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Bringing Broadband to Rural America

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Highlights from the NATOA Policy and Legal Seminar

By Nancy E. Cornish, Esq. and Kenneth S. Fellman, Esq.

More than 100 individuals gathered in Arlington, Virginia, for NATOA's Policy and Legal Seminar on April 3rd and 4th. The two-day seminar was a welcomed opportunity for NATOA members to hear well-organized and comprehensive presentations on the current status of community broadband, PEG access, the DTV transition, local franchising, and public safety. This article provides a brief summary of the session highlights.

Community Broadband Update

The opening session provided an update on community broadband, an area of immense activity in the past year. Matthew Ames, Miller & Van Eaton, discussed the current situation and the tension between municipalities and private sector incumbents who fight the entrance of municipalities into community broadband. Regarding the municipal role in the broadband marketplace, which has taken a number of hits over the past year, Mr. Ames noted "there are ways to make this work. We just need to find the best solution." Jessica Zufolo, Senior Policy Director at Medley

Global Advisors, also recognized the tension between municipalities and private entities. She noted that there are municipal broadband success stories. But the question is: how can municipal entrants devise a sustainable business model? According to Ms. Zufolo, if the business model is sustainable, it will drive investment.

Jim Baller, The Baller Herbst Law Group, discussed America's national broadband policy, or lack thereof. He suggested that government officials and their allies must quickly come together to resolve the digital inclusion issues.

Numerous other countries have various broadband options for their citizens that are better, quicker, and less expensive than anywhere in the United States, a fact that many others would repeat throughout the seminar. “We as a country,” advised Mr. Baller, “need to look at broadband as a strategic issue and get money into these projects.”

PEG Access Update

The PEG Access update addressed another area of tumultuous activity in the last year. Brian Grogan, Moss & Barnett, reviewed the history of PEG access and noted that PEG is currently at risk of being put where citizens cannot find it. Jim Horwood, Spiegel & McDiarmid, discussed the FCC video franchising orders’ impact on PEG Access, noting that the orders are “pretty lousy” for PEG. He discussed several states that have franchising laws addressing issues of PEG signal quality and functionality, with Illinois and California having the best language. However, despite pro-PEG legislation, AT&T continues to offer its ‘PEG Solution’ that is fundamentally different from and inferior to the method AT&T uses to deliver other programming. The PEG channels are hosted in a menu selection program on Channel 99, television’s “Siberia.” Mr. Horwood showed a video demonstration of PEG Channel Access on AT&T U-Verse, produced by the Media Center in Palo Alto, California. After watching the video, Mr. Horwood posed the question: do AT&T’s actions violate California’s video franchising laws?

Dr. Andrew Afflerbach, CEO of Columbia Telecommunications Corp., educated the group on the technical aspects of U-Verse and other PEG Access products in use or being considered by local governments and/or providers. Dr. Afflerbach stated that many of the problems lend themselves to technical solutions, and PEG Channels “can be functionally identical to other channels.”

Keynote – Commissioner Jonathan Adelstein

NATOA was honored to have FCC Commissioner Jonathan Adelstein as the keynote speaker on Thursday. Commissioner Adelstein covered an array of topics. Commenting about the FCC’s second video franchising order, Commissioner Adelstein noted that the FCC took a bad decision and made it worse. He said, for the first time publically, that the FCC should stay the second order. He commented that the orders, as he predicted in his dissent, are causing a “two-step downward spiral,” precluding local government ability to require more from a new entrant than it required from an incumbent years ago. Regarding issues related to PEG access, Commissioner Adelstein said PEG channels are being regulated to a “second tier” and he “just can’t see how undermining PEG serves the public interest.” Commissioner Adelstein expressed his concerns with the 2009 DTV transition, noting that local governments must continue to do whatever they can to educate the public. The federal government should help coordinate a clear and concise message and do it now. “You can’t just do it the month before.”

Commissioner Adelstein concluded stating that “local governments have a really key role in this ever-evolving age of broadband” and they “need a federal partner who will treat [local government’s] views with respect.”

Congressional, Regulatory, and Legal Update

The next panel covered the congressional, regulatory, and legal update. Steve Traylor, Deputy Director of Government Relations for NATOA, discussed the 700 MHz auction and NATOA’s involvement in revamping the rules for a new auction. Mr. Traylor mentioned that NATOA filed comments opposing the XM/Sirius merger, stating that it was not in the public interest. The Department of

Justice disagreed and approved the merger. He addressed NATOA’s work on procedural rules for forbearance petitions and NATOA’s public policy statement on net neutrality.

