

Office of Telecommunications & Regulatory Affairs

Public, Educational, and Government (PEG) Program & Legislative - Regulatory Update

January 12, 2016

Cable/Video PEG Issues:

- Austin Public in coordination with Building Services, completed the major renovation of the facility including carpet replacement, studio floor tile installation, repainting, ceiling tile replacement, and conversion of internal/external lights to LED.
- For a complete update of Austin Public activities, visit <https://www.austinpublicaccess.org/>.
- On December 15, Council authorized staff to negotiate an interlocal agreement under which AISD will receive \$459,047.00 in PEG funding for capital equipment related to AISD's Educational Channel. The agreement is pending AISD board and city staff approval which is expected by February 1, 2017.

CITY REGULATIONS

Wireless Small Cell Communications Regulatory Coordination

The interdepartmental wireless study group and outside consultant Aero Solutions updated City management on 10/12 and City Council on 10/18 on policy recommendations for wireless small installations in the downtown ROW. The Small Cell Fee Ordinance was adopted by Council at its December 8, 2016 meeting, and the Administrative Rules covering the new wireless regulations were put out for the 30-day public comment period that began 11/07/17 and closed on 12/08/18. The final Administrative Rules covering the new wireless regulations in the ROW, Master License Agreement, and Site License Application will be published on 1/13/17. We estimate the submission of the first Master License Agreements, site license applications and corresponding power supply applications will occur at end of January, depending on the execution of the master license agreements by the wireless companies.

STATE ACTIVITY

TARA staff is working with Government Relations to prepare for the 2017 Texas Legislative Session that began January 10th.

NATIONAL ACTIVITY:

FCC Seeks Comments on Small Cell Deployment

On December 22, 2016, the FCC issued a Public Notice inviting public input on potential Commission actions to expedite wireless infrastructure deployment, including, but not limited to issuing a declaratory ruling similar to the new rules suggested in the Mobilitie, LLC petition to the FCC dated November 15, 2016. Such a ruling could severely limit municipal authority over public rights of way in several areas including sharply reducing the fees that wireless providers are charged for ROW access, limiting the time required for cities to process applications for ROW access; dictating the criteria used to approve or deny ROW access, and other rights that have been traditionally within the exclusive jurisdiction of cities. This type of ruling could also reduce franchise and license fees currently paid by other service providers like telecom and cable TV who have facilities in the city ROW. Comments are due February 6, 2017 with Reply Comments due March 8, 2017. NATOA and other municipal interest organizations are requesting the FCC to extend the Comment and Reply due dates. The full 15-page Public Notice can be found at: http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db1222/DA-16-1427A1.pdf. Additional details from the TEXAS CITIES LEGISLATIVE COALITION January 6, 2017 report can be found on pages 3-5 below.

National Telecommunications and Information Administration (NTIA) Seeks Comments on Census Questions regarding Computer and Internet Use

On January 9, 2017, NTIA requested comments on its proposal to add 58 questions to the U.S. Census Bureau's November 2017 Current Population Survey (CPS) to gather reliable data on broadband (also known as high-speed Internet) use by U.S. households through the Computer and Internet Use Supplement ("the Supplement"). Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden on respondents of providing the requested information. The comment period will end on March 10, 2017. The complete release can be found at: <https://www.federalregister.gov/documents/2017/01/09/2017-00154/proposed-information-collection-comment-request-computer-and-internet-use-supplement-to-the-census>.

AT&T and Time Warner have agreed to an \$85 billion purchase deal

On December 7, the Senate Judiciary Subcommittee on Antitrust, Competition Policy & Consumer Rights held a hearing on the proposed purchase which is still pending. According to Brian Stelter in CNN Money, the purchase, announced Saturday evening, will help AT&T expand beyond wireless and Internet service into programming. Time Warner (TWX) is the parent of CNN, TNT, HBO, the Warner Bros. studio, and other channels and websites. AT&T (T, Tech30), which dates back to the invention of the telephone in 1876, is one of the country's largest providers of wireless phone and Internet service that also recently acquired the DirecTV satellite TV business. The deal will be subject to a review by government regulators but approval in 2017 is likely despite objections that have been expressed by President-Elect Trump.

FCC Adopts Broadband Consumer Privacy Rules

The new rules empower consumers to decide how their data are used and shared by broadband providers. Here is the link to the full rules and order adopted October 27, 2016 and released November 2, 2016 <https://www.fcc.gov/document/fcc-releases-rules-protect-broadband-consumer-privacy>. Reversal of the rules by the new Congress and Trump administration is likely.

