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Wireless Providers:
Do they have a right to use your public ROW?

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Background on the 1996 Act

The Federal Telecommunications Act of 1996 (the "1996 Act") is actually the popular reference to an amendment of the Federal Communications Act of 1934. The 1934 Act has been amended many times since its inception, including, some well known major amendments like the1984 Cable Act, and, of course, the 1996 Act.

The 1996 Act separates its regulations according to the type of services provided. For example, there are separate regulations for the telecommunications and cable industries. The 1996 Amendment is sometimes referred to as the "Telecommunications Deregulation Act" (or other similar titles) because it was an attempt to "deregulate" the telecommunications and cable industries to encourage existing and new providers to develop newer, better, and, hopefully, cheaper technologies and services. The use of the term "deregulated" as a description for the 1996 Act is slightly misleading since the telecommunications and cable industries are still regulated. This structure of separating different categories of services based upon the technology used to deploy those services and applying different laws to each category has been disparaged for several reasons and led to what many industry insiders predict will be a total rewrite of the 1996 Act.* (see comment at the end of the paper).

Although the public policy soundness of the 1996 Act may be debatable, it is clear that since the passage of the 1996 Act local governments have seen several trends; some expected and others not. One expected trend was the increase in the number of Competitive Local Exchange Providers (CLEC's) in our communities. Meanwhile, contrary to the expectations of some, very few additional facilities based telecommunications systems were constructed because the CLEC's primarily leased lines from Incumbent Local Exchange Providers (ILEC's). The CLEC's then "resold" telecommunications services to customers. Those CLEC's that constructed facilities based systems tended to build "loops" of networks that targeted larger customers (e.g. large business with many on-site connections), which is known as "cherry picking." Conversely, residential neighborhoods were largely ignored by the facilities based companies. Another trend involved the construction of facilities based networks by cable "overbuilders" (i.e. new competitors) that would provide bundled services (i.e. cable, telecommunications and data) in many communities, though many of those new competitors have since failed. And finally, there was an increase in activity by wireless providers who sought to construct their antennae and support structures (buildings, poles or towers) to fit within their particular grid in a municipality. Many local communities have been struggling to deal with these trends in addition to attempting to preserve important local rights, e.g. right-of-way (ROW) management and compensation rights, in anticipation of "future" trends (e.g. Internet classification, VoIP, WiFi, WiMAX).

Many local communities have dealt with the placement of wireless facilities in their communities but most of those instances have involved the siting of such facilities on non-ROW property. A recent trend is taking shape that involves the authority of local governments to regulate the placement of wireless facilities in public ROW. Since the passage of the 1996 Act, wireless carriers have habitually challenged local siting requirements as being discriminatory or prohibitive, and there have been numerous conflicting decisions on what types of requirements are enforceable by local regulators. Nonetheless, there is not much specific legal guidance related to this new trend of seeking access to local ROW.

Wireless carriers are seeking access to ROW due to the evolution of digital wireless technology. As many industry experts predicted, the facilities (antennae and support structures) used by some wireless providers have become smaller, so, for example, instead of seeking a ground lease to site their facilities, they're seeking access to structures like utility and light poles, and, therefore, the public ROW. This trend begs a few questions: *What "rights" do wireless providers have when attempting to use ROW? Can a municipality charge a wireless provider a fee for the use of public property, including, ROW? Does smaller mean fewer, i.e. less burden on public property, including, the ROW?* This paper will address this specific trend, attempt to answer, or at least address, the above questions, and lay a foundation for local governments to rely upon in deciding what is the best approach in each respective community. The relevant provisions of the 1996 Act can be found at 47 U.S.C. §§253 (a) & (c), and §§332 (c) (7) (A), (B) & (C). Even though there are no definitive cases on the subject of a wireless provider's right to access the ROW, it is important to keep in mind the potential relevance of case law that has evolved since the passage of the 1996 Act.

Relevant Federal Laws

Title 47 U.S.C. §253

Title 47 U.S.C. §253, entitled "Removal of barriers to entry," generally relates to a state or local government's limited ability to regulate the provision of telecommunications services. Specifically, §253 (a), "In general," provides that:

> 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. [emphasis added].

