International Municipal Lawyers Association

2012 Annual Conference, Austin, Texas

New Approaches to Wireless Siting in Local Zoning Ordinances—Can Local Rights Be Protected?

III Telecommunications Panel

Monday, October 22, 2012

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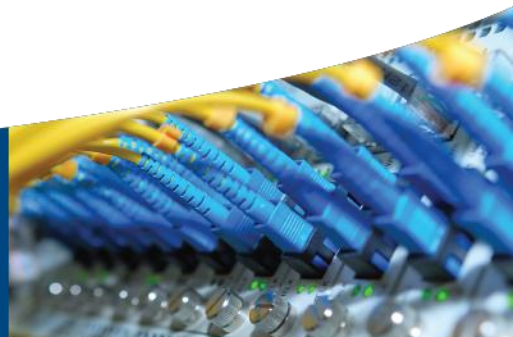
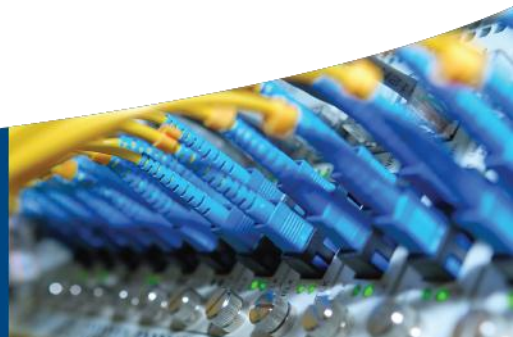
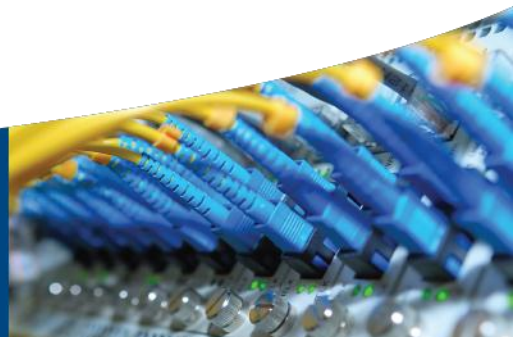


- This presentation will track:
  - Significant federal statutes impacting local zoning authority
  - Major FCC rules and initiatives affecting local authority
  - Distributed antenna systems



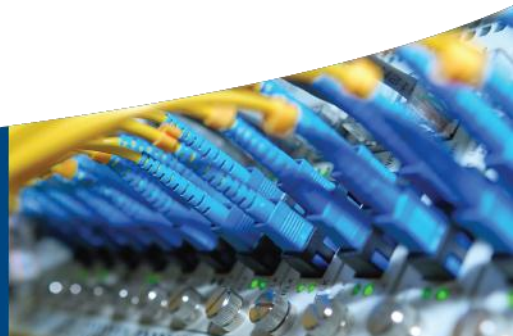
Wireless Siting: What is the Scope of Federal Authority?

- The FCC rules discussed in this handout were challenged by localities, who claimed that the FCC lacked jurisdiction to act as a super-zoning authority
- Rules were upheld by 5th Circuit, which decided it had to defer to the FCC's view of its jurisdiction to adopt zoning rules.
- On October 5, 2012, the U.S. Supreme Court granted cert to address the question of whether courts should defer to an agency's view of its jurisdiction, *Arlington v. FCC*, No. 10-1545.
- Case will be heard early next year, and could significantly affect FCC rules for zoning (and agency's approach to other issues)



