

THE LAW FIRM OF LINDA K. AIN
859-806-0646
lindaain@twc.com

SMALL CELL FACILITIES IN THE RIGHTS OF WAY

INTRODUCTION¹

- Small cell facilities are used for the deployment of 5G broadband networks and to increase the range and reliability and coverage for 4G LTE networks
 - 5G is the fifth generation of cellular network technology. 5G will replace 3G and 4G LTE in the long run.
- Small cells facilities are used to compliment macro cell towers
- Small cells facilities are typically placed on existing vertical structures
- The number of small cells deployed is predicted to dramatically increase over the next few years.
- A recent trend has emerged where Kentucky cities and counties are being contacted about placing small cell antennas within rights-of-way (ROW).
- If providers desire to attach small cell facilities directly to municipally owned property, such as city traffic lights, streetlights, and poles of municipally owned utilities, local governments should require pole attachment agreements or leases of municipal facilities.
- Local governments may want to review their zoning ordinances to establish an efficient way to review and process small cell requests. Zoning can be used to regulate siting of small cell towers, and to establish a permitting process for these types of applications.
- Local governments may also regulate small cell facilities through
 - Franchises
 - Right-of-Way Policies-including permitting

KENTUCKY'S FRANCHISE REQUIREMENT

- Sections 163 and 164 of the Kentucky Constitution require small cell providers, as well has all other telecommunication providers to obtain a franchise to use rights-of-way.
- Sections 164 of the Kentucky Constitution requires that local governments solicit bids prior to awarding franchises for use of the right-of-way by small cell providers, as well has all other telecommunication providers.

¹ This memorandum is not intended to be exhaustive. It discusses the matters covered only as in sufficient detail to make readers aware of potential issues and of the main considerations involved. The Law Firm of Linda K. Ain is providing this memorandum solely for general educational purposes. It is not intended to be legal advice and should not be treated or cited as such. For legal advice, please consult your own legal counsel or contact us. If you have questions or need additional information, please contact Linda K. Ain, lindaain@twc.com, 859-806-0646.

- Under Section 164 of the Kentucky Constitution, no franchise can be longer than 20 years.
- Under federal law, a franchise for small cell and/or telecommunications providers cannot be exclusive and must be competitively neutral and nondiscriminatory.

FCC REGULATION OF SMALL CELL FACILITIES

On January 14, 2019, an FCC Order² preempting local authority over small cell facilities and limiting the ability local governments to regulate public property and rights-of-way went into effect.

On August 12, 2020, the US Court of Appeals for the Ninth Circuit upheld most of the FCC's orders regarding the deployment of cell service buildouts including limiting municipal fees to cost and maintain the shot clock provisions outlined by the FCC.

- However, the Court handed local governments some wins including
 - Sending back to the FCC portions of one order that requires aesthetic regulations be “no more burdensome” than regulations applied to other infrastructure deployed.
 - The Court noted that the requirement that aesthetic regulations be objective is arbitrary and capricious.
 - Aesthetic rules must still be both published in advance and reasonable, which the court found to mean technically feasible.
 - The court rejected the wireless industry-backed appeal that the FCC should have imposed a “deemed granted” regime for failure to meet a shot clock.

On October 22nd, the 9th Circuit denied the request for rehearing en banc on its small cell decision, which means the August decision of the three-judge panel will stand. This is disappointing, but not unexpected.

It is extremely important that local governments have in place technical and aesthetic standards and requirements to protect the rights-of-way to the greatest degree possible under the Order.

- Aesthetics Requirements
 - Aesthetics requirements must be reasonable and published in advance.
 - Local governments should clearly define their aesthetic standards.
 - Aesthetic standards may include requirements or guidance for:
 - Size of antennas, equipment boxes, and cabling
 - Painting of attachments to match mounting structures
 - Use of shrouds, stealth techniques, or other camouflage

² In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Declaratory Ruling and Third Report and Order, WT Docket No. 17-79, WC Docket No. 17-84, 2018 WL 4678555, (rel. September 27, 2018) (“Order”).

