



## Seattle, WA

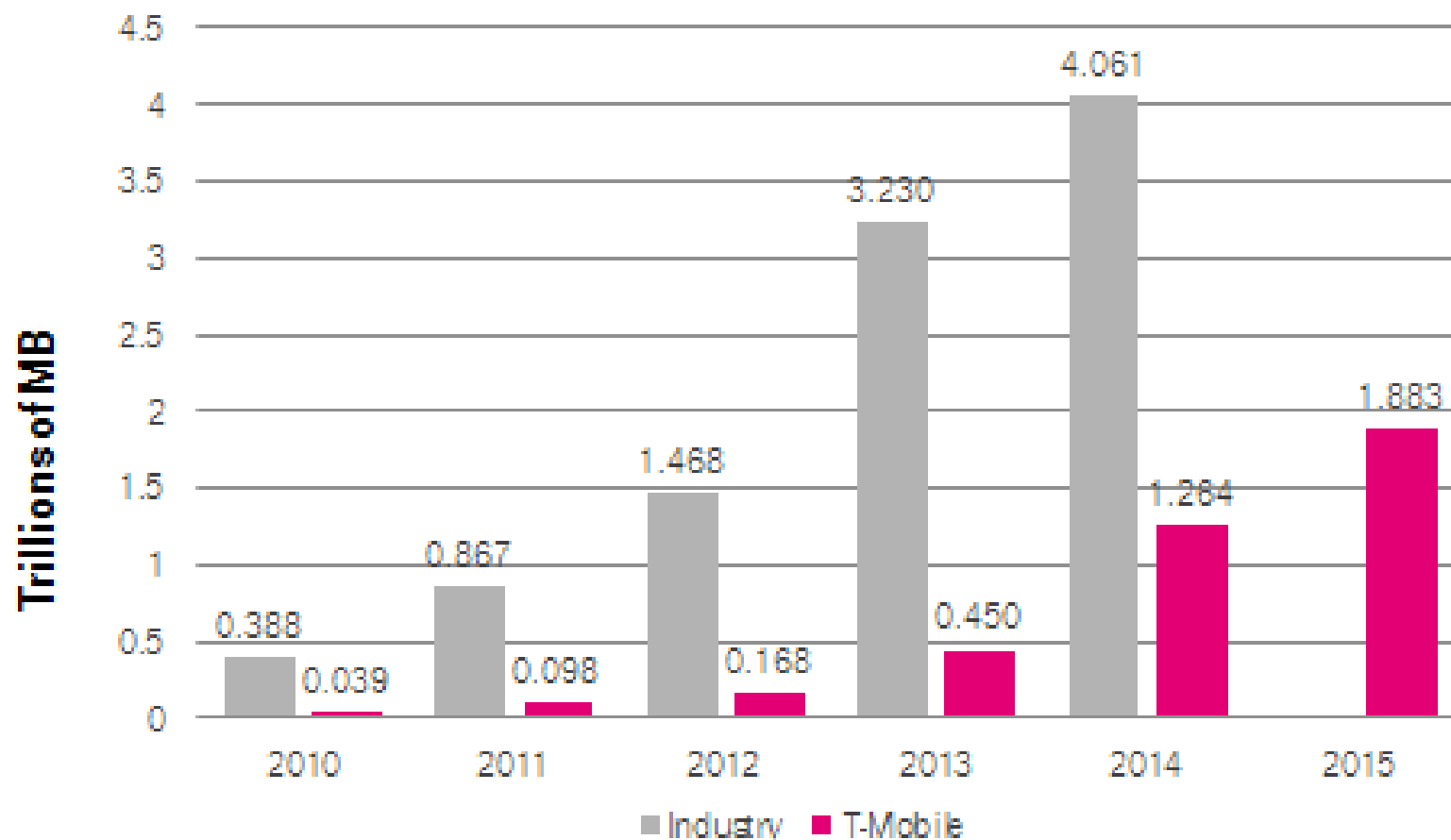


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# Practical and Operational Issues Implementing Net Neutrality

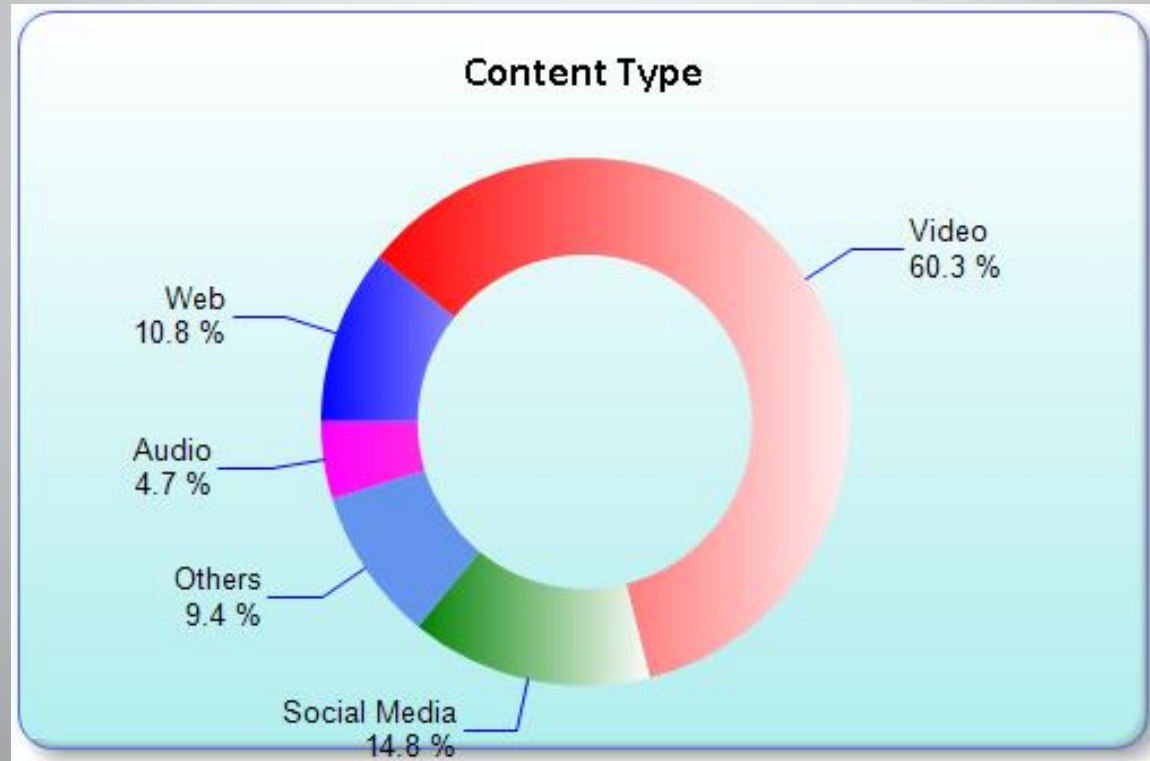
- **Dan Menser, Vice President, Legal Affairs, T-Mobile USA**
- **Jim Lamoureux, Senior Attorney, Microsoft**
- **Russell Hanser, Partner, Wilinson, Barker, Knauer LLP**
- **Luisa Lancetti, Chief Counsel, Law and Policy, Federal Regulatory Affairs, T-Mobile USA**

