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Small Cell, DAS and Wi-Fi Facilities Siting in the Public Right of Way: Practical Considerations for Local Governments

July 21, 2015

The recent proliferation of small cells, distributed antenna systems (DAS), and outdoor Wi-Fi facilities has brought with it a number of challenges, and some potential opportunities, for local governments. In reviewing, negotiating, and approving the siting of wireless facilities within the public right of way (PROW), a local government must navigate the sometimes-competing interests of 1) obtaining fair compensation for use of the PROW, 2) obtaining fair compensation for attachments to city facilities (if any), 3) accommodating reasonable access and entry to the market for service providers that may be entitled to it under federal and state law, 4) facilitating (and encouraging) the efficient deployment of valuable wireless services for city residents and businesses, 5) recognizing and exploring opportunities for beneficial public-private partnerships, and 6) satisfying the local government's obligations with regard to public safety and welfare.

This memorandum explores some of the main considerations for local governments faced with such issues.

Due to the relatively recent emergence of these technologies, the distinctions among state and local laws, and wide variation in local objectives, no single approach can be said to work well in all instances. A local government's strategy will depend on a variety of factors, with potentially significant variation among local governments. Some localities may be primarily concerned with obtaining fair compensation. Others might be less concerned with compensation, but keenly interested in promoting the development of wireless services for use by residents, businesses, and the local government itself.¹ Others might emphasize administrative simplicity. Still others may seek to negotiate an exchange of facilities, perhaps including a fiber grant to the

Perhaps with an eye toward the development of FirstNet services.

locality. Against a backdrop of varying state and local law, local governments vary greatly in terms of their approaches to these deployments, especially with regard to compensation models.

Accordingly, while we do offer some potential strategies for consideration based on our experience (for example, we suggest that the difference between franchise rights and attachments rights is an important and useful conceptual distinction), none of the following should be interpreted as a recommendation applicable to a particular situation, nor should it be interpreted as legal advice.

Our discussion below proceeds as follows:

- I. Background: DAS, Small Cell, and WiFi
- II. Franchises and Attachment Rights
- III. Compensation
- IV. Key Provisions Under Federal Law: Section 253, Section 332(c)(7), and Section 6409(a)
- V. Exclusivity and Nondiscrimination
- VI. Wi-Fi, DAS, and Small Cell Systems by Franchised Cable Operators

I. BACKGROUND: DAS, Small Cell and Wi-Fi

Generally. While we use the broad term "wireless facilities" in this memo, our use of the term is limited to a particular group of wireless technology and equipment involving the use of relatively small antennas (and ancillary equipment) that may be installed in significant numbers in the PROW, often on utility poles or street lights.² Indeed, while some deployments may be "gap fillers" with only one or a handful of installations, the low power and comparatively small coverage footprint of any single antenna node of this type may require a substantial number of node sites to accomplish a service provider's objectives. While a large cell tower comprises a "macrocell," these technologies enable the deployment of multiple "microcells" covering an area in which a large cell tower would be impracticable.

Distributed Antenna System (DAS). A distributed antenna system (DAS) "is a network of spatially separated antenna nodes connected to a common source via a transport medium, that provides wireless service within a geographic area or structure."³ Essentially operating as a single antenna split into a several smaller, lower-power antennas, a DAS network lends itself to installation in areas not conducive to a larger, monolithic, high-power antenna. A DAS network

² While DAS and small cells are frequently used to provide coverage within structures, including large buildings, tunnels, etc., our discussion in this paper is limited to their use outside.

³ Wikipedia, "<u>Distributed Antenna System</u>," accessed 12/10/14; Tracy Ford, The DAS Forum, "Installing DAS & Small Cells, What You Need to Know," *BICSI News Magazine*, March/April 2013, available online via <u>The DAS Forum</u>.

can work well indoors, in urban areas, and in scenarios where other approaches may not work due to zoning, terrain, or aesthetic issues. "DAS deployments offer robust and broad coverage without creating the visual and physical impacts of multiple macrocells."⁴

From a service perspective, a DAS is very flexible, as most DAS networks are technologyagnostic, to a point. DAS can operate as an enhancement to a cellular system, providing greater coverage; as a cell booster, providing a better signal within areas purportedly covered but with poor quality; and as a radio frequency repeater system. It may be deployed indoors or outside. DAS deployments can be used to enhance cellular voice and data (2G, 3G, 4G, and LTE), to facilitate first responder operations (including two-way radios), and for real-time location systems (RTLS). A DAS can also be configured to support numerous Wi-Fi access points.⁵

Unlike small-cell solutions, the distributed architecture of a DAS, including the high capacity optical fiber network providing interconnectivity and the ability to drive large numbers of nodes from a central hub location, makes DAS a robust, scalable, flexible and efficient solution to a range of capacity and coverage challenges. For example, a DAS can be deployed to simultaneously accommodate multiple wireless frequencies and technologies for two or more wireless service providers.⁶

As indicated above, an important component of a DAS network is the presence of an extensive fiber optic network connecting the various antenna nodes back to a central point of interconnection. For large DAS deployments, this may require a significant investment in fiber deployment and/or fiber acquisition within the municipality. For example, in the City of Baltimore, Maryland, the large DAS operator Crown Castle (formerly NextG) recently acquired

Wi-Fi can ride on top of the wired element of a DAS. However, the caveat is that the Wi-Fi RF coverage range from a shared antenna is smaller than voice services due to its higher frequencies, so the antennas need to be closer to provide seamless Wi-Fi coverage, which translates into more antenna and reduced voice power levels to minimize the overlap.

HetNet Forum, "Distributed Antenna Systems (DAS) and Small Cell Technologies Distinguished," February 2013, at 12.

⁴ In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, WT Docket No. 13-328, Report and Order, (Oct. 21, 2014)("Wireless Siting Order"), ¶ 31.

⁵ While DAS can be used to propagate a Wi-Fi signal, it is not clear how many external DAS systems employ Wi-Fi, or whether Wi-Fi is expected to play a significant role in the plans of large neutral-host DAS operators. According to an early 2014 estimate, more than 50 percent of DAS networks (both indoor and outdoor) will use some form of Wi-Fi by 2018. *See BICSI*, "Distributed Antenna Systems Technology Update," accessed 12/14/14. But note:

⁶ The DAS Forum, *supra* n.4.

24/7 Mid-Atlantic Network, a company with a substantial fiber footprint throughout the City and surrounding area, that operated one of the largest carrier hotels in the area.⁷

In general, a DAS network may be installed and operated by a "neutral host," by an "anchor" provider, or by single wireless service provider. A building or venue owner such as a convention center or a stadium may own a DAS network as well – as may a municipality. A neutral host provider is in some respects a landlord, obtaining revenue from one or more service-provider "tenants" who use the DAS. Most neutral host providers, including Crown Castle, ExteNet, Boingo Wireless, American Tower Corp., and others, generally do not themselves offer retail communication services to the public at large. Their prime service customers are mobile carriers, such as AT&T and Verizon Wireless. An anchor provider may own and operate the DAS primarily for its own use, while also providing some form of retail communication service directly to the public. As a practical matter, the distinction between a neutral host and an anchor may not always be clear: AT&T, Verizon Wireless and other anchor providers sometimes refer to themselves as "neutral host providers."

Small Cell. Substantial confusion exists between the terms "DAS" and "small cell." The two technologies are indeed similar: Like DAS nodes, small cells transmit at signal power levels that are much lower than macrocells (i.e., large towers) and tend to be deployed at low elevations in areas where macrocells would not be feasible.

However, DAS and small cells differ greatly with respect to functionality, capacity, complexity and cost. These network architectures and technologies are not interchangeable, and each is suitable only for the particular purposes and environments it is designed to address....

