

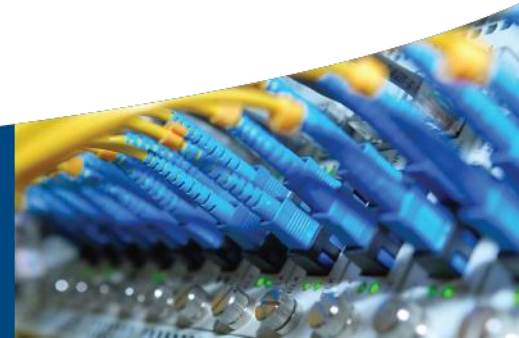
Existential Threats to Cable Franchise Fees and other Municipal Rights-of-Way Revenue

VATOA Call
October 30, 2015

PRESENTED BY

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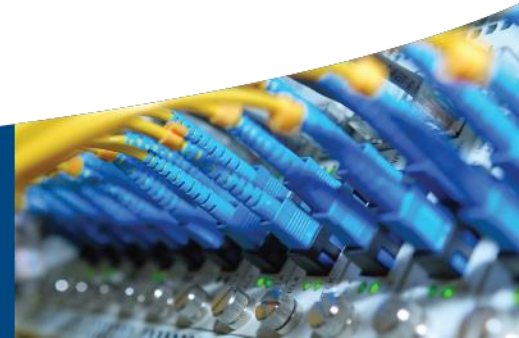


Presenter

Gerry Lederer, not Soren Kierkegaard

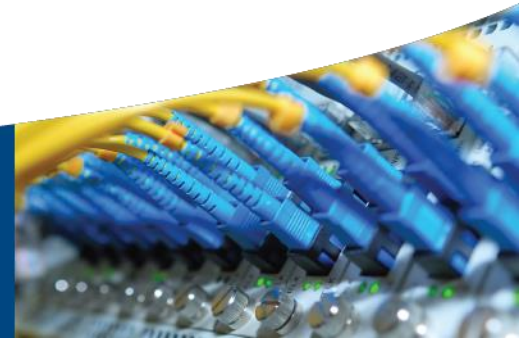


Pertaining to [existence](#), not the study of the evil side of human life.