Set Top Box Competition

No action was taken on set top box competition prior to Congressional adjournment, and future action in the new session is unlikely. FCC Chairman Wheeler hopes to schedule a vote on a rule to require cable providers to allow subscribers to change their source of cable boxes and related apps by year's end. A final vote on the FCC order originally set for September 29, was cancelled. If the order is approved, the industry would then have two-years for full implementation. By a 3-2 vote, at its February 18 open meeting, the FCC approved issuing a Notice of Public Rule Making to let consumers change out their cable boxes for cheaper devices and apps, and the approval was endorsed by the White House. Consumer groups generally support the proposed rule, providing that the rules protecting viewer privacy rights are also applied to third party device manufacturers and suppliers.

FTC Seeks Rehearing En Banc of Dismissal of AT&T "Throttling" Case

As reported in Kelley Drye's CommLaw Monitor, On October 13, 2016, the Federal Trade Commission (FTC) filed a petition in the U.S. Court of Appeals for the Ninth Circuit requesting a rehearing en banc of the court's decision in the FTC's case against AT&T alleging that the company dramatically reduced – or "throttled" – data speeds for certain customers on unlimited data plans once those customers had used a certain level of data. The request, if granted by the court, would result in the full contingent of judges hearing the case, likely early this year which could reset the jurisdictional boundaries between the FTC and the Federal Communications Commission (FCC) with respect to phone companies, broadband providers and other common carriers.

Comcast & AT&T Sue Nashville

Comcast joined the AT&T suit against Nashville's "one touch" make ready ordinance designed to speed aerial construction by new competitors like Google Fiber. According to Jon Brodtkin in the October 26, 2016 issue of Ars Technica, Comcast's complaint in US District Court in Nashville is similar to one already filed by AT&T last month. Both ISPs are trying to invalidate a One Touch Make Ready ordinance that lets new ISPs make all of the necessary wire adjustments on utility poles themselves instead of having to wait for incumbent providers like AT&T and Comcast to send work crews to move

their own wires. The ordinance was passed largely to benefit Google Fiber, which is offering service in Nashville and says that it hasn't been able to deploy faster because it is waiting to get access to thousands of poles.

H.R. 2666, the No Rate Regulation of Broadband Internet Access Act--No recent developments

On April 15, 2016, the U.S. House of Representatives voted 241 to 173 to pass H.R. 2666, the No Rate Regulation of Broadband Internet Access Act, a bill that would restrict the FCC's ability to enforce key net neutrality protections. The bill was placed on Senate Legislative Calendar under General Orders Calendar No. 431. According to the Electronic Frontier Foundation, the White House has promised to veto the bill if it passes the Senate.

S 2644 – FCC Reauthorization Act of 2016 –No recent developments

(Thune – R-SD)(reauthorized FCC for FY 2017-2018; provisions include: require FCC to begin proceeding on cramming; promote broadband access for veterans; report on impact of Universal Service Fund (USF) on tribes; require report on Rural Health Care Program; require report on broadband deployment and subscription data collection services); Unanimously passed by the Senate Commerce Committee on April 27, 2016; includes S 2553 and S 2558. Placed on Senate Legislative Calendar under General Orders Calendar No. 637 on September 20, 2016.

HR 5893 - No Regulation Without Representation Act of 2016- No recent developments

A bill introduced by Rep. Jim Sensenbrenner, R-Wis., that would not require merchants to collect sales tax or report sales unless the person or company is "physically present in that state" during the tax period. The bill is in the Committee on Finance.

Net Neutrality – No recent developments

On June 14th, the DC Federal Court of Appeals ruled in a 2-1 decision that internet service should be treated as a telecommunications service allowing the FCC to prevent broadband providers from restricting internet access. AT&T and others have said they will continue to appeal this ruling.

TEXAS CITIES LEGISLATIVE COALITION

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Telecommunications:

On December 4th, the DC Federal Court of Appeals heard initial arguments between the FCC and industry groups who are opposed to allowing the FCC to prevent undue restrictions to internet access by broadband providers. The court will rule on the case later in 2016. ??????

On February 26, 2015, the FCC ruled in favor of net neutrality by reclassifying broadband access as a telecommunications service and thus applying Title II (common carrier) of the Communications Act of 1934 to Internet service providers.

Major Provisions of Title II that will apply to broadband providers:

- The proposed Order applies "core" provisions of Title II: Sections 201 and 202 (e.g., no "unjust and unreasonable practices"
- Allows investigation of consumer complaints under section 208 and related enforcement provisions, specifically sections 206, 207, 209, 216 and 217
- Protects consumer privacy under Section 222
- Ensures fair access to poles and conduits under Section 224, which would boost the deployment of new broadband networks
- Protects people with disabilities under Sections 225 and 255
- Bolsters universal service fund support for broadband service in the future through partial application of Section 254.

Major Provisions of Title II that are Subject to Forbearance (would not apply to broadband):

- the Order makes clear that broadband providers shall not be subject to tariffs or other form of rate approval, unbundling, or other forms of utility regulation
- Universal Service Contributions: the Order DOES NOT require broadband providers to contribute to the Universal Service Fund under Section 254

- The Order will not impose, suggest or authorize any new taxes or fees – there will be no automatic Universal Service fees applied and the congressional moratorium on Internet taxation applies to broadband.

