

THE LAW FIRM OF LINDA K. AIN
4725 Inman Drive
Lexington, KY 40513
(859) 224-3035
lindaain@twc.com

SMALL CELL FACILITIES IN THE RIGHTS OF WAY

INTRODUCTION

- What are Small Cell Facilities?
 - Small cell equipment transmits wireless signals to and from a defined area to a larger cell tower.
 - Small cell equipment is installed at sites that support cell coverage within a large cell area with high coverage needs (hospitals, factories, schools, colleges, shopping malls) or at sites within large geographic areas with poor cell coverage.
 - Small-cell solutions are typically deployed piecemeal to provide coverage or enhance capacity in much smaller areas.
 - Each small-cell installation requires a communications link back to a larger network and an electric power source.
 - Some systems use fiber backhaul and others use microwave technology.
- Nationally, the wireless data demand has driven deployments of small cell facilities to fill gaps in coverage & lower operating costs.
- A recent trend has emerged where Kentucky cities and counties are being contacted about placing small cell towers within rights-of-way (ROW).
- In reviewing, negotiating, and approving the siting of small cell facilities within the ROW, a local government must consider the following factors
 - obtaining fair compensation for use of the ROW,
 - obtaining fair compensation for attachments to city facilities (if any),
 - accommodating reasonable access and entry to the market for service providers that may be entitled to it under federal law,
 - facilitating the efficient deployment of valuable wireless services for residents and businesses,
 - recognizing and exploring opportunities for beneficial public-private partnerships, and
 - satisfying the local government's obligations with regard to public safety and welfare.

- For cities and counties, it is extremely important to require small cell providers, as well as all other telecommunication providers to obtain a franchise as required by Sections 163 and 164 of the Kentucky Constitution.
- If providers desire to attach small cell facilities directly to municipally owned property, such as city traffic lights, street lights, and poles of municipally owned utilities, local governments should require pole attachment agreements or leases of municipal facilities.
- Local governments may want to review their zoning ordinances to establish an efficient way to review and process small cell requests. Zoning can be used to regulate siting of small cell towers, and to establish a permitting process for these types of applications.

KEY FEDERAL LAWS

- **Section 253 of the Federal Communication Act**, entitled “Removal of Barriers to Entry,” prohibits local governments from creating barriers to the provision of telecommunications services (47 U.S.C. § 253(a))¹ while preserving the right of local governments 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. . . .” (47 U.S.C. § 253(c)).
- **47 USC 332(c)(7)**
 - 47 USC 332(c)(7) provides for limited preemption of local zoning authority in the siting of personal wireless service facilities.
 - 47 USC 332(c)(7) generally preserves local zoning authority, but imposes five limitations:
 - Local governments shall not “unreasonably discriminate” among providers of functionally equivalent services
 - Locality governments shall not prohibit or effectively prohibit provision of personal wireless service
 - Local governments must act on request within “reasonable period of time”

¹ Section 253(a) provides, “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.”

- Denials must be “in writing” and supported by “substantial evidence”
 - No regulation of radio frequency emissions – except local governments may require applicant to demonstrate compliance with FCC rules
- It is important to recognize that 47 USC 332(c)(7) (and the subsequent FCC Orders and cases) addressed local government action relating to local zoning and land use regulations, as opposed to decisions made concerning municipal property and the public right of way.
- **Section 6409(a) of the Spectrum Act (47 USC 1455)**
 - Pursuant to 6409(a), a local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower² or base station³ that involves (A) collocation of new transmission equipment; (B) removal of transmission equipment; or (C) replacement of transmission equipment that does not substantially change the physical dimensions of such tower or base station.
 - Section 6409(a) applies to zoning decisions and other specific government approvals with regard to wireless facility modifications that do not involve an attachment to city-owned structure.
 - The FCC has made clear that Section 6409(a) does not apply to a local government acting in a proprietary capacity, as opposed to a land use regulator.

FCC’S WIRELINE AND WIRELESS INFRASTRUCTURE NOTICES OF PROPOSED RULEMAKING AND THE WIRELINE NOTICE OF INQUIRY

This spring the FCC adopted a pair of Notices of Proposed Rulemaking that collectively examine alleged regulatory impediments to wireline and wireless network infrastructure and deployment at the federal, state, and local levels. The FCC sought comments on how to best reform various regulations that affect the speed and cost of infrastructure investment. Additionally, the FCC issued a Wireline Notice of Inquiry.