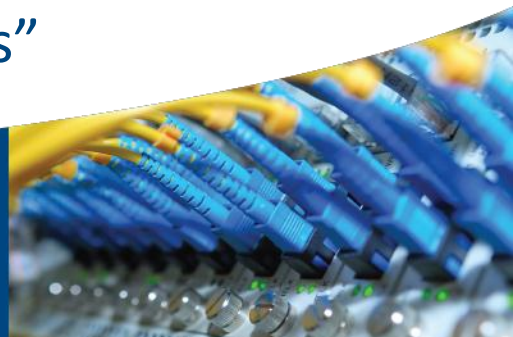
Federal Statutes

- 47 U.S.C. § 332(c)(7)– Preservation of Local Zoning Authority
- 47 U.S.C. § 253 – Removal of Barriers to Entry (not clear provision applies to wireless, *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008)
- Middle Class Tax Relief and Job Creation Act of 2012, Sec. 6409 (HR 3630) – Collocation by Right



47 U.S.C. § 332(c)(7)

- Generally preserves local zoning authority
- Also imposes five limitations on State and local governments:
  - Shall not "unreasonably discriminate" among providers of functionally equivalent services
  - Shall not prohibit or effectively prohibit provision of service
  - Must act on request within "reasonable period of time"
  - Must deny "in writing" and supported by "substantial evidence"
  - May not regulate RF – except may require applicant to satisfy FCC rules
- Applies to "personal wireless service facilities"

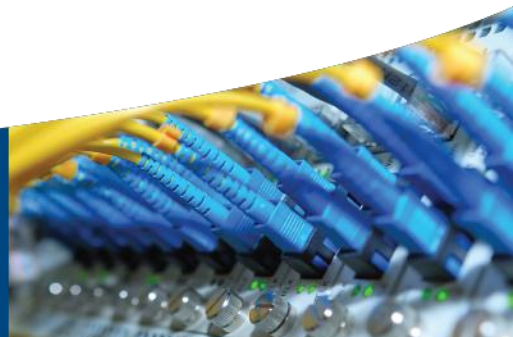


Effect of Prohibiting

- Local regulation shall not "shall not prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II).

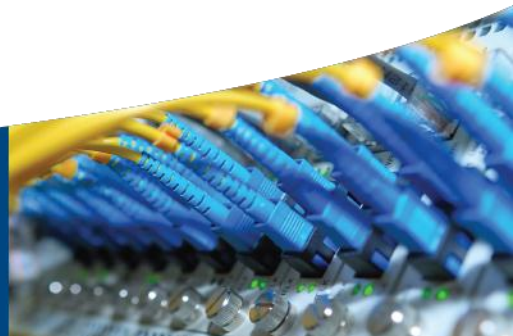
- Most courts require a provider to show a "significant gap" in coverage. *Second Generation Properties, L.P. v. Town of Pelham*, 313 F.3d 620, 631–33 (1st Cir. 2002); *Sprint Spectrum L.P. v. Willoth*, 176 F.3d 630, 642–643 (2d Cir. 1999); *Omnipoint Communications Enterprises, L.P. v. Zoning Hearing Bd. of Easttown Tp.*, 331 F.3d 386, 398 (3d Cir. 2003); *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 732 (9th Cir. 2005).

- Fourth Circuit requires at least a significant gap. *360 Degrees Communs. v. Bd. of Supervisors of Albermarle Cnty.*, 211 F.3d 79, 86-87 (4th Cir. 2000)



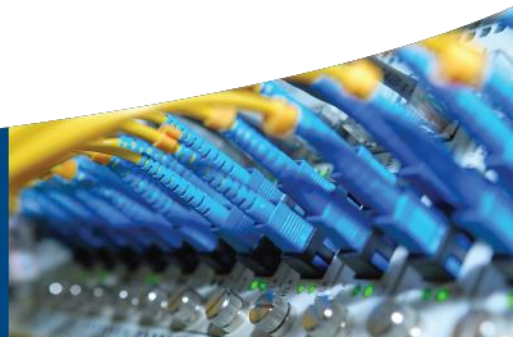
Effect of Prohibiting (cont'd)

