

Responding to the FCC's Rights-of-Way Threat

by Jay Doegey and Gerard Lavery Lederer

On April 7, the Federal Communication Commission (FCC) released a Notice of Inquiry (NOI) entitled "*Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting.*"[1] Believing the FCC's choice of title reflected its prejudgment of fault on the part of local government's rights-of-way and tower siting policies, the Internal Municipal Lawyers Association sprang into action. In this column, we seek to pull the curtain back on this ongoing effort so that IMLA members can see their association in action.

IMLA's response to the Commission's threat has been to assemble a coalition of most of the nation's local governments, their national associations, and the departments and individuals within those departments responsible for rights-of-way management, and assessing the impact of local, State, and federal fiscal policy on local governments and the economy.[2] IMLA's strategy was to encourage a broad local government response, but a response that had a coordinated approach and positive message that local government has long supported broadband deployment. The message would be delivered in multiple, coordinated ways. It would start with a template for use by individual communities to participate in the proceeding and end with "Flagship Comments." These comments run almost 400 pages in length, and are buttressed by a number of economic and accounting research papers and affidavits commissioned specifically for the filing. In addition, IMLA General Counsel Chuck Thompson has led numerous calls with IMLA members who traditionally represent local governments on communications matters, to ensure consistency of message to the greatest extent possible. Finally, with an understanding that sound legal arguments alone might not carry the day, going forward, the team plans to commence a congressional and media education effort.

Local Governments Seek Increased Broadband Access

The theme of the "Flagship Comments" and template was straightforward. Local governments seek increased broadband deployment and adoption in their communities. Affordable broadband stimulates the economy and creates jobs. Its educational, health, and networking capabilities benefit consumers and make government more efficient and responsive. Local governments are so anxious to obtain these benefits that when private industry has failed to provide broadband, they have provided it themselves. As importantly, local governments promote broadband adoption: local governments provide low and no-cost access to the Internet at schools, libraries, job centers, community centers and elsewhere. In light of this history, local governments are puzzled that the FCC, instead of addressing what is deterring broadband deployment and adoption in America, chose, yet again, to examine local government property management.

Where is the Evidence of Harm?

FCC Commissioner Robert McDowell recently remarked that "capital investment in fixed and mobile broadband deployment continues to be a tremendous success story...."[3] AT&T touts the competition in the wireless industry and admits that there are currently at least five competitive wireless providers in each of the top 20 U.S. markets. Obviously, local government rights-of-way practices have not diminished this investment, and no provider has guaranteed that if these local practices were diminished, it would provide services at lower prices or in unserved areas.

While local right-of-way practices do not deter broadband deployment or adoption, they do serve critical interests in local communities. Through these practices, local governments ensure that a scarce public resource, central to the everyday life of a community, can be protected, shared, and developed. These local practices have played a critical role in protecting the community during recent broadband deployment efforts.

What the FCC Should Do

The Commission should not ask local governments to spend scarce resources to respond to open-ended NOI questions as a means to promote broadband deployment, but should complete the work it promised Congress and local governments it would do in the National Broadband Plan. In that document, the FCC proposed to recreate a committee of State, local, federal, and tribal entities to discuss right-of-way management and compensation practices, and recommend best practices. This group would mirror the structure of the FCC's Local and State Government Advisory Committee (LSGAC), that existed from 1997 to 2003. Without explanation, however, the Commission appears to have abandoned this course, despite its success in the past. What has the Commission done? It has taken rights-of-way advice from an industry group entitled the Technical Advisory Committee, on which there are *no* local government participants.

Right-of-way practices— although critical to balancing competing interests in a community — are a *de minimis* factor in a broadband provider's deployment calculus. IMLA has worked hard to document that there is no evidence that these practices

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it was obtained with evidence procured in violation of the Fourth Amendment.

The issue now comes before the U.S. Supreme Court. In addition to the question presented by the petition for certiorari (whether the warrantless use of a tracking device on Jones's vehicle to monitor its movements on public streets violated the Fourth Amendment), the parties were directed to brief and argue the following question: "Whether the government violated respondent's Fourth Amendment rights by installing the GPS tracking device on his vehicle without a valid warrant and without his consent." ML

Inside Canada

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chases, with little wait time or screening, were most likely to occur at retail pet stores. "Requiring owners to put additional thought and preparation into their decision to purchase a dog is rationally connected to reducing unwanted dogs in the city."[8]

Other Canadian cities are now looking at enacting similar restrictions.

Notes

1. *International Bio Research v. Richmond (City)*, 2011 BCSC 471, at para. 16 (B.C.S.C. Apr. 15, 2011).
2. *Id.* at para. 6.
3. Council Minutes, Nov. 08, 2010, at para. 3, available at http://www.richmond.ca/cityhall/council/agendas/council/2010/110810_minutes.htm.
4. *International Bio Research*, at para. 3.
5. *Id.* at para. 37.
6. *Id.* at paras. 56,57.
7. *Id.* at para. 83.
8. *Id.* at para. 77. ML

Second Look

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4. Advisory Committee Notes, Fed. R. Evid. 502(d).
5. For an example of a motion seeking a Rule 502(d) order, *see* City of Dallas' Motion for Entry of Order Protecting Privileges from Waiver with Supporting Brief, *United States. v. Don Hill*, Crim. Action No. 3:07-CR-289-M (N.D. Tex. Aug. 5, 2009), ECF No. 929; and for an example of a Rule 502(d) order, see Order Granting Motion for Entry of a Protective Order as to City of Dallas, *United States v. Don Hill*, *supra* (N.D. Tex. Aug. 14, 2009), ECF No. 934, which provides in pertinent part:

> The motion is GRANTED, and it is hereby ORDERED that pursuant to Federal Rule of Evidence 502(d) and the Court's inherent powers, no privilege or protection for communications or other information claimed as privileged by the City of Dallas, Texas, is waived by disclosure connected with the litigation pending in this case, and that any such disclosure is also not a waiver in any other Federal or State proceeding.

Note that Dallas had to seek relief under common law and inherent powers to protect privileges beyond attorney-client and work product because Rule 502 is limited to protecting only those two privileges. The City's main additional concern was to protect the legislative deliberative privilege for City Council discussions. ML

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have deterred broadband deployment or adoption, or that they will do so in the future. If the FCC has genuinely not pre-judged these issues, it should have little trouble concluding that its time and resources are better spent elsewhere. But, if the FCC cannot appreciate the evidence we have placed before them, we are fully prepared to visit the matter with higher authorities such as the Congress, the courts and the people of America—the real owners of the rights-of-way.

Jay Doegey is IMLA's President-Elect and City Attorney of Arlington, Texas. Gerry Lederer is Of Counsel with the law firm of Best Best & Krieger (incorporating the practice of Miller & Van Eaton) and a proud IMLA member. Best Best & Krieger has been honored to assist IMLA in assembling and serving as counsel to the local government coalition.

Notes

1. *In re Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, WC Docket No. 11-59, FCC 11-51 (Apr. 7, 2011).
2. The coalition's members, in addition to IMLA, include: The National League of Cities, National Association of Counties, United States Conference of Mayors, National Association of Telecommunications Officers and Advisors, Government Finance Officers Association, International City/County Managers Association, and the American Public Works Association.
3. *Seventh Broadband Progress Report and Order on Reconsideration* (GN 10-59), dissenting Statement of Commissioner Robert McDowell (released May 20, 2011) at 1. ML