



BALLER STOKES & LIDE PC

2014 P STREET, N.W.
SUITE 200
WASHINGTON, DC 20036
(202) 833-5300
FAX: (202) 833-1180
www.baller.com

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ALERT:

**Wireless Facilities in the Public Right of Way:
Is Your City Ready for a “Deemed Granted” Remedy?**

As you probably are aware, wireless facility owners and providers of various types are seeking to install wireless equipment within the public rights of way (PROW) in many communities nationwide.¹ These facilities may be attached to electric utility poles, streetlight poles, traffic signal poles, bus shelters and other miscellaneous structures, and possibly to new structures. Many cities, counties, and towns have already received a substantial number of siting requests during the past 18 months or so, and the further development of “5G” services and standards is likely to result in a dramatic increase in such requests over the next two years.

In an effort to further “streamline” the deployment of 5G infrastructure, the Federal Communications Commission (FCC) recently proposed new rules that could significantly impact the role of local governments in managing wireless facility installations in their PROW. In addition to the FCC’s proposed rules, at least 23 states are considering – and at least three have enacted – various forms of legislation affecting the authority and rights of local governments in this context.

¹ Small cells and distributed antenna systems (DAS) are being installed by Verizon Wireless, AT&T, T-Mobile, Crown Castle, Extenet, American Tower, and others. Sprint and a company called Mobilitie are taking a somewhat different approach: Instead of relying on fiber optic cable or copper for backhaul, Sprint prefers to use its own 2.5GHz wireless spectrum. To do so, Sprint apparently benefits from taller poles than electric utility streetlight poles commonly used for small cells. Therefore Mobilitie, Sprint’s contractor, generally seeks to deploy so-called “mini macro” wireless facilities in the public right of way, with poles as high as 120 feet.

In light of these prospective new rules, we recommend that local governments act quickly, but thoughtfully, to establish a workable process for the management of wireless facility installations in the PROW. This paper outlines a few key steps and policy issues that local governments may wish to consider in doing so.

I. Background: FCC's Proposed Rules

Pursuant to two Notices of Proposed Rulemaking released on April 21, 2017, the FCC is considering rules that promise to significantly limit local government discretion in the processing and management of wireless facility siting applications, and that may affect their rights with regard to publicly-owned structures.² In particular, local governments might be required to act on an application for a new wireless facility in the PROW within 150 days (or some other period of time specified by the FCC),³ or else it will be “deemed granted.”⁴ Moratoria to pause a “shot clock” will not be permitted.⁵ Other potential rule changes are also on the table, including fee limitations,⁶ potential restriction of local rights for attachments to publicly-owned structures,⁷ and limitations on conditions requiring expenditures by providers not related to rights-of-way management.⁸

While the proceedings are open for comment and no final rules have been announced, we are not optimistic that the outcome will be favorable to local governments.⁹ FCC leadership clearly intends to adopt rules to “streamline” wireless facility deployment, at the probable expense of local government interests. We also expect the FCC to act relatively quickly to adopt any new rules. It is possible, if not probable, that new rules could be enacted before the end of 2017.

² *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, [Notice of Proposed Rulemaking and Notice of Inquiry, FCC 17-38](#), released April 21, 2017 (“*Wireless NPRM/NOI*”); *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, [Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment](#), FCC 17-37, released April 21, 2017 (“*Wireline NPRM/NOI*”).

³ The FCC had previously established 150 days as the “presumptively reasonable” timeframe for review, but the *Wireless NPRM* contemplates the possibility of a different time period. See *Wireless NPRM*, ¶¶ 17-19; *Wireline NOI*, ¶ 103.

⁴ *Wireless NPRM*, ¶ 9 *et seq.*

⁵ *Wireless NPRM*, ¶ 22.

⁶ *Wireless NOI*, ¶¶ 93-94; *Wireline NOI*, ¶¶ 104-05.

⁷ *Wireless NOI*, ¶ 96; *Wireline NOI*, ¶ 108

⁸ *Wireline NOI*, ¶ 106.

⁹ Initial comments in the *Wireless NPRM* proceeding are due on June 9, 2017, with reply comments due July 10. Initial comments on *NOI* portion of the *Wireline* proceeding are due on June 12, 2017, with reply comments due July 12.

Furthermore, restrictive legislation enacted in several states by the end of May or June 2017 may become effective even before the FCC completes its rulemakings.

In short, local governments should consider taking immediate action to salvage right-of-way management rights concerning the installation of wireless facilities in the PROW. Localities must be prepared to act quickly in response to siting requests, fully taking into account the local government's valid PROW management interests. A local government that has not already done so should consider starting the process now, so that the locality can respond efficiently and appropriately to small cell siting requests in compliance with any new FCC rules.

II. Recommendations

The looming FCC rules, and corresponding timeframe limitations, will severely challenge the ability of local governments to constructively address the many issues presented by wireless facility installations in the PROW. At the same time, the potential for extensive wireless facility installations in the PROW, within a short timeframe, suggests that local governments would benefit from a thoughtful, holistic approach to what is, for many, an entirely new category of PROW usage.