- Courts require a provider to make a showing about the means it would use to fill the "significant gap."
  - Provider must demonstrate that a "good faith effort has been made to identify and evaluate less intrusive alternatives, e.g., that the provider has considered less sensitive sites, alternative system designs, alternative tower designs, placement of antennae on existing structures, etc." *Omnipoint Communications Enterprises, L.P. v. Zoning Hearing Bd. Of Easttown Tp.*, 331 F.3d 386, 398 (3d Cir. 2003); *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 735 (9th Cir. 2005); *T-Mobile Central v. Charter Twp. of West Bloomfield*, slip op., No. 11-1568 (6th Cir. 2012)



Effect of Prohibiting (cont'd)

- The First and Seventh Circuits require a provider to show that there are "no alternative sites which would solve the problem." *Second Generation Properties, L.P. v. Town of Pelham*, 313 F.3d 620, 635 (1st Cir. 2002); *VoiceStream Minneapolis, Inc. v. St. Croix County*, 342 F.3d 818, 834–835 (7th Cir. 2003).
- A provider cannot reject certain sites without giving them serious consideration. *USCOC of Greater Iowa, Inc. v. Zoning Board of Adjustment of the City of Des Moines*, 465 F.3d 817, 825 (8th Cir. 2006).



Unreasonable Discrimination

- Local regulation shall not "unreasonably discriminate" among providers of functionally equivalent services. 47 U.S.C. § 332(c)(7)(B)(i)(I).
- Statute only forbids "unreasonable" discrimination.
- Courts have found unreasonable discrimination where local governments:
  - Previously allowed identical (or larger) facilities in similar locations. *See, e.g., Ogden Fire Co. No. 1. v. Upper Chichester Twp.*, 504 F.3d 370, 394 (7th Cir. 2007).
  - Refused to co-locate similar equipment on already-existing poles. *Nextel West v. Town of Edgewood*, 479 F. Supp. 2d 1219, 1232 (D.N.M. 2006).

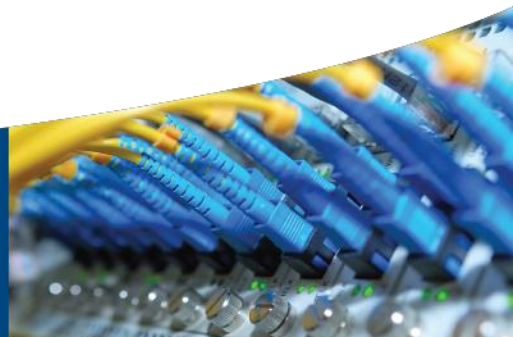


Substantial Evidence

- Highly deferential to the local government making the decision. *VoiceStream Minneapolis, Inc. v. St. Croix County*, 342 F.3d 818, 830 (7th Cir. 2003); same test that is applied in reviewing administrative agency decisions. *PrimeCo Personal Commc'ns, L.P. v. City of Mequon*, 352 F.3d 1147, 1148 (7th Cir. 2003)

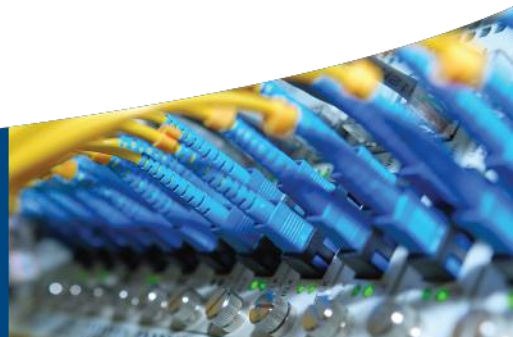
- Measured by state and local requirements – i.e., one cannot deny application based on a standard not embodied in local requirements

- Denial for aesthetic reasons can be supported by substantial evidence if rooted in specific facts, not generalized objections. *Helcher v. Dearborn County*, 595 F.3d 710, 724-725 (7th Cir. 2010)