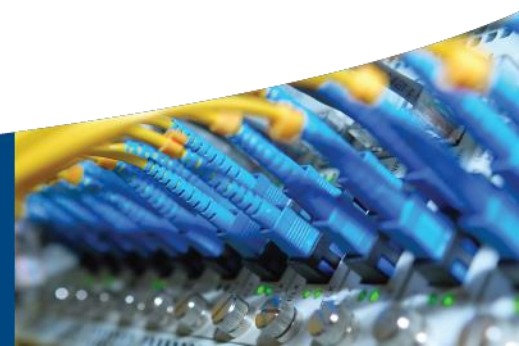
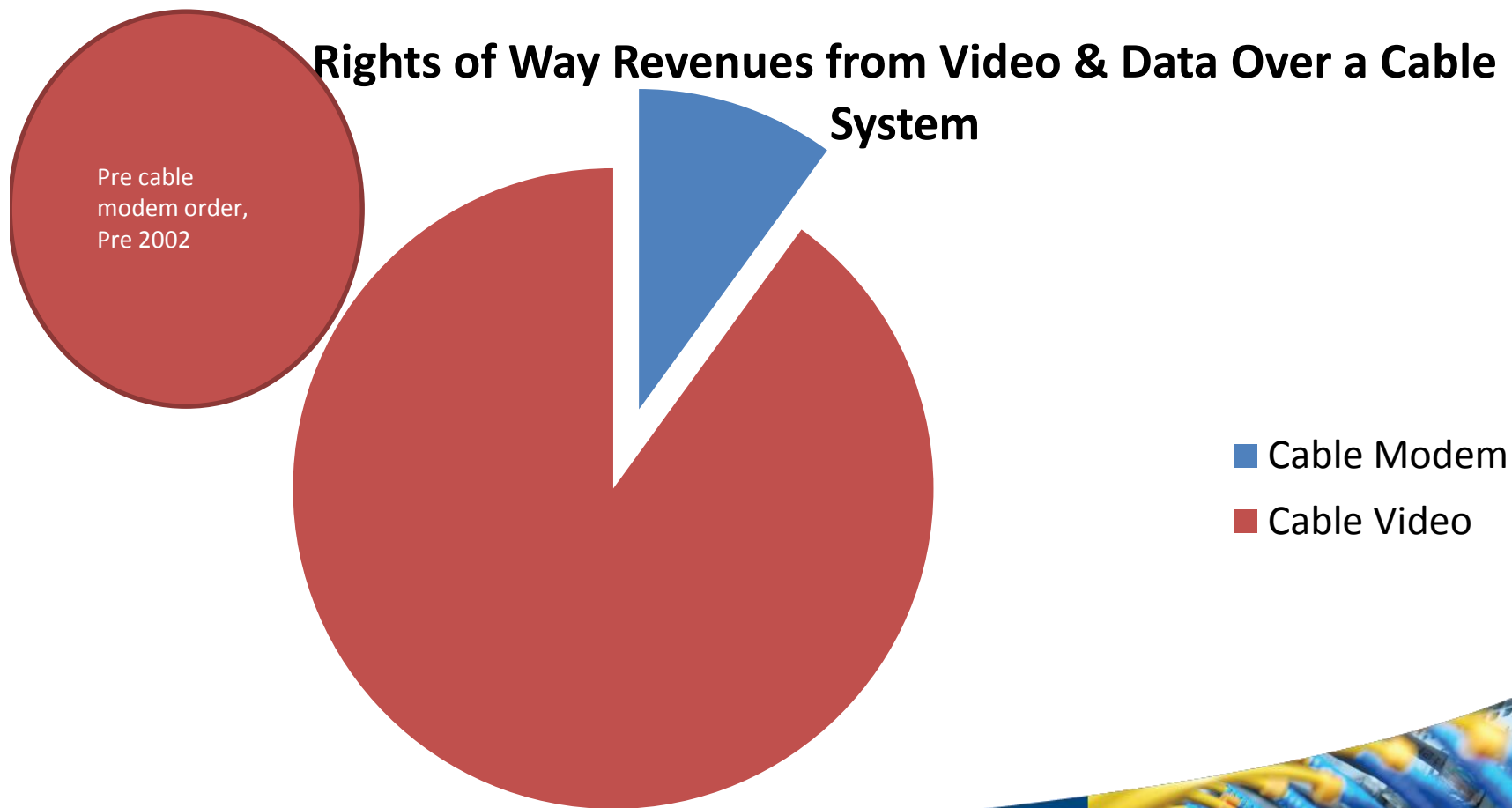
Understanding the Threat by Naming It

- Cable Modem Order
- OTT MVPD
- Footnote in Net Neutrality order
- Section 621 Order
- Internet Tax Freedom Act