- Flush-mounting of antennas
 - Placement of equipment in the pole base rather than on the outside of the pole
 - Consistency with the character of historic neighborhoods
 - Minimum spacing between attachments.
- Develop Right-of-Way Standards
 - Local governments should include all stakeholders to ensure a clear and comprehensive understanding of the standards.
 - Rights-of-way standards for small cell facilities placement should clearly indicate:
 - whether construction methods (e.g., directional boring, hand digging, micro-trenching) are prohibited or are required in particular areas;
 - the requirements for restoration of sidewalks and roads; and
 - all other requirements to protect the rights of way.
 - Ideally all technical standards and aesthetic requirements should be available in a single ordinance or in published regulation or manual.
- Fees
 - The Order limits the ability of local governments to obtain a fair market value for industry use of public property and the rights-of-way
 - The Order limits assessment of fees for the initial application and the use of the rights-of-way to a “reasonable approximation” of the government entity’s “objectively reasonable costs” associated with the deployment in question and applied in a nondiscriminatory manner.
 - The Order provides no guidance on how costs should be calculated.
 - The Order specifies certain presumptively reasonable fees for one-time applications and for access to rights-of-way and public facilities.
 - Non-Recurring Fees: \$500, including a single up-front application that includes up to five small cell facilities, with an additional \$100 for each small cell facility beyond five, or \$1,000 for non-recurring fees for a new pole to support small cell facilities.
 - Recurring Fees: \$270 per small cell facility per year for all recurring fees, including any rights of way access fee or fee for attachment to municipally owned structures in the rights of way.
 - The Order leaves room for higher fees if they are justified by reasonable costs, and it also leaves room for attachers to challenge the presumptive levels as exceeding costs.
 - In 2017, the Supreme Court of Kentucky issued an opinion in Kentucky CATV Association Inc. v. City of Florence et al. clearing the way for

cities to once again collect franchise fees on cable and communications services. In its opinion, the Supreme Court gave cities that option of “opting to forgo collecting a franchise fee in lieu of participating in the Telecom Tax scheme.”

- The Department of Revenue now also gives Kentucky counties the option to collect franchise fees.
- Local governments entering into new franchises should be very careful not to waive or extinguish their future rights to collect franchise fees.
- It is extremely important for cities & counties to determine whether it is in their economic interest to remain in the state’s excise tax distribution scheme or begin collecting franchise fees. Currently the excise tax distribution received by each city & county is approximately 85% of the franchise fees it collected in 2005.
- Cities & counties should request that their incumbent telecommunications and cable operators provide them with their actual gross revenue figures in order to determine whether they should remain in the state’s excise tax distribution scheme or begin collecting franchise fees.
 - Cities & counties should request new entrants, such as small cell operators, provide estimated projected franchise fee calculations.
 - Until a city or county determines whether it is better to stay in the excise tax distribution program or start collecting franchise fees, any new telecommunications franchise entered by a city or county should contain language:
 - preserving the option to forego collecting a franchise fee in lieu of participating Multichannel Video Programming and Service Tax scheme under KRS 136.600 et seq. and
 - stating that the city or county may opt to exercise its constitutional right to collect franchise fees during the term of the franchise
- Under KRS 136.660, local governments that opt to continue to receive the Telecommunications Excise Tax Distribution cannot require payments or in-kind property or services in telecommunications franchises. However, pursuant to KRS 136.660, communities receiving the Telecom Excise Tax distribution can receive donations from a small cell or other telecommunications provider.
 - Service providers may be willing to provide local governments some form of non-monetary, in-kind donation because of wireless facilities siting in the ROW, 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.

- Cities & counties that opt to receive franchise fees may receive donations but may also require in kind contributions in their franchises.
- Examples of in-kind donations/contributions include
 - Granting the local government, the right to use of un-activated ("dark") fiber optic cable from every attachment (antenna node) site, to a centralized location.
 - Installing facilities in an area that it might not otherwise serve, but for which service is a high priority for the city or county.
 - Installing street lighting and/or security cameras on small cell towers
- Application Process
 - Local Governments should be prepared to act quickly to meet the "shot-clock" requirements in the Order.
 - The shot clocks apply to "any approval that a siting authority must issue under applicable law prior to deployment." This includes zoning approvals and building permits and may also include license or franchise agreements to access the rights of way, leases for use of municipal poles or property in the rights of way, electric permits and road closure permits, among others.
 - The Order sets out the presumptively reasonable periods of time for action on applications for wireless facilities:
 - Review of an application to collocate a small cell facility using an existing structure: 60 days.
 - Review of an application to collocate a facility other than a small cell facility using an existing structure: 90 days.
 - Review of an application to deploy a small cell facility using a new structure: 90 days.
 - Review of an application to deploy a facility other than a small cell facility using a new structure: 150 days.
 - The shot clocks are reset, not just tolled, if the siting authority notifies the applicant within 10 days after submission that the application is incomplete. For subsequent determinations of incompleteness, the shot clock would toll—not reset—if the siting authority provides written notice within 10 days that the supplemental submission did not provide the requested information.
 - Failure to act within the shot clock constitutes a presumptive violation of the Communications Act and applicants may seek expedited injunctive relief in court within 30 days of a local government missing a shot clock deadline. There is no "deemed granted" remedy.