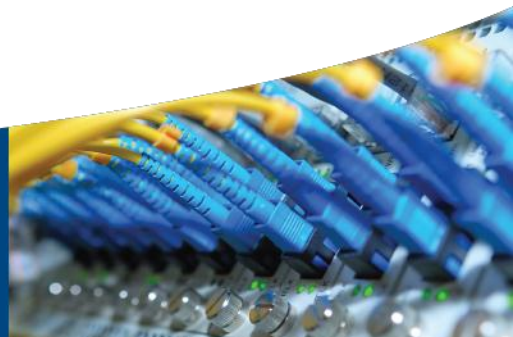
"Reasonable period of time" – the FCC's Shot Clock Order

- The FCC asserted it could "implement" Section 332(c)(7).
- Adopted a nationwide standard for a reasonable period of time" to process wireless applications.
  - 90 days for collocation request
  - 150 days for new siting applications



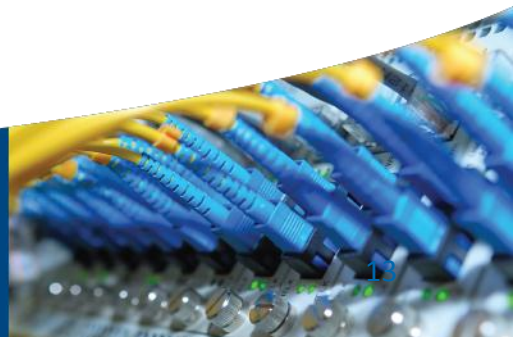
FCC's Shot Clock Order (cont'd)

- Time runs from a "complete application"
  - But only if the applicant is notified within 30 days of filing that the application is incomplete.
- The FCC declared that an application cannot be denied solely because "one or more carriers [already] serve a given geographic market."



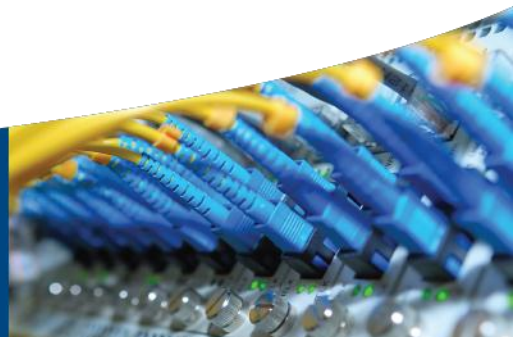
The Fifth Circuit Decision
668 F.3d 229 (2012)

- Arlington, TX and other local governments challenged FCC authority to regulate local zoning processes
- The Fifth Circuit ruled against localities after it concluded that it must defer to FCC's view of its jurisdiction; it acknowledged its approach conflicted with other circuits
- Supreme Court granted cert on October 5, 2012.
- Argument likely in January or February.



47 U.S.C. 253

- No state or local regulation "may prohibit or have the effect of prohibiting the ability of any entity to provide … telecommunications service"
- Two safe harbors where local action is protected even if prohibitory:
  - Requirements that are competitively neutral … to protect the public safety and welfare
  - Management of the public ROW, and charges for use of ROW on a competitively neutral and nondiscriminatory basis



Middle Class Tax Relief and Job Creation Act of 2012, Sec. 6409 (HR 3630)

(1) IN GENERAL ….a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.

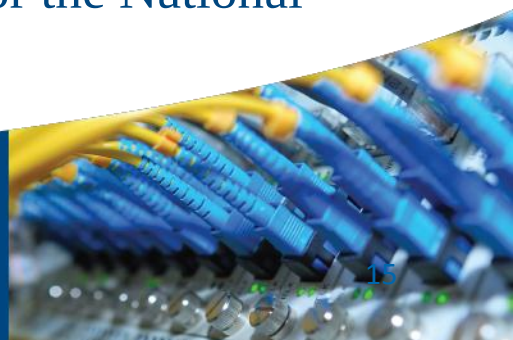
(2) ELIGIBLE FACILITIES REQUEST… any request for modification of an existing wireless tower or base station that involves—

