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MEMORANDUM

To: North Metro Telecommunications Commission
From: Michael R. Bradley, Michael C. Athay, and Tou Xiong
Re: April 2022 Legal Report
Date: April 6, 2022

FCC Senior Staff Appointments Include Former Minnesota Government Lawyer Narda Jones As Chief of Staff

On April 4, FCC Chairwoman Rosenworcel announced two staff changes. As of mid-April, Narda Jones will assume the role of Chief of Staff, replacing Acting Chief of Staff, Travis Litman, who is leaving the agency. Effective yesterday, Priscilla Delgado Argeris will serve as Chief Legal Advisor. More information on their backgrounds is available here: <https://docs.fcc.gov/public/attachments/DOC-382043A1.pdf>. Ms. Jones previously worked at the Minnesota Attorney General's Office and the Minneapolis City Attorney's Office, in addition to past work at the FCC.

Biden Nomination of Gigi Sohn for Open FCC Seat

Sohn's nomination is waiting for a Senate vote to discharge it to the Senate floor. The discharge vote is required because the Commerce Committee moved the nomination on a 14-14 tie vote.

Preventing Digital Discrimination Notice of Inquiry (GN Docket No. 22-69)

The FCC adopted a [Notice of Inquiry](#) that will lay the groundwork for a Notice of Proposed Rulemaking to address the Infrastructure Act requirement that the FCC adopt rules, not later than two years after enactment of the Act, "to facilitate equal access to broadband internet access service." Among other obligations associated with this provision, the FCC must "develop model policies and best practices that can be adopted by States and localities to ensure that broadband internet access service providers do not engage in digital discrimination. Comments are due by May 16, replies by June 30. Chairwoman Rosenworcel has tasked the Communications Equity and Diversity Council with advising on some of the issues addressed in the Notice. A link to the video and agenda for the most recent CEDC meeting can be found [here](#).)

Local Governments Sue Netflix, Others To Impose State Franchise Law Video Fees On OTT Operators

Local governments have initiated litigation in at least a dozen states, arguing that over-the-top (OTT) video service providers such as Netflix and Hulu are subject to state video franchising laws and therefore obligated to pay the required franchise/video service fee. The obligation alleged in these cases generally depends on the definitions of "video service" and "video service provider" in the applicable

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state statute and the cases do not argue that “cable operator,” as that term is defined in the Cable Act, applies to OTT video providers. A list of states in which litigation is pending follows, with a brief status summary. The list is courtesy of NATOA, which notes that given the number of cases and variety of issues and decisions, some information may be out-of-date or inaccurate, notwithstanding best efforts to ensure completeness and accuracy.

Arkansas: *City of Ashdown v. Netflix, et al.*: Arkansas Federal court **dismissed** city’s claims, finding Netflix and Hulu do not provide “video services” under Arkansas law and that the city lacks the right to bring a claim. An appeal is pending before the 8th Circuit Court of Appeals, with briefing ongoing as of March 2022. In its brief at the 8th Circuit, Netflix argues the state video law cannot apply to it because it could not comply with certain requirements, like PEG: “Companies that do not operate or maintain their own network in the public rights-of-way cannot satisfy that [PEG] mandate. After all, if an entity merely makes its content available for customers to stream over the public Internet through another party’s network, it cannot ‘designate’ any ‘capacity on its video service network’ for public programming.”

California: *City of Lancaster v. Netflix, et al.*: In September, 2021, California state court **dismissed** city’s complaint that alleged Netflix and Hulu are subject to franchise fees under DIVCA (the state video franchise law). The court found that only the CPUC can sue a provider for failing to get a state franchise and pay franchise fees. The court also found DIVCA does not apply to Netflix and Hulu because they do not own or operate any infrastructure in the ROW and do not provide “video programming” as defined in DIVCA. The City has filed an amended complaint, and a hearing on the defendants’ motion to dismiss that complaint is scheduled for April 6, 2022. One of Netflix’s arguments is that requiring it to comply with DIVCA’s PEG requirements violates the First Amendment because Netflix does not use the rights of way.

Georgia: *Gwinnett County, GA, et al. v. Netflix, et al.*: State court **dismissed** complaint with prejudice because (among other things): (1) the causes of action in the Television Act apply only to a “holder of a state franchise” and Defendants do not hold state franchises; (2) the Act does not apply to Defendants because they do not construct or operate networks in the rights of way and Plaintiffs have not alleged any facts that distinguish Defendants’ video content from any other content available over the Internet and (3) Defendants’ services fall within the Television Act’s “public Internet” exclusion. The County filed an appeal with the Georgia Court of Appeals on March 18, 2022.

