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Local Governments' Response to FCC's Effort to Regulate Local Rights-of-Way

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Summary

- The FCC released a Notice of Inquiry ("NOI") on April 15 which seeks to examine what local government charges and regulations are "barriers to broadband deployment".
- Initial comments filed on July 18 – REPLY COMMENTS DUES SEPTEMBER 30.
- Local governments must take serious, substantial and sustained action to address FCC initiative and to prepare a broader legal, political and media response.

Goal on Reply

- Respond to industry accusations, and continue efforts to reverse the direction of the FCC, away from depriving local governments of revenues and regulatory authority and toward recognizing that local governments can and are helping broadband deployment – but must be able to control the behavior of bad actors in the telecommunications and cellular industries

Key FCC Decisions

- *In the Matter of 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*, Notice of Inquiry, WC Docket No. 11-59 (FCC April 7, 2011) Available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-51A1.doc
- *Petition for Declaratory Ruling To Clarify Provisions of Section 332(C)(7)(B) To Ensure Timely Siting Review and To Preempt Under Section 253 State and Local Ordinances That Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165, *Declaratory Ruling*, 24 FCC Rcd 13994 (2009), *recon. denied*, 25 FCC Rcd 11157 (2010), *appeal pending sub nom.*, City of Arlington and City of San Antonio v. FCC, Nos. 10-60039 & 10-60805 (5th Cir.) ("Shot Clock Order")
- *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5103 (2007), *aff'd sub nom.*, Alliance for Community Media v. FCC, 529 F.3d 763 (6th Cir. 2008), *cert. den'd*, 129 S. Ct. 2821 (2009). ("Local Franchising Order")
- *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order on Reconsideration, FCC 11-50 (April 7, 2011) Available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-50A1.doc
- Omnibus Broadband Initiative, FCC, Connecting America: The National Broadband Plan (2010), http://www.broadband.gov/

Key Statutory Provisions

- **47 U.S.C. Section 253** (No State or local statute, regulation, legal requirement, may prohibit or have effect of prohibiting the ability of any entity to provide any telecommunications service; safe harbor for state and local actions to "manage the public rights-of-way or to require fair and reasonable compensation)
- **47 U.S.C. Section 332 (c)(7)** (Except as provided in this paragraph, nothing in Act limits or affects local authority over decisions regarding the placement of personal wireless service facilities)
- **Section 706 of Telecommunications Act of 1996**: The Commission shall encourage the deployment of advanced telecom capability utilizing regulating methods "that remove barriers to infrastructure investment."
- **General authority provisions** (Section 201(b), e.g.)

The Reason for the NOI

- "…the National Broadband Plan..concluded that the rates, terms, and conditions for access to rights of way significantly impact broadband deployment…" "[T]he Plan recommended that "the FCC . . . develop guidelines for public rights-of-way policies…"
- "The Notice…reflects…recommendations by the Technological Advisory Committee (TAC), *a working group of industry and technology leaders":* FCC should "promote best practices and uniformity in rights of way access and wireless…siting…*including rate development*"; "reduce the time…for tower siting applications;" and encourage localities to develop means of notifying…parties of upcoming open trenching projects…"
- **Message from the Chairman: States, localities (and other entities that manage RoW are a problem, and the FCC is the cure.**

The NOI: What Information Did the FCC Seek?

- Compensation (rents) for use of the rights of way, other public property at issue:
  - Are "market based" rates… reasonable?
  - How are market-based rates or other non-cost based rates for public rights of way determined when…there does not appear to be a competitive market for public rights of way?
  - Are market-based rates substantially higher than cost-based rates?
- Police power fees for processing applications for permits for rights of way and wireless tower siting also at issue
  - What are appropriate criteria for determining the reasonableness of such charges?...

The NOI: What Is the FCC Seeking?

- The Requests seek information regarding:
  - Timeliness and ease of the permitting process (wireline and wireless);
  - Reasonableness of charges
  - Extent to which ordinances or statutes have been updated to reflect current communications technologies or innovative deployment practices
  - Consistent or discriminatory/differential treatment
  - Presence or absence of uniformity due to inconsistent or Varying practices and rates in different jurisdictions or areas
  - Other rights of way concerns including “third tier” regulation or requirements that cover matters not directly related to rights of way use or wireless facilities siting

Solutions?

