Bureau of Municipal Information White Paper

# Wireless Systems in the Right of Way

## *What You Need to Know*

This overview will discuss: (1) the technologies proposed for use in the right of way; (2) the impact of federal law on these proposals; (3) concerns over companies' statements regarding their public utility status; (4) municipal consent to use the right of way; (5) application of the Municipal Land Use Law (MLUL); and (6) some considerations for municipalities to consider going forward.

## Introduction

The League has received reports of municipalities being approached by companies that wish to use the right of way (ROW) to install different wireless telecommunications facilities. Some companies have claimed access to the ROW because they are "public utilities" under New Jersey law. Others have referenced the Federal Telecommunications Act. In order to clarify this

situation and help municipalities make sense of this area we have provided a brief overview below.

**This overview is not legal advice.** All questions related to this area should be referred to your municipal attorney.

## A. New Technologies Being Proposed in the Right of Way

The demand for wireless communications services (voice, broadband, data) has increased the number of wireless providers. This has spurred requests for not only monopoles, in addition to more traditional lattice towers, but also distributed antenna systems (DAS) and small cells. These "micro" systems transmit wireless signal to and from a small defined area, use less power than traditional towers but provide coverage to a significantly smaller area. They can be installed on or in buildings or on existing monopoles, lattice towers or utility poles. Recently, wireless developers have proposed placing monopoles, DAS and small cells in the ROW.

## B. Differentiating Between Wireless Providers & Facility Developers

There are two different types of wireless developers operating in New Jersey. The first group, *wireless providers*, are licensed by the FCC to use spectrum and provide personal wireless service. These entities are not regulated by the BPU. An example of these type of providers would be Verizon Wireless or T-Mobile. The second group, *facility developers*, are not licensed by the FCC. They do not provide wireless service directly. They rent their wireless facilities to wireless providers. An example of these type of developers would be Mobilitie Management, LLC or Crown Castle N.G. East, LLC. Some facility developers claim public utility status because the

Board of Public Utilities designated them Competitive Local Exchange Carriers (CLECs) and Interexchange Carriers (IXC).

## C. Impact of the Federal Law

The Federal Telecommunications Act (TCA) applies to wireless providers proposing to build monopoles, DAS or small cells in the ROW. This provision may also apply to facility developers. Sections 253 and 332 are the two portions of the TCA relevant to the local siting of wireless facilities. Applications to construct these facilities will cite portions of sections 253 and 332 as support for their requests. *These provisions should not, however, be taken out of context.* Federal law does not pre-empt local municipal regulation and land use controls.

Section 332 preserves local zoning authority over the "placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A). However, "there is a tension between the two objectives of the Act: the objective to facilitate nationally the growth of wireless telephone service and the objective to maintain local control over the siting of towers." National Tower LLC v. Plainville Zoning Board of Appeals, 297 F.3d 14, 20 (1st Cir. 2002).

The TCA does impose limitations on local discretion. *First*, the TCA makes it unlawful for local government to prohibit, or have the effect of prohibiting, the "provision of personal wireless service." 47 U.S.C. § 332(c)(7)(B)(i)(II). *Second*, the TCA prohibits local government from "unreasonably discriminating among providers of functionally equivalent services." 47 U.S.C. § 332(c)(7)(B)(i)(I). *Third*, the TCA

imposes administrative requirements on local government. For example, it requires that local government "act on any authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time." 47 U.S.C. § 332(c)(7)(B)(II). For the purposes of this section, the Federal Communications Commission (FCC) has clarified a "reasonable period of time" to mean 150 days for the review of a siting application. Supra. IMO Petition to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting, ¶ 4, WT-Docket No. 08-165 (11/18/09). *Fourth*, The TCA also requires that any "[denial of] a request….be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(III).

*Importantly*, the TCA protects local government's ability to "manage the public rights-of-way… on a competitively neutral and non-discriminatory basis.." 47 U.S.C. §253 (c). In White Plains the 2d Circuit invalidated portions of a local franchise ordinance because it charged a higher fee for a new wired telephone provider for use of the ROW than it charged other wired telephone providers. TCG New York, Inc v. City of White Plains, 305 F.3d 67, 80 (2d Cir. 2002). This would mean that once a municipality has allowed the placement of a DAS, small cell or monopole in the ROW, it may have to impose the same conditions on similar applicants in the future.