## Mobile Data Needs Increasing: Annual Data Used by Smartphones and Devices



Source: CTIA, "Annual Wireless Survey Results", September 2015, and T-Mobile data

# Video Comprises the Majority of Wireless Data Usages





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# Spectrum Overview

Krista Witanowski

Assistant Vice President, Regulatory Affairs

CTIA – The Wireless Association®

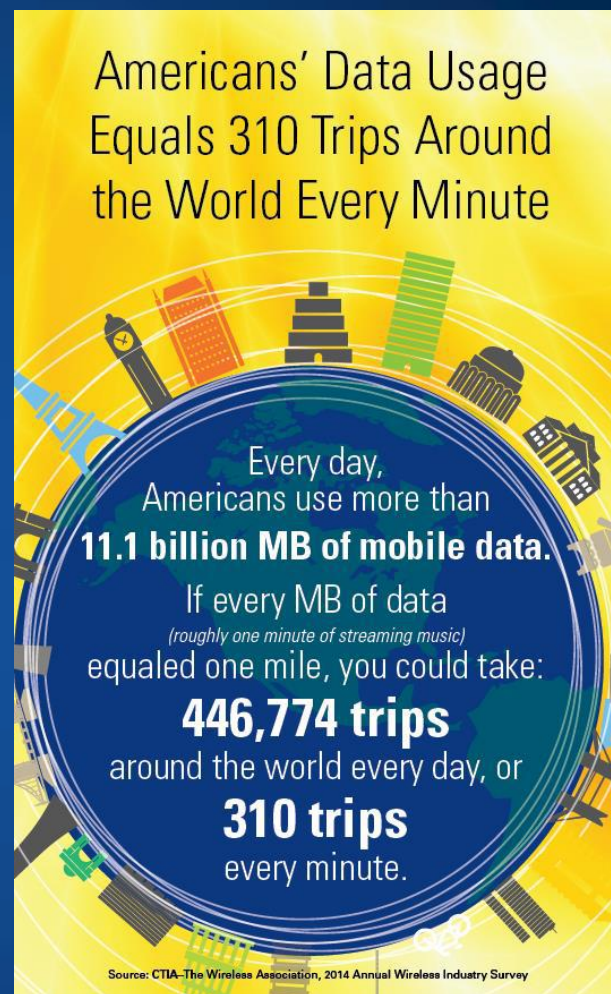
## Spectrum Overview

- **Wireless Growth and Demand.**
- **Economic Impact of Licensed Wireless Spectrum.**
- **Short-Term Steps To Meet Current Demand.**
  - 600 MHz Incentive Auction
  - 3.5 GHz Band
  - 24 GHz Spectrum Frontiers NPRM
- **Long-Term Steps to Meet Future Demand.**
  - Spectrum Pipeline



## Wireless Growth And Demand

- **Mobile Data Demand Continues to Increase.**
  - Americans use more than 11.1 billion megabytes of data every day.
  - More than two-thirds of Americans have between one and five connected devices at home.
  - By the end of 2015, there will be 3.5 billion mobile broadband subscriptions worldwide.
  - By 2019, mobile data traffic is expected to be nearly *six times* 2014's traffic.





## Wireless Growth and Demand, Con't

- **National Broadband Plan Correctly Anticipated Increased Demand.**
  - FCC growth rate projection for 2014: **562 PB** (petabytes) per month.
  - Actual mobile broadband traffic in 2014: **563 PB** per month.
- **Supply Has Not Kept Pace With Demand.**
  - We need to identify and re-allocate **more than 350 MHz** of new spectrum for licensed mobile broadband services by 2020.

## Economic Impact of Licensed Wireless Spectrum

### ANNUAL ECONOMIC IMPACT

**>\$400  
BILLION**

### ADDS JOBS



### BOOSTS OTHER INDUSTRIES



**Telehealth** market expected to grow from \$240 million in 2013 to **\$1.9 billion** by 2018.<sup>2</sup>



**App economy** generated an estimated **>752,000 jobs** in 2013.<sup>3</sup>



**Unlicensed spectrum** valued at **\$62 billion** per year.<sup>4</sup>

# **SHORT-TERM STEPS TO MEET CURRENT DEMAND**

## 600 MHz Band Incentive Auction

- ***March 29<sup>th</sup>, 2016:*** 152 days away and counting (as of today!).
- 9+ FCC Rulemakings Resolved.
- Last auction in the pipeline for lower band licensed spectrum.

## 3.5 GHz Band

- **R&O and Second FNPRM Adopted April 17, 2015.**
  - Makes 150 MHz of additional spectrum available for commercial use in the 3.5 GHz (3550 – 3700 MHz) band.
  - Adopts a novel, three-tier spectrum access regime that requires sharing between incumbent, priority access (licensed), and general access (unlicensed) users.
- **Key Issues to be Resolved:**
  - Opportunistic sharing of priority spectrum.
  - Technical rules (e.g., interference protection, power levels, out-of-band emissions limits).
  - License terms and renewal expectancies.
  - Auction procedures.
  - Database requirements.