Based on our experience working with communities around the country on this issue, we offer the following general suggestions and potential points of inquiry for local governments that wish to be proactive in addressing this situation. This is certainly not an exhaustive list, and local conditions (including state and local law) will further guide the process.

1. Identify, gather, and educate the stakeholders.

As a natural first step, it is important to directly involve the relevant local agencies and personnel, and to ensure a common basis of understanding.

- *PROW administration.* Local government agencies that have responsibility for administering the PROW must obviously be involved. This may include, depending on the locality, a public works department, city, town, or county engineer, or department of transportation.
- *Zoning.* Depending on the locality, a zoning department and code may or may not have authority in the PROW. If it does apply, a zoning code could very well conflict with a locality's objectives in the PROW. (Zoning codes often include provisions for large, macro-cell wireless facilities, rather than small cells).
- *IT department.* The locality's IT department could play an important role, particularly if the locality owns or controls relevant communications infrastructure (such as a fiber network), or desires to obtain services resulting from a wireless facility installation.
- *Municipal electric utility.* Poles owned by a municipal electric utility (or any electric utility) are prime candidates for siting of wireless facilities.
- *Others.* Other stakeholders based on the particular needs and structure of the locality.



2. Determine whether the locality’s current rules and processes are adequate for the workable management of wireless facilities in the PROW. Identify and address obstacles.

In some cases, a locality’s current processes may need relatively few changes in order to reasonably accommodate the management of wireless facilities in the PROW. In other cases, local code provisions and processes may present intractable obstacles to manageable deployment, and may need to be amended.

- Does the current zoning code apply to the PROW? If so, does it allow for reasonable deployment of small cells? Or do zoning provisions relating to macro-cell towers create obstacles?
- Depending on local and State law, it may not be clear exactly how to grant PROW rights for wireless facilities. Is a franchise required? A license agreement? A site-specific PROW use permit?
- Does the locality’s current ROW permit or license process apply appropriately to wireless facilities? Does the permit application need to be amended?
- Does any current ROW permit or license fee structure need to be amended?
- Is a new wireless facility ordinance needed?
- There may be questions about the provider’s regulatory status and rights under State law.

3. Make necessary policy decisions.

The proliferation of new wireless facilities in the PROW can present a variety of policy questions. If possible, such issues should be addressed up front, rather than on an ad hoc basis.

- Does the locality have *particularized* aesthetic concerns with regard to wireless facilities (type or size)?
- Does the locality seek to limit deployments in particular areas of the community (i.e., residential, historic, sensitive)?
- Are current PROW structures sufficient to support the expected facilities? If not, how will the city respond to proposals to install new or replacement poles? New policies for replacement poles or new additional structure may need to be adopted.
- Keep in mind that federal nondiscrimination rules will apply, which cautions against a rushed or ad hoc evaluation of siting requests.
- Fiber backhaul: Small cell wireless facilities normally require connectivity to a fiber optic network. Is there an opportunity to use city-owned fiber optic assets, or extend an existing fiber network to support wireless facility deployment?
- Are wireless facilities to be attached to publically-owned structures? If so, the terms and conditions of such arrangements will need to be worked out, in addition to any grant of PROW access rights.

4. Develop appropriate documentation and contractual vehicles.

A variety of contracts and other documents may need to be prepared, or existing documents amended, to accommodate wireless facilities siting in the PROW. These might include the following (again, depending on local circumstances):

- A PROW use permit application.
- A PROW use Master License Agreement.
- In the case of attachment to publicly-owned structures, an attachment Master License Agreement.
- Various other agreements and documentation.

ADDITIONAL INFORMATION:

Local governments may wish to consult the following references for further information on this issue. National organizations supporting local governments, including but not limited to [NATOA](#), the [National League of Cities](#), [Next Century Cities](#), [Broadband Communities](#) and others, are also good sources of information. Organizations within your own state (such as a state municipal league) may also provide useful assistance or advocacy.

- Baller Stokes & Lide, P.C., [“Small Cell, DAS and Wi-Fi Facilities Siting in the Public Right of Way: Practical Considerations for Local Governments,”](#) July 21, 2015.
- M. Shapiro, D. Murphy, A. Yenkelevich, W. Dutton, [“Wireless Innovation for Last Mile Access: An Analysis of Cases and Business Strategies,”](#) Quello Center, Michigan State University, December 12, 2016.
- Andrew Afflerbach, [“How the Local Oversight Process Addresses the Concerns of the Public Sector in Small Cell Siting,”](#) CTC Technology & Energy, March 27, 2017.
- *Mobilitie, LLC Petition for Declaratory Ruling*, WT Docket No. 16-421, [Report and Declaration of Andrew Afflerbach for the Smart Communities Siting Coalition](#), March 8, 2017.
- Lydia Beyoud, [“Sprint Approved ‘Trial’ for Contractor Mobilitie to Build Wireless Sites Without Completing Regulatory Compliance,”](#) Event Driven, May 2, 2017.
- Susan Crawford, [“Handcuffing Cities to Help Telecom Giants,”](#) Backchannel, March 29, 2017.
- Susan Crawford, [“The Surprising Backbone of the Internet of Things,”](#) Backchannel, October 12, 2016.