However, §253 also explicitly recognizes a state or local government's authority over the management and use of its ROW, and to receive compensation for that use. Title II of the Act, 47 U.S.C. §253 (c), entitled "State and local government authority," generally relates to a state or local government's ability to manage its ROW and receive fair and reasonable compensation for its use. This provision is also known as the "safe harbor" provision because even if a regulation is found to be in violation of §253 (a), i.e. it's prohibitory, then that regulation may still be deemed allowable pursuant to federal law if it is a regulation protected by §253 (c). Specifically, §253 (c) states:

> 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. [emphasis added].

Title 47 U.S.C. § 332 (c) (7)

Title 47 U.S.C. §332 (c) (7), entitled "Mobile services," generally deals with federal, state and local authority to manage wireless providers. Generally, it is the FCC that regulates the use of the radio airwaves; however, §332 (c) (7), entitled "Preservation of local zoning authority," ensures that critical local zoning authority is maintained by local governments.

Specifically, §332 (c) (7) (A), entitled "General authority," states that:

> ***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. [emphasis added]

Further, §332 (c) (7) (B), entitled "Limitations," provides:

> (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. [emphasis added].
>
> (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. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

And finally, §332 (c) (7) (C) (i) defines personal wireless service as any "commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services."

United States Supreme Court Decision related to §253

The only United States Supreme Court decision on §253 is *Nixon v. Missouri Municipal League*, 124 S.Ct. 1555 (2004). Unfortunately, this case is non-illustrative of what might constitute an effective prohibition of service or what might be discriminatory because it focused on whether a Missouri

statute may prohibit a local political subdivision, in this case a Missouri municipality or its utility company, from providing telecommunications services. The Court found that a municipality is not to be considered "any entity" for the purposes of §253 (a), and, thereby, concluded that a state may pass a law prohibiting municipalities from providing telecommunications services. Although *Nixon* provides no substantive guidance on which types of local requirements may have the effect of prohibiting the provision of telecommunications services, it is expected that the telecommunications providers will be re-energized by this decision and attempt to use it to support empty threats that the Supreme Court has found that §253 limits local government authority. Don't be persuaded by such an argument that relies on *Nixon* so long as your local regulation has nothing to do with whether or not your local governing authority is providing a telecommunications service in contravention of a state law prohibition!

Federal Appellate Court Decisions related to §253

Although the decisions have been inconsistent, several federal appellate courts have issued rulings which provide at least some jurisdictional guidance on how to analyze the potential prohibitive nature of a local regulation.

In *Qwest v. City of Santa Fe*, ___ F.3rd___ 2004 W.L. 1879940 (10th Cir., filed August 24, 2004) (the District Court decision can be found at 224 F. Supp. 2d 1305 (D.N.M. 2002), the Tenth Circuit found that a registration requirement is not prohibitive within the meaning of §253 (a). The Tenth Circuit further relied upon the district court's factual findings on the fees that were imposed on Qwest by the city's ROW use requirements, which leads to the conclusion that the Tenth Circuit believes that the determination of whether or not an illegal §253 (a) prohibition exists is probably a factually based issue. However, this court also found that language giving local government "broad" or "unfettered discretion" does constitute a prohibition, particularly if a city is allowed to consider general public interest factors. *also see City of Auburn v. Qwest*, 260 F.3d 1160, 1176 (9th Cir. 2001), *cert. denied*, 122 S.Ct. 809 (2002). Therefore, to be safe, a city should base ROW access rights on clearly identified factors. And finally, the court also found that Santa Fe's "appraisal-based rent," in combination with excess conduit requirements, were prohibitive because of the "massive increase in cost" to Qwest. [Although unrelated to a §253 "prohibition," *Santa Fe* is particularly useful to cities in that it expressly found that there is no individual §1983 cause of action available to Qwest, and, therefore, there was no claim for damages, costs and attorney's fees, which conflicts with a Ninth Circuit ruling that there is. See *Abrams v. City of Rancho Palos Verdes*, 354 F. 3d 1094 (9th Cir. 2004) [**Update** – September 28, 2004 - Supreme Court granted cert. in *Abrams*].