[S]mall-cell solutions are typically deployed piecemeal to provide coverage or enhance capacity in much smaller areas with a signal technology for a single wireless carrier.

Each small-cell installation is similar to a single DAS node installation in that it requires a communications link back to a larger network, an electric power source and location space. An appropriately-configured small cell can generally be deployed to provide an immediate solution to a more isolated location with small coverage or capacity challenges in a manner that requires less up-front design work, planning and capital investment than a DAS.⁸

Operationally, then, small cells tend to be deployed in a more targeted fashion than a DAS, providing a coverage boost for a single mobile wireless carrier in a defined area. Unlike neutral host DAS providers, entities that deploy small cells, such as AT&T and Verizon Wireless, often

⁷ Rob Powell, "<u>Fiber M&A: Crown Castle to Buy 24/7 Mid-Atlantic Network</u>," *Telecom Ramblings*, September 8, 2014.

⁸ The DAS Forum, *supra* n.4

do so to improve their own mobile wireless service rather than as an independent source of revenue. Importantly, a DAS can accommodate multiple carriers – generally up to four – while a small cell normally only serves a single carrier.

From a regulatory perspective, DAS and small cells are nearly indistinguishable. Both are likely to involve telecommunications service or commercial mobile radio service (CMRS) regulated under Title II of the federal Communications Act, and both normally involve the use of licensed spectrum. Their regulatory status under state law is likely to be similar if not identical as well.

Wi-Fi. Like DAS and small cell technology, Wi-Fi is a wireless service that provides coverage in a relatively small area, using low-power, relatively small antennae that can be mounted on utility poles, street lights, and other structures both within and outside of the PROW. Wi-Fi, unlike most current DAS and small cell equipment, may be installed directly on an overhead wire, instead of attached to a pole. Unlike DAS and small cell technology, Wi-Fi is a broadband Internet access service based on the IEEE 802.11 standard that typically uses unlicensed spectrum to enable communication between devices.

While Wi-Fi is evolving to play a greatly expanded role with regard to the provision of retail voice services, Wi-Fi is primarily known for enabling access to the Internet. Accordingly, as a regulatory matter Wi-Fi historically has been treated as something wholly apart from other wireless technologies that emerged to serve more traditional telephony-oriented purposes, and which are generally regulated as CMRS providers under federal Title II.

The FCC's recent *Open Internet Order*,⁹ however, stands to blur that dichotomy by including "broadband Internet access service" within the scope of Title II regulation. The *Open Internet Order* defines that term in a technology-independent fashion, such that Wi-Fi will fall within its scope if it involves the provision of Internet access on a "retail, mass market basis."¹⁰ Importantly, if ultimately upheld and implemented, the *Open Internet Order* would confer upon Wi-Fi broadband Internet access service providers the same rights to access poles, conduit and infrastructure that are currently held by regulated providers of "telecommunications services."¹¹ A more comprehensive discussion of the regulatory prognosis for Wi-Fi, and the implications of any change as a result of the *Open Internet Order*, is beyond the scope of this paper.

One recent development of particular importance to local governments is the massive deployment of external Wi-Fi devices by franchised cable operators. As discussed later, this presents some challenging questions relating to local franchising and attachments.

⁹ *In the Matter of Protecting and Promoting the Open Internet,* GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24, released March 12, 2015 ("Open Internet Order").

¹⁰ *Id.*, ¶¶ 119, 224, 340, 379.

¹¹ Open Internet Order, ¶ 56.

II. FRANCHISES AND ATTACHMENT RIGHTS

For local governments, it is useful – and in some jurisdictions, it may be very important – to consider wireless siting issues in terms of two conceptually distinct sets of rights sought by the siting entity: (1) a right to occupy the public right of way, typically granted by the local government in the form of a franchise agreement or permit; and (2) a right to attach wireless facilities directly to municipally owned property, such as city traffic lights, street lights, and poles of municipally owned utilities. The first relates to a city's authority to manage the use and placement of facilities within the PROW, irrespective of who owns the poles or infrastructure on or within which the facilities are placed. The second relates to the city's rights as a property owner – acting in a proprietary capacity¹² – to control access to city-owned infrastructure, and may be manifest in a negotiated attachment agreement between the municipality and the attaching entity.

More concretely, a locality that has both city-owned poles (including street lights and traffic lights) and poles owned by a private utility within the PROW might require a franchise agreement for a DAS, small cell or Wi-Fi deployment involving either city-owned poles or privately-owned poles, and would also require an attachment agreement with the city for the right to attach to city-owned poles. Again, this may be subject to variation depending on state and local law.

As proposed in the Infrastructure NPRM and supported by the record, we conclude that Section 6409(a) applies only to State and local governments acting in their role as land use regulators and does not apply to such entities acting in their proprietary capacities. ... Like private property owners, local governments enter into lease and license agreements to allow parties to place antennas and other wireless service facilities on local-government property, and we find no basis for applying Section 6409(a) in those circumstances. We find that this conclusion is consistent with judicial decisions holding that Sections 253 and 332(c)(7) of the Communications Act do not preempt "non-regulatory decisions of a state or locality acting in its proprietary capacity."

In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, WT Docket No. 13-238, Report and Order (Wireless Siting Order), released October 21, 2014 at ¶ 239 (internal citations omitted). See also, Qwest Corp. v. City of Portland, 385 F.3d 1236, 1240 (9th Cir. 2004) (recognizing that Section 253(a) preempts only "regulatory schemes"); and Sprint Spectrum v. Mills, 283 F.3d 404, 421 (2d Cir. 2002) (finding that Section 332(c)(7) "does not preempt non-regulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity").

¹² As one would expect, different regulatory requirements may be applicable depending on the capacity in which the city is acting. For example, the FCC recently affirmed this distinction in its *Wireless Siting Order*, in which the FCC stated:

Some municipalities have chosen to meld these rights together into a single license agreement, which may make good sense in some situations. As suggested below, however, a more clearly delineated approach is an option that may confer some substantial benefits, depending on state and local law. While it may or may not be appropriate to execute a wholly separate franchise agreement and attachment agreement, the conceptual and legal distinction can be useful during the consideration of public-private partnership alternatives, in identifying appropriate compensation for the local government, and in accommodating the right of service providers to deploy wireless facilities and deliver wireless service within the locality. It is likely to be particularly important in an area with a large number of city-owned street lights and/or traffic lights, or that is served by a municipally owned electric utility.

We take a closer look at franchises and attachment agreements, respectively, in the following sections, before proceeding to discuss compensation models.

A. Franchise for Occupation of Public Right of Way

In simplest terms, a franchise is the permission given by a governmental body to a private actor that enables the private actor to undertake some activity within, or otherwise occupy, the public rights-of-way.¹³ This itself raises a potential threshold issue: are wireless facility deployments of the type described here subject to local franchising requirements? Is the attachment of a comparatively small DAS, small cell, or Wi-Fi antenna anywhere within the PROW in fact prohibited, unless the provider first obtains a franchise? This is in part a matter of local law, but in terms of meaningful physical impact on the PROW we believe the answer in many locations is likely to be "yes," particularly considering the potential for substantial fiber optic deployment and the installation of ancillary facilities (battery backup, concrete pads, etc.) in the PROW.