- FCC Asks What It Should Do To Reduce RoW and Wireless Siting Barriers
  - Educational efforts and voluntary activities?
  - Adopting a set of best practices?
  - Working to increase uniformity in rights of way and wireless facilities siting governance?
  - Initiating a “race to the top” type of competition?
  - Establishing voluntary mediation of rights of way and wireless facilities siting disputes?
  - Raise awareness about facilities deployment techniques that could reduce costs and speed deployment? [micro-trenching]

Solutions? (Cont'd)

- FCC asks should it:
  - Recommend permitting wireless facility sites on federal property?
  - Recommend legislative solutions?
  - Adopt non-binding policy guidelines?
  - Adopt rules to address RoW or wireless facilities siting problems?
  - Adopt policy guidelines or rules establishing safe harbors, triggering heightened scrutiny of other practices, and charges?
  - Adopt guidelines or rules allowing or requiring infrastructure providers to recover RoW, wireless charges directly from local subscribers?
  - Adopt guidelines or rules interpreting the provisions of Section 332 or Section 253
  - Adjudicate cases under section 253?

Legal Questions

- Commission seeks comment on its legal authority to implement solutions. NOI states "we believe":
  - FCC has authority to engage in educational or voluntary activities
  - FCC has authority to adopt policy guidelines and rules
  - But these are not final determinations: "We seek comment on this view. Could the Commission, for example, adopt rules…defining what constitutes fair and reasonable compensation under section 253(c)?"
- Asks whether the Commission has authority to adjudicate Sec. 253 rights of way cases. Courts have said FCC does not have that authority "the Commission is not bound by those courts…"
- Asks if FCC can adopt rules pursuant to Sec. 706

How Did Local Government Respond?

- National Comments:
  - Submitted econometric study showing no relationship between broadband deployment and RoW practices or charges, or wireless siting; submitted data indicating requiring cost-based regulation would *increase* regulatory costs; submitted declarations explaining basis for local regulation.
  - There is no significant problem; delay is caused by provider actions
  - FCC has no authority to adopt rules concerning these issues.
  - Local governments would be happy to work with the FCC on voluntary efforts to share information
- Individual Comments: Communities emphasized that broadband is being deployed promptly; local efforts are protecting public safety; local practices are often developed with industry; and federal rules will not help

How Did Industry Respond?

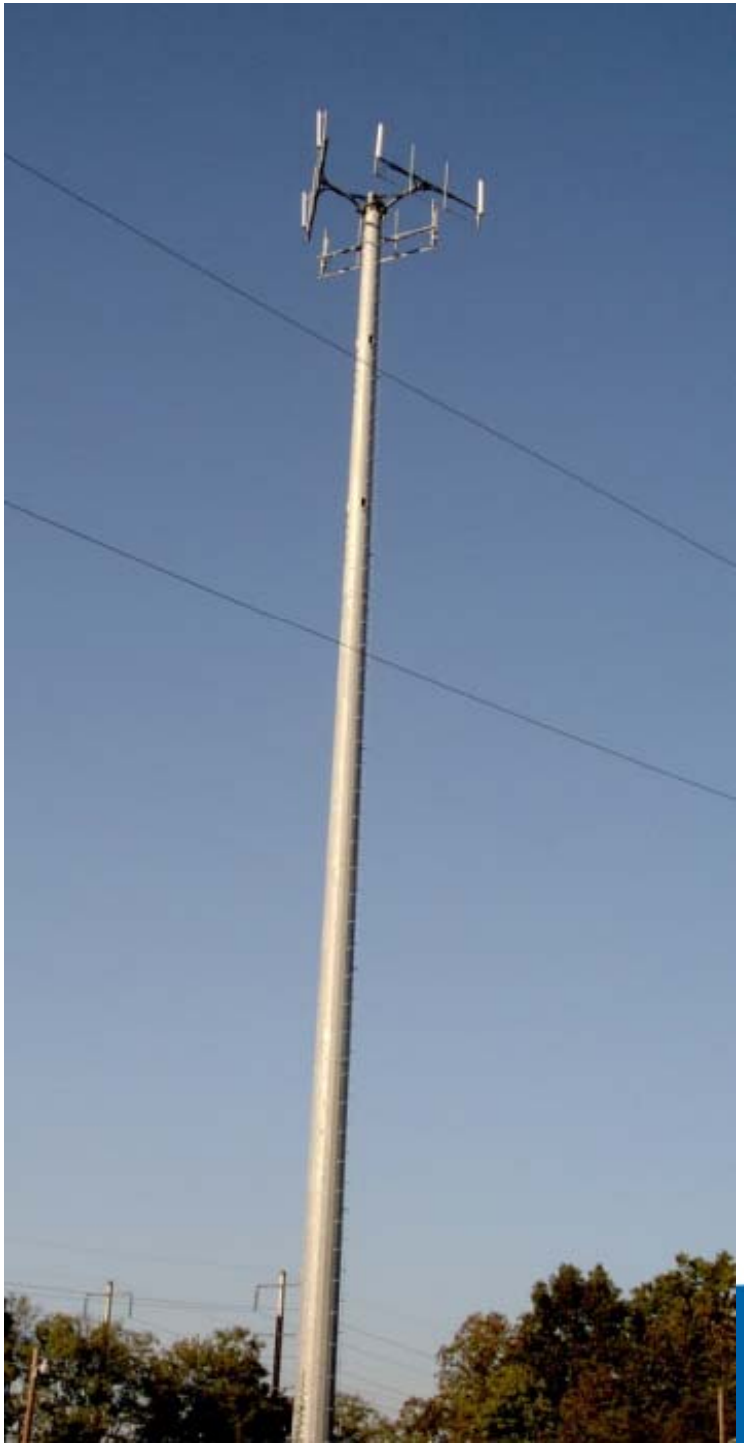
- No studies
- Over 700 communities accused of being bad actors and delaying broadband deployment
  - PCIA accused dozens of communities of using "problematical consultants" who drive up costs, ask for unneeded information; and delay deployment
  - PCIA argued that dozens of cities delayed deployment by prohibiting new attachments to legal "non-conforming" structures; imposing excessive collocation requirements; requiring full discretionary hearing for collocation
  - Communities accused of charging excessive permitting fees, excessive and discriminatory fees, and excessive fees for use of property like light poles