Alexander Hoehn-Saric, U.S. Senate Commerce Committee, discussed action on the Hill this year. He said top Committee priorities were the DTV transition and broadband deployment.

Tim Lay, Spiegel & McDiarmid, reviewed recent court decisions. He said the overarching theme was that the role of local government is changing and the cases give some indication of where we are headed. The cases covered issues ranging from barrier to entry provisions, Section 253 and civil rights claims, the definition of “cable,” preemption of local taxation and franchising authority over VoIP and other information services, and net neutrality.

State of Competition: Empirical Evidence Update

In the next session on the state of competition, Dr. Constance Book, Elon University, talked about her studies on Texas statewide franchising and on the FCC’s video franchising orders. Her findings are published in the Spring 2008 issue of the *NATOA Journal*. Dr. Book presented compelling and independent evidence showing the effects of statewide franchising: increased costs (all Texans subsidizing the cost of the Verizon infrastructure that benefits more privileged Texans, new fiscal responsibilities of local governments to operate PEG channels that are passed on to citizens), not as much competition as promised by the industry, and a great deal of negative “side effects.”

Holly Hansen, Hansen Consulting, presented a summary of NATOA’s statewide franchising survey. The full report and summary is on the NATOA website. This study gathered factual information directly related to statewide franchising.

This information from Dr. Book's studies and NATOA's statewide franchising survey will help local government staff and advisors educate their elected officials on the truth behind the promises made in statewide franchising debates.

Public Safety Update

Day two of the conference began with a public safety update. Discussing the failure of the D block auction, James Hobson, Miller & Van Eaton, opined that "to make the D block viable, we need to have more incentives for commercial." However, Mr. Hobson expressed concern that the pendulum will swing too far toward commercial needs. Vivek Kundra, CTO for the District of Columbia, discussed the practical impact of the promise of interoperability. Explaining the D.C. area's NCR Net, Mr. Kundra provided insight into how interoperability can deliver improved public safety response. Marcine Anderson, King County, Washington, provided a brief history of the EAS system and examined the pros and cons of the FCC's and FEMA's respective proposals for the future of the EAS system.

DTV Transition

The next session addressed the DTV Transition – only 320 days away. Jill Novik, City of Seattle, revealed some of Seattle's initiatives to get its citizens ready. All panelists expressed concern for "at-risk" populations –the elderly, lower income, and non-English speaking people. The discussion focused on getting the message out by whatever means possible. Certain

national efforts are in play, as explained by Marcellus Alexander, Executive Vice President, Television, National Association of Broadcasters, and Eloise Gore, Associate Chief, Media Bureau, FCC. But, as former FCC Commissioner Gloria Tristani asked, is that enough? Noting a number of DTV transition problems still to be addressed, Ms. Tristani urged us to be vigilant in our efforts at the local level.

Keynote – Blair Levin

For the closing keynote, Blair Levin, Managing Director for Stifel Nicolaus and Company, provided his perspective on "The Road Ahead in Telecom and Media." Mr. Levin noted that there are usually innate checks and balances in place throughout natural and social realms, but that natural balance is missing today in telecom and media. Verizon and AT&T are strong, while their two largest competitors, cable and Sprint, are generally weak. From a Wall Street perspective, Mr. Levin discussed what drives investors and, consequently, what drives service providers. He advised local governments to decide what they want to do and then set benchmarks, goals and objectives. Before promising results, local governments must be clear about their communication goals, and the means to achieve those goals.

If you were unable to attend the seminar, you missed a lot of substance. Plan on participating in the next round of Policy & Legal sessions in Atlanta, Georgia at NATOA's Annual Conference, September 17-21, 2008. ■

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Ken Fellman is a partner in the Denver law firm of Kissinger & Fellman, P.C. His practice emphasizes local government representation, particularly telecommunications law. Ken represents local governments nationally in connection with cable matters, community broadband deployment and public safety communications. Ken served as Mayor and City Council member in Arvada, Colorado from 1993-2007. Appointed in 1997 by then-FCC Chairman Reed Hundt to the Commission's Local and State Government Advisory Committee, he served as chair until the FCC disbanded the Committee in 2003. Ken is a NATOA Board Member, and has testified on NATOA's behalf in the U.S. House and Senate. He was honored to receive NATOA's 2006 President's Award, and to be chosen as NATOA's 1998 Member of the Year.