The *Santa Fe* court specifically rejected the cost based test advocated for by the industry and adopted a totality of the circumstances test, which is consistent with the decision in *TCG Detroit V. City of Dearborn*, 206 F.3rd 618 (6th Cir. 2000), *affirming* 16 F. Supp.2nd 785 (E.D. Mich. 1998). In *Dearborn*, a key case among several that is relied upon by local governments to support the value based fee approach, the court upheld a gross revenue based fee structure for the use of ROW as consistent with §253 (c). This court reasoned that the failure to use the term "cost" within the language of §253 (c) and the inclusion of the term "compensation" indicated an intent that fees not be limited to costs only and that the reasonableness of compensation be based upon a totality of the circumstances test. Further, in *TCG New York v. City of White Plains*, 305 F.3rd 67 (2nd Cir. 2002), *cert. denied*, 123 S. Ct. 1582 (2003) the court reasoned that "compensation" has been historically recognized as a term that permits the assessment of value based fees when public property is used for private purposes. And finally, in *Qwest v. City of Portland*, 200 F.Supp. 2d 1250 (D. Ore. 2002),

appeal pending, No. 02-35473 (9th Cir.) this district court also held that §253 (c)'s "fair and reasonable compensation" qualification did not limit a city's revenues to the amount of its costs in managing the ROW. [**Update** – October 12, 2004 - 9th Cir. ruled that the district court's: 1) finding that the subject ordinances were not prohibitive under 253 (a) must be reversed and remanded to the district court to analyze each ordinance individually and to appropriately apply the *Auburn* test to look at whether a local requirement may have a prohibitory effect instead of an actual effect; and 2) finding that revenue based fees were allowable must be affirmed because Qwest's challenge was barred by claim and issue preclusion.]

Conversely, the telecommunications industry chooses to rely upon *Bell Atlanta v. Prince George's County*, 49 F. Supp. 2d 805 (D. Md. 1999) for the proposition that the compensation identified in §253 (c) is cost based, i.e. limited to a city's actual administrative costs in managing and policing its ROW. But again, there are several decisions that have ruled otherwise.

Federal Appellate Decisions Related to §332 (c) (7)

Federal appellate court decisions on §332 (c) (7) are arguably more varied than the §253 cases. A fairly complete, yet concise, summary of §332 and the divergent federal decisions can be found in *MetroPCS, Inc. v. City and County of San Francisco*, 259 F. Supp. 2d 1004 (N.D. Cal., 2003). The *MetroPCS* court separated the various requirements of §332 above, and highlighted the conflicting interpretations as follows:

§332 (c) (7) (B) (iii) "written record" requirement – That court recognized "[C]ourts are split on interpretations of the 'in writing' requirement'" of §332 (c) (7) (B) (iii), and that while some jurisdictions have found that local zoning authorities must issue "full findings of fact and conclusions of law" (citing *Omnipoint Communications, Inc. v. Planning & Zoning Comm'n*, 83 F. Supp. 2d 306, 309 (D. Conn. 2000), other jurisdictions have found that stamping the word "Denied" on an application to be sufficient to meet the "written record" requirement. (citing *AT& T Wireless PCS v. City Council of Virginia Beach*, 155 F. 3d 423, 429 (4th Cir. 1998). In *Southwestern Bell Mobile Systems v. Todd*, 244 F. 3d 51 (1st Cir. 2001), the First Circuit concluded that "both of these approaches seem flawed." Id. at 59. The *Todd* court recognized that the statutory language did not require detailed findings, yet recognized that local authorities must make sufficient findings to permit meaningful judicial review in a "written denial" containing "sufficient explanation of the reasons for the permit denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons." Id. at 59-60. Thus, 1st Circuit requires the issuance of a "written denial" in addition to the official proceeding's records.

§332 (c) (7) (B) (iii) "substantial evidence" requirement – The court recognized that the standard under the 1996 Act is intended as "the traditional standard used for judicial review of agency actions." (citing H.R. Conf. Rep. 104-458 at 208 and *Preferred Sites LLC v. Troup County*, 296 F. 3d 1210, 1218 (11th Cir. 2002). It also recognized that the case law is divided on which party carries the burden of proof under this requirement. The *MetroPCS* court concluded that the traditional standard is summed up as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," (citing *Preferred Sites* at 1218) and that, it demands "more than a scintilla of evidence but less than a preponderance." (citing *Airtouch Cellular v. City of El Cajon*, 83 F. Supp. 2d 1158, 1164 (S.D. Cal. 2000). And probably most importantly, in confirmation of local zoning's ability to enforce and interpret it

zoning regulations, it relied upon *Cellular Telephone Co. V. Town of Oyster Bay*, 166 F.3d 490, 494 (2nd Cir. 1999) in finding that "local and state zoning laws govern the weight to be given the evidence."