## Spectrum Above 24 GHz

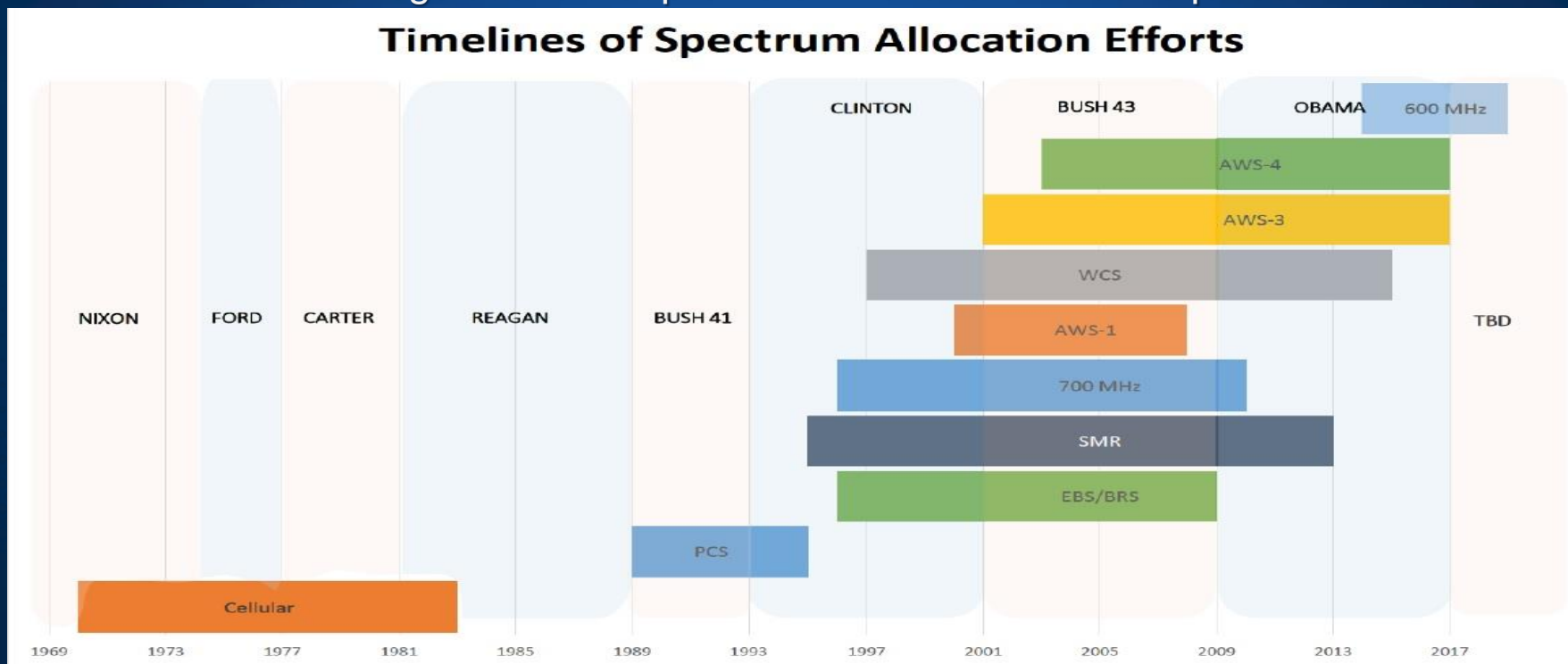
- **NPRM Adopted by FCC on October 22, 2015.**
  - Builds off a 2014 NOI seeking comment on the potential use of several millimeter wave (“mmW”) bands above 24 GHz for mobile broadband.
  - Focuses on four mmW bands:
    - 28 GHz (proposing licensed);
    - 37 – 38.6 GHz (proposing licensed);
    - 38.7 – 40 GHz (proposing licensed); and
    - 64 – 71 GHz (proposing unlicensed).
- **NPRM is a Step Forward in Freeing Up Spectrum for 5G.**
  - Spectrum above 24 GHz can deliver enhanced capacity for mobile broadband services as well as substantial increases in throughput by using wide swaths of spectrum and cutting edge antenna technologies.
  - However, low and mid-band spectrum (below 3 GHz and between 3-6 GHz) is still critically important to providing 5G technologies to consumers.
- **Comments Due January 26<sup>th</sup>, 2016, Replies due February 23<sup>rd</sup>, 2016.**



# **LONG-TERM STEPS TO MEET FUTURE DEMAND**

## Spectrum Pipeline

- **It Takes 13 Years to Reallocate Spectrum for Wireless Use.**
  - Continued re-assessment of the spectrum's needs of wireless consumers and sound regulations that promote innovation will be required.



**Thank You!**



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# Wireless Broadband Infrastructure Deployment

*Maria Browne  
(Featuring Scott Thompson)  
October 29, 2015*

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# Infrastructure Demand

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- Wireless Capacity Demands Increasing
- Increased DAS and Small Cell Deployments
- Transition to Use of Poles in Public ROW



# Regulatory Response

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- New Congressional Proposals
- FCC Initiatives
- State Initiatives
- Some Gaps Remain

# New Broadband Infrastructure Legislation

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- H.R. 3805, Broadband Conduit Deployment Act
- NTIA database of federal assets on which broadband infrastructure can be attached
- Amendment of Section 224 to Improve Pole Access (certified states, pole tops, make-ready)
- Further Streamline NEPA and NHPA Review to eliminate duplicative agency reviews
- Streamline Interior, Forest and DOD review
- Deadline for GSA Forms for Fed'l Wireless Siting

# Proposed Amendments to Section 224

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The amendments to Section 224 would:

- Expand scope of covered poles to include federally owned poles
- Expand scope of access obligation (but not rates, terms and conditions) to include municipalities and cooperatives (previously exempt) and extend new reporting obligations to them too
- Expand scope of protected attachers to include broadband (i.e., Google)
- Expand ILEC rights to include access (currently only rates, terms and conditions)
- Require certified states to adopt a non-discriminatory access obligation substantially similar to the federal requirement
- Require pole owners, including munis and coops, to file annual reports on rates charged and the location of all poles, conduits and ROW they own
- Designate the pole top as part of the “usable space” thereby addressing pole owner arguments regarding rates for pole tops
- Require the FCC to conduct a rulemaking on make-ready costs

# FCC Wireless Broadband Initiatives

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- 2015 Scoping Inquiry (DA 15-865)
  - NHPA, Amend National Collocation Agreement
- 2014 Infrastructure Report and Order (FCC 14-153)
  - NEPA, NHPA, 6409(a), Shot Clock Cleanup
- 2011 Pole Attachment Order (FCC 11-50)
  - Wireless Access (Pole Top, Time Frames)
  - Telecom Rate Reduction
    - Recon Pending – Order Expected
- 2009 Shot Clock Order
- 2004 Public Notice re Pole Tops (DA 04-4046)
- Omnipoint v. PECO Rate Case (2003)