How Did Industry Respond?

- FCC asked to:
  - Establish national regulations for the permitting process, including shot clocks;
  - Further regulate and restrict local zoning authority
  - Regulate permitting charges and fees for use of the rights of way, as well as other property by defining what constitutes a “reasonable” charge
  - Prevent localities from requiring cable operators to obtain additional franchises to provide telephone/Internet services
  - Regulation of private property access rights as well?

How This Proceeding is Changing

- In terms of sheer volume of accusations and pages of comments, the wireless industry was more aggressive than wireline industry
- A clear focus: obtaining a right to collocate with minimal oversight
- Another focus: limiting authority of localities to control placement of facilities in the rights of way (DAS systems)



Pictures v. Words

Why does the collocation debate matter?

Most communities *prefer* collocation – but in some cases – and without supervision – a series of small changes can alter the landscape dramatically.

Let's watch what happens to one tower…in light of one of the specific comments submitted in the FCC NOI by PCIA, a wireless industry trade association

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Pictures v. Words

"The collocation of additional antennas that do not substantially change the size of the tower should not trigger a full zoning review…

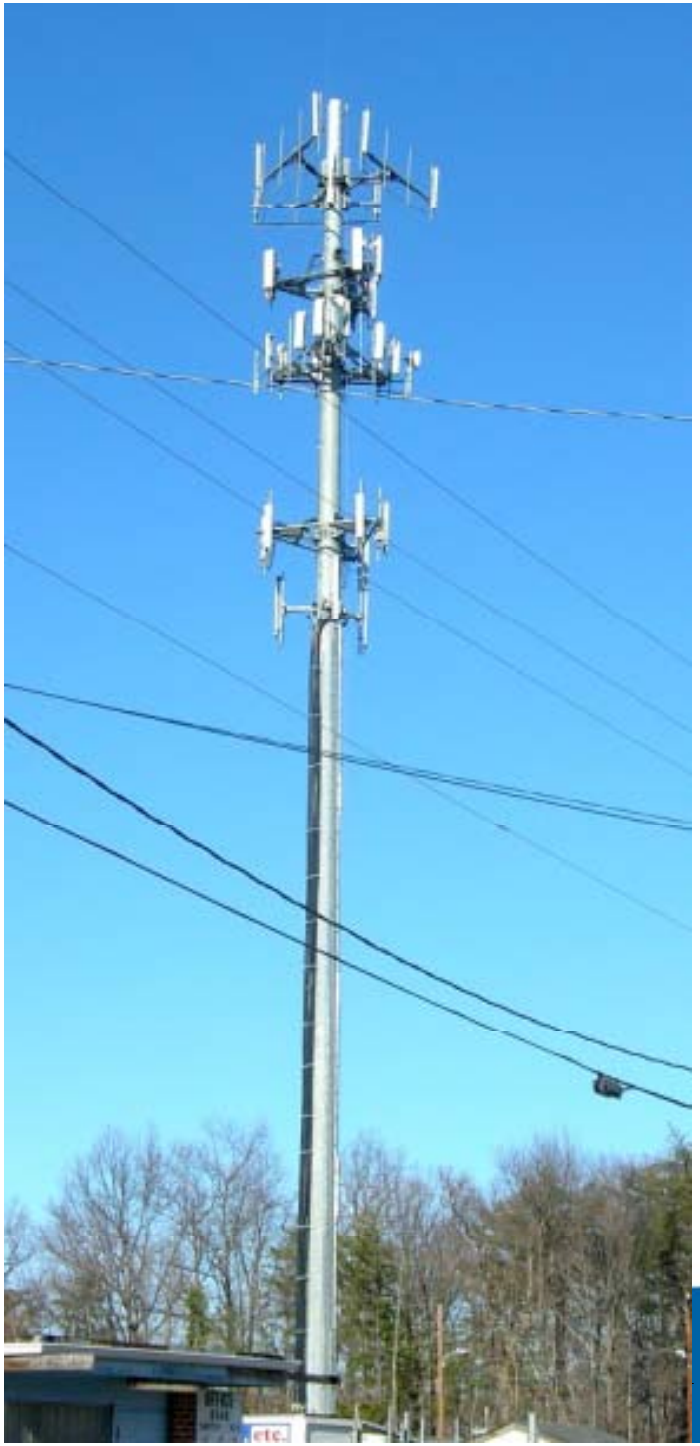
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"…because public health issues (*i.e.,* RF emissions) are by statute exclusively within the purview of the FCC…"

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"…safety issues are addressed through the submission of an engineering report stamped by a licensed engineer at the building permit stage…

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…and welfare issues (typically aesthetics, property values, etc.) are not an issue because the tower itself is essentially unchanged."

