

Broadband and Communications Update: Challenges and Opportunities for Colorado Municipalities

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Municipal Attorneys Webinar
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LOTS OF ISSUES



- “Small Cells” in the public Rights-of-Way
 - Negotiated Agreements
 - State legislation
 - Federal Communications Commission proceeding
- Broadband legislation update – state and federal
- What’s new in Cable Franchising
- Street lights and Smart Cities
- Public Safety Communications



MULTIPLE COMPANIES ARE, OR WILL BE COMING

- In many places, Mobilitie is the issue *de jure*, but we really need to 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

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



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



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; some don't (but should)
- 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
 - But keep an eye on new state legislation



Local Government ROW License Agreement

- Multiple local governments are negotiating ROW license agreements with different companies
- Master Agreement – covers primary terms and conditions that will apply in every case
 - Preference for use of existing facilities
 - Terms upon which stand alone poles may be permitted
- Individual Site Licenses

Opening Pandora's Box

- Once the first company installs poles and antennas in the ROW, the non-discrimination provisions of federal (and perhaps state) law require that all future applicants to locate similar structures be treated comparably
- 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)



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

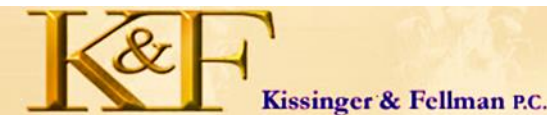
State Law – House Bill 17-1193

- Amends CRS 38-5.5-101 from 1996
 - Makes placement of small cell facilities a “use by right”
 - Allows for “batch” applications
 - Use is subject to all police powers
 - Charges limited to amount that would be authorized if local government were regulated under 47 U.S.C. Sec. 224 (federal pole attachment regs)
 - Cable exemption for wi-fi equipment
- and CRS 29-27-402 from 2014
 - New definition of “micro-cell” and limit on permitting
 - Imposes new 90 day shot clock

And yet Another Challenge at the FCC



- In response to a Mobilite petition for declaratory ruling at the FCC, the Commission has issued 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 seeks feedback on how siting is happening, and effectiveness of the local approval process
- 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



And yet Another Challenge at the FCC

- Both the industry and local governments are actively involved in this proceeding
- Comments were due March 8th; Reply Comments due April 7th (unless extension granted)
 - Over 60 local government entities, coalitions, state and national associations commented – arguments include:
 - Lack of FCC authority under Sec. 253 to limit ROW charges
 - Lack of FCC authority under Sec. 332 to restrict land use authority
 - 10th Amendment issues

And yet Another Challenge at the FCC

● Local Government Issues:

- Numerous examples of local governments “doing it the right way”
- Numerous examples of delays being the fault of the industry applicants
- Numerous local governments named only generically as bad actors – no due process

● Industry Issues

- Outrageous fees for permits and charges for use of ROW
- Unreasonable delays
- Requirements for public hearings for requests that should be addressed on an administrative level

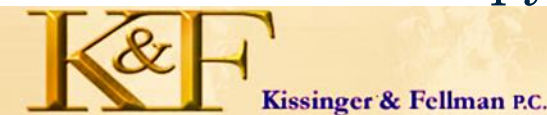


And yet Another Challenge at the FCC

- This proceeding could lead to new federal rules preempting local authority over our ROW
- In the past, the FCC has not been shy about preempting local laws, but has been more restrained about preempting state laws
 - Perhaps having a state law might save us from something worse coming out of the FCC?
- Expect decision in 2 – 6 months and the inevitable appeal to federal court

Getting Information and Acting

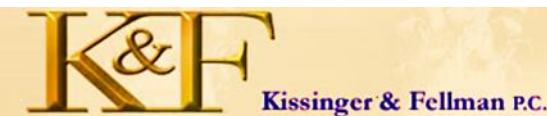
- Look at amending your code if necessary, and treat applications the same as you would for any other applicant
- If you don't have criteria for determining the conditions under which you will allow poles in the ROW, you need them
- Issues that may come up:
 - “Some of our facilities will go on utility 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 CDOT



Getting Information and Acting

- One of the challenges is balancing the relationships with the companies you are negotiating with and the messages being sent by company leadership
- Mobilitie senior management is particularly dismissive and disrespectful of local governments

“There are many stupid cities around the county—really dumb. They’re greedy. They have their hands out. They don’t give a s*** about their constituents. They don’t care.” - Gary Jabara, Mobilitie CEO, AGL Magazine, March 2017, p. 38.