Assuming that a franchise requirement is consistent with local and state law (discussed further below), it is important to note that a wireless facility or telecommunications franchise is likely to be very different from a cable television system franchise that the locality may already have in place. A cable TV franchise is subject to certain boundaries and authorizations set forth in the federal Communications Act, as amended (47 U.S.C. ch. 5, subch. V-A). For example, under federal law, local franchising authorities are specifically authorized to require a franchise to pay a franchise fee of up to 5 percent (§ 542(b)); to provide financial support for capital expenditures for public, educational and governments channels (§ 531); to fulfill certain customer service requirements (§ 552); and to provide an "institutional network" (§ 531(f)). Title VI specifically permits a local franchising authority to consider the technical, financial, and legal qualifications of a putative franchisee (§ 541(a)(4)(C)). Title VI also addresses process, setting forth particular requirements for negotiating and renewing cable franchises (§ 541, 546).

¹³ We use the term "franchise," but acknowledge that many jurisdictions use alternate terminology ("license," "right of way occupancy permit," etc.) to refer to essentially the same concept.

While cable TV operators are regulated through a mix of federal, state and local regulation, telecommunications companies classified under federal Title II – which a DAS, small cell or Wi-Fi operator¹⁴ is likely to be – are primarily regulated at the federal and state level. This difference in regulatory categorization is important for a variety of reasons, as will become clear. Under Title II, states retain significant regulatory jurisdiction over telecommunications carriers, and as a result, state law and regulation by the state public service commission is likely to be relevant in evaluating a DAS or small cell deployment.

One key aspect of state law that must be explored is the extent to which state law confers rights on regulated entities with regard to PROW access. While state laws and regulations do not normally supplant local authority entirely, they may directly or indirectly impose limits on local discretion, may affect the nature of terms included within a franchise (including compensation), and typically prohibit a locality's ability to regulate the telecommunications services as such.

For example, in *Bell-Atlantic-Maryland v. Prince George's County*,¹⁵ the federal district court determined that, under Maryland law, the question of a telecommunications company's suitability to occupy the PROW had already been answered by virtue of its certification by the state Public Service Commission, and that a local government is preempted from requiring or considering vague qualifications not directly related to PROW management in the course of granting a franchise.

Depending on the jurisdiction, there may also be a question as to whether a telecommunications franchise fee "must be directly related to the actual costs incurred by a municipality when a telecommunications provider makes use of the rights of ways."¹⁶ (We return to this issue in our discussion of franchise fees in Section III.)

B. Attachment Rights

The question of attachment rights is a wholly different matter, conceptually, and relates to the city's rights as a property owner to control access to city-owned infrastructure such as street light poles or conduit. Unlike an obligation to obtain a franchise – which relates to the city's police power, regulatory and zoning authority to manage the use and placement of facilities within the public rights-of-way, irrespective of who owns the poles or infrastructure on or within which the facilities are placed – the negotiation of attachment rights with the locality is not triggered by a service provider's mere presence in the PROW, and comes into play only in the event the provider seeks to attach to city facilities. To the extent the provider attaches to private utility poles or other private property, the provider presumably would execute attachment agreements with those entities, as well.

¹⁴ Assuming this aspect of the *Open Internet Order* is upheld. *See supra* n.4.

¹⁵ Bell Atlantic-Maryland, Inc., v. Prince George's County, Maryland, 155 F.Supp.2d 465 (D. Md. 2001).

¹⁶ XO v. City of Maryland Heights, 256 F.Supp.2d 987, at 994 (8th Cir. 2003).

In essence, an attachment agreement operates as a negotiated license, normally requiring payment in a form of rent in exchange for the use of the property. An attachment agreement may concern a single specific pole or structure or a set number of specifically identified poles. Most often it is an open-ended master agreement, with permission to use individual poles or pole lines granted in the future through a permitting process that includes case-specific engineering and cost determinations.

An attachment agreement would focus on the respective rights and obligations of the city and the service provider, including allocation of risk and compensation obligations. More specifically, an attachment agreement may address the following issues, among many others:

- Provisions for new poles and pole replacement;
- Process issues, including how to communicate a siting request and how the city processes it;
- What to do in the case of damaged or destroyed poles;
- Reservation of certain city rights to use the poles;
- Provision for electric power;
- Maintenance obligations;
- Engineering certifications and make-ready issues;
- Payment of fees and charges;
- Description of in-kind compensation;
- Regulatory compliance; and
- Liability and indemnifications.

As further discussed in the next section, the proprietary nature of attachment rights may permit significant flexibility in terms of attachment negotiations, with a potentially more market-based outcome than might be available as part of a franchise negotiation.

III. COMPENSATION

Both franchise agreements and attachment agreements normally involve the payment of some form of compensation by the franchisee / attaching entity. Before taking a closer look at some considerations relating to franchise fees, attachment fees, and in-kind compensation, we offer three overarching observations:

First, attachment fees and franchise fees do not operate in isolation. A service provider likely cares more about the overall impact to the bottom line than it does about the respective allocation among fees. This is especially true if the provider is heavily reliant on attachments to city facilities. Accordingly, a lower franchise fee may enable assessment of a higher attachment fee, and vice versa.¹⁷ Such an approach may be more complicated to coordinate in communities where the municipal electric utility controls access to city-owned poles and street lights, since

¹⁷ As discussed below, any such approach will also have to ensure that such fees are nondiscriminatory and competitively neutral as between similarly situated providers.

the municipal utility likely has independent revenue and cost allocation requirements from the city departments that regulate the use of the PROW. In any event, any such balancing approach will also have to ensure that such fees are nondiscriminatory and competitively neutral, which may amplify the effects of the immediate action under consideration. For example, lowering franchise or attachment fees for one entity may result in pressure from other current or future occupants or attachers to lower their fees as well.

Second, the compensation model is driven by the locality's overall objectives, which may or may not primarily concern revenue. A city may wish to facilitate more widespread deployment or may seek to craft some form of public-private partnership, both of which may lead to an arrangement resulting in less direct revenue for the city than it might otherwise be able to achieve.

Third, if the local government's primary objectives are revenue-related, the locality should proceed with a healthy respect for the potential consequences of municipal overreach, both individually (under Section 253(a), specifically) and among local governments generally.

A. Franchise Fee

In the case of a franchise, the franchisee may be required to pay to the franchisor (the city) a "franchise fee." Often, though not always, a franchise fee is calculated as a percentage of the franchisee's gross revenue derived from its activities within the public right of way. Unlike cable franchises issued under the authority of the federal Cable Act, there is no specific federal authorization empowering local government to assess a franchise fee relating to wireless services, nor is such a franchise fee limited to a particular percentage, under federal law.

"Gross Revenue." In the event the city wishes to assess a franchise fee corresponding to a percentage of the franchisee's gross revenue from services provided within the franchise area, the franchise agreement should carefully define the term "gross revenue." Gross revenues may be defined to encompass revenues derived from the franchisee's activities in the PROW for which the franchise is granted (excluding, for example, the sale of equipment), including all revenue derived from RF transport, and perhaps fiber optic transport,¹⁸ services by the franchisee within the franchise area.

One consequence of adopting a gross-revenue-based franchise fee for an un-deployed technology and in an immature market is that, for an initial period of time, revenues are likely to be low, and may continue to be somewhat unpredictable. Identification and accounting of gross revenues may also present an issue, especially for small cell sites operated by single carriers.

Alternatives to Percentage of Gross Revenue. As an alternative to a franchise fee based on a percentage of gross revenue, some local franchising authorities have instituted a flat fee. Under

¹⁸ If undertaking this approach, localities should carefully assess any nondiscrimination issues relating to other providers of wireline transport services.

this approach, the provider would pay a set franchise fee each year, not tied to the revenue of the service provider, and which may or may not approximate the amount paid under a gross revenue-based formula.

Another possible alternative is to assess only a nominal franchise fee, or no fee at all. This may be particularly attractive if the local government expects to obtain significant compensation as the result of attachments.