(A) collocation of new transmission equipment;

(B) removal of transmission equipment; or

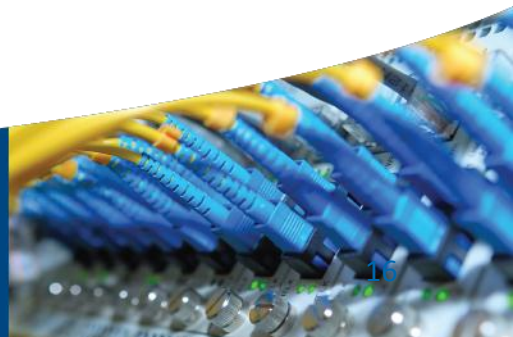
(C) replacement of transmission equipment.

(3) APPLICABILITY OF ENVIRONMENTAL LAWS.—Nothing in paragraph (1) shall be construed to relieve the Commission from the requirements of the National Historic Preservation Act or the National Environmental Policy Act of 1969.



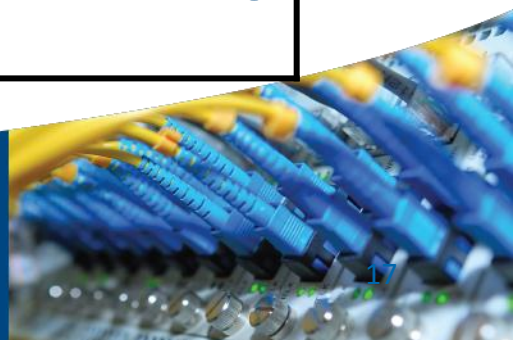
What Does this Mean?

Key terms undefined	Questions:
“Wireless tower”	Limited to towers solely designed to support wireless antennae?
“Base station”	What facilities constitute a base station?
“Collocation”	What activities/facilities does it include?



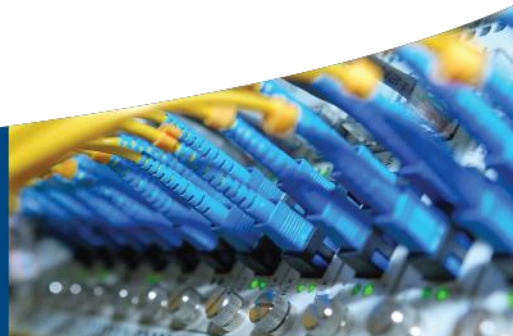
What Does this Mean?

Undefined terms	
"substantially change the physical dimensions"	•Measured in terms of a percentage increase in height, width, and volume only? OR • impact? (safety hazards, intrusion on sensitive areas changes that expose structures on a stealth facility)? AND WHAT ABOUT: •Weight or wind-loading changes? • Noise characteristics? •Changes to grandfathered, non-conforming use towers?



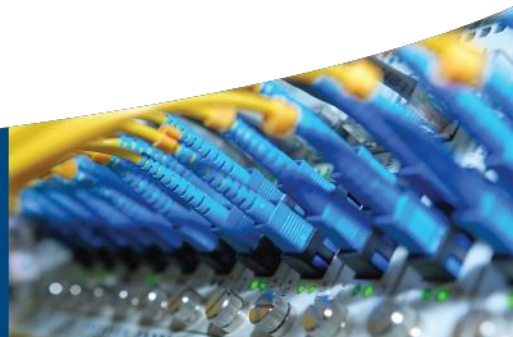
The FCC's Notice of Inquiry

- *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 (Apr. 7, 2011).
- FCC is being asked to extend significant benefits to cellular providers
  - New shot clocks
  - Limits on review of collocation applications
  - Limits on right to restrict DAS
  - Requiring localities to provide same access to RoW for DAS and wireline
  - Adopting new interpretations of Section 332 and 253 to limit local authority
  - Limit fees that can be charged for use of government property to which cellular providers may wish to attach (light poles, water towers, etc.)
- Protection of local rights will require localities to remain active in this proceeding