Broadband Legislative Update

- SB 42 – would've repealed municipal broadband restrictions of SB 152, but was killed by Senate Business, Labor and Technology Committee on 4-3, party line vote
- Easement perfection
- Federal legislation
- FCC activity



Cable Franchising

- May not be going away soon, but it is going away
 - Subscribers are cutting the cord
 - No local jurisdiction over video packages provided “over the top”
 - Franchise fees and PEG support is not a given
- Challenges from the minimal competition we’ve experienced
 - Comcast refusing to continue build out and other obligations in areas where CenturyLink has franchises
 - CenturyLink stepping back now on additional franchises and continued expansion where they operate
- The end of I-Nets

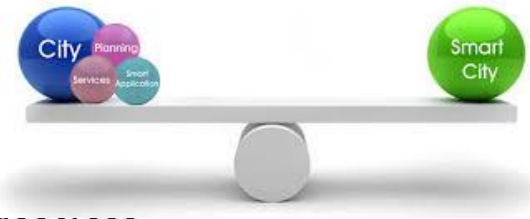


Cable Franchising

- If you are in franchise negotiations and having problems
 - You do have authority under federal law provisions for “formal” franchise renewal
 - It is expensive and time consuming, but can ultimately get you closer to what you want
- New cable operator – Layer3
 - They appear to provide traditional cable packages
 - They may own or control backhaul infrastructure in ROW but may not own infrastructure in ROW in municipality
 - They’ve claimed cable operator status for purposes of other federal law benefits
 - Do they need a franchise? A: maybe ...

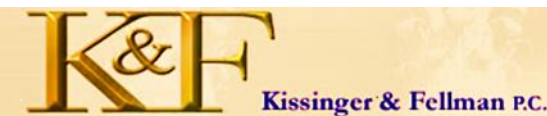
Why do Smart Cities Need Better Broadband?

- The Internet of Things and the applications it will require to provide new services involves three critical components
 - Sensors
 - Connectivity
 - People and the capability to utilize
- The Internet of Things will allow us to connect, analyze and view data from any device, and take coordinated action.

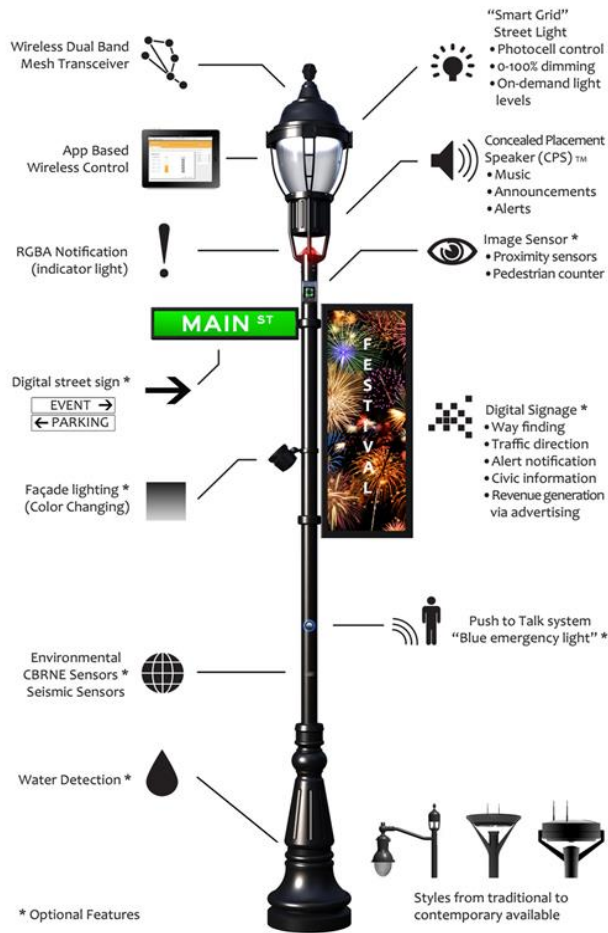


SMART LOCAL GOVERNMENT APPS (Most examples from www.libelium.com; Design and manufacture of wireless sensors for Smart Cities and the Internet of Things)

- Smart Parking – Monitoring of parking spaces availability in the city.
- Structural health – Monitoring of vibrations and material conditions in buildings, bridges and historical monuments.
- EMF Levels – Measurement of the energy radiated by cell stations and WiFi routers.
- Smart Roads – Highways with warning messages and diversion options according to climate conditions, traffic jams, etc. – monitoring of vehicles and pedestrian levels to optimize driving and walking routes.
- Smart Lighting – Intelligent and weather adaptive street lighting.
- Waste Management – Detection of trash levels in containers to optimize the collection routes.



