WIRELESS BROADBAND EXPANSION: CHALLENGES AND POLICY

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Multiple Companies are or will be Coming to Your Jurisdiction

- Wireless facilities in the ROW raise issues not generally considered when siting traditional cell towers –

How should (must) we consider them?

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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 Colorado law
  …
- …but *they do have some rights*

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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
  - More on Colorado's new state legislation (HB 1193) in a few minutes

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Example of Structure for Providing Access: 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
- Not the only way to do this – might be better served with robust provisions in local codes and regulations, and simply address site applications on a site by site basis
  - But at some point, must be formal approval in the first instance to allow access to your ROW (CRS 38-5.5-101, *et seq.*)

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 and public safety issues related to "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) "no prohibition of service" 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 prohibit or have the effect of prohibiting the provision of personal wireless services
    - Query: what does "have the effect of prohibiting" wireless services mean?

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
- 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

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

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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
  - Right to attach to local government facilities in the ROW
  - Pole attachment 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 potential limit on permitting
  - Imposes new 90 day shot clock for small cell locations or collocations

And Now a New Challenge at the FCC

- *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment,* WT Docket No. 17-79 -- Notice of Proposed Rulemaking and Notice of Inquiry

NPRM:

- Assess the impact of the Commission's actions to date
- What siting applicants can or should be required to do to help expedite or streamline the siting review process
- They plan, under one or more of three legal theories, to adopt a "deemed granted" rule if applications are not acted upon in the time dictated by the FCC

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New Challenge at the FCC

NPRM:

- They are considering shortening the previously adopted shot clock times – possibly creating different shot clocks for facilities of different heights
- Considering shorter shot clocks for small cell facilities
- Considering starting the shot clock during the "pre-application process – *before the application is even filed*!
- Considering a determination that shot clock will continue to run ever during a moratorium (making it useless)

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New Challenge at the FCC

NPRM

- Reexamining National Historic Preservation Act and National Environmental Policy Act Review
  - This will be a direct attack on Tribal Nations as well as potentially lessening requirements for respecting historic designation issues and environmental assessment requirements

New Challenge at the FCC

Notice of Inquiry

- FCC has held that in interpreting the phrase "prohibit or have the effect of prohibiting" we must consider whether an action "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment" -- should FCC provide further guidance on how to interpret and apply this statutory language
  - Should a plaintiff show that the local regs "may" have the effect of prohibiting service, or that they do in fact have that effect?

New Challenge at the FCC

NOI

- Aesthetic concerns: FCC seeks comment on whether it should provide more specific guidance on how to distinguish legitimate denials based on evidence of specific aesthetic impacts of proposed facilities, on the one hand, from mere "generalized concerns," on the other
- Fees: FCC will consider whether fees charges for applications are reasonable and if they should set parameters for what fees can be charged

New Challenge at the FCC

NOI

- The are seeking information on whether recurring charges (like rent) for government owned structures not in the ROW (like water towers, building rooftops, etc.) may have the effect of prohibiting service
- This includes reconsidering a prior FCC decision that held that localities are not bound to the fee limitations or mandated approval requirements when acting in a proprietary as opposed to regulatory capacity
  - An unbelievable intrusion into local authority and a pretty blatant example of a federal government takings if they choose to dictate what kind of fees can be charged for these properties
- And last but not least, they will consider local government undergrounding policies and whether they should dictate whether local governments should be precluded from undergrounding other utilities if it negatively impacts wireless facilities

Getting Information and Acting

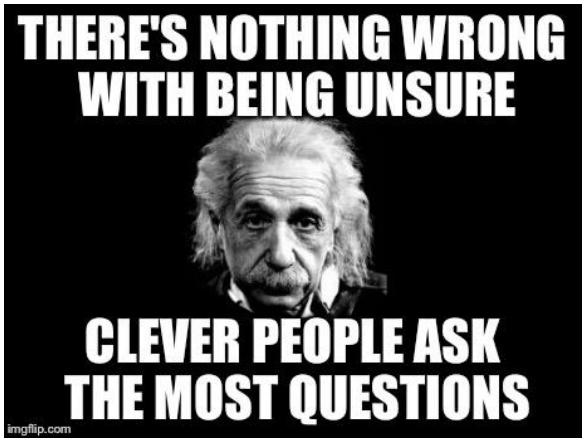
- Look at amending your code if necessary, and treat applications the same as you would for any other applicant
- If you don't have criteria for determining the conditions under which you will allow poles in the ROW, you need them
- Issues that may come up:
  - "Some of our facilities will go on utility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

- "*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.

THANKS!



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