- Draft extension agreements for applicants who voluntarily extend the shot clocks.
 - Applications for wireless facility siting in the rights-of-way should
 - clearly identify and request all information reasonably required to enable a timely review;
 - specify the size and format of required drawings;
 - note the required format for map coordinates, electronic files, and other elements of the application;
 - state the qualifications required for the individuals who develop the design submittal, structural analysis, and other key components of the application
 - If possible, the entire application submittal and review process should be electronic.
- Fiber or Other Wireline Facilities
 - The Order does not address fiber or other wireline facilities that will be needed to serve small cell facilities. (The Order does address wiring/cabling installed with small cell facilities to provide power and connect antennas to associated equipment.)
 - Consider whether existing codes, ordinances or other legal requirements apply to fiber installations and/or whether revisions or new provisions are needed to address the potential for new or additional requests to place fiber in the rights of way.
- Ways to Protect Public Safety.
 - Adopt standards to ensure deployments do not endanger lives or property, interfere with other utility services and infrastructure, or obstruct pedestrian and vehicle access and sight lines.
 - Consider whether certain types of structures cannot be safely used for small cell facilities due to size, age, construction, etc.
 - Insurance, indemnification, bonding and other protections (which may also be included in ROW and attachment agreements).
 - Consider whether there are specific risks related to public employees working on or near small cell facilities that must be addressed.
 - Local governments cannot regulate the placement, construction, and modification of small cell facilities on the basis of the environmental effects of radio frequency (“RF”) emissions to the extent the facilities comply with the FCC’s regulations concerning such emissions.
 - Consider requiring compliance with FCC RF regulations.
 - Also, consider expressly requiring indemnification for RF issues that arise in the future.

ATTACHMENT AGREEMENTS FOR SMALL CELL &TELECOM PROVIDERS

- It is extremely important to recognize that there is a difference between access to the public rights-of-way and access to government-owned structures, such as streetlight poles and utility poles that are located within the public rights-of-way. All wireless providers and infrastructures providers must obtain written authorization not just to occupy public rights-of-way, but also to attach their facilities to municipal poles and other structures. Local governments need to develop pole attachment agreements governing access to municipal facilities.
- Exclusivity and Nondiscrimination
 - A grant of attachment rights cannot be explicitly exclusive, but, unlike a generalized franchise to occupy the ROW, attachment rights by their nature are 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.
- An attachment agreement may address the following issues, among many others:
 - Provisions for new poles and pole replacement
 - Create a process for notification and maintenance of attachment
 - 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
 - Require engineering certifications
 - Create a process for notification and completion of make-ready work
 - Require regulatory compliance
 - Set liability and indemnifications standards;
 - Set insurance standards
 - Set surety bond
 - Require permit forms for attachment & removal
 - Set installation standards
 - Require updated location maps
 - Require relocation of attachments due to conflicts or unreasonable interference
 - In an emergency, your utility should have the right, but not the obligation to, remove, relocate, or replace facilities
 - Reserve the right to maintain poles
 - Require identification of poles by tagging
 - Require a valid franchise to operate in the City/County
 - Require compliance with all permitting requirements of the City/County
 - Create a Termination Process
 - Set Grounding Requirements
 - Inspections

- Reimbursement for Pre-Attachment inspection and pole loading analysis and Post- Attachment inspections.
- Payments
 - Application and engineering survey fee to cover your costs
 - Annual fee for Pole Attachments (traditional fiber/cable attachments)
 - These range in Kentucky from as low as \$5 a pole to over \$50 per pole
 - Annual fee Small Cell Antenna Attachments
 - A separate agreement should be required if a provider wants to have both traditional attachments and small cell antenna attachments.
 - The Order limits assessment of fees for the ongoing rental of attachment space, to a “reasonable approximation” of the government entity’s “objectively reasonable costs” associated with the deployment in question and applied in a nondiscriminatory manner.
 - The Order provides no guidance on how costs should be calculated.
 - The Order specifies certain presumptively reasonable fees for annual access to public facilities.
 - The Order leaves room for higher fees if they are justified by reasonable costs, and it also leaves room for attachers to challenge the presumptive levels as exceeding costs.
 - Other Charges
 - Survey Fee
 - Make-Ready Work
 - Inspection of facilities
 - Removal of facilities,
 - Supervision of performed work on the poles.

ZONING FOR SMALL CELL PROVIDERS

- Currently, many zoning ordinances in Kentucky address cell tower sites, but only a few Kentucky communities address small cell towers in their zoning ordinances.
 - Local governments may want to review their ordinances to establish an efficient way to review and process small cell tower requests, particularly in light of federal law.
 - The following factors may help guide local governments when reviewing current zoning ordinances:
 - Does the zoning ordinance apply to smaller facilities in the ROW?

- Will the regulatory process allow the local government to review a request to place a number of facilities at multiple sites in a timely way?
- Can the local government ensure that small cell facilities, once approved, will not expand into harmful facilities later?
- Has the local government developed an approach to leasing government-owned property for new wireless uses that protects the community and maximizes the value of its assets?