"Reasonable Compensation" Limited to Cost Recovery? There is a split of authority as to whether a telecommunications franchise fee must be limited to cost recovery directly related to the franchisee's use of the PROW.¹⁹

B. Attachment Fee

An attachment fee may be accurately described as a form of rent, paid in exchange for the use of the property. Essentially operating as a license payment, the negotiation of attachment compensation can be more flexible than the imposition of a franchise fee. In addition, an attachment fee generally is not subject to the same strictures relating to cost recovery as may exist in the franchise context in some jurisdictions

In general, an attachment fee is likely to operate on a "per pole, per year" basis, although quarterly or semiannual payments may be specified. A sliding scale based on quantity is a potential option. The agreement may relate to a specifically described set of poles, or even a single pole, or it may amount to a master attachment agreement, under which individual attachment permits are issued as candidate poles are identified.

A local government may have a better opportunity to obtain in-kind compensation (discussed in greater detail below) as part of an attachment agreement, as opposed to a franchise agreement. For example, a city could conceivably negotiate a right to use capacity on a DAS network itself, or arrange for a right to use DAS fiber optic cable. It may be possible to negotiate the installation of shadow conduit or additional fiber as part of an installation by the provider (perhaps even extending beyond the DAS network itself). Naturally, these points are all subject to the operator's ability and willingness to provide it, and would be a subject of negotiation.

¹⁹ See Cablevision of Boston v. the Public Improvement Commission of the City of Boston, 184 F.3d 88 (1st Cir. 1999); TCG v. City of Dearborn, 206 F.3d 618 (6th Cir. 2000); Time Warner Telecom v. City of Portland, 322 Fed.Appx. 496 (9th Cir. 2009);); Qwest v. City of Santa Fe, 380 F.3d 1258 at 1272 (10th Cir. 2004); City of Portland v. Electric Lightwave, Inc., 452 F.Supp. 2d 1049, 1072 (D. Or. 2005); Bell Atlantic-Maryland v. Prince George's County, 49 F.Supp. 2d 805 (D.Md. 1999); vacated and remanded, 212 F.3d 863 (4th Cir. 2000).

The amount of an attachment fee also will depend on (1) the impact of the federal Pole Attachment Act and applicable state law (perhaps indirectly), and (2) a set of market-oriented variables. We take a closer look at each in the following two sections.

1. The Federal Pole Attachment Act

Section 224 of the federal Communications Act of 1934, as amended, regulates the rates, terms and conditions of access by cable television operators and telecommunications service providers to utility poles, ducts, conduits and rights-of-way pursuant to rules and regulations established by the Federal Communications Commission (FCC or Commission).²⁰ Specifically, Section 224(f) states:

A utility shall provide a cable television system or *any telecommunications carrier* with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.²¹

The FCC has developed extensive pole attachment regulations that govern nondiscriminatory access, including attachment rate formulas that essentially limit on-going pole attachment fees charged by utilities to an incremental cost recovery for the use of the pole. These rates generally yield attachment rates that average between \$4-\$8 per pole, per year.

Because the Act states that a utility shall provide "*any telecommunications carrier* with nondiscriminatory access," the FCC has determined that wireless providers such as cellular, PCS and DAS providers are entitled to nondiscriminatory access to utility poles at regulated rates as long as they provide telecommunications services.²²

The FCC's rate and access rules, however, do not apply to entities that are municipally or cooperatively owned. That is so because 47 U.S.C. § 224 imposes federal pole attachment requirements only upon entities that meet the definition of "utility" in Section 224(a)(1), and the term "utility" is defined so as to exclude local governments, cooperatives, and railroads:

- ²¹ 47 U.S.C. § 224(f)(1)(*emphasis* added).
- ²² In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996: Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, Report and Order, FCC 98-20 (rel. February 6, 1998) ("Pole Attachment Rate Order"). This decision was upheld by the U.S. Supreme Court in National Cable & Telecommunications Assn., Inc. v. Gulf Power Co., 534 U.S. 327 (2002). In 2011, the Commission affirmed the applications of its telecommunications attachment rate formula to wireless pole attachments. In the Matter of Implementation of Section 224 of the Act, Report and Order and Order on Reconsideration, WC Docket No. 07-245, FCC 11-50, released April 7, 2011.

²⁰ 47 U.S.C. § 224. Following the practice of the Commission, we will refer to attachments to poles, conduits, ducts and rights-of-way collectively as "pole attachments," unless otherwise specified.

The term "utility" means any person whose rates or charges are regulated by the Federal Government or State and who owns or controls poles, ducts, conduits or rights-of-way used, in whole or in part, for any wire communications. *Such term does not include* any railroad, any person who is cooperatively organized, or *any person owned by the federal government or any State*.²³ *Id.* (emphasis added).

While a municipal entity is exempt from the federal pole attachment regulations, the rules may have an indirect impact on a local government as it develops its own practices and policies related to the use of its poles, particularly with respect to attachment rates in areas where private utility attachments are available. Also, the existence of the federal statutory exemption does not necessarily mean that municipalities are not subject to pole attachment requirements that may affect the attachment rate they are permitted to charge. Instead, municipalities must look to see what, if anything, applicable state law requires with respect to pole attachments. Furthermore, attaching entities, public service commissions, and courts often look to the federal rules and FCC interpretations as benchmarks of what is fair and reasonable. So, a local government that seeks to depart from federal standards should have a thorough understanding of them and be able to articulate meaningful distinctions from their own circumstances.

Nevertheless, in some jurisdictions it may be possible to negotiate attachment compensation primarily according to localized market-based variables, as described further in the following section.

2. Market Variables

From a service provider's perspective, it may well make sense to favor a compensation scheme involving a static, predictable, relatively nominal attachment fee, alongside a franchise fee pegged to the provider's gross revenues (at least for the initial contract term). From a local government's perspective, however, a lower franchise fee might be desirable, or may be required as a consequence of local or state law. Under that approach, a more substantial attachment fee may be justified and accommodated as a consequence of various market and business factors, including but not necessarily limited to the following:

- *The quantity of attachments*. A smaller, more targeted deployment might absorb a higher attachment fee more readily than a widespread deployment.
- *The business plan of the attaching entity.* A small cell deployment by a wireless carrier such as AT&T and Verizon Wireless is generally done for the purpose of increasing the

²³ "State" is defined to include "any political subdivision, agency, or instrumentality thereof." 47 U.S.C. § 224(a)(3). The FCC has specifically stated that municipalities, cooperatives, and non-utilities are exempt, and that "the Commission does not have authority to regulate (and the proposed rules, thus, do not apply to) small utilities that are municipally or cooperatively owned." *In the Matter of Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, FCC 11-50, released April 7, 2011, at n.14, ¶46 of Regulatory Flexibility Analysis.

quality of existing services, not to generate revenue from services directly as a result of the attachment. A neutral host DAS provider, on the other hand, relies on revenue directly realized from the attachment.

- *The ratio of city-owned poles vs. poles owned by a private utility.* If viable attachment sites are available in a particular area on poles owned by a private utility with regulated attachment rates a city should expect to charge a comparable attachment fee, or cause providers to seek to attach to non-city facilities first.
- *Demand, density, and geography.* Demand among multiple providers for scarce, highly desirable poles in heavily populated or congested areas (such as an entertainment district or central business district) may permit a higher attachment fee than that assessed in other areas of lower demand.
- *Nondiscrimination issues.* As discussed in greater detail below, a local government may be compelled to offer a lower attachment rate to a particular provider than it might otherwise, as a consequence of nondiscrimination obligations under Section 253, Section 331(c)(7), and possibly other laws.
- *Amount of franchise fee.* As noted above, a service provider might not distinguish between franchise fees and attachment fees, viewing them more as a unified expense. As such, a local government may be able to obtain increased compensation for attachments if the corresponding franchise fee is low, or even nominal.