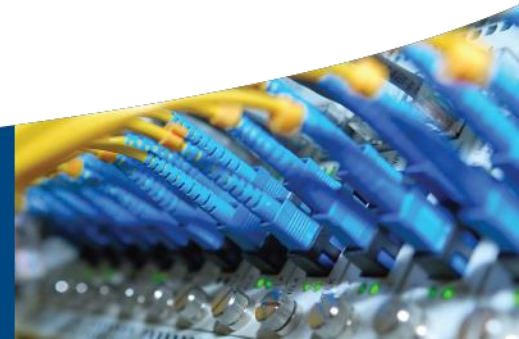
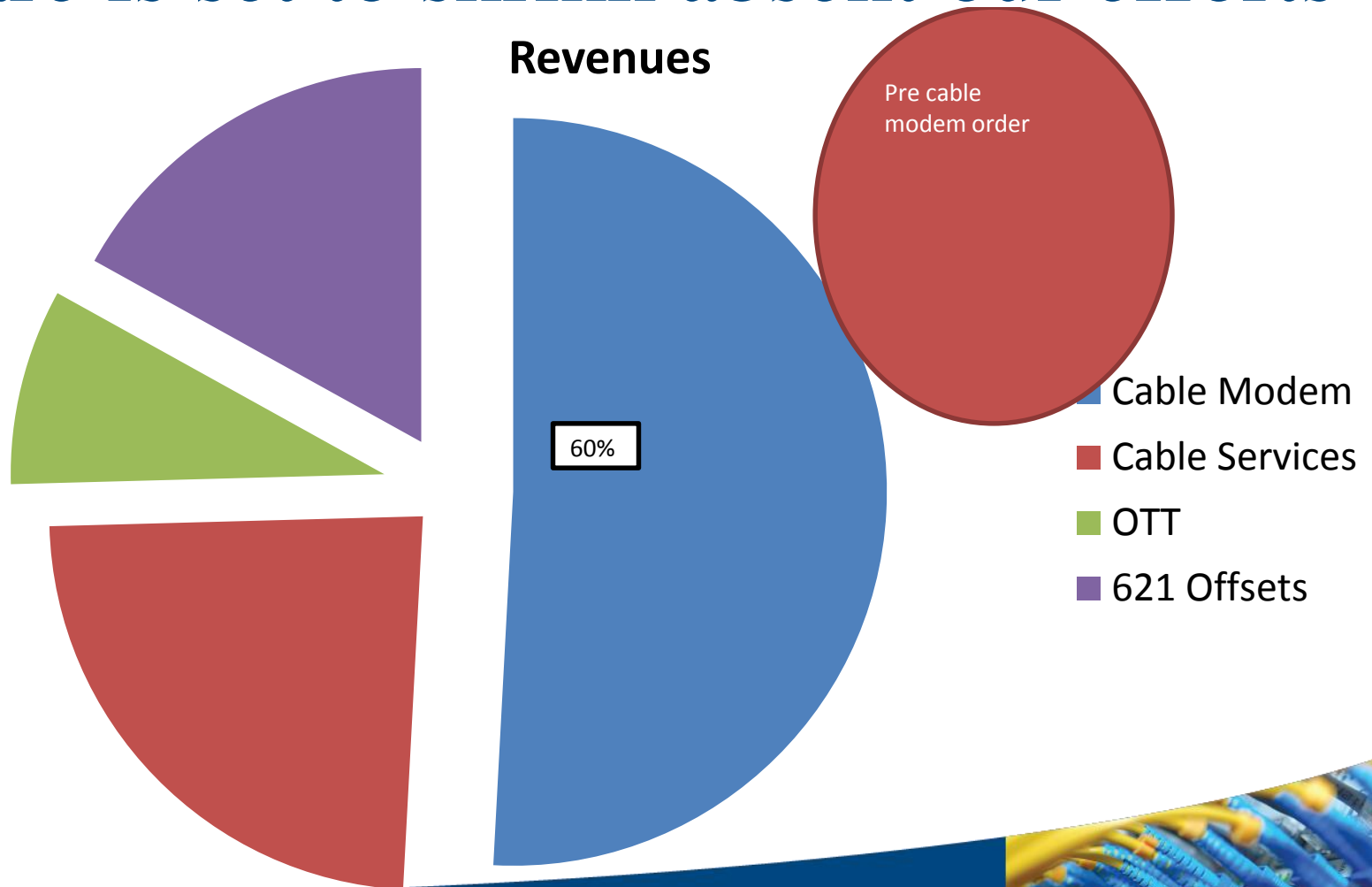


The Pie has Grown but Not Local Government's Share

Rights of Way Revenues from Video & Data Over a Cable System

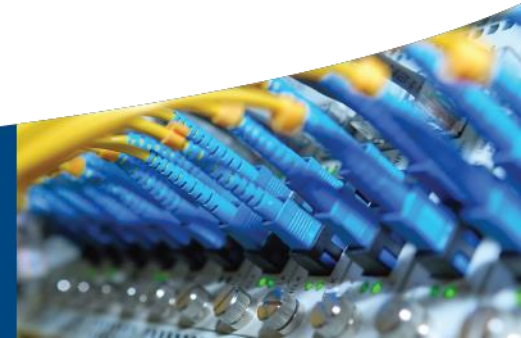


The Pie May Stabilize but Local's Share is set to shrink absent our efforts



Key Points

- Federal communications laws, combined with changes in technology, increasingly affect:
 - Local authority to obtain fair compensation for use of valuable public property (the rights of way), and other key revenue streams (tax laws).
 - The availability of adequate communications services to every member of your community, and the adequacy of public safety networks.
 - Local ability to incentivize deployment of broadband facilities, and to deploy municipal networks.



A Short Bit of History...