# Sample State Shot Clocks



- **California**
  - Application deemed approved if: FCC shot clock timeframes exceeded and
  - All required notices about applications provided. See Cal. Gov't. Code § 65850.6
- **Florida**
  - *Collocation*: 45 Days. See Fla. Stat. 365.172(13)(d)(1).
  - *Non-Collocation*: 90 Days. See Fla. Stat. 365.172(13)(d)(2)
  - If a local government fails to act within the shot clocks it is deemed granted. See Fla. Stat. § 365.172(13)(d)(3)(b).
- **North Carolina**
  - *Collocation*: 45 days. See N.C. Gen. Stat. §§ 153A-349.53(a)-(a2) (applying to counties), 160A-400.53(a)-(a2) (applying to cities)
  - *Non-Collocation*: "A reasonable time." See N.C. Gen. Stat. §§ 153A-349.52(e) (applying to counties), 160A-400.52(e) (applying to cities)
- **Wisconsin**
  - *Collocation*: 45 days. See Wis. Stat. § 66.0404(3)(c)
  - *Non-Collocation*: 90 days. See Wis. Stat. § 66.0404(2)(d)
  - If local entity fails to act, the application will be deemed approved. Stat. §§ 66.0404(2)(d), 3(c)
- **Missouri**
  - *Collocation*: 45 days. See R.S. Mo. § 67.5100(2)
  - *Non-Collocation*: 120. See R.S. Mo. § 67.5096(4)
  - If locality fails to act within time frame, the application will be deemed granted. See R.S. Mo. § 67.5096(5), 5100(6).
- **Pennsylvania**
  - *Collocation*: 90 days. See 53 Pa. Cons. Stat. § 11702.4(b)(2)
  - *Non-Collocation*: 90 days. See 53 Pa. Cons. Stat. § 11702.4(b)(2)
  - If the locality fails to act within the time frame, the application will be deemed granted. See 53 Pa. Cons. Stat. § 11702.4(b)(3).

# New Washington Pole Attachment Rules

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- Adopts FCC cable rate, timeframes and precedent
- Pole owners must make access to pole tops available at FCC rates
- Includes poles with distribution and transmission



# Mind the Gaps

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- FCC Rules Section 106 of Nat'l Historic Preservation Act
  - Structures older than 45 years
  - Volumetric and set back limitations
  - On historic properties, in historic districts
  - State and local requirements excluded
- 6409(a)
  - “Proprietary function” exception
  - Substantial change in physical dimensions – prior concealment conditions
- Section 332 Shot Clock
  - No deemed granted remedy/penalties
- 47 USC 224
  - Utilities denying or limiting access to pole tops
  - Limiting qualifying poles (antennas, equipment)
  - Make-ready costs/timeframes
  - Unregulated entities
  - Certified states

# The future?

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# Disclaimer

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CTIA West Legal Issues Fall Seminar

## IP Issues: Copyright

October 29<sup>th</sup>, 2015

# Copyrightability – Originality

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Original, as the term is used in copyright, means only that the work was **independently created by the author** (as opposed to copied from other works), ***and*** that it possesses at least **some minimal degree of creativity.**”

***Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.,***  
**499 U.S. 340, 345 (1991)**

## Copyrightability

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- *Oracle Am. Inc. v. Google Inc.*, No. 14-410 (U.S.)

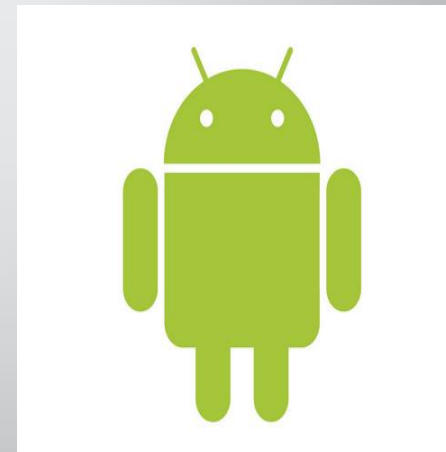
ORACLE®

Google



## Copyrightability

- In developing its Android mobile OS, Google copied verbatim the declaring code of 37 packages of Oracle's Java—amounting to more than 7,000 lines of code.
  - Google also copied the organization of classes and methods within each package.



# Copyrightability

## Oracle Appealed to the Federal Circuit

### On behalf of Oracle:

- Ralph Oman, Register of Copyrights, 1985-1993
- BSA | The Software Alliance
- Computer Science Professors
- Former Sun Microsystems Executives
- Microsoft Corporation, EMC Corporation, and NETAPP, Inc.
- Picture Archive Council of America, Inc. and the Graphic Artists Guild

### On behalf of Google:

- Intellectual Property Law Professors
- Computer and Communications Industry Association
- Computer Scientists
- Software Innovators, Startups, and Investors
- RackSpace, Application Developers Alliance, TMSoft, and Stack Exchange

# Oracle v. Google: Holding

Components of the Work	District Court	Federal Circuit
Structure, sequence and organization (SSO) of 37 API packages	Jury: Infringed Court: Not copyrightable	<b>Copyrightable</b> <ul style="list-style-type: none"><li>• No functionality bar</li></ul>
Declaring code of 37 API packages	Jury: Infringed Court: Not copyrightable	<b>Copyrightable</b> <ul style="list-style-type: none"><li>• Merger doctrine inapplicable</li><li>• <i>Scenes a faire</i> doctrine inapplicable</li><li>• Short phrases doctrine inapplicable</li></ul>
Implementing code <ul style="list-style-type: none"><li>- RangeCheck function</li><li>- Eight security files</li></ul>	Infringed	<b>Infringed</b> <ul style="list-style-type: none"><li>• Not <i>de minimis</i></li></ul>

# Copyrightability – not for short phrases

- Gorski v. Gymboree (N.D. Cal. 2014)



# Fair Use Defense –17 U.S.C. § 107

“[T]he fair use of a copyrighted work, . . . for purposes such as criticism, comment, news reporting, teaching . . ., scholarship, or research, is not an infringement of copyright.”

# Fair Use Defense –17 U.S.C. § 107

“In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

1. The **purpose and character of the use**, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. The **nature of the copyrighted work**;
3. The **amount and substantiality of the portion used** in relation to the copyright work as a whole; and
4. The **effect of the use upon the potential market** for or value of the copyrighted work.”