§332 (c) (7) (B) (i) (I) nondiscriminatory requirement – Focusing on the qualification that discrimination must not be unreasonable, the court recognized that "some discrimination among providers of functionally equivalent services is allowed, and, that "Any discrimination need only be reasonable." (citing *Sprint v. Willoth*, 176 F. 3d 630, 638 (2d Cir. 1999), quoting *Virginia Beach*, 155 F. 3d at 427. It also acknowledged the cities should be allowed "the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning requirements, even if those facilities provide functionally equivalent services." citing H.R. Conf. No. 104-458 at 208. In citing *Omnipoint Comm. Inc. v. City of White Plains*, 175, F. Supp. 2d 697, at 717 (S.D.N.Y. 2001) the *MetroPCS* court found that the provider must show that the city "discriminated among providers of functionally equivalent services and that these providers were treated unequally," which it construed to mean that "MetroPCS must demonstrate that the City treated a MetroPCS competitor differently than it treated MetroPCS for a functionally identical request." citing *Sprint Spectrum L.P. v. Board of Zoning Appeals of the Town of Brookhaven*, 244 F. Supp. 2d 108, 117 (E.D.N.Y. 2003). In balancing zoning decisions with the ability to treat providers differently, the *MetroPCS* court relied upon both *Virginia Beach* and *Willot*h in concluding that "a valid zoning decision may properly form the basis of a denial" of a siting request. Under the city's Planning Code, the "community's need for the proposed services" was taken into account.

§332 (c) (7) (B) (i) (II) prohibition preemption – According to an interpretation of *Town of Amherst, New Hampshire v. Omnipoint Communications Enterprises, Inc.* 173 F.3d 9, 14 (1st Cir. 1999), the party to a suit questioning the local regulator's denial carries a "heavy" burden of proof to show actual prohibition. Since the city showed that MetroPCS had indeed been awarded 30 antenna sites and 18 conditional permits the *MetroPCS* court found that there was no "general ban" to entry. MetroPCS alternatively argued that there was a "significant gap" in service that was sufficiently detrimental to constitute a denial of service. This court recognized there are critical conflicting interpretations on what constitutes a "significant gap." Citing *APT Pittsburgh Ltd. Partnership v. Penn Township Butler County of Pennsylvania*, 196 F.3d 469, 480 (3rd Cir. 1999), the Third Circuit found "a significant gap is a gap in coverage that no provider has been able to fill – so if any provider has provided coverage for the area, no significant gap exists." However, the First Circuit, citing *Second Generation Properties, L.P. v. Town of Pelham,*, 313 F.3d 620, 634 (1st Cir. 2002), held that "a significant gap exists if any provider cannot provide general service in a certain area, even if other providers can." The *MetroPCS* district court was persuaded by the First Circuit interpretation on the policy grounds that the it better ensured competition in the marketplace. It further found that a significant gap was not supported by the mere presence of "dead spots" so long as general coverage was available, which is a question of fact. And finally, the last hurdle in analyzing whether or not a prohibition exists is that even if a significant gap exists, then a provider must demonstrate that the requested site is the only acceptable option to provide service coverage. Again, the circuit courts are split on the issue: some require "the least intrusive proposal" (the Second and Third Circuits), while others accept proposals that "provide better service or that better promotes commercial goals of the community" (the Fourth Circuit).

The *MetroPCS* case was appealed and is scheduled to be heard before the Ninth Circuit. There are many cases with conflicting interpretations of §332's provisions; however, *MetroPCS* is an excellent illustration of the competing jurisdictional interpretations of the federal law's preservation of local zoning authority. Obviously, the interpretations of §332 that support a local zoning authority's regulatory discretion are the preferred interpretations. However, before advocating one of those preferred interpretations on behalf of your municipality, it is critical for each local regulatory authority to be aware of which interpretations carry the weight of binding authority in a particular jurisdiction.

Application of the Law to the Siting of Wireless Facilities within the ROW

For practical reasons, wireless providers have not had the same historical access to local ROW that has been enjoyed by telecommunications providers that provide their services via landlines. Unlike the facilities based providers, wireless providers have been able to deliver services without physically occupying the ROW. The term "franchise" as it applies to municipal governments can have a variety of meanings depending upon which jurisdictional laws apply, but, in the utility or telecommunications context it usually means the right to install, maintain and operate a city-wide system (telecommunications, cable, electricity, etc.) within the public ROW in exchange for some form of compensation (e.g. a percentage of gross revenues, flat fees or per linear foot charges). Historically, landline systems have sought and acquired local franchises, while wireless providers have located their facilities on both private and public property (owned in fee, and not ROW).