² Pursuant to 47 CFR § 1.40001, a tower is a structure built for sole or primary purpose of supporting FCC licensed or authorized antennas and associated facilities.

³ Pursuant to 47 CFR § 1.40001 a base station is “any structure other than a tower” that at time of application was supporting or housing equipment associated with wireless service, antennas, coax, or backup power supplies (walls, rooftops are support structures).

It is likely, that this fall, the FCC will issue new rules relating to a multitude of issues of interest to local governments including permitting, right of way regulation, pole attachments and franchise fees.

FRANCHISES FOR SMALL CELL FACILITIES & TELECOMMUNICATIONS PROVIDERS

- **Exclusivity and Nondiscrimination**
 - Franchise agreements for small cell and/or telecommunications providers cannot be exclusive, and must be competitively neutral and nondiscriminatory.
 - Section 253(c) of the Federal Communications Act provides an important safe harbor for localities against barrier-to-entry claims made under 253(a), if the management of the ROW is competitively neutral and nondiscriminatory.

- **Franchise Fees**
 - In June, the Supreme Court of Kentucky issued an opinion in *Kentucky CATV Association Inc. v. City of Florence et al.* clearing the way for cities to once again collect franchise fees on cable and communications services. In its opinion, the Supreme Court gave cities that option of “opting to forgo collecting a franchise fee in lieu of participating in the Telecom Tax scheme.”
 - Unfortunately, Kentucky counties were not given the option to collect franchise fees.
 - Cities and counties entering into new franchises should be very careful not to waive or extinguish their future rights to collect franchise fees.
 - It is extremely important for cities to determine whether it is in their economic interest to remain in the state’s excise tax distribution scheme or begin collecting franchise fees. Currently the excise tax distribution received by each city is approximately 85% of the franchise fees it collected in 2005.
 - I recommend that cities request that their incumbent cable and telecommunications operators provide cities with their actual gross revenue figures in order to determine whether the cities should remain in the state’s excise tax distribution scheme or begin collecting franchise fees.
 - I also recommend that cities request from new entrants, such as small cell operators, estimated projected franchise fee calculations.
 - Until a city determines whether it is better to stay in the excise tax distribution program or start collecting franchise fees, any new telecommunications franchise entered by a city should contain language

- preserving the city’s option to forego collecting a franchise fee in lieu of participating Multichannel Video Programming and Service Tax scheme under KRS 136.600 et seq. and
 - stating that the city may opt to exercise its constitutional right to collect franchise fees during the term of the franchise
 - Any new telecommunications franchise entered by a county should provide that if at any time Kentucky law is changed to allow the collection of franchise fees by the local governments, a franchise fee may be imposed.
 - Franchise fees must be nondiscriminatory and competitively neutral as between similarly situated providers.
 - Franchises should also contain provisions relating to franchise fee reports and audits of any future franchise fees.
- **Other provision that should be include in a Telecommunications Franchise**
 - Application Process.
 - The application requirements should include:
 - A description of the proposed system design.
 - A description of all the types of services proposed. System designs should be required to detail equipment start point, routes and end point location accompanied by network routing maps(s).
 - Information in sufficient detail to identify the location of the existing ducts or conduits to be occupied.
 - A preliminary installation schedule and completion date.
 - An engineering statement advising that the system and operations thereof would meet all the requirements of the franchise ordinance.
 - Applications should be reviewed closely
 - Construction Standards
 - Performance Bond and Letter of Credit Requirements
 - Indemnification.
 - Insurance.
 - Transfer of Control
 - Franchise Duration.
 - Under Section 164 of the Kentucky Constitution, no franchise can be longer than 20 years
 - Penalties
 - Right to Terminate and Cancel the Franchise.
 - Advertising for Bids & the Bid Process.
- **Donations/In Kind Contributions**
 - Under KRS 136.660, counties and cities that opt to continue to receive the Telecommunications Excise Tax Distribution cannot require payments or

in-kind property or services in telecommunications franchises. However, pursuant to KRS 136.660, communities receiving the Telecom Excise Tax distribution can receive donations from a small cell or other telecommunications provider.