# Fair Use – Derivative Works

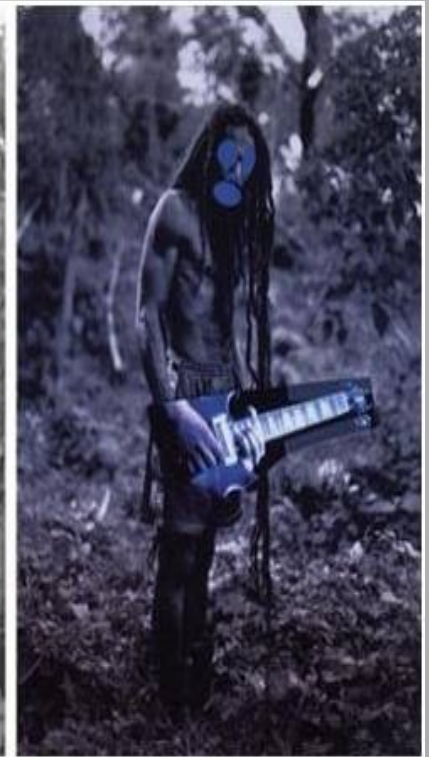
- “A ‘derivative work’ is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.”
  - 17 U.S.C. § 101
- The owner of the original work has the exclusive right to create derivatives.
  - 17 U.S.C. § 106(2)
- An unauthorized derivative work is an infringement

# Fair Use

- *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2014)
  - Patrick Cariou published a book of classical portraits and landscape photographs taken while living among Rastafarians in Jamaica.
  - Richard Prince tore out 35 photographs, fixed them to a wooden board, and painted over portions. Prince's works, part of a series entitled *Canal Zone*, later sold for over \$10 million.



**Cariou**



**Prince**

Graduation (2008)



# Fair Use

- The Second Circuit focused on **transformativeness**:
  - The district court erred by requiring that the secondary work comment on the original or its author to be transformative.
  - A work **reasonably perceived by a reasonable observer to alter the original with “new expression, meaning, or message”** is transformative.
  - 25 of the 30 works were transformative because they “**manifest an entirely different aesthetic.**”
- The transformative nature of Prince’s use outweighed or influenced all four of the fair use factors.
- As a matter of law, 25 of 30 works were fair use.

# Fair Use

- *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756 (7th Cir. 2014)
  - Michael Kienitz took a portrait of Madison, WI Mayor Paul Soglin for use in Mayor Soglin's reelection campaign and the City of Madison's official website.
  - Sconnie Nation took the photograph, changed it, and sold it on t-shirts and tank tops as a commentary on Mayor Soglin's withdrawal of support for an annual protest-themed community block party.



Original Photograph



Adaptation

## Fair Use



Permissionless,  
Transformative  
Innovation

# Fair Use – Google Books Progeny

- *Authors Guild v. HathiTrust* (2d Cir. 2014)



# Fair Use

*Fox News v TVEyes*  
(D. Mass. 2014)



- Subscribers include the white house, military, and 100 members of Congress
- Transformative use
- Parties agreed Fox News programming was creative
- TVEyes copied all of the work but it was no more than necessary
- No market harm



# *Lenz v. Universal Music*

(9<sup>th</sup> Cir. Sept 14, 2015)



## *Lenz v. Universal Music*

- Lenz uploads 29" video Feb. 2007
  - “Let’s Go Crazy” plays in background
  - Kids dance; mom talks
- <https://www.youtube.com/watch?v=N1KfJHFWlhQ>
- Universal (Prince’s publisher) sends DMCA takedown to YouTube
- YouTube removes video; Lenz sends YT a DMCA “counter notification” and YT reinstates video
- Lenz files suit July 2007; amended April 2008, alleges misrepresentation under 17 USC sec. 512(f)

## *Lenz v. Universal Music*

- 17 USC 512(f):
- “Any person who knowingly materially misrepresents under this section -- (1) that material or activity is infringing . . . shall be liable for any damages . . . .”
- Sept. 14, 2015 - 9<sup>th</sup> Cir. affirms denial of dueling SJ motions
  - Grants Lenz’s claim that Universal violated Section 512(f) because Universal materially misrepresented that her video was infringing when it was, instead, a fair use.



## *Lenz v. Universal Music – 9<sup>th</sup> Cir.:*

- Fair use of a work is not an infringement
  - Therefore “a copyright holder must consider the existence of a fair use before sending a takedown notification.”
- Fair use is different from traditional affirmative defenses and does not amount to infringement at all.
- If copyright owner fails to consider fair use, it could be liable for nominal damages.

# Thank You!

## Further Questions?

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## Seattle, WA



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## DEFINING SUCCESS TOGETHER

# CTIA West Legal Seminar Privacy & Consumer Protection

October 2015

# The FCC and the FTC

FTC Act	Communications Act
<p><b>Section 5(a)</b></p> <ul style="list-style-type: none"><li>▪ unfair or deceptive acts or practices in or affecting commerce are unlawful</li></ul>	<p><b>Section 201(b)</b></p> <ul style="list-style-type: none"><li>▪ [A]ny charge, practice, classification, or regulation that is unjust or unreasonable is unlawful.</li></ul>
<p><b>Section 5(n)</b></p> <ul style="list-style-type: none"><li>▪ To be “unfair” the act or practice<ul style="list-style-type: none"><li>— Must cause or be likely to cause substantial injury to consumers</li><li>— Consumers cannot avoid it</li><li>— Harm not outweighed by benefits to consumers or competition</li></ul></li><li>▪ Public policy considerations a factor, but cannot be primary basis for determination</li></ul>	<p><b>Section 222(a)</b></p> <ul style="list-style-type: none"><li>▪ Duty to protect the confidentiality of proprietary information of, and relating to, other telecommunications carriers, equipment manufacturers, and customers</li></ul>

# FTC Enforcement – Data security

## What does Section 5 require?

- Data security measures must be reasonable in light of:
  - sensitivity and volume of consumer information it holds
  - size and complexity of its data operations
  - cost of available tools to improve security and reduce vulnerabilities
- Commission does not require perfect security and fact that a breach occurred does not mean that law was violated
- FTC orders involve a range of industries and platforms: retailers , financial firms, social networks, and mobile; and a range of data types: payment card data, Social Security numbers, account passwords, health data, information about children