Illinois: *City of East St. Louis v. Netflix, et al.*: Complaint filed in federal court against Netflix, Inc., Disney Platform Distribution, Inc., Apple Inc., Hulu LLC, WarnerMedia Direct, LLC, Amazon.com Services, LLC, CBS Interactive Inc., Youtube LLC, CuriosityStream, Inc., Peacock TV, LLC, DirecTV, LLC, and DISH Network, LLC. A **motion to dismiss filed by the defendants is pending** as of March 2022. *Village of Shiloh v. Netflix, et al.*: Complaint filed in state court against Netflix, Hulu, DirecTV, Dish and Disney. Defendants removed the case to federal court, but the federal district court remanded the case back to state court in March 2022 (even though a similar case filed by East St. Louis remains pending in federal court).

Indiana: *City of Fishers, Indiana et al. v. Netflix, et al.*: City’s Complaint **survived a motion to dismiss** A hearing on Defendants’ Motion Certify Interlocutory Appeal and Motion to Stay, and also on Defendants Netflix and Dish’s Motion to Reconsider is scheduled for May 11, 2022.

Kansas: *City of Fort Scott v. Netflix*: Complaint filed in state court in July 2021. In November 2021, the Court **granted the City’s unopposed motion to stay the litigation** for 120 days due to the similar cases pending in other states.

Louisiana: *City of Kenner v. Netflix, et al.*: On January 22, 2021, the City of Kenner filed a petition for declaratory judgment and other relief against Netflix, Inc. and Hulu, LLC arguing they are video service providers under the Louisiana Consumer Choice for Television Act and thus must pay franchise fees as required by the Act. Defendants removed the case to federal court, but on March 31, 2022, the federal court remanded the case back to state court.

Missouri: *City of Creve Coeur, et al. v. Netflix, et al.*: City’s complaint **survived a motion to dismiss** (Order here), with the Court finding (among other things) the cities alleged facts that Netflix and Hulu provide “video service” because their content delivery systems operate by keeping the content within a private network of local ISPs that bypass the “public internet.” Discovery is ongoing and a hearing on class certification was scheduled for March 31, 2022.

Nevada: *City of Reno v. Netflix, et al.*: Nevada Federal court **dismissed** city’s claims, finding Netflix and Hulu do not provide “video services” under Nevada law and the city lacks the right to bring a claim, which right the statute vests with the Attorney General. An appeal is pending before the 9th Circuit.

New Jersey: *Borough of Longport, et al. v. Netflix, et al.*: Complaint filed in federal court on August 13, 2021. Defendants’ **motion to dismiss is pending** as of March 2022. The New Jersey law tracks more closely with the Cable Act than other state franchising laws, but it defines “cable television service” to include “video programming, without regard to the technology used to deliver such video programming, including Internet protocol technology,” which is not included in the federal definition of “cable service.”

Ohio: *Maple Heights v. Netflix and Hulu*: City filed Complaint in federal district court alleging Netflix and Hulu are subject to the state video franchising law but have failed to pay the required fee. The district court certified questions to Ohio Supreme Court regarding the applicability of the state video franchising law: (1) Whether Netflix and Hulu are video service providers under Ohio law; and (2) Whether Maple Heights can sue Netflix and Hulu to enforce Ohio’s video service provider provisions. A hearing is scheduled for April 13, 2022. In an amicus brief, DIRECTV, which is not a defendant in the case, argues that the cities are trying to redirect tax revenue from the state and counties: “Ohio currently assesses sales tax on ‘specified digital product[s],’ which include ‘digital audiovisual work[s].’ At least some OTT streaming content providers, including Netflix, Hulu, and DIRECTV, pay this sales tax to the state and counties of Ohio. But the tax does not apply to ‘video services provider[s],’ as that term is used in [state law]. If Maple Heights prevails on its contention OTT streaming content providers constitute ‘video service providers,’ they would be exempt from state sales tax. This outcome would redirect millions of dollars in revenue currently collected by the State of Ohio and Ohio counties to local governments.”

Tennessee: *City of Knoxville v. Netflix, et al.*: Complaint filed in Federal court. The federal court decided to certify to the Tennessee Supreme Court the question of whether Netflix and Hulu are video service providers as that term is defined in the state video franchise law. Oral argument is set for May 3, 2022.

Texas: *City of New Boston v. Netflix, et al.*: Complaint filed in Texas Federal court. On September 30, 2021, the court **dismissed** the city's lawsuit because the franchise fee provision of Texas law only applies to franchise holders and neither Netflix nor Hulu is a franchise holder; the court also found state law did not give it authority to declare that the companies should be franchise holders, which is a determination to be made/enforced by the state PUC rather than municipalities. Other Texas cities are preparing to sue OTT providers.

