



# BROADBAND

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to the Broadband Future

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## FEDERAL LAW AND POLICY UPDATE

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TATOA Annual Conference  
San Antonio, Texas

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- The Hill
- Video Franchising
- Effective Competition
- Small Cell Mania – Mobilitee Petition and Its Offspring, BDAC and the Wireless and Wireline NPRMs
- OTMR
- Net Neutrality/Open Internet
  - Court
  - FCC
  - Congress
- Privacy
  - FCC
  - FTC
  - Court

- CRA resolution passed repealing FCC broadband privacy rules.
- MOBILE NOW Act (S. 19) – Passed by Senate
  - Watch out for possible ROW/wireless preemption add-ons in House
- Gigabit Opportunity (“GO”) Act. (S 1013/ HB 2870)
  - Sen. Capito (R-WV)/Rep. Collins (R-GA)
  - Could be rolled into infrastructure legislation
  - Ties tax breaks to local government’s “streamlining” of ROW and zoning requirements.

- Community Broadband Act (S. 742)
  - A bill to promote competition, to preserve the ability of local governments to provide broadband capability and services, and for other purposes
- Balancing the Rights of Web Surfers Equally and Responsibly (BROWSER) Act of 2017 – HR 2520
  - Rep. Blackburn (R-TN) introduces Internet privacy legislation
- HR 2479 (Leading Infrastructure for Tomorrow’s America Act) – which includes \$40 billion for broadband deployment
  - Again, watch out for ROW/wireless preemption, or “GO Act”-like add-ons

- **SPEED Act (S. 1988)**
  - Sponsored by Sen Wicker (R), Se. Masto (D)
  - Creates new exemptions from federal historical and environmental review
  - Directs GAO to develop new procedures for deployment of wireless on federal buildings, ROW & other property
  - Theoretically does not affect local/state authority
- **FCC Reauthorization Act**
  - Could provide a vehicle for attachment of other changes to law

- ▶ *Montgomery County v. FCC* (6th Circuit)
  - Appeal of FCC's *2d Video Franchising Order* and *Recon Order*. Case is a major victory for locals; what will FCC do on remand?
  - Court vacates, as inadequately justified, FCC's rulings that:
    - Costs of cable-related in-kind franchise requirements (such as PEG capacity and I-Nets) are a "franchise fee."
    - LFAs cannot regulate provision of non-cable services over a cable system ("mixed use" rule).
  - Court upholds FCC's ruling on franchise MFN clauses.
  - "On remand, the FCC should determine and explain anew whether, and to what extent, cable related exactions are 'franchise fees' under the Communications Act. And the FCC should do so expeditiously, rather than take another seven years to issue a proper order under the law."
- ▶ <https://ecfsapi.fcc.gov/file/0925163241137/FCC-17-120A1.pdf> FCC adopts cable system digital signal standards. Local enforcement critical.



# Effective Competition

## ▶ *NATOA v. FCC* (DC Circuit)

- Upholds FCC decision that flipped effective competition presumption.
- Effective competition presumed nationwide.
- With very few exceptions, this is the death knell for cable rate regulation and the uniform rate requirement.



## **Recurring FCC Theme: Local Governments Are the Problem, Not the Solution, to Broadband Deployment**

- The current FCC Chair and majority have repeatedly characterized local government ROW access and land use requirements as “barriers to [broadband] entry and investment.”
  - In many speeches
  - Mobilite Petition
  - Wireless and Wireline Barrier proceedings
  - BDAC formation and working groups.
  - Section 706 inquiry
  - MDU proceedings



# Small Cell Mania at the FCC

- ▶ *Mobilitie Petition, Wireless Barriers NPRM, and Wireline Barriers NPRM*
  - What industry wants (and FCC seems sympathetic):
    - Shorter (60-day) shot clock.
    - “Deemed granted” remedy for §§ 332 and 253 violations.
    - Limit ROW, attachment and application fees to costs.
    - Apply §§ 253/332(c)(7) to ROW access/municipal pole access.
  - Other issues (in *Wireline NPRM*):
    - Pole attachment rule revisions (including possibly OTMR).
    - Streamlined service discontinuance and copper retirement



# Small Cell Mania at the FCC

- ▶ *Mobilitie Petition, Wireless Barriers NPRM, and Wireline Barriers NPRM*
  - FCC expected to act in steps – with most local issues addressed after BDAC recommendations
  - But FCC expected to adopt a Report and Order, Declaratory Ruling and Further Notice of Proposed Rulemaking in Nov:
    - [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2017/db1026/DOC-347451A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db1026/DOC-347451A1.pdf) - draft
    - Main issues for localities: “streamlining” copper retirement
    - NPRM asks whether and how states and localities should be preempted to facilitate rebuilding after disaster
    - NPRM asks how to streamline abandonment of services too slow to qualify as broadband



# Small Cell Mania at the FCC

## ▶ BDAC

- Membership heavily tilted to industry
- 3 key working groups
  - Removing State and Local Regulatory Barriers Working Group
  - Model Code of Municipalities Working Group
  - Model Code for States Working Group
- BDAC “barrier” report likely on November 9; other reports likely later



# Small Cell Mania – the States

- ▶ Quickly spread to Texas.
- ▶ Many other states have also enacted various forms of small-cell legislation. Details vary, but legislation typically –
  - Grants ROW access.
  - Limits fees.
  - Sets shot clock-like deadlines.
  - Often create exemptions for wi-fi devices installed by cable operators on strand
- ▶ Consider in light of industry developments (Comcast Machine Q)

- ▶ District court upholds Louisville Metro's OTMR ordinance against AT&T's challenge.
- ▶ Other pending OTMR litigation:
  - Charter challenges Louisville Metro's OTMR ordinance.
  - AT&T and Comcast are challenging Metro Nashville's OTMR ordinance.
  - Frontier is challenging West Virginia's OTMR requirement.

# Net Neutrality - Consumer Choice

- In the Courts –
  - DC Circuit upholds *2015 Open Internet Order* and denies rehearing.
  - Industry is seeking cert.
- Before the FCC –
  - The Pai FCC issues an NPRM proposing to undo the *2015 Open Internet Order* and reclassify broadband as an “information service.”
  - Likely to act by year’s end.
  - GN Docket No. 17-142 Commission asks: are state and local laws that give tenants a right to choose providers a barrier to entry?
- On the Hill –
  - Talk of “compromise” net neutrality legislation; but action seems unlikely until dust settles on appeal of anticipated Pai FCC undoing of *2015 Open Internet Order*.



# Broadband Privacy

- ▶ Congress “un-does” the Wheeler FCC’s broadband privacy rules.
- ▶ Pai FCC believes broadband privacy should be handled by the FTC, not the FCC.
- ▶ 9th Circuit is rehearing *AT&T v. FTC* on the scope of the “common carrier” exemption in the FTC Act.
  - 9th Circuit panel had ruled that exemption applies to carrier and all of its services, not just common carrier services.
  - That interpretation would deprive FTC of all jurisdiction over any entity that provides any common carrier service.
  - Result would be no federal agency has jurisdiction over BIAS providers’ privacy practices.
- Some local jurisdictions adopting their own privacy rules (e.g., Seattle)



# FirstNet – Public Safety

- NTIA designates AT&T as FirstNet provider
  - 20 MHz Spectrum in 700 MHz band
  - May sell excess capacity
  - Access to \$6.5 billion to initially design, construct and operate
  - 25 years
- States may opt out but must develop network that is interoperable with FirstNet
  - Opt-in/opt-out deadline December 28
  - Thus far, 27 states (including Texas) have opted-in



# QUESTIONS AND CONTACT INFO



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