# FTC Enforcement – Data security

## *FTC v. Wyndham Worldwide* (3d Cir. 2015)

- Three data breaches compromising hundreds of thousands of customer credit cards
- Alleged that Wyndham engaged in unfair and deceptive practices under Section 5
  - Failed to take “reasonable and appropriate” measures to protect data
- District Court denied motion to dismiss
- Third Circuit affirmed
  - Upholds FTC’s authority to regulate companies’ data security practices under Section 5

# FTC Enforcement – Data security

## *In the Matter of LabMD, Inc.*

- FTC alleged LabMD failed to reasonably protect consumer data including medical data
  - Alleged two breaches of compromising 10,000 consumers
- Administrative proceedings ongoing before ALJ



# FTC Enforcement – Data security

## *Verizon Closing Letter (2014)*

- Routers shipped with outdated encryption standards
- FTC investigation closed because of overall data security practices related to routers, along with efforts by Verizon to mitigate the risk to its customers' information

# FCC Enforcement – Data security

## The TerraCom/ YourTel NAL

- Affiliated Lifeline carriers suffered a data breach: applicant eligibility info (which was **NOT** CPNI) could be accessed online, using sophisticated programs, due to a vendor mistake
- **For the first time**, FCC found independent carrier privacy obligations under section 222(a)
- **And** for good measure, the FCC also found for the first time that section 201(b) (“unjust or unreasonable” practices) applied to data breaches
- Proposed \$10 million forfeiture
- Settled in July 2015 for \$3.5M (including settlement of unrelated matters)

# FCC's New Interpretation of Section 222(a)

*Open Internet Order* and recent Lifeline Order apply TerraCom/YourTel NAL theories to carriers and broadband providers.

*Open Internet Order*, para 53: “Ensuring the privacy of customer information both directly protects consumers from harm and eliminates consumer concerns about using the Internet that could deter broadband deployment. Among other things, **section 222 imposes a duty on every telecommunications carrier to take reasonable precautions to protect the confidentiality of its customers’ proprietary information.**”

Directs providers to “employ **effective** privacy protections in line with their privacy policies and core tenets of basic privacy protections.”

# Challenges to FCC's New Interpretation

## **CTIA** – August 2015 Petition for Reconsideration of *Lifeline Order*

- Under Section 222(a), CPNI is the only customer data protected
- Section 201(b) does not provide FCC with authority over data security practices

## **USTelecom** – September 2015 challenge to *Lifeline Order* in D.C. Circuit

- Assertion of privacy authority under Sections 222(a) and 201(b) as to information that is not CPNI violates Administrative Procedure Act

# Implications of Expanded Section 222

## Enforcement Risk

- Strict Liability?
- Massive Fines
  - April 8 AT&T settlement (call center breach): **\$25M**
  - June 17 AT&T Mobility NAL (Open Internet but not privacy-related): **\$100 Million**

## Need for strictest measures to protect privacy, avoid data breaches

- Data Security Audits
- Accuracy of Privacy Policy Disclosures
- “It’s Not Just CPNI Anymore”

# Recommended Security Practices

**Look to prior  
FCC and FTC  
Guidance  
and  
enforcement  
activities:**

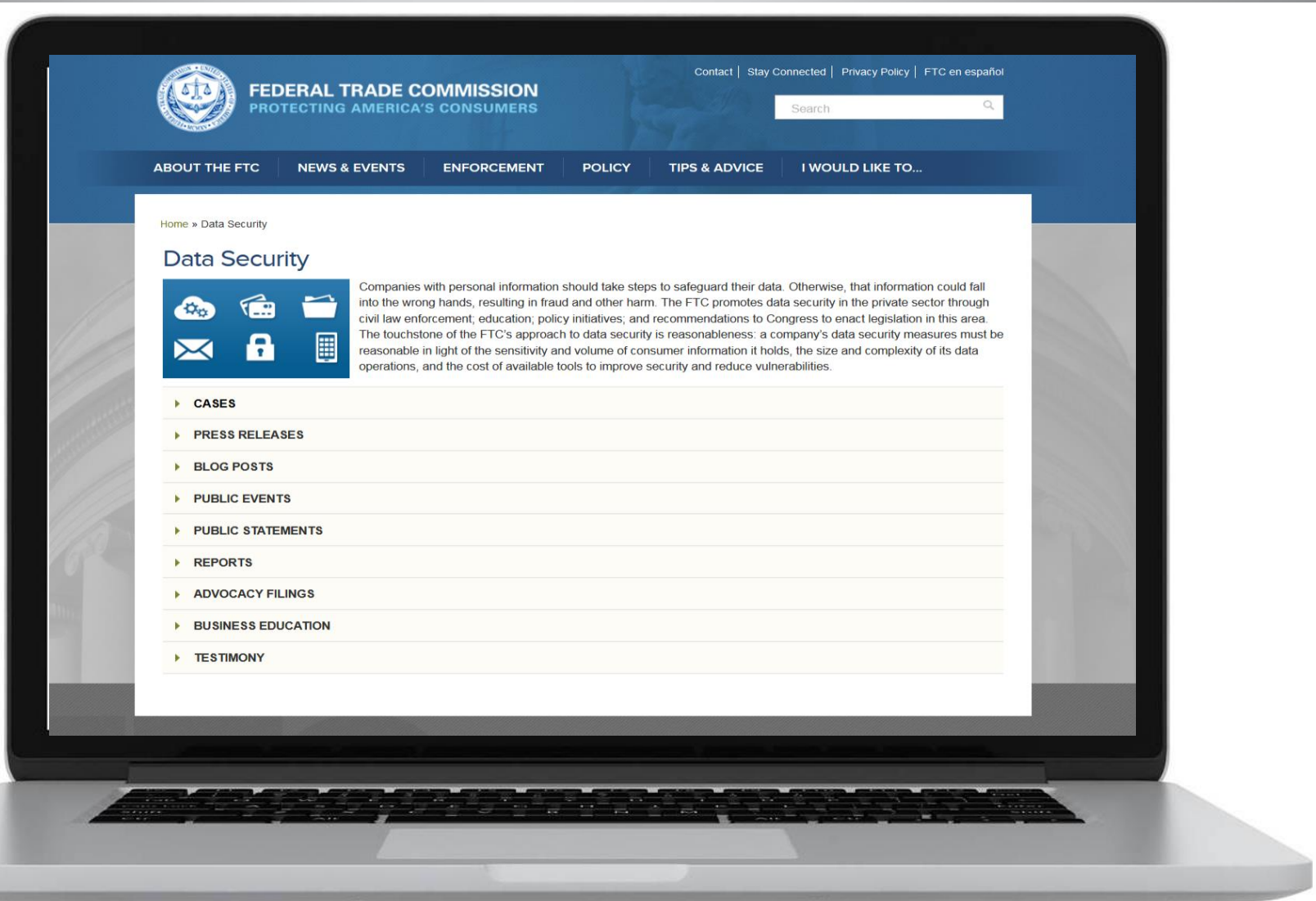
- Risk assessments
- Information security program
- Designated person(s) to administer the program
- Training
- Testing & improvements
- Appropriate due diligence and oversight of service providers

