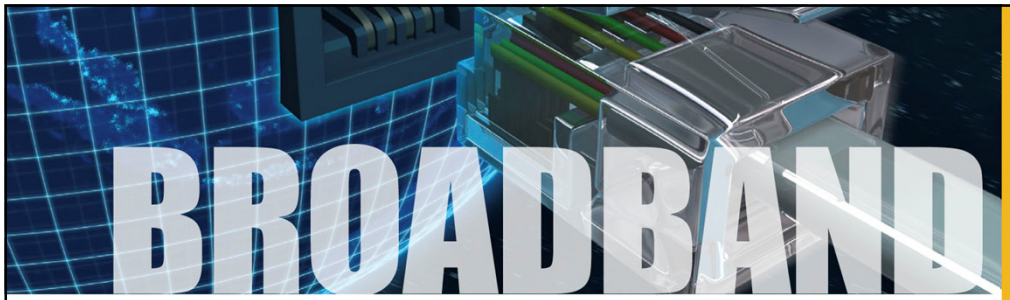


Connecting America's Public Sector
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# COURT & FCC DEVELOPMENTS IMPACTING LOCAL GOVERNMENTS

by Tim Lay

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1333 New Hampshire Avenue, NW
Washington, DC 20036
www.spiegelmcd.com
202.879.4022
tim.lay@spiegelmcd.com


# The Courts

## I. THE COURTS.

### A. Supreme Court.

1. *City of Arlington, Texas, et al. v. FCC,* 133 S.Ct. 1863 (2013).

- Review of Fifth Circuit's decision upholding FCC's Cell Tower "Shot Clock" Ruling, *City of Arlington et al. v. FCC,* 668 F.3d 229 (5th Cir. 2012).
- Cert. granted as to only one of two issues raised:
  Whether, contrary to the decisions of at least two other circuits, and in light of this Court's guidance, a court should apply *Chevron* to review an agency's determination of its own jurisdiction.
- SCOTUS affirmed the 5th Circuit by a 6-3 vote, thereby upholding the FCC's "Shot Clock" Ruling.
- But majority and dissenting opinions spent little time analyzing the language of §332(c)(7).



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# The Courts

- Instead, entire focus was on *Chevron* issue, divorced from §332(c)(7)'s actual language and legislative history. Majority saw no meaningful line to draw between "jurisdictional" and "non-jurisdictional" agency rulings.
- Conclusions:

1. Overturning agency decisions will be more difficult.
2. Drafting statutory language limiting agency jurisdiction will be more difficult.
3. FCC's power to limit and/or preempt local wireless zoning and ROW practices may have grown.
4. Best bet is to influence agency before it makes its decision.
5. Impact on pending *Open Internet* appeal?
6. Impact already being felt in new FCC Wireless Siting NPRM (discussed below).

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# The Courts

B. Courts of Appeals.

1. *Verizon v. FCC*, No. 11-1355 (D.C. Cir. filed Sept. 30, 2011).

- Appeal of FCC's *Open Internet Order (*argued on Sept. 9).
- Verizon attacks on 2 grounds:
  - Beyond the FCC's Title I ancillary jurisdiction authority.
  - Violates 1st (& 5th) Amendment rights of broadband ISPs.

2. *American Electric Power Service Corp. v. FCC*, 708 F. 3d 183 (D.C. Cir. 2013), *cert. denied*, 82 USLW 3189 (U.S. Oct. 7, 2013).

- Upheld FCC's *Pole Attachment Order*, which (among other things) lowered the telecom attachment rate to close to the cable rate, applied the FCC's rules to wireless attachments, and extended the rules to ILEC attachments.
- Note: FCC's pole attachment rules do not apply to munis or co-ops, but state law may apply them (as they see fit to modify) to munis & co-ops.



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# The Courts

3. *T-Mobile South, LLC v. City of Milton*, 2013 WL 4750549 (11TH Cir. Sept. 5, 2013), and *T-Mobile South, LLC v. City of Roswell*, 2013 WL 5434710 (11th Cir. Oct. 1, 2013).

   - Appeals of wireless siting decisions involving § 332(c)(7)(B)(iii)'s requirement that local wireless siting decisions must be "in writing."
   - Short decision or letter, coupled with written transcript of city council meeting, satisfies the "in writing" requirement.

C. State Courts.

1. *Cable One, Inc. v. Ariz. Dept. of Revenue*, 232 Ariz. 275, 304 P.3d 1098 (Ariz. Ct. App. 2013).

   - Issue: Whether a cable operator's VOIP service makes it a "telecommunications company" for purposes of Arizona property tax law.
   - Court rejected cable operator's argument that because VOIP was not classified as a "telecommunications service" by the FCC, cable operator cannot be a "telecommunications company" under Arizona property tax law.
   - Key passage: "These [FCC] authorities concern regulation, not taxation."

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# The Courts

3. *Qwest Corp. v. City of Portland*, No. 121216632 (Ore. Multnomah Cty. Cir. Ct. May 13, 2013).

   - Qwest's challenge, under Oregon law and under § 253 , of Portland's 5% utility license fee (ULF).
   - Court rules that, because ULF is not a ROW fee but a tax, § 601 of FTA protects it, and § 253 does not apply.



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# The FCC

II. FCC.

A. FCC's *ROW NOI* (WC 11-59) and *Level 3* (WC 09-153) proceedings.

1. Both still pending.

2. Section 253 & ROW.

- Is "fair and reasonable" ROW compensation limited to costs or FMV? [Note: tw telecom attacks TX Chap. 283's access line-based ROW fees.]
- Is discriminatory or non-competitively neutral ROW compensation *ipso facto* a §253(a) "prohibition"?
- Should FCC "overrule" 8th Circuit *Level 3* and 9th Circuit *Sprint* decisions? [*i.e.*, that any non-*de jure* §253(a) "prohibition" must be proved with facts.]
- Does FCC have authority to interpret and/or adjudicate §253(c)?
- SCOTUS *Arlington* decision not helpful here.


