

Federal Communications  
Policy Update

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TATO 2021 Annual Conference  
Houston, Texas  
November 5, 2021

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## Overview

- ◆ The FCC
  - ◆ Section 253(d) Petitions
  - ◆ Wireless Infrastructure Proceeding
  - ◆ EBB
  - ◆ ECF
- ◆ The Hill
  - ◆ Broadband Funding
  - ◆ Other Broadband-Related Bills
- ◆ The Courts
  - ◆ *City of Eugene, et al. v. FCC*
  - ◆ *NCTA v. Frey*
  - ◆ *Environmental Health Trust, et al. v. FCC*
  - ◆ *League of California Cities, et al v. FCC*
  - ◆ Cases seeking to include streaming services in state video franchise laws

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## The FCC

Overview:

1. Commission Transition
2. Section 253(d) Petitions
3. Wireless Infrastructure Proceedings
  - ❖ 6409(a) Recon Petition
  - ❖ OTARD Broadband Hub Order
4. Emergency Broadband Benefit Program
5. Emergency Connectivity Fund

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## The FCC

Commission Transition

- ◆ 5-member Commission, appointed by the president and confirmed by the Senate
- ◆ As of October 2021:
  - ◆ One vacancy and an Acting Chair
  - ◆ 2-2 party split
- ◆ As of January 2022 (if no Senate confirmations):
  - ◆ Two vacancies and current Acting Chair no longer on Commission
  - ◆ 2-1 party split with Rs in the majority
- ◆ Biden Nominates Rosenworcel as Chair and Gigi Sohn as 3<sup>rd</sup> Dem FCC member.

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**The FCC**

Section 253(d) Petitions

- ✦ **Bluebird** – Alleges city’s per-foot ROW fee effectively prohibits telecom services in violation of Section 253(a)
  - ✦ Asks the FCC to find the fee of \$1.91/foot is prohibitive and is not saved by Section 253(c)
  - ✦ Industry commenters argue the *Small Cell Order’s* cost-based fee limitations apply to wireline facilities
  - ✦ Bluebird & industry commenters also argue per-foot ROW fees should be prohibited
  - ✦ Bluebird filed a Section 253(d) challenge against other MO cities in 2020

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**The FCC**

Section 253(d) Petitions

- ✦ **Mediacom** – Alleges city’s conduit network design and agreement to lease conduit to Google Fiber effectively prohibits telecom services
  - ✦ Alleges the network design and agreement discriminatorily favors Google Fiber and prevents Mediacom, the longstanding & dominant incumbent, from providing broadband services
  - ✦ Asks the FCC to stop network construction and rewrite the city’s agreement (which would conveniently insulate Mediacom from competition)
  - ✦ Proceeding is on hold pending settlement discussions

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The FCC

Wireless Infrastructure Dockets

◆ **6409(a) Rulemaking Reconsideration Petition:**

- ◆ FCC enlarged “site” to include 30 feet outside the site boundary, allowing excavation and deployment within the 30-foot zone to be eligible for shall-approve, deemed-granted, permit applications
- ◆ Effective January 4, 2021
- ◆ Reconsideration petition pending:
  - ✦ FCC does not have authority to expand a wireless site
  - ✦ Allowing these changes would be “substantial”

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The FCC

Wireless Infrastructure Dockets

◆ **OTARD Rulemaking**

- ◆ OTARD rules prohibit laws, regulations, or restrictions imposed by state or local governments or private entities that impair the ability of antenna users to install, maintain, or use over-the-air reception devices measuring one meter or less in diameter that provide services to the user’s premises
- ◆ New rules also cover “hub and relay” antennas used to transmit signals to and/or receive signals from multiple customer locations
- ◆ Effective March 29, 2021
- ◆ Appeal pending (*Children’s Health Defense, et al. v. FCC*)