So, why did it evolve this way? The landline provider uses the ROW in order to run ***its system along, under and over*** public streets, sidewalks, alleys and other various forms of ROW until it reaches the customer's property, at which point its system leaves the realm of public ROW in order to connect to the end user. To require a landline provider to locate its system on private or public property that is held in fee simple interest, i.e. prohibit it from using the ROW, would likely have the effect of prohibiting the ability to provide telecommunications service in violation of §253 (a). On the other hand, a typical wireless provider's system utilizes the radio airwaves and relies upon a series of strategically placed antennae within its grid, each mounted on a support structure of sufficient height to relay its signal from one antenna to another (line-of-sight signals). These wireless facilities often never physically occupy the public ROW. In other words, a landline system **needs** access to the ROW in order to provide their services, while wireless providers do not.

The relevant applicable federal law limiting a local governments authority over the placement of wireless facilities is found in §332 (c) (7). The key language found in the general wireless siting provision of §332 (c) (7) (A) is that "nothing in this Act" limits a local government over the "decisions regarding the placement, construction, and modification of personal wireless service facilities." Therefore, to the extent that a provider's facilities are "personal wireless service facilities" as defined in §332 (c) (7) (C) (i) then there is a strong argument that no law, including §253, limits or affects a municipal government's ability to make decisions concerning the placement or construction of wireless facilities, except for those limitations found in wireless zoning decisions set forth in §332 (c) (7) (B). And under §332 (c) (7) (B) (i) (I) & (II), a local zoning authority may not "unreasonably discriminate among providers of functionally equivalent services," or effectively prohibit such services through the regulation of the placement of wireless facilities in their communities. Therefore, so long as a regulatory ban on siting wireless facilities within public ROW does not have the effect of prohibiting the provision of personal wireless services and does not unreasonably discriminate, then that regulation will be defensible against a §332 (c) (7) (B) preemption challenge. Again, particular attention should be paid to the standards, i.e. the interpretations of §332 (c) (7) (B), that apply to each jurisdiction.

Even if §253 does apply, can a municipal authority limit or prohibit the placement of wireless facilities within the ROW? There is a good argument that it can. Unlike landline facilities, the ROW is not an "essential facility" to providing wireless services. To the contrary, wireless carriers always have the option of locating their transmission and receiving facilities on private or public property, i.e. non-ROW property. And if a wireless provider attempts to argue that ROW is an "essential facility" to the provision of wireless service, then the historical evidence proves that argument to be false. In order for a court to apply the §253 (a) "prohibition" to a wireless carrier, and thus grant ROW access to that carrier, would lead to the unintended effect promoting the over proliferation of wireless facilities in the ROW, as opposed to their location within private or public property. And finally, in the event that a court were to find that §253 does apply, then §253 (c) still allows a municipality to manage its public ROW and receive fair and reasonable compensation (and several jurisdictions support the rental, value based fee approach) for the use of that ROW. Be mindful that §253 (a) is liberally cited by the industry to contend that a particular local requirement is illegal as a "barrier to entry." In light of the somewhat inconsistent legal precedent on this provision and the telecommunications industry's free use of this argument it is difficult to pinpoint when a local requirement crosses that legal threshold of prohibiting, or having the effect of prohibiting, an entity from providing telecommunications service.

However, if §253 does apply, then once a municipality allows a wireless carrier to access the public ROW to site wireless facilities, then local governments would be held to the standard of treating the wireless carriers in a "competitively neutral and nondiscriminatory" manner. Although this standard differs from the §332 standard in that there is no "reasonableness" qualification, there is still probably a good argument that the §253 standard does not mean that each provider be treated exactly alike so long as each provider is treated equitably.

Another potential issue involves the case of wireless providers of Internet access (like WiFi & WiMAX) that typically use unlicensed radio spectrum. To the extent that the services offered by these providers are "information services" and not "telecommunications services," then §253 again arguably does not apply. The rationale is that the §253 (a) preemption extends only to state and local requirements that prohibit or have the effect of prohibiting any entity's ability to provide "any interstate or intrastate telecommunications service." Thus, if the wireless carrier is not providing a "telecommunications" service, then there is a strong argument that §253 just does not apply.