C. In-Kind Compensation

Subject to potential state law limitations, it may be possible for a local government to acquire some form of non-monetary, in-kind compensation as a consequence of wireless facilities siting in the PROW, and in particular as part of attachment agreement negotiations. Doing so may be beneficial to the service provider as well, which may be in a position to offer the use of what is essentially surplus property, involving only incremental costs, in exchange for a reduced fee payment.

In the world of cable TV franchising, institutional networks, complimentary services, and negotiations of in-kind compensation along these lines are fairly common, and the federal Cable Act specifically authorizes local franchising authorities to require them. No such federal statutory authorization exists, however, with regard to wireless facility / telecommunications franchises or pole attachment agreements.²⁴

²⁴ Courts have interpreted Section 253 as allowing municipalities to obtain in-kind compensation in the form of fiber and conduit. For example, in *Time Warner Telecom v. City of Portland*, the Ninth Circuit upheld the ability of the City of Portland to obtain shadow conduit for municipal purposes from providers. *Time Warner Telecom v. City of Portland*, 322 Fed.Appx.496 (9th Cir. 2009). See also, *Cablevision of Boston v. the Public Improvement Commission of the City of Boston*, 184 F.3d 88 (1st Cir. 1999), upholding Boston's requirement that cable and telecommunications providers install shadow conduit.

In fact, state or local law may limit the ability of a local government to receive valuable in-kind compensation as part of a telecommunications franchise. Particularly in jurisdictions where a telecommunications franchise fee is arguably limited to cost, it may be difficult to support a request for valuable in-kind compensation relating to the franchise. Accordingly, it may be more appropriate in some cases to negotiate an in-kind compensation package or establish a public-private partnership in connection with an attachment agreement, rather than a franchise agreement.

For example, in exchange for a reduced attachment fee, a service provide might opt to grant the local government the right to use a few strands of unactivated ("dark") fiber optic cable from every attachment (antenna node) site, to a centralized location. A service provider might also be amenable to negotiating a DAS tenancy of some form, enabling direct use of the DAS by the local government. Or, a service provider might agree to install facilities in an area that it might not otherwise serve, but for which service is a high priority for the city. The overall scenario is ripe for the development of innovative, mutually beneficial public private partnerships of various forms.

D. Revenue and Other City Objectives

It is to be expected that a local government, on behalf of its citizens, will seek to obtain reasonable compensation in exchange for a grant of franchise or attachment rights. However, for a variety of reasons, local government may choose to moderate their requirements for compensation relating to a local franchise, to attachments to city-owned structures, or both.

A fee that is fair and reasonable may in some circumstances be less than "what the market will bear." Attempting to charge the absolute maximum franchise fee alongside a very high, marketbased attachment fee may be economically untenable from the service provider's perspective, and could potentially lead to problems for the city under Section 253(a) and (c) (as further described in the next section).

Some local governments may choose to emphasize objectives other than revenue, such as encouraging the deployment of telecommunications facilities and services in the area. With this objective in mind, it is important to be mindful of the implications of possibly setting a precedent applicable to all attachments to city poles, street lights, and other facilities. In doing so, the local government may wish to consider a variety of questions:

First, does the city's compensation scheme operate as a substantial disincentive to the deployment of facilities enabling improved wireless service? Local governments that place a premium on improved wireless service may wish to carefully evaluate whether this is so. Going further, and as noted above, local governments have an obligation under Section 253(a) and possibly state law to not prohibit deployment. A compensation scheme that has the effect of prohibiting deployment may run afoul of such provisions.

An additional set of issues relating to deployment and improved services concerns nondiscrimination principles (discussed in greater detail in the next section). To what extent does the city's compensation model – particularly with regard to attachment fees – apply to other service providers, including facilities-based broadband? Is the city prepared to impose the same or similar fee structure upon all other similarly situated attaching entities? Do the nondiscrimination principles lead to unacceptable disincentives to deployment for any particular service providers, in particular, last-mile facilities-based broadband providers? To what extent does the compensation model apply to a municipal service provider? These are complex, highly fact-specific questions.

With these general considerations in mind, a city can attempt to structure a fair, nondiscriminatory compensation structure that makes sense for the city as well as prospective service providers.

We now turn to a review of the key federal laws with regard to wireless facilities siting in the PROW and to city facilities.

IV. Key Federal Laws: Section 253; Section 332(c)(7) and Section 6409(a)

A. Section 253

Section 253 of the federal Communication Act, entitled "Removal of Barriers to Entry," prohibits state and local governments from creating barriers to the provision of telecommunications services (47 U.S.C. § 253(a))²⁵ while preserving the right of local governments to "require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis. . . ." (47 U.S.C. § 253(c)).²⁶

²⁵ Section 253(a) provides, "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

²⁶ Significantly, under the plain language of the statute, Section 253(a) operates as the only preemptive provision of Section 253, while Section 253(c) operates as a "safe harbor" to protect local governments from such preemption. A few courts have strayed away from such a plain language interpretation, finding that even if there is not a prohibition within the meaning of Section 253(a), a municipal regulation could be preempted if it falls outside the safe harbor provisions of Section 253(b)-(c). *See, e.g., Bell Atlantic-Maryland, Inc., v. Prince George's County, Maryland*, 49 F. Supp. 2d 805, 816 (D. Md. 1999), vacated and remanded 212 F.3d 863 (4th Cir. 2000). The majority of circuits, however, have rejected such an interpretation, holding that Section 253(c) is intended to serve as a safe harbor to preemption under Section 253(a) and is not an independent requirement. See, e.g., *Level 3 Communications, LLC v. City of St. Louis*, 477 F.3d 528, 532 (8th Cir. 2007), *cert. denied*, 537 U.S. 935 (2009); see also *Illinois Bell Telephone Co. v. Village of Itasca*, 2007 WL 1560263, *8 (N.D. Ill. 2007).

So, does Section 253(a) mean that a local government *must* permit a wireless facilities deployment in the PROW? Also, is there is some point at which the level of compensation demanded by the local government amounts to a prohibited barrier to entry? What if reasonable alternatives exist to deliver comparable service, other than siting within the PROW? These are unsettled, factspecific questions for which there is no definite general answer. Over the years there has been a significant amount of debate and litigation surrounding the scope of Section 253(a), and there remains a split of opinion among the various federal courts with respect to a few key issues, including what is allowed as "reasonable compensation" for use of the PROW.

It is not always clear whether or how Section 253(a) applies outside of the context of access to public rights-of-way. While we do not believe that Section 253(a) applies to a city acting in a proprietary manner with regard to attachment rights, various issues could nevertheless emerge that cities need to be mindful of. For example, while a city may be able to deny all entities access to its streetlights, it is less clear that a city may allow some entities on its streetlights but deny access to similarly-situated competitors who are otherwise qualified. Again, these are complex, highly fact-specific questions that are best addressed on a case-by-case basis.

B. Wireless Facilities Siting: Section 332(c)(7)

In an effort to address purported local impediments to the deployment of wireless communication facilities,²⁷ Congress adopted 47 U.S.C. § 332(c)(7) as part of the Telecommunications Act of 1996.²⁸ Section 332(c)(7) was an attempt to accommodate two conflicting interests: 1) the need to facilitate the deployment of wireless telephone service infrastructure nationwide, and 2) the need to preserve adequate local control over the review, siting and approval of wireless tower facilities. It provides, in relevant part:

(7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof--

 (\mathbf{I}) shall not unreasonably discriminate among providers of functionally equivalent services; and

²⁷ See Rancho Palos Verdes v. Abrams, 544 U.S. 113, 115 (2005).