- Service providers may be willing to provide local governments some form of non-monetary, in-kind donation because of wireless facilities siting in the ROW, and in particular as part of attachment agreement negotiations.
- Doing so may be beneficial to the service provider as well, which may be in a position to offer the use of what is essentially surplus property, involving only incremental costs.
- Cities that opt to receive franchise fees may receive donations, but may also require in kind contributions in their franchises.
- Examples of in-kind donations/contributions include
 - Granting the local government, the right to use of un-activated ("dark") fiber optic cable from every attachment (antenna node) site, to a centralized location.
 - Installing facilities in an area that it might not otherwise serve, but for which service is a high priority for the city or county.
 - Installing street lighting and/or security cameras on small cell towers.
- **Certificate of Public Convenience and Necessity**
 - On August 14, 2017, the Kentucky Public Service Commission issued an order which exempts all telecommunications utilities from the requirement of KRS 278.020(5) to obtain a certificate of public convenience and necessity before applying for or obtaining any franchise, license, or permit from any city or other governmental agency.

Louisville's "One-Touch Make-Ready" Ordinance

In February 2016, the Louisville Metro Council enacted a "one-touch make-ready" ordinance outlining new procedures for the installation of communications networks on utility poles in the city. AT&T sued Louisville Metro, disputing Louisville Metro's right to permit new users of utility poles to rearrange existing attachments on the poles in order to complete their own make-ready work.

In an opinion issued on August 16th, the US District Court found that the "one-touch make-ready" ordinance falls within Louisville Metro's authority to manage its rights-of-way, and therefore outside the exclusive jurisdiction of the Public Service Commission. The Court concluded that the ordinance is valid and that Louisville Metro is entitled to summary judgment.

ATTACHMENT AGREEMENTS FOR SMALL CELL & TELECOM PROVIDERS

- Exclusivity and Nondiscrimination
 - A grant of attachment rights cannot be explicitly exclusive, but, unlike a generalized franchise to occupy the ROW, attachment rights by their nature are more subject to de facto exclusivity.
 - As a practical matter, attachment rights to certain poles and even certain geographic areas may become exclusive as a consequence of physical loading and space restrictions, limiting the number of attachments that can be made to any one pole.
- An attachment agreement may address the following issues, among many others:
 - Provisions for new poles and pole replacement
 - Create a process for notification and maintenance of attachment
 - What to do in the case of damaged or destroyed poles
 - Reservation of certain city rights to use the poles
 - Provision for electric power
 - Maintenance obligations
 - Require engineering certifications
 - Create a process for notification and completion of make-ready work
 - Require regulatory compliance
 - Set liability and indemnifications standards;
 - Set insurance standards
 - Set surety bond
 - Require permit forms for attachment & removal
 - Set installation standards
 - Require updated location maps
 - Require relocation of attachments due to conflicts or unreasonable interference
 - In an emergency, your utility should have the right, but not the obligation to, remove, relocate, or replace facilities
 - Reserve the right to maintain poles
 - Require identification of poles by tagging
 - Require a valid franchise to operate in the City/County
 - Require compliance with all permitting requirements of the City/County
 - Create a Termination Process
 - Set Grounding Requirements
 - Inspections
 - Reimbursement for Pre-Attachment inspection and pole loading analysis and Post- Attachment inspections.
 - Payments
 - Application and engineering survey fee to cover your costs

- Annual fee for Pole Attachments
 - These range in Kentucky from as low as \$5 a pole to over \$50 per pole
- Small Cell Antenna Attachments
 - A much higher rate can be negotiated for these attachments.
 - A separate agreement should be required if a provider wants to have both traditional attachments and small cell antenna attachments.
- Description of in-kind compensation
- Other Charges
 - Survey Fee
 - Make-Ready Work
 - Inspection of facilities
 - Removal of facilities,
 - Payment of attorney's fees and
 - Supervision of performed work on the poles.

ZONING FOR SMALL CELL PROVIDERS

- Currently, many zoning ordinances in Kentucky address cell tower sites, but only a few Kentucky communities address small cell towers in their zoning ordinances.
 - Local governments may want to review their ordinances to establish an efficient way to review and process small cell tower requests, particularly in light of federal law.
 - The following factors may help guide local governments when reviewing current zoning ordinances:
 - Does the zoning ordinance apply to smaller facilities in the ROW?
 - Will the regulatory process allow the local government to review a request to place a number of facilities at multiple sites in a timely way?
 - Can the local government ensure that small cell facilities, once approved, will not expand into harmful facilities later?
 - Does the small cell provider have wireless customers, or is it only placing facilities with the hope of obtaining them?
 - Has the local government developed an approach to leasing government-owned property for new wireless uses that protects the community and maximizes the value of its assets?