FCC NPRM for Promoting Fair and Open Competitive Bidding in the E-Rate Program (WC Docket No. 21-455)

The Commission adopted a [Notice of Proposed Rulemaking](#) seeking comment on a proposal to implement a central document repository, or bidding portal, through which service providers would be required to submit their bids to USAC instead of submitting bids directly to applicants. It also seeks comments on whether to require applicants to provide other competitive bidding documentation that is not captured in the bidding portal (e.g. bid evaluation matrices, questions from bidders), as well as contract documents, at the time they submit their FCC Form 471 funding applications to USAC. The proposals are in response to a September 2020 audit by the Government Accountability Office (GAO) (report [here](#)) and a 2017 recommendation from the Commission's Office of Inspector General (OIG) (report [here](#)) recommending changes to the program to address actual and potential fraud. The FCC extended the deadline, and Comments are now due by April 27; replies are due by May 27, 2022.

FCC Implementation of the Affordable Connectivity Program (WC Docket No. 21-450)

The FCC released its [Report and Order and NPRM](#) implementing the Affordable Connectivity Program, an extension of a modified Emergency Broadband Benefit Program included in the Infrastructure Investment and Jobs Act. The Wireline Competition Bureau previously released three orders ([November Order](#), [December 8 Order](#) and [December 30 Order](#)) with preliminary guidance on the transition from the EBB to the ECP Program. The NPRM seeks comment on establishing a grant program for outreach regarding the ACP, implementing a mechanism for determining the application of the enhanced benefit for high-cost areas, and on a potential pilot program focused on increasing the awareness and enrollment of eligible households participating in Federal Public Housing Assistance Programs. Comments were due by March 16th, replies by April 15th.

April FCC Open Meeting

The meeting will be April 21, 2022 at 10:30 a.m. Eastern. The [Tentative Agenda](#) includes an item on how receiver improvements could provide greater opportunities for efficient use of spectrum, and an item to improve wireless emergency alerts, along with two adjudicatory items and an enforcement item.

Cyber Incident Reporting Will Be Required For Critical Infrastructure

The 2022 federal [funding bill](#) President Biden signed on March 15, 2022 included the Cyber Incident Reporting for Critical Infrastructure Act, which requires entities in a critical infrastructure sector to report cyber incidents to the federal Cybersecurity and Infrastructure Security Agency (CISA) within 72 hours, and to report to CISA any ransom payment resulting from a ransomware attack not later than 24

hours after the payment. The bill requires CISA to conduct a rulemaking within 24 months, in consultation with the Department of Justice and other Federal agencies, to implement the new requirements. CISA must publish the final rules within 18 months after the NPRM. Included in the rulemaking, among other things, will be final definitions of “covered entities” subject to the reporting requirements and “covered cyber incidents” that must be reported.

State and Local Government Cybersecurity Act

This bill ([S. 2520](#)) ([H.R. 5960](#)) provides that federal cyber experts share cyber information and resources about threats and breaches with state and local officials. The bill has passed in the Senate and is pending in the House.

FCC Announces Third Window for ECF Applications

The Federal Communications Commission announced on March 25, 2022 that it is opening a third application filing window to award at least \$1 billion in Emergency Connectivity Fund support. The third application filing window will open on April 28, 2022 and close on May 13, 2022. During this time, eligible schools and libraries can submit requests for funding to purchase eligible equipment and services between July 1, 2022, and December 31, 2023. The FCC anticipates, given past demand, this will likely be the last opportunity for schools and libraries to request funding before the remaining Emergency Connectivity Funds are exhausted.

Local Government Coalition Opposes FCC Regulation of Access to Publicly Owned Poles and Local ROW Policies

NATOA joined with local government advocacy groups in March to ask the FCC to reject recent filings suggesting the Commission should enact regulations governing use of municipal, public power and electric cooperative poles and local ROW policies. The coalition’s [filing](#) outlines the principles that support the long-standing legal framework in which municipalities, public power utilities and cooperatives—whose purpose is to serve the public interest—retain the flexibility and trust to manage their poles and other assets in the best interest of their communities. The coalition submitted an [Ex Parte Letter](#) to the FCC countering the position of the Schools, Health & Libraries Broadband Coalition (SHLBC), in an [ex parte filing](#) with the FCC in September, 2021, that contended local government ROW policies, and municipal, public power, and cooperative pole attachment policies, are obstacles to broadband deployment that require a rulemaking and FCC regulation. NATOA’s filings were joined by the American Public Power Association, Communications Workers of America, National Association of Counties, National Association of Towns and Townships, National League of Cities, National Rural Electric Cooperative Association, Next Century Cities and United States Conference of Mayors.