# FTC Start with Security (2015)

- 10 practical lessons businesses can learn from the FTC's 50+ data security settlements
- Conferences
- Website and print materials



# ftc.gov.datasecurity



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PROTECTING AMERICA'S CONSUMERS

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## Data Security



Companies with personal information should take steps to safeguard their data. Otherwise, that information could fall into the wrong hands, resulting in fraud and other harm. The FTC promotes data security in the private sector through civil law enforcement, education, policy initiatives, and recommendations to Congress to enact legislation in this area. The touchstone of the FTC's approach to data security is reasonableness: a company's data security measures must be reasonable in light of the sensitivity and volume of consumer information it holds, the size and complexity of its data operations, and the cost of available tools to improve security and reduce vulnerabilities.

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# business.ftc.gov



# Collaboration or “Collision Course”?

 [Advanced Search](#)

## FTC, FCC To Clash On Internet Privacy, Regulators Say

By Jimmy Hoover

Share us on:    

Law360, Washington (September 2, 2015, 5:57 PM ET) -- Republican members of the [Federal Trade Commission](#) and [Federal Communications Commission](#) on Wednesday warned that the FCC's plan to enter the FTC's territory of Internet data privacy may lead to double enforcement and a cloud of uncertainty for broadband companies.

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## The Consequences of a Washington Internet Power Grab

Our two agencies, the FCC and FTC, are on a collision course that could severely hamper how the Web works.

By [MICHAEL O'RIELLY](#) And [MAUREEN K. OHLHAUSEN](#)  **22 COMMENTS**

Aug. 6, 2015 7:19 p.m. ET

As commissioners with the Federal Communications Commission and Federal Trade

Joint enforcement and investigations

# Cramming Cases

## *FTC v. AT&T Mobility* (N.D. Ga. 2014)

- Allegations of cramming involving Premium SMS services
  - AT&T allegedly “charged consumers for [Premium SMS] subscriptions that the consumers did not order or authorize”
  - AT&T allegedly earned more than \$260 million from these charges in 2012 and 2013
- Global settlement with FTC, FCC and coalition of AGs
  - \$105 million
    - FTC (\$80 million); States (\$20 million); FCC (\$5 million)
  - Redress program administered by FTC

## *FTC v. T-Mobile USA* (W.D. WA 2014)

# Cramming Cases

*FTC v. AT&T Mobility* (N.D. Ga. 2014)

*FTC v. T-Mobile USA* (W.D. WA 2014)

- Allegations of cramming involving Premium SMS services
  - T-Mobile allegedly “charged consumers for [Premium SMS] Subscriptions that the consumers did not order or authorize”
- Global settlement with FTC, FCC and coalition of AGs
  - Full refunds to consumers (at least \$90 million)
    - If less, balance remitted to FTC for additional redress, consumer education
  - States (\$18 million); FCC (\$4.5 million)
  - Redress program administered by FTC

# Cramming – common carrier exemption?

## What about the common carrier exemption?

- Section 5 of FTC Act “empower[s] and direct[s]” the FTC “to prevent persons, partnerships, or corporations, ***except ... common carriers subject to the Acts to regulate commerce*** ... from using ... unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45(a)(2)

### *FTC v. Miller*, 549 F.2d 452 (7th Cir. 1977)

- Framed “in terms of ***status*** as a common carrier” -- “not activities”
- “Having conceded [the company’s] common carrier status, the FTC is without jurisdiction to investigate the company.”

### *FTC v. AT&T Mobility* (N.D. Cal. 2015)

- Section 5 “can be applied to an entity that has the status of a common carrier so long as what is being regulated is the entity’s non-common carriage services.”

# FTC Enforcement – Data throttling

## *FTC v. AT&T Mobility* (N.D. Cal. 2015)

- Alleged “data throttling” (reducing data speed when it exceeds limit per billing cycle)
- **“Important Update for Unlimited Data Plan Customers**  
To provide the best possible network experience, starting 10/01/11, smartphone customers with unlimited data plans whose usage is in the top 5% of users can still use unlimited data but may see reduced data speeds for the rest of their monthly billing cycle. We'll alert you if you near the top 5%. To avoid slowed speeds you may use Wi-Fi or choose a tiered data plan. Details @ [att.com/dataplans](http://att.com/dataplans)."
- Allegedly failed to disclose
  - Degree of speed reduction
  - Impact on use of devices
  - Speed reduction was “due to a limit intentionally imposed” rather than due to “general network congestion”
- Theory: unfair and deceptive practices (FTC Act §5)



## Seattle, WA



**Davis Wright  
Tremaine LLP**

## DEFINING SUCCESS TOGETHER



# STATE REGULATORY ISSUES





## **Moderator**

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## **Panel Members**

Dave Conn, Vice President, State Government Affairs, T-Mobile



Paul Kjellander, Commissioner, Idaho PUC

Cindy Manheim, Senior Regulatory Counsel, AT&T

## Overview

- History of State Wireless Regulation
- State Wireless Regulation Today
- Looking Ahead: Future of State Wireless Regulation
- Hot Topics in State Regulation

## History of Wireless State Regulation

- **Pre-1993 OBRA:** traditional utility regulation; tariffs; CPCNs; prohibition of equipment bundling; state PUC regulation of individual cell sites; dismissal of consumer class actions because PUCs “occupied the field”
- **After 1993 OBRA:** Regulation of state rate or entry = **NO**   
state regulation of terms and conditions = **OK** 
- **1996 Telecom Act:** increased state role over interconnection, pole attachment issues
- **2000s:** Numerous state wireless deregulatory bills
- **2010s:** Prepaid tax legislation
- **Section 706:** authorizing state regulation of broadband /VOIP?