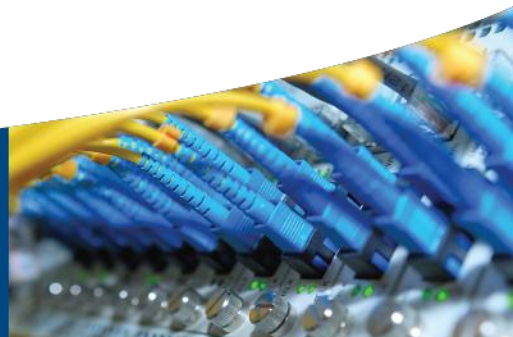
Recent Comments of Commissioner Ajit Pai

- Remarks to CTIA, October 10, 2012
  - http://www.fcc.gov/document/commissioner-pai-remarks-ctias-mobilecon-and-summary
- Criticizes local governments
- Calls for more extensive FCC rules, including a "deemed granted" approach



OTARD Rule, 47 C.F.R. 1.4000

- The rule preempts:
  - (A) “any restriction” (including zoning rules)
  - (B) governing particular property
  - (C) that “impairs the installation, maintenance, or use” of
  - (D) particular antennas.



OTARD Rule: SBCA v. Philadelphia

- In November 2011, Philadelphia amended its zoning code to address placement of antennas between the façade of buildings and the street



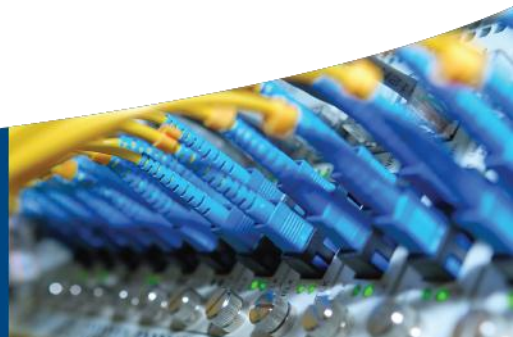
SBCA v. Philadelphia

- *For single-family homes*: No property owner or tenant shall install a satellite dish or antenna between the façade of a building and the street "[w]here an alternative location is available . . ., with no material delay or material reduction in signal reception and at no significant additional cost to the owner or tenant."
- Installer must certify that no alternative locations were available.
- Installer must paint dishes that are between the façade and the street to match the color of the façade as closely as possible.



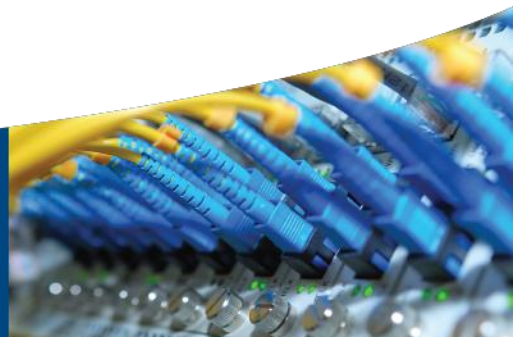
SBCA v. Philadelphia

- SBCA claimed:
  - This "ranks among the most overbroad regulations of satellite dishes in history."
  - Each of the City's requirements is preempted by the OTARD rule.
  - The public safety and historic preservation safe harbors do not apply.
  - The requirements "impair" under the rule.