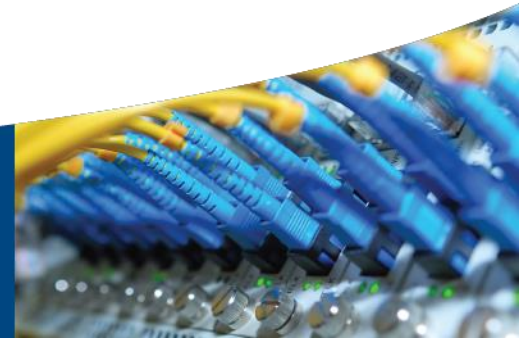
- Communications law was divided into “silos” – different rules applied to different types of communication:

Title II	Common Carrier
Title III	Television/radio services/wireless citing
Title VI	Cable
What Title (I, II or VI)	Information Services



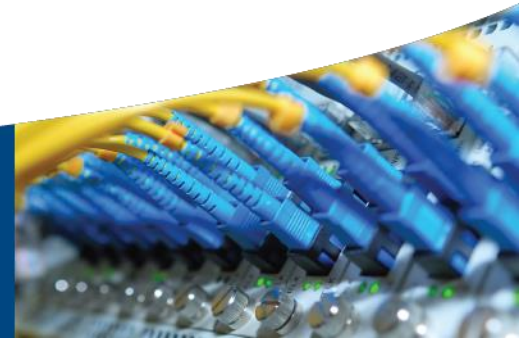
A Short Bit of History...

- Legal obligations tied to definitions, but technology is making the “silos” obsolete:
 - Video now delivered over many platforms;
 - Operators are seeking relief from all common carrier obligations, and to abandon the public switched telephone network (PSTN) at state and federal levels.
- There is a strong national push for deployment of broadband facilities where rights/obligations of providers are unclear.



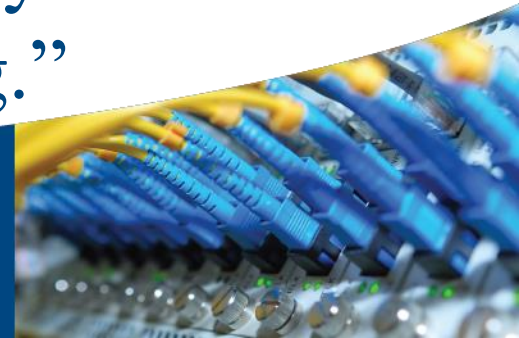
Understanding the Threat by Naming It

- Cable Modem Order
- **OTT MVPD**



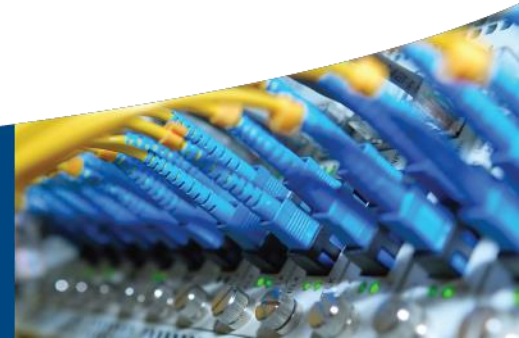
FCC OTT MVPD NPRM

- Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, Docket No. MB 14-261
- <https://www.fcc.gov/document/commission-adopts-mvpd-definition-nprm>
- Formal pleading cycle closed, *ex partes* permitted.
- Possible decision late this year/next year.
- Colloquially – the “OTT Proceeding.”



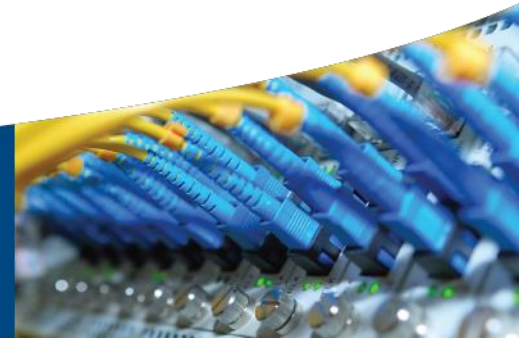
What Is OTT?

- FCC definition in rulemaking: “linear video services that travel over the public Internet and that cable operators do not treat as managed video services on any cable system.”
- Linear = scheduled and virtually simultaneous with transmission - not like (traditional) NetFlix or iTunes.