## Wireless Regulation Today





## Current Hot State PUC Issues

- 911
- State Universal Service
- Lifeline
- Infrastructure Deployment
- Backup Power/Network Preparedness
- Consumer Protection/ Quality of Service
- Taxes and Surcharges
- Numbering
- IP Interconnection/Rural Call Completion

# 911

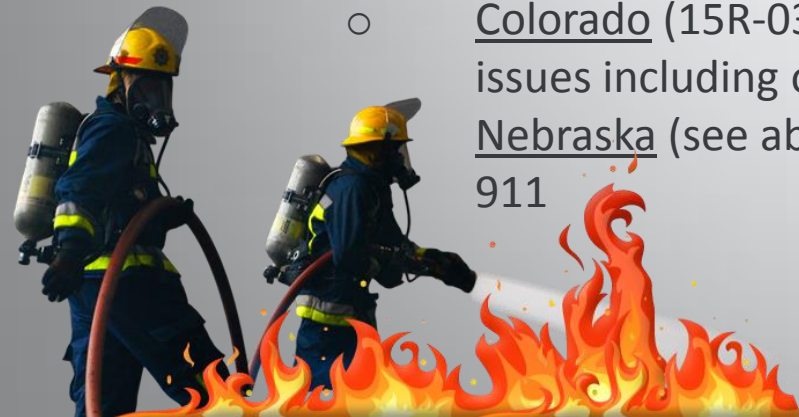
**Outages --** Nebraska (C-4787; 911-063; PI-198) outage in Omaha on 9/1/15

**Fee Allocation/Setting –**

- Nebraska: various dockets (App. 911-060/PI-191) allocate fees to PSAPs for enhanced 911 features, regional PSAP
- Connecticut (12-01-09; 13-01-05, 15-01-15) lowered surcharge from \$0.70 to \$0.59 (6/15)
- Massachusetts (14-3, 15-2) increasing surcharge to \$1.25 (2016); \$1.00 (2017/8)

**NG 911 (including text to 911)**

- Colorado (15R-0318T) comprehensive docket, range of 911 issues including outage reporting, diverse routing, NG-911  
Nebraska (see above dockets) also seeking comment on text to 911



## State Universal Service

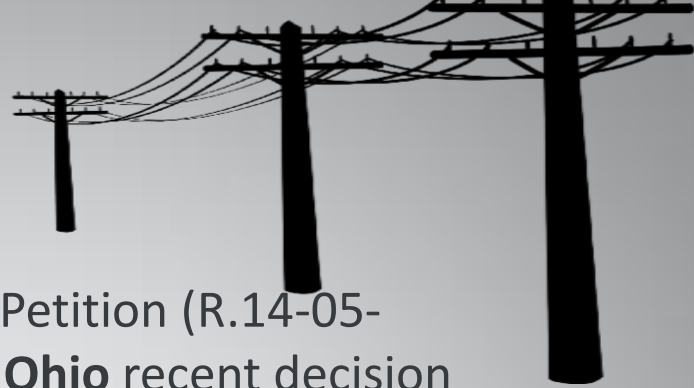
- Flurry of activity in 2014 to conform state Lifeline rules to FCC Lifeline and Link up order
- Surcharge Activity: a number of states are looking at changing the surcharge amounts; for example **Idaho** reduced their surcharge rates (GNR-T-13-03; GNR-T-15-07); other states, including **California** have raised their surcharge rates (T-17486); **Nebraska** looking at moving away from a revenue-based model (NUSF-100, PI-193)
- Broadband -- several states are looking to fund wireless broadband. Some states like **California and Nebraska** have established state funds to support broadband buildout. **Utah** has a pending proceeding looking to support broadband (15-00264-UT). Rumblings about individual support for broadband customers



## Lifeline

- **California** – (R.11-03-013) - Lifeline docket – Phase 2
- **Oklahoma** – (201400005/6) - New Lifeline rules, proposed minimum \$3.00 charge on all Lifeline customers; including prepaid in retail intrastate revenues(neither adopted)
- **Oregon** – (UM 1217) annual reporting requirements for ETCs

# Infrastructure Deployment



- **Pole Access:** **California** pending AT&T Petition (R.14-05-001) for CMRS access to poles/ROW); **Ohio** recent decision (13-579-AU-ORD) requiring non-discriminatory access to poles and ROW; **Oregon** (UM 1643) waiver of certain pole attachment rules, workshops; **Washington** (UT-140621) looking at adopting the many of the FCC rules with some variations; held an option hearing in mid-September; order adopting proposed rules expected soon; **Maine** (2015-00295, 2015-00198) looking at pole attachment rates
- **Pole Safety:** CA GO 95 Fire Safety dockets (R.88-11-005; R.15-05-006)
- **Siting on Private Property:** Connecticut has a Siting Council; Vermont Telecom Plan – a broadband plan that recommends expedited siting process at local/state level and pole attachment reform; final plan released on 14/4/14

## Backup Power/ Network Preparedness



## Consumer Protection / Quality of Service

- **California** – Bonding /registration requirements (D.14-11-004)
- **Indiana** – (2010): Proposed extension of customer complaint process to CMRS
- **Puerto Rico** – (2014): Dept. of Consumer Affairs -- released proposed regulations which would require businesses to publish specifics of their privacy policies and self-classify level of protection provided. Final regulation adopted on 2/27/15
- **Service Quality** : CA – (R.11-12-001) (so far wireless out of it)

## Taxes and Surcharges

- Prepaid legislation
- Overall percentage in **California** approaching 25%
- **South Carolina** – (2015-290-C): petition asking the PSC to determine that wireless carriers in South Carolina are providing telecom services that compete with wireless and thus must contribute to state USF.



## Numbering

- **California** (2015) - 213 and 415 area code relief; overlays
- **Florida** (2014) – overlay of 305 with 786 (SUN)
- **Idaho** 208 exhaust; comments filed October 2015
- **And many more ...**



## Interconnection / Rural Call Completion

- IP transition: Washington (UT-131989) proceeding
- Rural call completion – (I.14-05-012) CA docket
- Some ongoing federal and state litigation with traffic pumpers



## Looking Ahead: Hot State PUC Issues over the Next 5 Years