Finally, be aware that Title 47 U.S.C. §224 generally deals with the FCC's authority to regulate rates, terms and conditions imposed by utilities on cable television systems or providers of telecommunications service that have attachments to the utilities' poles, ducts, conduits and ROW, to assure that such rates, terms and conditions are just and reasonable, and to make certain that access to the utilities' poles, ducts, conduits and rights-of-way is provided in a nondiscriminatory manner. However, pursuant §224 (a) (1) &(3), the Pole Attachment provisions to Title 47 do not apply to municipally-owned utilities, unless there is a state or local regulation that makes those provisions applicable.

CONCLUSION

Assuming that there are no state or local regulations to the contrary, the general conclusion is that a wireless provider *does not* have a legal right of access to public ROW pursuant to federal law. Although there are persuasive arguments that a wireless provider does not have the right to access local

public ROW pursuant to either §253 or §332, it does not follow that it is necessarily in the best public policy interests of each local community to ban wireless facilities from its ROW. There are tangible benefits to be realized from the siting of wireless facilities in a community, especially in the age of digital/Internet protocol/broadband wireless services, and each jurisdiction has to decide how to best accomplish accessibility to these types of services and preserve local regulatory authority, particularly as it relates to the management and use of local ROW, including, compensation for that use. Now that the technological hardware associated with supporting and transmitting wireless signals has "shrunk" to the point where certain facilities can be located on structures like utility poles or light poles, it increases the likelihood that wireless carriers will seek access to local ROW. The providers will argue that these smaller facilities are beneficial not only because they reduce the size of the support structures, but also because the place "less demand" on the ROW in that there are no wires, etc. The claim of "less demand" is debatable since the technology behind these services still relies upon a line-of-sight placement of the wireless system. This means that although they are smaller, it requires more of them to cover the same area as their larger/taller counterparts. In other words, whereas a traditional cellular or digital wireless system might rely upon 10 antennae, each placed on 120 foot tall support structures to fill out a line-of-sight grid; the smaller version might require 100 antennae, each placed on 60 foot tall support structure to fill out the same grid. And if local regulator decides to grant a wireless carrier access to its ROW, then it is important to recognize the potential implications that could be triggered by the nondiscriminatory requirements of federal law, whether it is under §332 or §253. The ROW is a valuable community asset that should be managed wisely.

*Comment on the potential re-write of the 1996 Act and other initiatives - A common criticism, especially among those without some experience or understanding of the telecommunications industry and its regulations, and, unfortunately somewhat common among those of us with some experience in regulating the industry, is that the regulations are always behind the technology; and that regardless of which law may be passed, technology changes so quickly, and regulations so slowly, that no matter what regulatory language is adopted it will not only be obsolete shortly after it becomes effective, it will also stifle the development and deployment of newer and more efficient communications services. It is as though it is a cat (government) and mouse (provider) chase in which the cat is in persistent pursuit, and if the cat ever catches the mouse, the mouse is killed and eaten. It is of no surprise that this criticism is adopted and perpetuated by the communications industry because it successfully frames the argument so that it suggests that any attempt at regulation is at best futile, and at worst counterproductive. The industry, and, arguably, popular solution to the problem that is so successfully framed by this criticism is that newer technologies should be virtually completely unregulated (e.g. cable modem/Internet services). The solution that this argument ignores is the possibility of overhauling the regulatory structure to eliminate the current structure and replace it with a more equitable set of rules that do not distinguish between technologies but do protect certain critical local regulatory interests. The other criticism, the "flip-side" of the first criticism, is one that is gaining popularity among local governments, and those entities that represent or advocate on behalf of local governments. It recognizes that the current structure of regulation is inherently unfair because its arbitrary treatment of technology (by applying different legal requirements based on the types of services) becomes the force that drives the technology. The result of such regulatory structure is that it creates incentives to develop and deploy one type of technology over another. In other words, the current regulatory framework steers technology and services, and, therefore, the economy, in a direction that is most favorable from a regulatory perspective, which *might not* necessarily be the most technologically, efficiently, affordably or reliably beneficial direction. The key may be to adopt an equitable regulatory structure that focuses not on a particular industry or technology, but on important public policy factors such as the preservation of mandatory 911 service, the universal service fund, right-of-way management and compensation interests, and various other important factors. The National Association of Telecommunications Officers and Advisors (NATOA) is monitoring this issue, and other initiatives, and is an excellent resource and advocate for local governments. Their web-site can be found at www.natoa.org