

Current Legal Issues Affecting Broadband Infrastructure Deployment

Presented by Scott Thompson, Jay Ireland, Maria Browne,
John Seiver, Jill Valenstein, and Jim Tomlinson

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Introduction



- Welcome
- This PowerPoint presentation will be available on our blog *Broadband Deployment Law Advisor* (www.broadbandlawadvisor.com) at the conclusion of this webinar.
- There will be 10 minutes left at the end of this presentation for questions.
- For CLE credit, please contact Camille King (camilleking@dwt.com).



Presented by Scott Thompson

Recent Federal Steps to Accelerate Wireless Facilities Deployment

Recent Federal Steps to Accelerate Wireless Facilities Deployment



- FCC Shot Clock Order (2009)
- “presumptively reasonable” times in which zoning authorities must act on wireless siting applications
 - 90 days for a collocation
 - 150 days for facilities other than collocations
- Declined to adopt “deemed granted” remedy
- Declaratory Ruling – “One Provider” / “Blanket Ban” standards wrong
- Affirmed by 5th Circuit and Supreme Court *City of Arlington v. FCC*

Recent Federal Steps to Accelerate Wireless Facilities Deployment



- Section 6409 of the Middle Class Tax Relief & Jobs Creation Act of 2012
 - Codified at 47 U.S.C. § 1455(a)
 - a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station
 - No discretion
 - January 25, 2013 FCC Wireless Bureau Public Notice
 - Base Station = an antenna, transceiver, or other associated equipment “in any technological configuration”-- includes DAS and small cells
 - National Collocation Agreement definitions appropriate for determining whether collocation, removal, or replacement “substantially changes the physical dimensions” of the underlying structure

Recent Federal Steps to Accelerate Wireless Facilities Deployment



- September 2013 FCC Notice of Proposed Rulemaking – Steps for DAS and Small Cells
- 4 “Major issues” re regulation of wireless siting
 1. Environmental and historical review of DAS & Small Cells
 2. Temporary exemption from FCC pre-construction environmental notification for certain temporary towers
 3. Application & Scope of Section 6409
 4. Application of FCC Shot Clock to DAS & Small Cells
 - Remedy



Presented by Jay Ireland

Deployment of Wired Facilities in Public Rights-of-Way and Private Easements

Deployment of Wired Facilities in Public Rights-of-Way and Private Easements



■ Access to Public ROW

– Cable providers

- Federal Cable Act: Cable franchise authorizes construction of a cable system over public ROWs, and through easements” dedicated to compatible uses. 47 U.S.C. §541(a)(2).
- State Video Laws: Since 2005, 22 states have adopted cable/video service franchise laws that streamline franchising and access to public ROWs.

Deployment of Wired Facilities in Public Rights-of-Way and Private Easements



■ Access to Public ROW (cont'd.)

– Telecom providers

- Section 253(a) prohibits state and local requirements that “may prohibit or have the effect of prohibiting the ability of any entity to provide any” telecommunications services. 47 U.S.C. §253(a).
- Section 253(c) permits state and local governments to manage public rights-of-way and to require telecommunications providers to pay “fair and reasonable compensation” on a competitively neutral non-discriminatory basis. 47 U.S.C. §253(c).
- Key contentious issues: ROW fees, burdensome franchise terms and more favorable treatment of ILECs over CLECs.
 - Substantial litigation leads to inconsistent results in different jurisdictions.
 - » *TCG v. City of White Plains*, 305 F.3d 67 (2d Cir. 2002).
 - » *Sprint Telephony PCS, L.P. v. San Diego County*, 543 F.3d 571 (9th Cir. 2008).

Deployment of Wired Facilities in Public Rights-of-Way and Private Easements



- Access to Public ROW (cont'd.)
 - State laws
 - 1996 Act – state law reforms.
 - Establish competitively neutral, fair and reasonable ROW fee structures.
- Access to private easements and poles
 - Federal statutory right for cable to access easements dedicated for compatible use.
 - State easement apportionment laws.
 - Eminent domain.
 - Federal and State Pole Attachment Laws.