# The FCC

B. Wireless Siting.

1. Wireless Bureau's Jan. 25, 2013, Public Notice construing § 6409 (a) of MCTRJCA of 2012.

- §6409 (a) provides that zoning authorities "shall approve" requests for "modification" of an "existing wireless tower or base station" that "does not substantially change the physical dimensions of such tower or base station."
- "Substantially change the physical dimension" based on National Collocation Agreement ("NCA") test: (1) a height increase of more than 10% or 20 feet, whichever is greater; (2) would involve installation of extra-standard number of new cabinets or a new shelter; (3) adding an appurtenance to edge of tower greater than 20 feet, or more than the tower's width, whichever is greater; or (4) would involve excavation outside current tower site.
- "Wireless tower or base station" based on NCA definitions.
- 90 days is the maximum presumptively reasonable time with which locality "shall approve" § 6409 (a) application.



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# The FCC

2. FCC's New Wireless Siting NPRM, WT Docket No. 13-238 (rel. Sept. 26, 2013).
   - Seeks comment in 4 areas:
     - Streamlining FCC's NEPA & NHPA review of DAS/small cell deployments.
     - Proposed exemption of temporary towers from FCC/FAA antenna registration and notification requirements.
     - Proposed rules to clarify § 6409(a).
     - Proposed supplementation of "Shot Clock" Ruling.
   - FCC's NEPA & NHPA review of DAS/small cells.
     - Extend exclusion for collocations on buildings to utility poles, light poles, and road signs.
     - Adopt new NEPA & NHPA categorical exclusions for DAS/small cell deployments.

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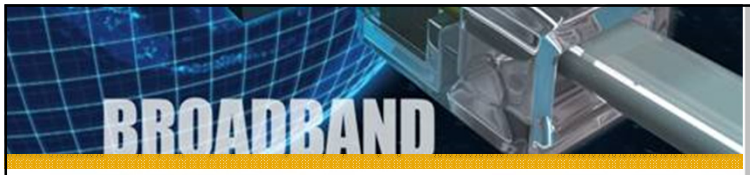


# The FCC

- Implementation of §6409(a).
  - Proposes to codify, and expand, much of Jan. 25 PN into rules.
  - What is an "existing wireless tower or base station"? FCC now suggests that buildings, water towers and poles may be.
  - Should "substantial change" in "physical dimensions" depend on type of structure involved?
  - May localities condition "approval" on compliance with building codes and land use laws?
  - Should § 6409 application be "deemed granted" if locality fails to act within a specified period of time?
  - Does "shall approve" raise federalism constitutional concerns?



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# The FCC

- Further Implementation of § 332(c)(7).
  - New, expanded definition of "collocation" subject to shorter, 90-day "shot clock."
  - Applicability of "shot clocks" to DAS.
  - Whether ordinances establishing preference for siting facilities on muni property violate § 332(c)(7)(B)(i)(I)'s anti-discrimination requirement.
  - Whether FCC should adopt a "deemed granted" remedy for "shot clock" rule violations.



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# The FCC

C. FCC's "E-Rate 2.0" NPRM.

1. Presents a host of issues.
2. Among them --
   - Elimination of P1/P2 distinction.
   - Expand dark fiber eligibility to include electronics and special construction to light fiber.
   - Allow FCDs to cover multi-year contracts.
   - Whether to condition receipt of E-Rate funds on a locality's ROW/permitting practices.
3. Reply comments will be due on a new date set by FCC after federal government shutdown ends.



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# The FCC

D. ACM's Petition Challenging AT&T's "PEG Product" (MB 09-13).

1. Argues that AT&T's PEG product violates Cable Act & FCC rules.
   - Represents impermissible operator "editorial control" of PEG.
   - Impermissibly discriminates against PEG vis-à-vis commercial channels.
   - Fails to provide "channel capacity" within meaning of Cable Act.
2. Among other arguments, AT&T defends on the ground that its U-Verse system is not a "cable system" because AT&T does not provide "cable service."
3. FCC has been sitting on the petition for nearly 5 years.



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# The FCC

E. Definition of "MVPD" and "Channel" under the Cable Act (MB 12-83).

1. Arises out of OVD's dispute with Discovery Channel.
2. Presents issues of whether OVDs are "MVPDs" & whether online video is a "channel."
3. PEG interests are concerned that an overly broad interpretation of "channel" could undermine the ACM Petition's argument that AT&T is failing to provide PEG "channel capacity."
4. Public interest groups mostly seek broad reading of "MVPD" and "channel" so that OVDs receive the benefits of MVPD status (primarily, access to programming).
5. Cable industry argues that OVDs aren't MVPDs because they are not facilities-based.
6. Most parties agree that issues should be addressed in a broader rulemaking.



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# The FCC

F. FCC NPRM on *Cable Television Technical and Operational Standards* (MB 12-217).

1. For the first time, FCC proposes cable system technical standards that apply to digital technology, including "non-QAM digital cable systems"—*i.e.*, those that "primarily utilize [IP] delivery over either fiber-optic cable or DSL-based transmission."

2. This would suggest (although the NPRM doesn't say so) that AT&T's U-verse is in fact a "cable system."

3. Comments and replies filed; decision still pending.



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# Questions?

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Tillman L. Lay

SPIEGEL & MCDIARMID LLP

1333 New Hampshire Avenue, NW
Washington, DC 20036

202.879.4022

tim.lay@spiegelmcd.com

www.spiegelmcd.com

SPIEGEL & MCDIARMID LLP

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