

## Office of Telecommunications & Regulatory Affairs

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

April 12, 2017

#### Cable/Video PEG Issues:

- For a complete update of Austin Public activities, visit <https://www.austinpublicaccess.org/>.
- TARA is working with the PEG channel managers to prepare a Request for Proposal (RFP) to purchase about \$200,000 in additional equipment for the City Hall GAATN room master control system that feeds the 7 PEG channels to the 4 cable/video service providers in Austin.

#### CITY REGULATIONS

##### Wireless Small Cell Communications Regulatory Coordination

The City Manager published the final rules on 3/6/2017, and the final rules were released to industry on 3/8/2017. Master License Agreements are now being submitted, and walk-outs, power requests, and site applications can be scheduled.

#### STATE ACTIVITY

##### SB 1004 – Hancock & HB 2838 - Geren

A committee substitute for SB 1004 was passed by the full Senate on April 6, 2017 and referred to the House for consideration. The identical bills that were filed on 3/06 and 3/03 are sought by wireless industry vendors ("network providers") to quickly install small cellular equipment ("network nodes") and/or towers in a city's rights-of-way and in the process reduce city authority. They would make various findings related to the deployment of cellular network nodes in the public rights-of-way and thereby reduce municipal authority over those rights-of-way. Here is a link to the detailed analysis provided by the Texas Municipal League, [https://www.tml.org/legis\\_updates/the-pucs-sustained-bombardment-of-city-authority-private-profit-from-free-use-of-city-rights-of-way](https://www.tml.org/legis_updates/the-pucs-sustained-bombardment-of-city-authority-private-profit-from-free-use-of-city-rights-of-way).

##### Public Utility Commission of Texas

The PUC Administrative Law Judge recommended that the PUC rule in favor of ExteNet in its complaint against the City of Houston regarding charges for small cell deployment. The Commission has yet to rule on the complaint.

On Friday, April 7, Crown Castle filed a similar complaint against Austin with the PUC. The complaint asserts the same general issues that have been filed against Houston, Dallas, and Beaumont—namely that Tx. Loc. Gov't Code Chapter 283 requires the City to allow Crown to use the rights of way without compensation, without a license agreement, and to install components of small cell/DAS wireless networks.

#### NATIONAL ACTIVITY:

##### Net Neutrality –

New FCC Chairman Pei stated on February 28, 2017 that under his direction, the FCC would move to reverse the heavy handed approach toward broadband regulation taken by the FCC under the previous FCC Chairman Wheeler. Pei promised to take a "light touch approach" to reverse the "utility-style regulation", (aka net neutrality).

On June 14<sup>th</sup>, 2016, 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. Here is a link to the ruling: [https://www.cadc.uscourts.gov/internet/opinions.nsf/3F95E49183E6F8AF85257FD200505A3A/\\$file/15-1063-1619173.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/3F95E49183E6F8AF85257FD200505A3A/$file/15-1063-1619173.pdf).

### **S.J. Res. 34 & H.J. Res. 86 to reverse FCC rules on Net Neutrality**

Introduced by Sen. Jeff Flake (R-AZ)—chair of the Senate Judiciary Subcommittee on Privacy, Technology and the Law—and Rep. Marsha Blackburn (R-TN7), Senate Joint Resolution 34 and House Joint Resolution 86 are companion bills that nullify the FCC's rule requiring ISPs to obtain customer permission before using the customer data. The bill was passed by the Senate on March 24, and by the House on March 28, with the President signing the resolution on March 29. The bill rolled back the FCC requirement, (that was scheduled to take effect later this year), to require internet service providers like Spectrum, Verizon, and Charter to obtain permission from their customers before selling any of the customer data. The bill did not refer the regulatory authority on broadband from the FCC to the Federal Trade Commission, but FCC chairman Pei is reported to be considering this change.

### **FCC Wireless Infrastructure Notice of Proposed Rule Making (NPRM)**

On March 30, 2017, the FCC issued a NPRM seeking comments on the regulatory impediments to wireless network infrastructure investment and deployment, and how we may remove or reduce such impediments. The notice has the potential to establish new FCC rules that would reduce municipal authority over placement of wireless infrastructure in its public ROW and roll back the protections provided by the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA), as they relate to wireless infrastructure deployment. Comments are due 30 days after publication of the NPRM in the Federal Register, and reply comments are due thirty days after the initial comment due date. The City will file comments in support of municipal rights to manage its public ROW. The FCC Fact Sheet on this NPRM can be found at [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2017/db0330/DOC-344160A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0330/DOC-344160A1.pdf).

### **FCC Seeks Comments on Small Cell Deployment**

The final FCC Order is now pending. 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. This is a significant proceeding. Comment due dates have been revised from February 6, 2017 to March 8, 2017, with Reply Comments now due April 7, 2017. The City of Austin filed comments along with NATOA and other national associations defending municipal rights and disagreeing with Mobilitie's contention that cities restrict wireless infrastructure deployment.

The full 15-page Public Notice can be found at: [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2016/db1222/DA-16-1427A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db1222/DA-16-1427A1.pdf).

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 Mobilite'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 Mobilite'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 macro-cell 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 Mobilite's assertion of excessive, multiple, and unfair fees well-founded?

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

AT&T announced on April 10, 2017 that it was buying the wireless holding company Straight Path Communications for \$1.6 billion as part of the company's efforts to continue building out its 5G spectrum holdings. According to the New York Times, AT&T's proposed \$85 billion merger with Time Warner is being reviewed by antitrust officials at the Justice Department. Republicans are expected to be generally more permissive of mergers, but the outcome is uncertain. New FCC chairman Pei has not commented on the impact of the sale on whether FCC review would be forthcoming. According to Brian Stelter in CNN Money, the purchase 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 Trump during the campaign.

**Federal Trade Commission Petition for Rehearing En Banc of Dismissal of AT&T “Throttling” Case—No recent developments**

In January 2017, judges in the Northern District of California, agreed with AT&T’s motion to dismiss the FTC petition to rehear the AT&T throttling case, saying that the FTC does not have jurisdiction over telecom carriers. 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 decision reaffirms FCC’s classification of broadband as a telecom service.

**National Telecommunications and Information Administration (NTIA) Seeks Comments on Census Questions regarding Computer and Internet Use—No recent developments**

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>.

**Comcast & AT&T Sue Nashville—No recent developments**

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.