Presented by Maria Browne

MDU Legal Update



- Federal law governing access to MDUs/MTEs
 - Prohibited Exclusivity
 - Telecom Carrier MTEs (47 CFR §§ 64.2500 and 64.2501)
 - Cable MDUs (47 C.F.R. § 76.2000)
 - Inside Wiring Rules (47 C.F.R. § 76.800 et seq)
 - Demarcation Point (Sheet Rock Ruling)
- Interesting Developments
 - Out of building access
 - In-building DAS



Presented by John Seiver

Electric Utility Challenges: Aftermath of April 2011 FCC Pole Attachment Order

Electric Utility Challenges: Aftermath of April 2011 FCC Pole Attachment Order



- Reconsiderations Pending at FCC
 - New Telecom Rate Attaching Entity Impact
 - Makeready Timeframes
- Cert Denied on ILEC 224 Coverage



Presented by Jill Valenstein

Know Your Pole Attachment Access Rights

Know Your Pole Attachment Access Rights



- New Access Timelines-FCC April 2011 Order (47 C.F.R. § 1.1420)
 - Preconstruction Survey (and access denials): 45 days (+15 days for large jobs).
 - Make-Ready Estimate: 14 days to provide/accept.
 - Pole owner must notify all existing attachers (upon make-ready payment) of planned make-ready.
 - Make-Ready Performance: 60 days after payment (+30 days for wireless above communications space; +45 days for large jobs.)
 - Large job = Lesser of 5% of pole owner's poles in a state or 3,000 poles (counted every 30 days).

Know Your Pole Attachment Access Rights



- Remedies for Failure to Meet Timelines (47 C.F.R. § 1.1420(h)-(i); 1.1422)
 - Hire Contractor to Perform Survey and Make-Ready (in “communications space”).
 - Pole owner must provide list of approved contractors.
 - Must notify pole owner of decision to use contractor.
 - Pole Owner May Stop Clock for “good and sufficient cause.”
 - File Complaint
 - Wireless attachments above “communications space” and make-ready in “electric space.”

Know Your Pole Attachment Access Rights



- Longstanding Access Rules (often violated)
 - Attacher pays only for make-ready necessary to accommodate its attachment. (See, e.g., *Cavalier Tele., LLC v. VEPCo*, 15 FCC Rcd 9563 (rel. June 7, 2000, Cable Bureau)).
 - Challenge make-ready costs to correct pre-existing violations caused by others (including the pole owner).
 - Existing attacher not required to pay to accommodate others (including pole owners). (47 U.S.C. 224(h)-(i)).
 - Overlashing may be performed without pole owner approval. (See *Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12141 (2001), *aff'd*, *Southern Company v. FCC*, 313 F.3d 574, 582 (D.C. Cir. 2002)).



Presented by Jim Tomlinson

Developments in Pole Attachment Rental Fees



FCC April 2011 Pole Attachment Order

- Objective: **Unified** cable & telecom rates
- Major evolution from Martin to Genachowski
- Modified telecom rate formulas
 - Standard formula: **66%** or **44%** of investment
 - Engineered to match cable rate
 - Alternative formula: Administrative and maintenance expenses only (usually higher)
- Minimal impact among states, but new formula affirmed by CT PURA
- Cable formula unchanged



Common Issues of Dispute

- Some utilities unilaterally lowered fees, many did not
- Appeals exhausted, so new formula is settled law
- Persistent claims that VoIP = telecom service
 - Battle of the footnotes
- Average number of attaching entities
 - 5 urban & 3 rural AE's still presumed
 - Which poles and attaching entities should count?
- Other formula presumptions may be dated
 - 15% for appurtenances
 - 37.5 foot average pole height
 - 11.25% rate of return



Be Alert For ...

- **Spikes** in AT&T or Verizon pole fees
 - ILEC fees are often relatively stable
 - 4Q12 pension charges: AT&T \$10 B, Verizon \$7.2 B
 - Uneven impact across states
 - 2013 invoices may be coming soon
 - Charges should not be in Acc't 6720 or amortized
- **Unchanged** telecom rates
 - 2010 telecom fees probably now unlawful
 - FCC Rule 1.1403(j) is official; utilities must provide data
 - Being proactive may save money



Questions?

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