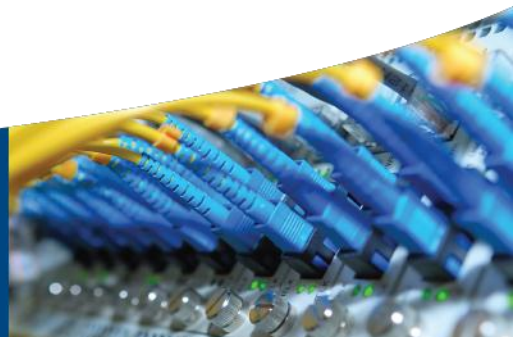
New Technology in the ROW: DAS

- A Distributed Antenna System (DAS) is a hybrid collection of smaller wireless antennas (called nodes by the providers).
- Originally used to provide service in high use areas such as public arenas; shopping malls, college campuses, convention centers.
- DAS is representative of the wireless industry's move to smaller, but more numerous facilities.
- FCC: DAS "nodes" could double by the end of 2012 to 20,000 and could reach 150,000 by 2017.



What is DAS?

- DAS providers may also provide cellular services directly.
- However, many communities are receiving applications from entities that install antennae in the RoW, and lease the facilities to cell service providers. These entities may place wireline facilities to carry traffic from the nodes/antenna sites, and obtain a telecommunications license from the state to act as a "carrier's carrier."
- For these providers, ability to be "first in" market and to gain control over critical locations is central to market plan.



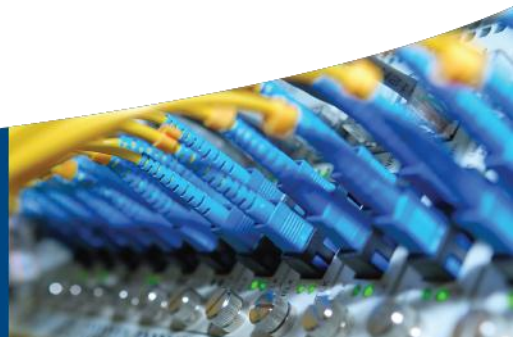
Q1: What Federal Law Applies?

- Providers claim that because they are a carrier's carrier, any regulation is subject to challenge under Section 253.
  - Initial DAS victories, but few since decisions in *Sprint PCS v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008) and *Level 3 v. St. Louis*, 477 F.3d 528 (8th Cir. 2007) (requiring actual prohibition).
- Providers claim same right as wireline providers to place facilities in RoW (but DAS providers do not wish to comply with undergrounding requirements).



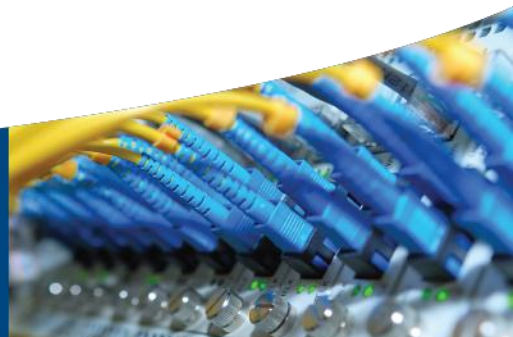
Q.2 Zoning/RoW Ordinance Issues

- Providers often argue:
  - Zoning codes do not apply at all to the rights-of-way.
  - Even if they do, discretionary processes do not apply.
- Some localities apply zoning codes; some apply RoW ordinances; others apply both.
- Key: revisit codes to ensure that codes properly address placement of shorter antennas in RoW
  - facilities in residential zones?
  - standards–e.g., height, bulk, spacing, aesthetics?



Q.3: Right-of-Way Oversight

- Under state law, what authority does your community have to oversee right-of-way use by DAS providers?
- Does this include both the right to franchise, and the right to regulate for aesthetics and other impacts?
  - Ninth Circuit says yes: *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates*, 583 F.3d 716, 722-723 (9th Cir. 2009)
- Can DAS tower builders take advantage of state franchises for “telephone lines?”