²⁸ Telecommunications Act of 1996, Pub. L. No. 104-104, § 704(a), 110 Stat. 56 (1996)(codified at 47 U.S.C. § 332(c)(7)).

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

47 U.S.C. § 332(c)(7).

While Section 332(c)(7)(B) does limit local government discretion in several respects as it relates to applications for the siting of wireless facilities, it is important to recognize that Section 332(c)(7) (and the subsequent FCC Orders and cases) addressed local government action relating to local zoning and land use regulations, as opposed to decisions made concerning municipal property and the public right of way.²⁹ In short, Section 332(c)(7) does not apply to the negotiation of attachment rights pertaining to city-owned poles.

For example, the erection of a 180' tall tower on private property within the boundaries of a town would likely present a zoning issue for the town, requiring the site owner to submit an application conforming with the town's zoning and land use regulations (and/or seeking a variance). Under Section 332(c)(7), the town could not "unreasonably discriminate" against the

²⁹ See AT&T Wireless PCS, Inc. v. City Council of Va. Beach, 155 F.3d 423, 427 (4th Cir. 1998); Sprint Spectrum, L.P. v. Willoth, 176 F.3d 630 (2d Cir. 1999); MetroPCS, Inc. v. City and County of San Francisco, 400 F.3d 715 (9th Cir. 2005).

site owner, the town would be obligated to act on the completed application within a reasonable time (specified by the FCC as 150 days), and the town could not take action that has the effect of prohibiting service. In effect, Section 332(c)(7) preempts any town zoning and land use regulations and processes that might conflict with these requirements.

The situation changes, however, with regard to a wireless facilities attachment to property owned and controlled by the city, such as a city-owned streetlight. In general, preemption of local and state law applies only to state and local *regulation*, and does not apply with regard to property owned and managed by the state or locality.³⁰ "By its terms, [Section 332(c)(7)] applies only to local zoning and land use decisions and does not address a municipality's rights as a landowner."³¹

In any event, to the extent it applies at all, Subsection (B) imposes three³² important limitations on the discretion of local governments when it comes to the siting and regulation of facilities for "personal wireless services." The term "personal wireless service" (PWS) is defined to mean "commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access service," while "personal wireless service facilities" means "facilities for the provision of personal wireless service." 47 U.S.C. § 332(c)(7)(C)(i), (ii). The FCC has stated that "where DAS or small-cell facilities, including third-party facilities such as neutral-host DAS deployments, are or will be used for the provision of personal wireless services, their siting applications are subject to [Section 332(c)(7)]."³³

The first limitation restricts a state or local government from discriminating among similarly situated providers with regard to the "placement, construction, and modification of personal wireless facilities." As we discuss later, a local government cannot "unreasonably discriminate

See Bldg. & Constr. Trades Council v. Associated Builders & Contractors, 507 U.S. 218, 226-27 (1993)("When a State owns and manages property ... it must interact with private participants in the marketplace. In doing so, the State is not subject to preemption ..., because preemption doctrines apply only to state *regulation*.") Another case that makes this point is *Time Warner Telecom of Oregon v. City of Portland*, 452 F.2d 1084, 1095 (D. Ore. 2006), *aff'd on other grounds*, 322 Fed.Appx. 496, 2009 WL 965816 (C.A.9 (Or.)) ("The problem with plaintiffs' preemption argument is that § 253(a) does not apply to IRNE. Section 253(a) preempts any "State or local statute or regulation, or other State or local legal requirement" that may have the effect of prohibiting the provision of a telecommunications service. Plaintiffs fail to show that IRNE regulates plaintiffs or imposes legal requirements on plaintiffs. ...")

³¹ Omnipoint Comms. Inc. v. City of Huntington Beach, 738 F.3d 192, 201 (9th Cir. 2013).

³² A fourth limitation prohibits a government entity from taking into account the environmental effect of radio frequency emissions (47 U.S.C. § 332(c)(7)(B)(iv)), and is less germane to the current discussion.

³³ Wireless Report & Order, ¶ 22.

among providers of functionally equivalent services."³⁴ Notably, this does not mean that a local government must treat all providers of the same service exactly the same, when it comes to placement of wireless facilities. If there is some reasonable need or basis to discriminate among providers of similar services – within the scope of local zoning authority – the local government may (and arguably must) do so, because treating dissimilarly-situated entities the same can be a form of discrimination.

Second, with regard to placement, construction, and modification of wireless facilities, a state or local government "shall not prohibit or have the effect of prohibiting the provision of personal wireless services."³⁵ In effect, this provision imports the "barrier to entry" prohibition established in Section 253(a) of the Telecommunications Act of 1996, which we discussed in Section V. In most respects, the analysis as to what constitutes a "prohibition" under Section 332(c)(7)(B)(i) mirrors that of Section 253(a) analyses.³⁶ As our previous discussion reflects, there may be conflicting authority as to how this provision is interpreted. More specifically, among other actions that may run afoul of this prohibition, the FCC has determined that a State or local government is prohibited from denying a siting application solely because service is available from another provider.³⁷

The third important limitation set forth in Section 332(c)(7) concerns the time period to review and act on a siting application. It states that a state or local government "shall act on any request for authorization ... within a reasonable period of time...." This provision has led to subsequent FCC regulation imposing a so-called "shot clock" for government action on wireless facilities siting requests. In 2008, the wireless industry trade association filed a petition with the FCC asking it to address what constitutes a "reasonable period of time" for purposes of Section 332(c)(7)(B)(ii). In response, the Commission determined that a "presumptively 'reasonable period of time' beyond which inaction on a personal wireless service facility siting application will be deemed a 'failure to act'" would henceforth be 90 days for completed collocation applications (i.e., requests to locate infrastructure on an existing tower), and 150 days for completed application within the designated timeframe, personal wireless service providers "may seek redress in a court of competent jurisdiction within 30 days, as provided in

³⁴ See AT&T Wireless PCS, Inc. v. City Council of Va. Beach, 155 F.3d 423 (4th Cir. 1998).

³⁵ See New Cingular Wireless PSC, LLC v. Fairfax Cnty. Bd. Of Supervisors, 674 F.3d 270 (4th Cir. 2012).

³⁶ See T-Mobile Northeast v. Fairfax County Bd. of Supervisors, 672 F.3d 259 (4th Cir. 2012); AT&T Wireless PCS, Inc. v. City Council of Virginia Beach, 155 F.3d 423 (4th Cir. 1998).

Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review . . ., WT Docket No. 08-165, Declaratory Ruling, 24 FCC Rcd 13994, ¶ 56 (2009)("Shot Clock Ruling"), recon. denied, 25 FCC Rcd 11157, aff'd sub nom., City of Arlington, Tex. v. FCC, 668 F.3d 229 (5th Cir. 2012) aff'd, 133 S.Ct. 1863 (2013).

³⁸ Shot Clock Ruling, $\P 2$.

Section 332(c)(7)(B)(v). The State or local government, however, will have the opportunity to rebut the presumption of reasonableness."³⁹

Again, the shot clock requirements are only applicable when municipality is acting in a regulatory capacity and do not apply to requests to attach to city-owned facilities. Nor is the shot clock likely to be triggered by a generalized request for a franchise to place wireless facilities in unspecified locations within the PROW.

C. Wireless Facilities Modification: Section 6409(a)

As part of the Middle Class Tax Relief and Job Creation Act of 2012, Congress enacted a set of statutes relating to public safety communications and the auction of electromagnetic spectrum known as the Spectrum Act. The Spectrum Act was intended to "advance wireless broadband service" for public safety and commercial purposes and, among other things, provided for the creation of a nationwide first-responder wireless network known as "FirstNet."

