



Small Cell Wireless Facilities in the Rights of Way: Challenges and Opportunities

NJLM webinar presentation

January 30, 2017

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MULTIPLE COMPANIES ARE, OR WILL BE COMING

- In many places, Mobility is the issue *de jure*, but we really need examine this issue on a broader scale



- Wireless facilities considered when address them?



in the ROW raise issues not generally siting traditional cell towers – how do we

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Do Companies Seeking to Put Vertical Assets in the ROW Have an *Unrestricted* Legal Right to do so?



- Not under federal law
- Not under New Jersey law ...
- ...but *they do have some rights*



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Is the Company a “Public Utility”?

- What is public utility (legally speaking)?
- We could teach an entire law school class on this
- For purposes of our discussion ...
 - a business or service, which may be publicly or privately owned, engaged in supplying the public generally with some commodity or service, such as electricity, gas, water, transportation, or communications
- Is there a difference between a “public” utility and a “utility”?
- The answers to these questions, to the extent there are clear answers, are functions of state and sometimes federal law



If the Company is Given ROW Access Under State Law, are there any Local Police Power Controls?

- Can local governments impose height limits in ROW?
 - Do your height limitations set forth in each zoning district apply on public as well as private property?
 - Many do
- Do you have local authority to limit the number of poles in the ROW, either to protect public safety or for aesthetic reasons?
 - I would suggest that you do



Are we Opening Pandora's Box Here?

- Once the first company installs poles and antennas in the ROW, don't the non-discrimination provisions of federal (and perhaps state) law require that all future applicants to locate similar structures be treated comparably?
 - Probably
 - At least you can hear the arguments being made by [PICK ONE] VZW, AT&T Wireless, Crown Castle, American Tower, T-Mobile, etc.
- Some companies are wireless service providers; some are simply infrastructure owners that lease space to providers
 - If you allow infrastructure companies to locate in the ROW, can you force a wireless provider to choose between a deal with the existing infrastructure owner or denial of their own application?
 - no!
 - So from a planning standpoint, we are looking for ways to promote deployment of small cell facilities while avoiding visual "tower clutter" in the ROW

Federal Law Issues

- Telecommunications Act of 1996, 47 U.S.C. Sec. 332 (c)(7) “no unreasonable discrimination” requirements:
 - The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof shall not unreasonably discriminate among providers of functionally equivalent services
 - Query: if you’ve previously allowed wireless facilities in the ROW, but required them to be camouflaged or otherwise restricted, if you allow stand alone towers from a new company do you subject your jurisdiction to charges of unreasonable discrimination?

Federal Law Issues

- Telecommunications Act of 1996, 47 U.S.C. Sec. 332 (c)(7): restricts local authority in some areas but generally preserves it
 - (A) General authority - Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities
 - (B) Limitations:
 - (i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—
 - (I) shall not unreasonably discriminate among providers of functionally equivalent services; and
 - (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services

Federal Law Issues

- Telecommunications Act of 1996, 47 U.S.C. Sec. 332 (c)(7):
 - (ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities **within a reasonable period of time** after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.
 - (iii) **Any decision** by a State or local government or instrumentality thereof **to deny** a request to place, construct, or modify personal wireless service facilities **shall be in writing and supported by substantial evidence contained in a written record.**
 - (iv) **No State or local government or instrumentality thereof may regulate** the placement, construction, and modification of personal wireless service facilities **on the basis of the environmental effects of radio frequency emissions** to the extent that such facilities comply with the Commission's regulations concerning such emissions.
 - (v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction.

Federal Law Issues

- Section 332 (c)(7) shot clock issues:
 - Relates to the placement, construction, and modification of personal wireless service *facilities*
 - Facilities are those used to provide personal wireless services, which are “commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services” 47 U.S.C. § 332(c)(7)(C)(i)
 - 90 days for collocations (that are not mandatory collocations under Section 6409 of the Spectrum Act) and 150 days for new facilities
- Likely means that even if an applicant is not a service provider, to the extent that it proves it is building infrastructure for a provider of personal wireless services, the 332 (c)(7) shot clocks apply



Federal Law Issues

- Telecommunications Act of 1996, 47 U.S.C. Sec. 253: Removal of Barriers to Entry
 - (a) In general - No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
 - (c) State and local government authority - Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.
 - (d) Preemption- If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

Collocation and Federal Law

- Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 (which has come to be known as the Spectrum Act because of its coverage of radio frequency spectrum issues) mandates that a State or local government approve certain wireless broadband facilities siting requests for modifications and collocations of wireless transmission equipment on an existing tower or base station that does not result in a substantial change to the physical dimensions of such tower or base station
- In October 2014, the Federal Communications Commission unanimously approved rules interpreting Section 6409(a)



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FCC Collocation Rules Definitions (can be mirrored in local ordinance)

- Terms defined:
 - Base station
 - Collocation
 - Eligible Facilities Request
 - Eligible Support Structure
 - Existing
 - Site
 - Substantial Change
 - Transmission Equipment
 - Tower



An eligible facilities request that does not result in a substantial change in physical dimension must be approved within 60 days of a complete application

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Question

- Under Section 332(c)(7), you must act on a complete application for new wireless facilities:



- ___ (A) in 60 days
- ___ (B) in 90 days
- ___ (C) in 150 days
- ___ (D) none of the above

Franchises, Permits, Licenses?

- What's the best way to assert your authority, and protect your jurisdiction?
- Once again, it depends in large part upon state law
 - You have authority to require a franchise,
 - You have authority to address police power regulations in a ROW access or license agreement, or in a franchise
 - You may need (or want) to permit facilities on an individual basis, depending upon what is proposed,
 - And despite what the law is today, you may need to advocate for local control at your friendly neighborhood state capitol building



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And yet Another Challenge at the FCC

- In response to a Mobilite petition for declaratory ruling at the FCC, the Commission has issues a public notice titled: **STREAMLINING DEPLOYMENT OF SMALL CELL INFRASTRUCTURE BY IMPROVING WIRELESS FACILITIES SITING POLICIES, DA 16-1427; WT Docket No. 16-421**
- In the PN, the Commission asks numerous questions and seek feedback on how siting is happening, and how effective the local approval process is
- Issues teed up include how long does it take, are local governments delaying deployment due to inappropriate fees or taking too long to process requests, and almost any other issue you can think of relating to local authority over the ROW



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And yet Another Challenge at the FCC

- The industry will be actively involved in this proceeding
- *Local governments need to be involved as well*
 - Comments are due March 8th
 - Reply Comments are due April 7th
- Do you have success stories? Do you have issues with the way applicants have approached your jurisdiction? Are you receiving complete applications and processing them in a timely manner?
 - The FCC needs your feedback in the record
 - This proceeding could lead to new federal rules preempting local authority over your ROW

Getting Information and Acting

- Look at amending your code if necessary, and treat applications the same as you would for any other applicant
- If you don't have criteria for determining the conditions under which you will allow poles in the ROW, you need them
- Issues that may come up:
 - “Some of our facilities will go on utility company poles”
 - Get a copy of their pole attachment agreement
 - “Some of our facilities will be on state roads in your jurisdiction”
 - Get a copy of their agreement with NJDOT

Getting Information and Acting

- So ... don't feel pressured; ask questions; get all the information you need to make a complete application under your local requirements, and act accordingly

- And if your policy is to limit big ugly poles in the ROW, make sure, to the extent you have the authority, that your code and regulations reflect that, treat all comers the same, and be willing to look for creative solutions in a collaborative way



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THANKS!



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