

BEST BEST & KRIEGER LLP

ATTORNEYS AT LAW

1891 120 years of EXCELLENCE 2011

FCC's Right-of-Way NOI:

What Should Local Government Do Now?

Gerard Lavery Lederer

Best Best & Krieger LLP

76th Annual IMLA Conference

Chicago

BBK
BEST BEST & KRIEGER LLP
ATTORNEYS AT LAW

Disclaimer

- The materials in this presentation do not constitute legal advice or establish an attorney-client relationship. This information is offered in order to provide a starting point for your further investigation and should not be relied upon as legal advice. Each particular situation will be factually unique. You should consult an attorney if you wish to determine your rights and obligations under applicable law. Our sharing of this presentation should not be construed as an offer by MVE or K&F to provide local legal services in any state where no MVE or K&F lawyer is qualified to provide such legal services, except in connection with a member of the local bar, or where such information would violate the local bar's rules on the advertising of such legal services.



BEST BEST & KRIEGER LLP

ATTORNEYS AT LAW

MILLER & VAN EATON

A LIMITED LIABILITY LAW FIRM

See IMLA Chip for Support Documents

- FCC's NOI.
- Local Governments' Comments filed July 18.
- List of Maligned Communities in industry comments.
- Filing Instructions for a Reply Comment.
- Form for filing a Reply Comment.

Update Provided In Chicago

- N.B. This presentation was due to IMLA on August 10, at which time local government had a Petition for Extension of time to file reply comments pending.
- Original reply comment deadline was August 30, 2011 – but that may have been moved back.
- Regardless, local governments can late file.

Executive Summary

- On April 7 the FCC released a Notice of Inquiry seeking data on local government charges for access to PROW and whether costs/regulations are "barriers to broadband deployment."
- In Industry Comments filed July 18th, 726 local governments were accused of delaying broadband deployment.
- Reply Comments due August 30, 2011, but late filed comments will be accepted. (This date may have been extended.)
- Local governments must take ***serious, substantial and sustained action*** to address this FCC initiative and to prepare a broader legal, political and media response.

Executive Summary

- The NOI posed 127 questions – mostly focusing on local government authority over rights-of-way and zoning of wireless communications facilities.
- Issues range from complexity of regulations, types of fees charged, timing for decisions, and overall, how local regulations affect broadband deployment.
- Wireless interests hijacked agenda. Primary issues are DAS and other wireless issues.
- Cable asks FCC to declare it cannot be charged anything above 5% of cable gross revenue to occupy rights-of-way.

Goal

- Tell ***our*** story – local governments understand the benefits of broadband and are advocates for bringing more deployment to all of our communities.
- Refute the industry's allegations – lots of simply fabrications – Have you checked the list?
- Reply to NOI and reverse the direction of the FCC, away from depriving local governments of revenues and regulatory authority and toward correcting the behavior of bad actors in the telecommunications and wireless industries.

Threats

- Local revenues, *even in states that have passed industry-backed laws on fees* (Texas, Oregon, Michigan); or where fees may be limited to cost (Tennessee, California, Oklahoma, Colorado)
- Management – If shorter deadlines for acting on permits are required, you will have to move other developments out of road and give telecomm priority or increase staff.
- Litigation to protect or collect fees under current rules.

Suggested Response

The Response

- Local Government ***must*** continue to respond to the FCC's questions.
  - Responses should aim to change the short and long term prospects for adverse FCC actions.
- This requires a nationally coordinated strategy that draws on the political, media, legal, public works, and planning resources of the local government community.

Timing and Scope

- Local governments comments and reply comments will play a major role in shaping the debate over FCC and possibly Congressional action in the coming months and years.

BUT

- NOI is only the opening round. The FCC's action agenda on broadband and the possible preemption of local authority will stretch through the next federal election cycle.

Tell Our Story

- Local governments should describe our successes:
  - Promoting broadband through zoning and rights-of-way management are central to a community's economic health, balancing many industries' and the public's needs;
  - There's a good reason why the cable industry can offer broadband to 93% of the nation's homes – because the local franchising process required community wide deployment;
  - Over 250,000 cell towers have been deployed nationally;
  - Local governments are not barriers to telecommunications service entry; and
  - Local governments compete with each other to welcome broadband in their communities.

A Strategy to Reach the Goals

- "Flagship" NOI comments and reply comments filed by national associations representing local government interests. Comments seek to address the "big picture" policy issues and legal issues. (Especially the lack of FCC legal authority to dictate local government actions.)
- Local government responses – tell local story and offset industry claims against your community.
- Non-FCC Responses
  - Congressional lobbying;
  - Media Initiatives;
  - Coordination with local government research and consulting organizations;
  - Collection of Completed Right-of-Way Studies; and
  - Efforts to build support from other industries.

IMLA Members Role

- IMLA members ***must*** assist municipal staff participate and file comments/reply comments to the NOI.
- Data driven, fact specific comments filed by individual local governments or groups of local governments, demonstrating the local regulatory processes, the policy reasons underlying these processes, and how these processes effectively promote broadband deployment on the local level.
- Focus on local successes and "lessons learned," using key NOI questions to illustrate both successes and challenges.
- Refute industry claims.


Q&A

Contact Information



Gerard Lavery Lederer
gerard.lederer@bbklaw.com
Best Best & Krieger
1155 Connecticut Avenue, N.W.
Suite 1000
Washington, D.C. 20036-4301
Phone: 202-785-0600
Fax: 202-785-1234
Website: www.bbklaw.com