Like Section 332(c)(7) of the Telecommunications Act of 1996, Section 6409(a) of the Spectrum Act was intended to address purported problems relating to state and local government processing of applications. While Section 332(c)(7) relates to applications for new wireless facilities sites, Section 6409(c) concerns the modification of *existing* wireless facilities (more specifically, "towers" and "base stations"). Section 6409(a) provides:

Sec. 6409. Wireless Facilities Deployment.

(a) Facility Modifications –

(1) In General. Notwithstanding section 704 of the Telecommunications Act of 1996 (Public Law 104-104) or any other provision of law, 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. For purposes of this subsection, the term 'eligible facilities request' means 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.⁴⁰

³⁹ Shot Clock Ruling, ¶ 32.

 ⁴⁰ Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96 § 6409, 126
Stat. 156 (2012)(codified at 47 U.S.C. § 1445(a).

The scope of Section 6409(a) is fairly simple: it directs government entities to approve – within 60 days^{41} – applications for modification of "an existing wireless tower or base station" (including addition, removal and replacement of equipment) if the modification will not "substantially change"⁴² the physical dimensions of the tower or base station.

The FCC clarified the meaning of some of Section 6409(a)'s key terms in an Order released in October 2014. In it, the FCC made the following determinations:

- The term "tower" means "any structure built for the sole or primary purpose of supporting any Commission-licensed or authorized antennas and their associated facilities" (¶ 167)
- The term "base station" includes a non-tower structure that has existing wireless facilities upon it, including DAS / small cells (thus Section 6409(a) applies to non-tower structures if they already have wireless facilities upon them)(¶ 179)
- A street light is a "non-tower structure" (¶ 81)
- Section 6409(a) does not apply to "states or municipalities in their proprietary capacities." (¶ 237 *et seq.*) (Thus Section 6409(a), like Section 332(c)(7), arguably does not apply to facilities attached to city-owned street lights, municipal utility poles, etc.)
- The term "transmission equipment" encompasses "antennas and other equipment associated with and necessary to their operation, including power supply cables and backup power equipment." (¶ 157)
- "Small wireless facility" (i.e., DAS / small cell) sitings are exempt from historical preservation review under Section 106 of the National Historic Preservation Act if such facilities are located on existing utility structures ("including utility poles and electric transmission towers") and non-tower structures, if certain conditions are met. One of the conditions is that the structure must not be located within 250 feet of a historic district.

Due to small cell, DAS and Wi-Fi networks' reliance on existing facilities (i.e., streetlight and traffic poles, utility poles, or building structures) that are not wireless "towers or base stations," and the relatively small size of such equipment, modification issues concerning Section 6409(a) are probably less likely to emerge than are initial siting issues arising under Section 332(c)(7). Section 6409(a) is also considerably more limited in scope than Section 332(c)(7), having no provisions relating to nondiscrimination, etc.

Furthermore, as indicated above, the FCC has made clear that Section 6409(a) does not apply to a state or local government acting in a proprietary capacity, as opposed to a land use regulator. In other words, like Section 332(c)(7), Section 6409(a) does not apply to modifications of

⁴¹ If the applicable State or municipal reviewing entity fails to issue a decision within 60 days on an applications submitted pursuant to Section 6409(a) the application will be "deemed granted." *Wireless Siting Order*, ¶ 226.

⁴² Wireless Siting Order, ¶ 182 et seq.

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wireless facilities on municipal light poles and other structural property owned by the local government.

In addition, the shot clock set forth in Section 6409(a) would not apply to an initial application for a generalized PROW franchise, as opposed to a request to modify specific facilities at a specified location.

Section 6409(a) does apply to zoning decisions and other specific government approvals with regard to wireless facility modifications that do not involve an attachment to city-owned structure.

In March 2015, Montgomery County, Maryland challenged the FCC's new siting rules in a lawsuit filed in the U.S. Court of Appeals for the Fourth Circuit. The Montgomery County action focuses in particular on the 60-day shot clock, among other issues.⁴³

V. Exclusivity and Nondiscrimination

Can a city issue a wireless facility / telecommunications franchise to one company, and not another? Can it grant attachment rights in a particular area to one company, and not another? Must all companies be treated identically, in terms of franchises and attachment rights? Questions of exclusivity and nondiscrimination often arise in the context of wireless facilities in the PROW, and we raise some of the main considerations in the following two sections. Please note, however, that these matters involve complex issues of federal, state and local law, and tend to be highly fact-specific. As such, the following discussion is necessarily high-level, is by no means exhaustive, and may be subject to substantial variation as a result of state and local law and the facts of the particular situation.

Franchise Rights. For a variety of reasons, a local wireless facility and/or telecommunications probably cannot be exclusive, and probably must be competitively neutral and nondiscriminatory. Under local law, the terms of a local charter or statute enabling such franchising might directly or indirectly prohibit exclusivity, and may even include a nondiscrimination obligation. Depending on the jurisdiction, the locality may be restricted from inquiring as to the financial, technical and legal qualifications of a service provider seeking a franchise, if the provider is a carrier certified by the state. Finally, depending on the jurisdiction, Section 253(c) of the federal Communications Act provides an important safe harbor for localities against barrier-to-entry claims made under 253(a), if the management of the PROW is competitively neutral and nondiscriminatory.

Attachment Rights. A grant of attachment rights probably cannot be explicitly exclusive either, but, unlike a generalized franchise to occupy the PROW, attachment rights by their nature are

⁴³ John Eggerton, "Montgomery County Sues FCC Over Tower Siting Decision," <u>Multichannel News</u>, March 10, 2015.

more subject to *de facto* exclusivity. As a practical matter, attachment rights to certain poles and even certain geographic areas may become exclusive as a consequence of physical loading and space restrictions, limiting the number of attachments that can be made to any one pole. Under a "first come, first-served" approach, a single entity might theoretically even acquire attachment rights to virtually all feasible poles in a particular area.⁴⁴ However, as a function of node coverage area and frequency of available poles, service providers are unlikely to require use of every pole in a particular area. Further, a municipality is not generally required to construct new facilities to accommodate an attaching entity if the municipality does not have a need for such facilities.

Nondiscrimination obligations with regard to attachment rights might arise as a result of various constitutional, statutory or regulatory provisions, but in general, greater variation among attachment agreements is likely to be permitted – even with regard to rates – than among franchise agreements. As a proprietary exercise, a local government is generally permitted to take into account market-oriented factors (as outlined in Section IV.B.2) in negotiating an appropriate attachment rate.

Zoning Issues. Section 332(c)(7)(B), entitled "Preservation of Zoning Authority," provides:

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof--

(I) shall not unreasonably discriminate among providers of functionally equivalent services;

As its title indicates, Section 332(c)(7)(B) applies only to local zoning and regulatory decisions concerning the location of particular sites, and does not apply to local governments acting in a proprietary capacity. It would apply, for example, in the case of a conditional use permit for the construction of a single, 135-foot tower but, as indicated previously, it is questionable whether it would apply to the negotiation of attachment rights to city-owned facilities in the PROW (as the FCC has recently acknowledged).⁴⁵

⁴⁴ A locality may wish to consider including a provision in attachment or franchise agreements requiring installation of facilities and activation of service using attachments within a particular period of time (i.e., "use it or lose it"), to minimize possible incidents of site-squatting.

⁴⁵ *See supra* n.10.

Nevertheless, it is conceivable that Section 332(c)(7) could be found to apply if the negotiation of attachment rights (or refusal thereof) is used as a tool to effect a zoning-like result.