Finally, municipalities should also take into consideration the impact of recent federal legislation that would allow for monopoles, DAS and small cells to collocate once they have been approved. In 2012, Congress passed the Middle Class Tax Relief and Jobs Creation Act of 2012, a law that limited the ability of local government to deny certain collocation (i.e. extension) applications for existing wireless facilities. 47

U.S.C. §1455(a). Section 6409(a) of the Act provided that "State and local government may not deny, and shall approve, any eligible facilities requests 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." The FCC clarified that these approvals must happen within 60 days of the application. IMO Acceleration of Broadband Deployment by Improving Wireless Siting Policies, WT Docket No. 13-238, 11-59, 13-32, ¶215,(10/17/14). The FCC also clarified that "DAS and small cells" should be included in the definition of "base station." Id. at ¶172. Consequently, once a town has approved a monopole, DAS or small cell, it loses the ability to limit its collocation.

## D. The Application of Federal Law to Facility Developers

Recent FCC orders and relevant case law indicate that facility developers may trigger the federal TCA because their facilities are being used, by wireless providers, for the provision of "personal wireless service." Put another way, while facility developer are not themselves licensed by the FCC to provide "personal wireless service" nevertheless, because they are renting their facilities to entities that *do* provide "personal wireless service," the TCA has some application to facility developers' requests. However, this area has not been well defined.

The FCC has stated that facility developers' applications are subject to the TCA's timing requirement mentioned above. *See* 47 U.S.C. § 332(c)(7)(B)(II). In a 2013 order, the FCC stated that "third-party facilities such as neutral host DAS deployment, [that] are or will be used for the provision of personal wireless services…are subject to the same presumptively reasonable time frames as other

personal wireless service facilities." IMO Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, Docket No. 13-238, 11-59, ¶ 158 (9/26/13). Thus, even though a facility developer is not providing wireless service, municipalities are required to respond within 150 days of their siting request.

Additionally, one Federal Circuit Court has applied the TCA to wireless developers. In Crown Castle v. Town of Greenburgh, the Second Circuit held that a municipality violated the TCA by not comporting with the "substantial evidence" requirement in denying a facility developer's application to install DAS and small cells in the ROW. Docket No. 13-2921-cv (2d. Cir. 2014).

At present there is a lack of clarity as to how the TCA impacts facility developers. While, the FCC and Second Circuit have indicated that some of the TCA's administrative requirement can apply to applications made by facility developers, it is not clear if the entire scope of the TCA applies.

## E. Concerns Regarding Facility Developers' "Public Utility" Status

It is unclear whether facility developers can rely on their "public utility" status when proposing to construct wireless facilities in the ROW. Some facility developers have claimed that they must be provided access to the ROW because they are a "public utility" subject to the BPU. It is clear that some facility developers have been given Competitive Local Exchange Carrier (CLEC) and Interexchance Carrier (IXC) status by the BPU. It is less clear whether their proposals to construct wireless facilities in the ROW fall within their legal status as CLECs and IXCs.

Essentially, facility developers are constructing wireless facilities that are rented out to wireless providers. Consequently, it is not clear that this activity can rightly fall within the purview of "telecommunications carriers" regulated by the BPU. N.J.A.C. 14:10-11(a)(2). The issue turns on whether facility developers are providing "telecommunications services." This term is defined as, ""[1]the offering of telecommunications for a fee directly to the public, or [2] to such classes of users as to be effectively available directly to the public, regardless of the facilities used." N.J.A.C. 14:10-1.2.

It is possible that facility developer's proposed activities in the ROW may not be considered "telecommunications services" under New Jersey law. There is an argument to be made that facility developers are not providing telecommunications directly to the public. Unlike wireless providers, they are not licensed to provide wireless service by the FCC. Rather, they allow wireless providers to *use* their facilities in the provision of wireless service. Regarding the second possibility, it's unclear whether this relationship – the renting of facilities to wireless providers – means that facility providers are providing telecommunications to "such classes of users as to be effectively available directly to the public." Facility developers are not selling their wireless capacity to the wireless providers who, in turn, sell it to consumers. Rather, they are simply renting out their facilities to the wireless providers who use their own spectrum to provide service to consumers.