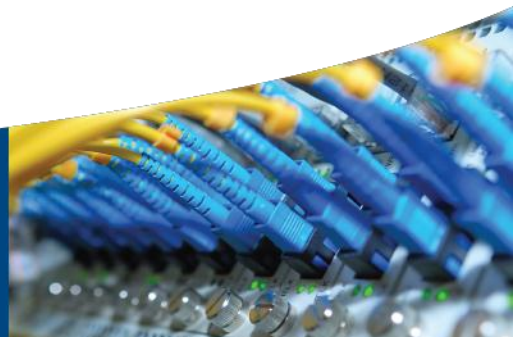
Q.4: Prohibition Issues

- Can DAS providers claim “prohibitions?”
  - Is there actually a “significant gap” that a DAS system fills?
  - How should the gap issue be addressed in ordinances?
  - What sort of alternatives would a DAS provider be required to consider? A higher antenna? Private property?
  - What sort of compensation should a DAS provider be required to pay for access to property owned by municipality (light poles, e.g.)? Can rates charged for proprietary property give rise to prohibition claim?



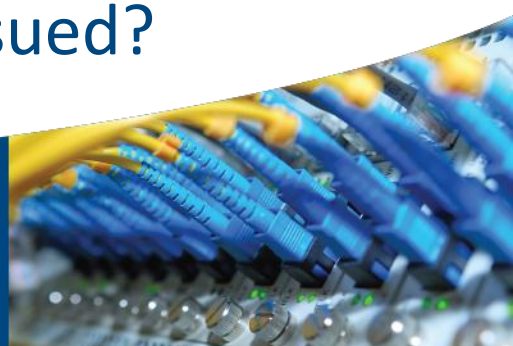
Q.5 Discrimination Issues

- Can local governments treat DAS providers differently than other telecommunications service providers, either by favoring the technology, or by applying same tests that are applied to other antenna placements?
  - *N.Y. SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 100 (2d Cir. 2010) (no preference for technology permitted, but leaves open possibility that local governments can adopt preferences based not based on technology, but on community impact.



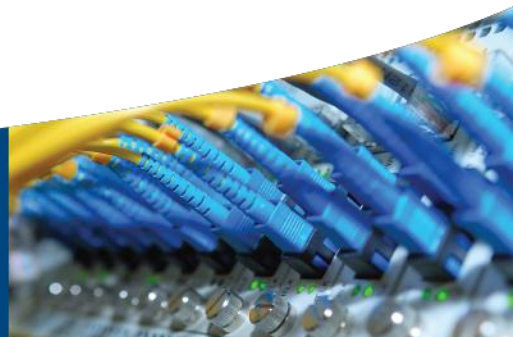
Q.6 Service-ready?

- Is the company ready to provide service?
  - Some companies (Crown Castle, NewPath) build on spec, hoping to lease the facilities to providers like AT&T, T-Mobile, Sprint.
  - These facilities could occupy the right-of-way for no useful purpose
  - Under what circumstances should facilities be treated as abandoned?
  - For what period should permits be issued?



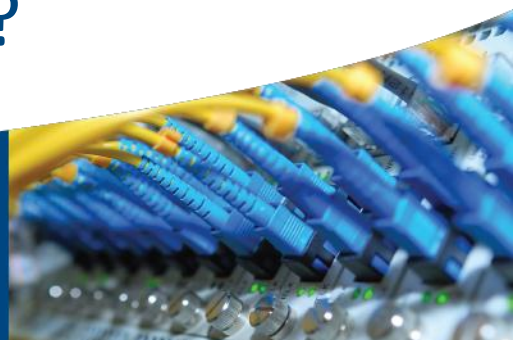
Q.7 Collocation Issues

- If the local government allows any single user in RoW, will it be required to lease to allow others to install facilities – even where that requires significant expansion as to number or size of facilities?
- Must local governments allow collocation? What standards should apply to a collocation review?



Q.8 Other Municipal Property

- Can DAS providers to place facilities on other municipally-owned property, such as street lights?
- Who will own the facilities? And what is the effect of various ownership options on other local rights (and on what the locality must permit other providers to do)
- What process will you use to do so?



Q.9 RF Concerns

- How to address public concerns about the health effects of RF emissions?



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