Even if Section 332(c)(7)(B) does apply to a particular situation, some level of discrimination is permitted, so long as it is "reasonable" and within the bounds of traditional local zoning determinations.⁴⁶

Preferences for Siting on Municipal Property. One situation in which a nondiscrimination issue might arise under Section 332(c)(7)(B) is that of a "municipal preference" clause included in a wireless facility siting ordinance or franchise. Such a clause might state that, all other things being equal, a provider *must* opt to site on city-owned property rather than privately-owned property. Providers of wireless services have repeatedly argued that some aggressive municipal preference clauses amount to impermissible discrimination, and are otherwise prohibited under Section 332(c)(7).⁴⁷ One may reasonably ask, though: if the municipal preference clause applies equally to all entities, where does the discrimination lie?

Also, the legislative history of the act provides:

The phrase "unreasonably discriminate among providers of functionally equivalent services" will provide localities with the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning requirements even if those facilities provide functionally equivalent services. For example, the conferees do not intend that if a State or local government grants a permit in a commercial district, it must also grant a permit for a competitor's 50–foot tower in a residential district.

H.R. Conf. Rep. No. 104–458, at 208 (1996), reprinted in 1996 U.S.C.C.A.N. 124, 222. *See Laurence Wolf Capital Management Trust v. City of Ferndale*, 61 Fed.Appx. 204 (6th Cir. 2003).

⁴⁷ In comments to the FCC, the wireless industry association said:

While siting wireless facilities on municipal property can benefit both the community and the provider, certain jurisdictions have used a preference for siting on municipal property to effectively prohibit the provision of wireless services. Municipal 'preferences' become effective mandates when jurisdictions couple them with ordinances that make it extremely difficult to site facilities on non-municipal property. By making it extremely onerous to site anywhere except municipal facilities, a jurisdiction has an effective monopoly on siting that can create market distortions and discourage wireless deployment.

Comments of PCIA – The Wireless Infrastructure Association and the HetNet Forum, WT Docket No. 13-328, Feb. 3, 2014, at 56 (citing St. Paul MN's "high municipal lease fees" and municipal siting preference as an example); *see* Comments of PCIA – The Wireless

See AT&T Wireless PCS, Inc. v. City Council of Va. Beach, 155 F.3d 423, 427 (4th Cir. 1998); Sprint Spectrum, L.P. v. Willoth, 176 F.3d 630 (2d Cir. 1999); MetroPCS, Inc. v. City and County of San Francisco, 400 F.3d 715 (9th Cir. 2005).

In its 2009 *Wireless Siting Order*, the FCC specifically declined to find that municipal property preferences are *per se* "unreasonably discriminatory or otherwise unlawful under Section 332(c)(7)":⁴⁸

To the contrary, most industry and municipal commenter support the conclusion that many such preferences are valid. For example, some commenters assert that such preferences are not unlawfully discriminatory as a general matter, but that they can violate Section 332(c)(7) if they effectively 'pressure' applicants to use municipal property or are coupled with ordinances making it too onerous to site anywhere else. As an example, PCIA describes a situation where a member company had difficulty siting due to a municipal property preference that coupled high municipal lease fees with onerous regulations, making it difficult to site on non-municipal property. As PCIA's argument suggests, however, determining whether a particular municipal property preference and related requirements. We note that available court precedent⁴⁹ further supports the conclusion that the validity of the preferences is an inquiry best suited to resolution on a case-by-case basis.⁵⁰

In short, a clause instituting a preference for siting on municipal property is not *per se* improper under federal law.

VI. Wi-Fi, DAS and Small Cell Systems by Franchised Cable Operators

Over the past several years, Comcast, Cox, Time Warner Cable and other large cable operators have taken steps to deploy significant Wi-Fi networks in their service territories. Cable operators also may choose to deploy DAS or small cell systems. Often, these networks involve the use of equipment located in the PROW. Especially in light of the recent *Open Internet Order*, this scenario presents a number of challenging issues with regard to cable franchising, in conjunction with the many other topics discussed above.

Because this issue concerns an extremely fluid regulatory environment, and depends heavily on terms of individual cable franchises, local and state law, and the facts of a particular case, we do not purport to comprehensively discuss it. Our objective is limited to highlighting just a few of

Infrastructure Association and the DAS Forum, WC Docket No. 11-59, July 18, 2011, at 35 (citing City of Kansas City, KS as example).

⁴⁸ Wireless Siting Order, ¶ 280.

⁴⁹ Citing *T-Mobile Northwest LLC v. Fairfax County Bd. Of Sup'rs*, 672 F.3d 259 (4th Cir. 2012).

⁵⁰ Wireless Siting Order, ¶ 280 (citations omitted).

the difficult legal and policy considerations that may emerge with cable company activity in this area.

First, Wi-Fi service historically was classified as an unregulated "information service," under the federal Communications Act.⁵¹ As such, Wi-Fi was not subject to federal Title II regulation and was not regulated by state public utilities commissions.⁵² This is in contrast to a service offered by a DAS or small cell system operator, which normally subjects the provider to regulation as a provider of "telecommunications service" under Title II and under state public utility laws.

If the recent *Open Internet Order* is implemented and upheld, however, a Wi-Fi service that provides broadband Internet access as a "mass market retail service"⁵³ will be subject to federal regulation as a "telecommunications service" under Title II (albeit limited, consistent with the FCC forbearance scheme applicable to newly reclassified BIAS providers). At the state level, states may impose obligations on BIAS "in manner not inconsistent with the carefully tailored regulatory scheme" adopted in the *Order*.⁵⁴ Much of the previous discussion in this paper was based on the probable assumption that a DAS or small cell provider would be a regulated telecommunications carrier, with major implications for many of the key points of federal and state law in this paper. If the *Open Internet Order* survives, many of those implications would apply equally to a mass market, retail Wi-Fi Internet access service from cable companies.⁵⁵

A second notable factor is that franchised cable TV operators already possess some right to occupy the PROW. The scope of that right is the question. In the *Open Internet Order*, the FCC indicated that the imposition of an additional "telecommunications franchise" upon cable operators as a consequence of BIAS reclassification would be untenable.⁵⁶ The FCC did not elaborate as to whether this expectation applies only to typical fixed line cable modem

- ⁵² In addition, the Internet Tax Freedom Act of 1998, P.L. 105-227, specifically prohibited the imposition of any federal, state or local taxes on Internet access.
- ⁵³ *Open Internet Order*, ¶ 187.
- ⁵⁴ *Open Internet Order*, ¶ 433.
- ⁵⁵ It is unclear whether a cable company's use of Wi-Fi for mobile carrier service backhaul, as opposed to retail Internet access service, presents a meaningful distinction.
- ⁵⁶ We note also that we do not believe that the classification decision made herein would serve as justification for a state or local franchising authority to require a party with a franchise to operate a "cable system" (as defined in Section 602 of the Act) to obtain an additional or modified franchise in connection with the provision of broadband Internet access service, or to pay any new franchising fees in connection with the provision of such services.

Open Internet Order, ¶433, n.1285.

⁵¹ Wireless Broadband Classification Order, 22 FCC Rcd at 5901-02, ¶ 1.

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broadband service, or would also apply to other services that might otherwise trigger a local franchise requirement, such as a DAS or small cell installation in the PROW.

Similarly, it is an open and probably fact-specific question whether a DAS, Wi-Fi or small cell initiative by a cable operator is or is not "cable service" and/or part of "cable system" within the meaning of the applicable franchise and for purposes of an underlying franchise fee calculation.

Regardless of how these franchise-related issues are resolved, a locality probably can still control terms relating to attachment to city facilities, which, as noted, involve rights that are conceptually distinct from PROW franchise rights. However, it should be noted that cable Wi-Fi systems, unlike DAS and small cell systems, are capable of being deployed using attachments directly to cable system facilities, including overhead wires owned by the cable operator, rather than attachments to poles.