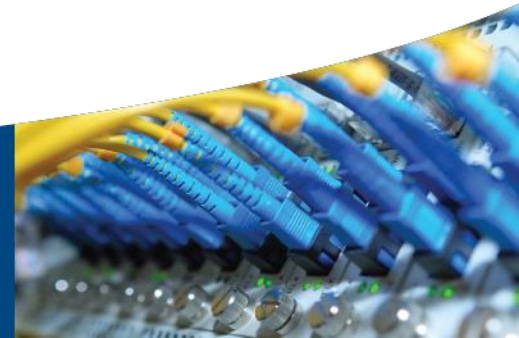
Main Issues Have Nothing To Do With Localities

- Main issue: What is a multi-channel video service provider?
- If companies providing video via the public Internet are MVPDs, they can obtain access to programming not otherwise available.
- Supporters see this as a way to introduce competition into video marketplace.



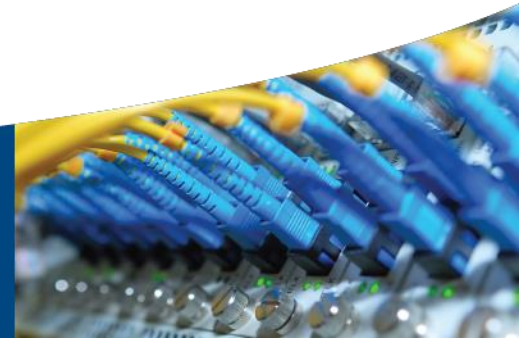
Good News...

- FCC concludes that an entity that uses “Internet Protocol” to deliver managed video services (AT&T, CenturyLink and so on) ARE cable operators and ARE subject to cable regulations and requirements.



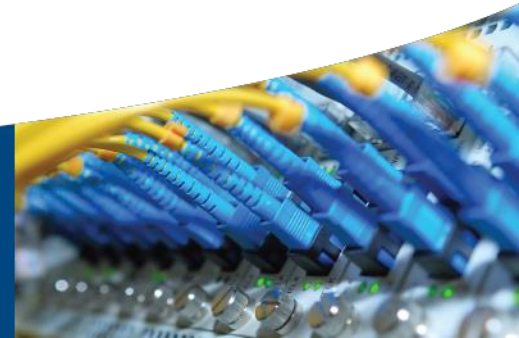
When Cable Operator Provides Service OTT Is Service a Cable Service?

- “Video programming services that a cable operator may offer over the Internet should not be regulated as cable services.”
- “If a cable operator delivers video programming service over the Internet, rather than as a managed video service over its own facilities, we tentatively conclude... this entity would be... a non-cable MVPD under our proposed Linear Programming Interpretation with respect to its OTT service.”
- An OTT service, if provided to consumers without regard to whether they subscribe to the cable operator’s managed video service, would be a non-cable MVPD service inside and outside of the operator’s footprint....



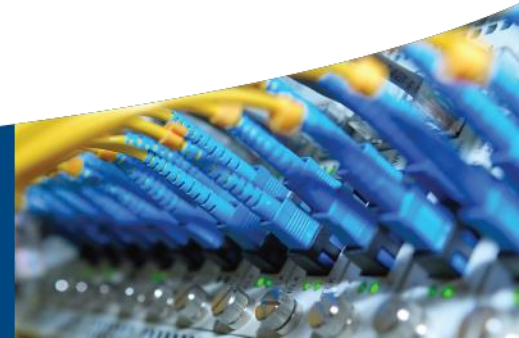
Is OTT Provided by Third Party Subject To Franchise Fees?

- Traditional federally authorized franchise fees reach “Cable Operators”: entities that own or control cable systems; fee reaches revenues derived by from operation of the cable system to provide cable services.
- Cable Act says: nothing in Cable Act limits right of locality “to impose a... fee...on any person (other than a cable operator) with respect to cable service or other communications service provided by such person over a cable system...” if fee NOT received by cable operator 47 USC Section 542(h) - but may be other state and federal limits



Why We Care

- If not “cable service,” then no franchise fees or PEG support under Cable Act.
- If not cable service, PEG fees can’t be used to support OTT.
- If not cable service not subject to consumer protections – at least if the **Section 621 Order** on reconsideration is upheld.
- Emphasizes importance and risk of defining terms critical to franchise benefits (the term “channel,” for example).
- Complicates enforcement issues.