In Addition, Threats Remain To…

- Local revenues, *even in states that have passed industry-backed laws on fees* (Texas, Oregon, Michigan);
- Budgets if it sets shorter deadlines for acting on permits, given staff cutbacks, imposes additional requirements for actions on permits (See pole attachment order, requiring utilities to provide a detailed explanation of specific grounds for denial of pole attachment request); results in new legal actions
- Development threat if pushes others to back of permit line
- Zoning threat, to extent rules that prevent localities from responding to challenges presented by DAS systems/ collocated facilities
- Charges for access to all types of public property

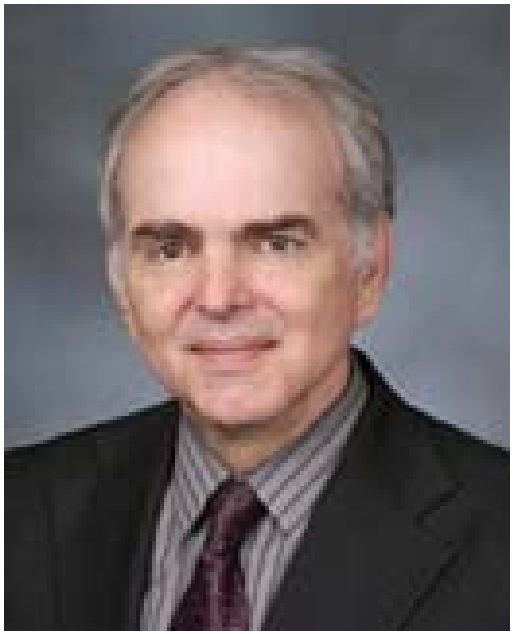
What's Next

- Local government must respond to the industry's accusations, and this is especially important for communities named in the comments (listed in documents produced by Gerry Lederer and provided on IMLA USB)
  - Don't ignore an accusation because it is untrue or vague
- Reply comments are due September 30. Filing is done electronically only
- Comments by individual communities should both respond to industry comments, but also emphasize:
  - Local broadband successes
  - Ways in which local government worked with industry in developing requirements

Work Does Not End With the Filings

- AFTER filings: there will need to be a nationally coordinated strategy that draws on the political, media, legal, public works, and planning resources of the local government community
- FCC Ex Partes
- Congressional lobbying;
- Media Initiatives;
- Coordination with local government research and consulting organizations;
- Efforts to build support from other industries, agencies
- Success will depend on financial and political support from local governments

Contact Information



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