This issue has not been resolved in New Jersey. There are no cases on point and the BPU has not provided any guidance. It should be noted that some states, like

Minnesota, have told facility developers that their status does not mean that local governments are required to provide access to the ROW. As will be discussed below, even if facility developers are operating within their status as CLECs or IXCs, they must still seek local approvals to install their facilities. However, as a public utility they could then appeal an adverse local zoning decision to the BPU. N.J.S.A. 40:55D-19.

## F. New Jersey Law Issues

### i. Municipal Consent to use the ROW

Wireless providers and facility developers need to obtain municipal consent to use the ROW. As a matter of New Jersey law, local government has total control over the ROW. The Appellate Division has held that, "a telephone company is … not a free agent in the placement of utility poles along a public road but must conform to the dictates of a local governing body expressed by way of ordinances with respect to the location of poles." Oram v. New Jersey Bell Telephone, 132 N.J. Super. 491, 494 (N.J. App. Div. 1975). Wireless providers must receive consent from the municipality pursuant to N.J.S.A. 48:3-19 before installing DAS or small cells onto existing poles. The placement of new poles and fixtures requires local approval pursuant to N.J.S.A. 48:17-10. Facility developers, *if* they are a operating as a "public utility", must receive a franchise from the municipality pursuant to N.J.S.A. 48:2-14. If a facility developer will be using the poles of another utility in the ROW, they too must receive municipal consent pursuant to N.J.S.A. 48:3-19.

Municipalities can require that wireless providers go through the zoning process as a condition of their approval to use the ROW. As stated above, the TCA explicitly preserved local government's authority over the siting of telecommunications facilities. 47 U.S.C. § 332(c)(7)(A). Thus, wireless providers must comply with local zoning, subject to the other restrictions found in the TCA.

Likewise, facility developers, *if* they are operating as a "public utility" when installing wireless facilities in the ROW, are subject to municipal zoning. This is because public utilities are not exempt from the local zoning process. In Borough of Red Bank, the Appellate Division clarified that "public utilities are subject to the municipal zoning power." New Jersey Nat. Gas Co. v. Borough of Red Bank, 438 N.J. Super. 164, 180 (N.J. App. Div. 2014), *quoting* In Re Petitions of PSE&G, 100 N.J. Super.1, 12 (N.J. App. Div. 1968). However, public utilities may appeal an adverse local zoning decision to the BPU. N.J.S.A. 40:55D-19.

Thus, even if a facility developer truly is operating as a "public utility" when it installs wireless facilities in the ROW, that activity is subject to local zoning. However, an adverse decision could be appealed to the BPU. This option would not be open to wireless providers.

**ii. Concern over Wireless Facilities Falling into the term "Public Utility" in Zoning Ordinances**

Municipalities should be careful to review their local zoning ordinances to make sure that wireless facilities, including DAS and small cells, do not fall within their code's definition of "public utility." Some municipalities provide public utilities an

expedited land use approval process. The Appellate Division has interpreted the term "public utility," as used in a local zoning ordinance, to include a wireless facility. Nynex Mobile Comm. Co. v. Hazlet Twp Zoning Bd of Adjustment, 276 N.J. Super. 598, 611 (N.J. App. Div. 1994). Because facility developers may try to blur the line between themselves and incumbent natural gas, electricity, basic telephone providers towns should clarify whether wireless facilities, including DAS and small cells, fall within their ordinance's definition of "public utility."

**iii. Fees for using the ROW**

Municipalities should also be aware that, contrary to the claims of some facility developers, towns' ability to recover fees for the use of the ROW may be limited. The statute at issue provides:

> a. No municipal, regional or county governmental agency may impose any fees, taxes, levies or assessments in the nature of a local franchise, right of way, or gross receipts fee, tax, levy or assessment against energy companies subject to the provisions of P.L. 1940, c.5 (C.54:30A-49 et seq.) prior to January 1, 1998 **or telecommunications companies**. Nothing in this section shall be construed as a bar to reasonable fees for actual services made by any municipal, regional or county governmental agency. [emphasis added] N.J.S.A. 54:30A-124.