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## The Courts

### Courts of Appeal

- ✦ *City of Eugene v. FCC* (9<sup>th</sup> Circuit)
  - ✦ Court upheld FCC's definition of "franchise fee" to include many non-monetary cable-related franchise obligations
  - ✦ Held that non-monetary obligations should be quantified at marginal cost, not fair market value
  - ✦ Rejected FCC's preemption analysis but upheld finding that Eugene, Oregon's fee imposed on broadband services as applied to cable operators is preempted
  - ✦ Petition for Supreme Court review filed November 1, 2021

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## The Courts

### Courts of Appeal

- ✦ *NCTA v. Frey* (1<sup>st</sup> Circuit)
  - ✦ Rejected NCTA's challenge to a Maine law requiring cable operators to:
    - ✦ Carry PEG channels on the basic service tier
    - ✦ Not separate PEG channels numerically from other local broadcast channels carried on the basic tier
    - ✦ Not diminish the signal quality of the PEG channel
    - ✦ Identify PEG channels in the electronic program guide in the same manner as local broadcast channels are identified
  - ✦ Also upheld requirement that local franchises include a line extension policy requiring the cable operator to make cable service available to every residence where there is a minimum density of 15 residences per linear strand mile of aerial cable

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## The Courts

### Courts of Appeal

- ✦ *Environmental Health Trust, et al. v. FCC* (D.C. Circuit)
  - ✦ Held the FCC's 2019 RF Order that left 25-year-old exposure guidelines largely unchanged was arbitrary and capricious and lacked a reasoned explanation
- ✦ *League of California Cities, et al v. FCC* (9<sup>th</sup> Circuit)
  - ✦ Appeal of FCC's 2020 Declaratory Ruling on the rules related to modifications of wireless structures subject to Section 6409(a) of the 2012 Spectrum Act
  - ✦ Briefing paused at FCC's request

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## The Courts

### District and State Courts

- ✦ Litigation pending by cities in AR, CA, GA, IL, IN, KS, LA, MO, NV, NJ, OH, TN, and TX alleging streaming services (Netflix, Hulu, etc.) are subject to state video franchise laws
  - ✦ *City of New Boston v. Netflix et al.*: TX Federal court dismissed the city's lawsuit, holding franchise fee provision of TX law only applies to franchise holders, and neither Netflix nor Hulu is a franchise holder; also found state law gives PUC, not municipalities, authority to determine who is subject to the law

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## The Hill

### Broadband Funding

- ◆ Infrastructure Investment and Jobs Act (H.R. 3684):  
Appropriates \$42.45 billion to states for an applications-based grant program
  - ◆ Local governments can be subgrantees and can apply for funding if the state opts not to apply
  - ◆ Includes the Digital Equity Act and an extension of the EBB program (to be called the Affordable Connectivity Program)
- ◆ American Rescue Plan Act (H.R. 1319): \$350 billion in emergency relief for states, local governments, tribes and territories; funding can be used for broadband infrastructure and digital inclusion projects.

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## The Hill

### Other Broadband-Related Bills

- ◆ •Broadband Incentives for Communities Act (H.R. 5058):
  - ◆ Introduced by Rep. Fletcher to establish an NTIA-run competitive grant program to assist local governments in providing efficient review and approval of zoning and permitting applications that facilitate the deployment of broadband infrastructure
  - ◆ Eligibility requires cost-based fees and “efficient” application processes (in other words, it rewards less local oversight)
  - ◆ Also requires NTIA to establish a “Local Broadband Advisory Council” to develop solutions to the challenges shared by local jurisdictions, covered entities, and infrastructure providers in facilitating wireless and broadband deployment

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## The Hill

### Other Broadband-Related Bills

- ✦ **Wireless Resiliency and Flexible Investment Act (H.R. 1058):**
  - ✦ Would amend Section 6409(a) to
    - ✦ codify the FCC's 60 day shot clock and deemed granted remedy as well as 2020 FCC rules stating when an application is submitted and received
    - ✦ Expands the definition of eligible facilities request to cover modifications that improve resiliency and benefit public safety, such as backup power or hardening

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