Is There A Way To Protect Local Compensation/the Public?

- In many cases, state law limits ability to obtain compensation for certain types of systems (telephone and telegraph systems) – but classic telephone system may be abandoned.
- Cable companies argue Cable Act permits operator to build a cable system and provide any service desired over that cable system without paying any additional compensation.
 - Hundreds of thousands of wireless devices are being installed mid-strand.



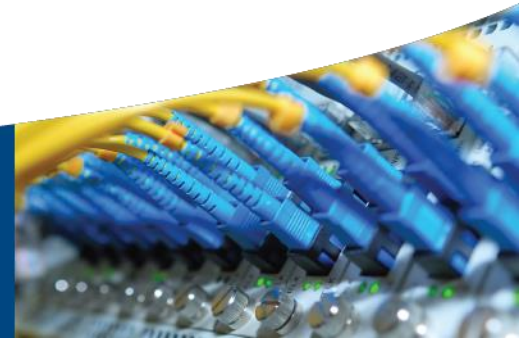
Case to Watch...

- *City of Eugene v. Comcast of Oregon II, Inc.* S062816 (pending decision before Oregon Supreme Court) appeal from *City of Eugene v. Comcast of Oregon II, Inc.*, 263 Or App 116, 149, 333 P3d 1051 (2014).
- Eugene imposes fee under *state law* for use of rights of way to provide Internet services *in addition* to cable franchise fee under cable franchise.
- Appeals court upheld that fee.
- Comcast contends cable franchise prohibits any additional fees for use of rights of way by cable system – and that fee is barred by Internet Tax Freedom Act.



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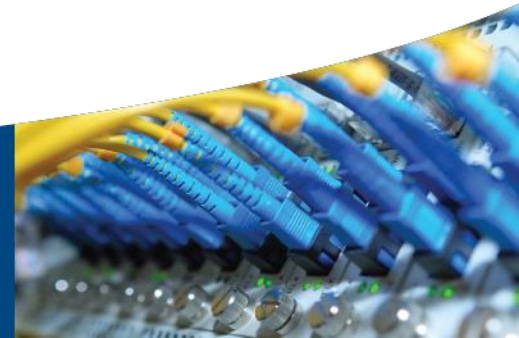
Other Threats To Local Authority

- FCC has been asked to declare that right of way compensation is limited to cost.
- “...we do not believe that the classification decision... would serve as justification for a state or local franchising authority to require [a cable operator]... to obtain an additional or modified franchise... or to pay any new franchising fees,” quoting letter from cable association that no add’l fees appropriate as “broadband equipment that adds no appreciable burden to the rights of way.” Footnote 1285, *Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601 (2015), *app. Pending, USTA v. FCC*, No. 15-1063 (D.C. Circuit).



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- **Section 621 Order**



2nd 621 Order

Federal Communications Commission

FCC 15-3

Before the
Federal Communications Commission
Washington, D.C. 20554

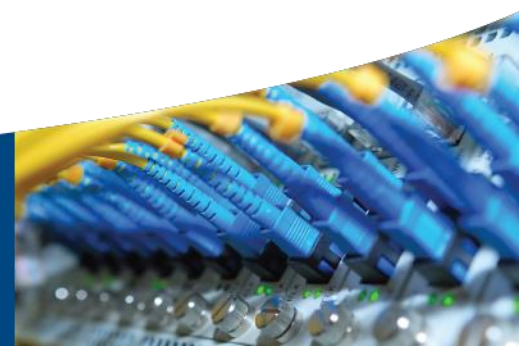
In the Matter of)
)
Implementation of Section 621(a)(1) of the Cable) MB Docket No. 05-311
Communications Policy Act of 1984 as amended)
by the Cable Television Consumer Protection and)
Competition Act of 1992)

ORDER ON RECONSIDERATION

Adopted: January 20, 2015

Released: January 21, 2015

By the Commission:



Appeal of the Commission's Second 621 Order

- Almost a decade ago, the FCC adopted two orders “implementing” Section 621 of the Cable Act (the provision that confirms local authority to issue one or more cable franchises).
- Among other things, the order addressed:
 - What constitutes a “franchise fee” or a credit against “franchise fee,” and
 - Scope of local authority over “mixed use” systems – systems that provide more than cable service.