On February 26, Angele A. Gilroy with the Congressional Research Service issued an extensive report on the Net Neutrality Debate that can be found at <http://fas.org/sgp/crs/misc/R40616.pdf>.

FCC takes first step towards massive preemption of local authority. On December 22, 2016, the Federal Communications Commission (FCC) issued a notice seeking comment on “ways in which the Commission could promote wireless infrastructure deployment.” Comments on the notice are due February 6, 2017 and reply comments are due March 8, 2017.

The United States Conference of Mayors, the National League of Cities, the Government Finance Officers Association, the International Municipal Lawyers Association, and the National Association of Counties this week filed a motion for an extension of the comment deadline to April 7, 2017 and the reply comment deadline to June 7, 2017. Local governments concerned about the short comment period for such a potentially far reaching notice should file their own brief comments in support of the motion for an extension of the comment period.

The Commission issued the notice in response to a petition for declaratory ruling filed November 15, 2016 by Mobilitie, a California wireless infrastructure company. In their petition, Mobilitie argues that local governments consistently create a barrier to the deployment of advanced wireless technology, especially Distributed Antennae Systems (DAS), which are a key component of the next generation of wireless communications service. In general, DAS infrastructure is considerably smaller than traditional cell phone towers but must be deployed much more densely and in a manner that requires intensive use of public rights-of-way. The Mobilitie petition goes on to ask the FCC to issue a declaratory ruling regarding interpretation of the Communications Act to speed deployment of advanced wireless infrastructure.

More specifically, Mobilitie argues that the Commission should:

- Interpret “fair and reasonable compensation” to limit municipal right-of-way charges to costs related to issuing permits and managing the rights-of-way and no more;
- Interpret “competitively neutral and nondiscriminatory” to mean charges that do not exceed those imposed on other providers for similar access; and
- Interpret “publicly disclosed by such government” to require local governments to disclose to a provider seeking right-of-way access the charges previously assessed on others for access.

In their petition, Mobilitie argues that FCC action to preempt local authority is critical to the deployment of DAS and other next generation wireless communication infrastructure.

Local government organizations vehemently disagree. They argue that local right-of-way management does not discourage wireless deployment, serves numerous public policy goals, and ensures that rights-of-ways are managed in a manner that allows for all users to safely and efficiently use public rights-of-way. They also argue that contrary to Mobilitie’s portrait of local governments as obstinate barriers to deployment, most local governments actively seek deployment of advanced wireless communication in their community and have gone to great lengths to proactively accommodate the deployment of infrastructure for next generation of wireless communications, including updating their ordinances and creating policies and procedures to accommodate the influx of permit applications. (Beyond these arguments, there is also the argument that the FCC does not have the authority to take action in this area in the first place.)

Local governments concerned with the FCC’s notice and the threat it poses to local authority should plan to file comments on this notice, either on their own or as part of a group or organization. The FCC will welcome new Commissioners in the coming year and is expected to have a majority that is hostile to local authority for the foreseeable future. So, any final rule or regulation issued in this matter will probably be favorable to industry and will considerably preempt local authority. Nevertheless, it is important to establish a strong written record on this and future FCC notices as they will bolster court challenges to Commission rulings and regulations that preempt local authority.

In response to Mobilitie’s request, the notice issued by the FCC is essentially an invitation to industry to provide a “wish list” of how they would like the Commission to preempt local authority.

More specifically, the notice asks for comments on the following issues.

How Local Land-Use Regulations or Actions Affect Wireless Infrastructure Deployment

- Do the concerns that motivated the Commission in 2009 and 2014 (which led the FCC to impose time limits for approval of cell tower permit application and forced local governments to accept all co-location applications for cell phone towers) still exist? Have they become more or less salient?
- Which, if any, local government actions (or inaction) have the effect of hindering the introduction of new services, obstructing efforts to improve existing services or make networks more robust, or deterring prospective providers from entering markets?
- How much time typically elapses between the filing of complete facility siting applications and approval or denial of such applications by local land-use authorities?
- How long does it take local land-use authorities to process DAS and macrocell facilities?
- Are there greater coverage gaps in specific localities that process applications more slowly or that have more stringent requirements?
- How often do local land-use authorities approve or deny facility siting applications? Why?
- Are there specific facility siting ordinances that are problematic? Any that could serve as models?
- Do local laws or requirements that thwart wireless facility deployment have other legitimate justification?

Potential Issues to Address

Should the Commission:

- Take action to attempt to reconcile competing interpretations by the courts of the Communications Act regarding local authority? (presumably in favor of industry)
- What is the reasonable period of time for the review of facility siting applications for DAS and other small cells? Should local governments process them in "batches"?
- What should local governments charge for the use of public rights-of-way by wireless providers? Is Mobilitie's assertion of excessive, multiple, and unfair fees well-founded?