ADVANTAGES OF MUNICIPAL STREET LIGHT OWNERSHIP



- Some cities that have evaluated this believe there can be extensive cost savings
- Provides flexibility in the kind of light fixtures you can use
- Gives municipality control over attachments for network equipment necessary to collect the kind of data you'll need to incorporate smart city applications

BUYING YOUR STREET LIGHTS

- Even if you don't buy the existing lights, consider amending code to provide for municipal ownership in all new development and redevelopment
- If you want to negotiate with Xcel: first steps ...
 - Do your own study to identify all street lights and those owned by the Company – they don't have good records and they don't know
 - Get an appraisal – in addition to value of the lights, include engineering study to estimate separation costs

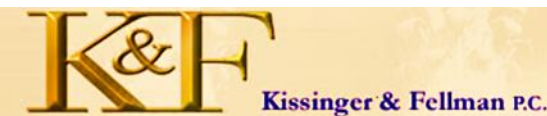
BUYING YOUR STREET LIGHTS

- Negotiations with Xcel will entail ...
 - Signing a non-disclosure agreement
 - Agreeing on a purchase price for the lights
 - Paying for a separation study
 - Negotiating the contract, which will include purchase price for the assets, and all costs for the separation
- Condemnation option – you may need to use it
 - Most Xcel franchises require 1 year notice of condemnation, so obtaining Council action and giving the notice starts the clock and can provide an incentive to negotiate timely

PUBLIC SAFETY COMMUNICATIONS – FIRSTNET AND ITS IMPACT ON COLORADO LOCAL GOVERNMENTS



- FirstNet is a creature of federal statute intended to construct a nationwide, interoperable public safety communications network
- FirstNet is appointed body, and exists within the National Telecommunications and Information Administration
- Will be choosing a private sector partner to build and operate the network
 - Nowhere near enough federal money allocated to do this without private investment
 - Challenge to choice of contractor (AT&T) recently dismissed by US Court of Claims

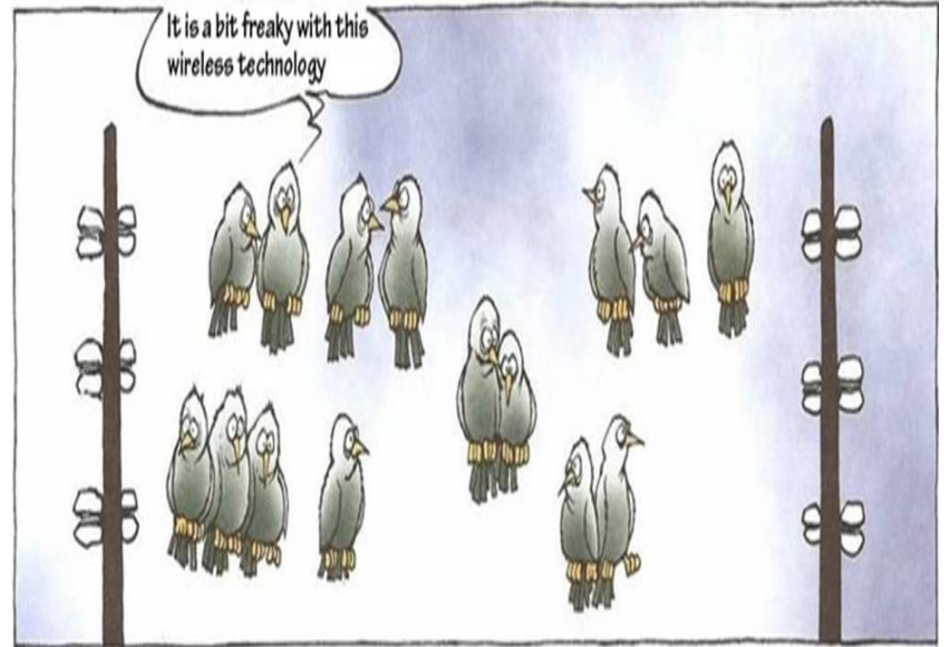


PUBLIC SAFETY COMMUNICATIONS – FIRSTNET AND ITS IMPACT ON COLORADO LOCAL GOVERNMENTS

- FN will create state plan and deliver to each Governor
- Governor has 90 days to decide to opt in or opt out
- Opting out means state will build own network, but must be interoperable with federal network
- FCC determining first part of the opt out process
- Concern: FN and its private partner have incentives to make opting out difficult
- Advantages of opting out
 - Network may be more robust
 - More local control
 - Potential advantages to local government broadband networks



THANKS!



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