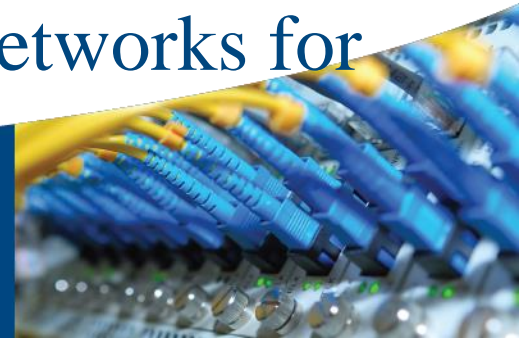
Appeal of the Commission's Second 621 Order

- The first order was intended to prevent localities from insisting that new entrants agree to terms the FCC thought deterred entry.
- The second order decided what parts of the first order applied to incumbents, and rephrased some parts of the first order.
 - Upheld by the courts, but the second order is now subject to court review.
- The Commission recently issued its reconsideration order, leaving its second order basically intact.



Significance of Commission's Second 621 Order

- **FCC held** *“Non-incident in-kind fees must count toward the 5 percent franchise fee cap, and does not limit the franchise fee exception to in-kind payments that are unrelated to cable service.”*
- Operators are already arguing that under the Second Order and the Reconsideration that they are entitled to deduct the value of courtesy services from franchise fees. (Services to schools and government buildings.)
- Operators argue that the second order means localities cannot require institutional networks for data transport.



BREADTH OF ORDER

- Order claims it only applied to local franchises;
 - Nevertheless, the Commission states interested parties can request the Commission revisit this issue and are “free to present evidence that the findings in [either the *621 Order* or the *Second Report and Order*] are of practical relevance to the franchising process at the state-level and therefore should be applied or extended accordingly.”
 - Footnote continues that “in litigation involving a cable operator and a franchising authority, a court anywhere in the nation would be required to apply the FCC’s interpretation of any provision of the Communications Act,” including those interpretations in the *621 Order* and the *Second Report and Order*.



What is an Incidental Expense,

Included in Definition

- Payments for bonds
- Security funds
- Letters of credit
- Insurance
- Indemnification
- Penalties
- Liquidated damages
- Other “minor” expenses

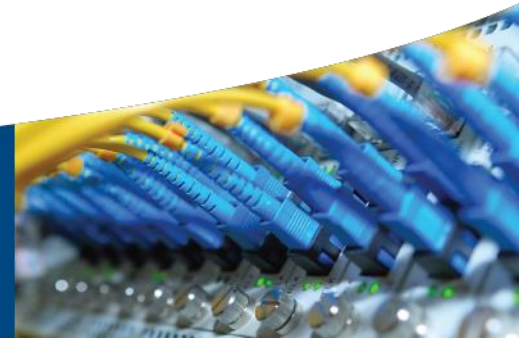
Not included

- Consultant fees
- Application fees that exceed reasonable costs
- Acceptance fees
- Free or discounted services
- Leased LFA equipment above market rates



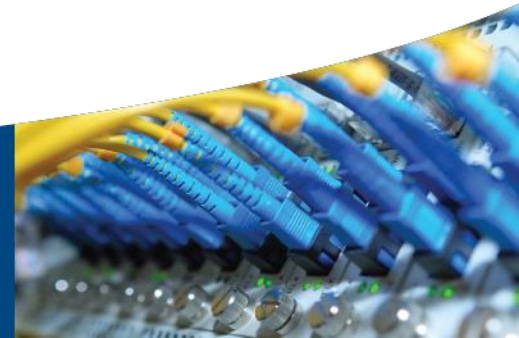
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Other Threats/Opportunities

- The Internet Tax Freedom Act (ITFA), enacted in 1998 and extended five times will sunset in December, 2015. The House passed H.R. 235, the Permanent Internet Tax Freedom Act (PITFA), and goes to the Senate for consideration. The Marketplace Fairness Act. (S. 698; H.R.2775), provides state and local government with the authority to impose local sales tax on remote sales.



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