The underlined portion was added by way of statutory revision in 1997. P.L. 1997, c. 162. This language has not been construed by any court. However, it would appear to limit the ability of local government to recover revenue from telecommunications companies for use of the ROW. Given the existence of the above quote language, it's unclear whether these fees can be validly levied.

## G. Considerations Going Forward

### i. What the TCA Prohibits

While municipalities still have authority over the siting of wireless facilities, as discussed above, this authority isn't without limits. Thus, municipalities should remember that:

> 1) The TCA makes it unlawful for local government to prohibit, or have the effect of prohibiting, the "provision of personal wireless service." 47 U.S.C. § 332(c)(7)(B)(i)(II);
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> 2) The TCA prohibits local government from "unreasonably discriminating among providers of functionally equivalent services." 47 U.S.C. § 332(c)(7)(B)(i)(I):
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> 3) The TCA requires that local government "act on any authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time." 47 U.S.C. § 332(c)(7)(B)(II). For the purposes of this section, the Federal Communications Commission (FCC) has clarified a "reasonable period of time" to mean 150 days for the review of a siting application. Supra. IMO Petition to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting at ¶ 4;
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> 4) The TCA also requires that any "[denial of] a request….be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(III);
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> 5) The TCA allows local government to regulate the ROW but it must do so "on a competitively neutral and non-discriminatory basis.." 47 U.S.C. §253 (c).

### ii. Local Strategies to Consider

It is important that municipalities review and revise their ordinances and develop new land use strategies in light of the concerns raised by the placement of wireless facilities in the ROW. While not an exclusive list, municipalities may want to:

1) Determine whether wireless facilities, including DAS and small cells, can fall within your zoning ordinance's definition of "public utility;"

2) Review height restrictions and determine how they would apply to DAS and small cells;

3) Determine whether or not your zoning ordinances require a variance for all wireless facilities. The FCC has specifically declined to issue a declaratory ruling that "zoning ordinances requiring variances for all wireless siting requests [violates the TCA]." IMO Petition to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting, ¶ 67, WT-Docket No. 08-165 (11/18/09).Thus, this may be a tool worth considering in order to maintain more control over the siting of these facilities.

4) Determine whether or not your municipality has already signed a consent agreement or franchise for the placement of wireless facilities in the ROW. If so, your municipality may be limited in its ability to provide different requirements for the use of the ROW by other applicants in the future. Municipalities can regulate the ROW but they must do so on a "competitively neutral and non-discriminatory basis." 47 U.S.C. 253(c).

5) Consider adopting *uniform* standards, after some discussion and research, for the use of the ROW. One such standard may be to preemptively limit the number of wireless facilities in the ROW. There is some concern about having the ROW fill up with wireless facilities. A "neutral and non-discriminatory" way to handle this is to simply provide a reasonable and standardized limit on the number of facilities that can be built per mile or per block.

6) The term of municipal consent or local franchise to use the ROW should be limited to a reasonable time frame such as 5, 10, 15 or 20 years.

### iii. Examples of Ordinances and Agreements that are Worth Reviewing

Municipalities may consider reviewing agreements and ordinances regarding the placement of wireless facilities. **Some agreements are subject to different state laws.** However, they demonstrate some of the strategies that are worth considering.

1) San Antonio, Texas Master License Agreement with Verizon Wireless for use of the ROW.

2) Minneapolis, Minnesota ordinance amending the zoning code on the issue of DAS and small cells.

3) City of Edina, Minnesota telecommunications zoning ordinance that clarifies that wireless telecommunications facilities are not "public utilities" for the purposes of local zoning.

4) City of West Orange, New Jersey ROW agreement for fiber facilities.

5) Township of Bedminster, New Jersey consent for application for development by Verizon Wireless.

## Conclusion

Municipalities which are approached by wireless providers and facility developers for use of the ROW should immediately contact their attorneys. This is a complex and complicated area of the law. We hope that this overview provides some context for analyzing relevant issues.