing some of the damaging PAI FCC rules in cable and small cells.

Still failing to provide updates RF guidance.

Commissioner Nathan Simington, Commissioner Brendan Carr, Chairwoman Jessica Rosenworcel, and Commissioner Geoffrey Starks.

Biggest Issues:

- Achieving a Majority
- Broadband Map Accuracy
- Internet For All
  - Digital Discrimination – ACP EBT
  - Broadband Label
- Funding For the Future
- Reversing Pai FCC
  - Net Neutrality
  - Small Cells – ROW regulation
  - Cable

Gigi Sohn

FRANCHISING BROADBAND

UTAH IS NOT A DILLON STATE – LIFE IS GOOD.

- **State v. Hutchinson, 624 P.2d 1116, 1126 (Utah 1980)** ("When the State has granted general welfare power to local governments, those governments have independent authority apart from, and in addition to, specific grants of authority to pass ordinances which are reasonably and appropriately related to the objectives of that power, i.e., providing for the public safety, health, morals and welfare. And the courts will not interfere with the legislative choice of the means selected unless it is arbitrary, or is directly prohibited by, or is inconsistent with the policy of, the state or federal laws or the constitution of this State or of the United States.")

WHERE IS BRAODBAND IN UTAH LAW?

- Broadband is only discussed in the context of the Utah Broadband Center and Access Act (Utah Code Ann § 63n–17–101, et seq.) creating grant funding. So nothing relevant to municipal authority.
- Utah Code Ann. § 54-19-103 A state agency and political subdivision of the state may not, directly or indirectly, regulate Internet protocol-enabled service or voice over Internet protocol service.
  - “Internet protocol-enabled service” means any service, functionality, or application that uses Internet protocol or a successor protocol that enables an end-user to send or receive voice, data, or video communications. Utah Code Ann. § 54-19-102.
  - I don’t believe this negatively impacts your ability to control your real estate.

Recognition of Franchising Authority

Counties

UCA §17-50-306. Granting franchises over public roads – Limitation.

(1) A county may grant franchises along and over the public roads and highways for all lawful purposes, upon such terms, conditions, and restrictions as in the judgment of the county legislative body are necessary and proper, to be exercised in such manner as to present the least possible obstruction and inconvenience to the traveling public.

(2) A franchise under Subsection (1) may not be granted for a period longer than 50 years.

UCA §17-50-309. Regulation of use of roads.

A county may enact ordinances and make regulations not in conflict with law for the control, construction, alteration, repair, and use of all public roads and highways in the county outside of cities and towns.

Cities and towns are in Title 10. Titles 10-6 and 10-7 cover fiscal and general powers.

Cities – similar permissions.

Recognition of Franchising Authority

Cities

Utah Code Ann. § 10-1-402(11)(a)(vi) A “telecommunications tax or fee” includes a “franchise fee.”

- Utah Code Ann. § 10-1-403 A municipal telecommunications license tax imposed under this part shall be at a rate of up to 3.5% of the telecommunications provider's gross receipts from telecommunications service that are attributed to the municipality in accordance with Section 10-1-407.
- Utah Code Ann. § 10-1-406(3): A telecommunications tax or fee imposed under Subsection (1)(b) shall be imposed:
- (a) by ordinance; and
- (b) on a competitively neutral basis.

Using Sandy Code as Example

CHAPTER 6-16. - TELECOMMUNICATIONS RIGHTS-OF-WAY

CHAPTER 6-13. - CABLE COMMUNICATIONS

(2) Cable *service* shall have the meaning provided under Federal law and regulations.

CHAPTER 6-?? - Broadband

Speed Bumps

47 USC 253 **(c)STATE AND LOCAL GOVERNMENT AUTHORITY NOTHING** in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

47 USC 332 (c)(7)(B)Limitations(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—**(I)**shall not unreasonably discriminate among providers of functionally equivalent services; and

Conclusions/Challenges

- Broadband is an interstate information service.
  - Interstate means “state and locals need not apply.” Utah law says much the same for locals even if intrastate
  - Information service means not telecomm, and not cable.
- You can franchise “broadband only” providers for use of their rights of way.
  - No different than café that wants a side walk option or corporation that needs to cross the street with its wires.
- Right now – broadband only providers are not protected by 253 nor 332.
- But – if they have a telecomm franchise or a cable franchise – can the community capture revenue on Broadband services?

Questions?

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