Municipal Association of South Carolina
2017 Annual Convention

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Cities Prepare for Small Cells

Friday 3:15 – 4:00 p.m.

As personal communication services revolutionize the way people live, small cell antennas promise to boost network signals and capacity. Learn about this emerging technology and how it may impact municipal fees, community aesthetics and management of municipal rights of way.

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Small Cells May Be Coming to Your City – Are You Ready?

So, what are "small cells"? Small cells add additional wireless bandwidth to existing cell tower networks, usually to add extra "cell phone juice" for heavily trafficked places and locations that existing cell towers have trouble reaching. For example, small cells add enough bandwidth to keep a strong signal going in locations such as heavy populated events (like a sporting event), parking garages, or large buildings.

While small cells are actually smaller, involving less equipment and antennas than a traditional cell tower, they still pose potential problems and conflicts with a city's public right of way. So, how should cities respond when companies approach them about small cell installations? Here are some questions cities might be asked—and how they should respond.

Does a city require any type of franchise agreement?

No. Federal law prohibits franchising for wireless providers.

Are new utility pole installations and replacement poles allowed? And is there a height restriction for new pole installations?

The answer depends on a city's right of way ordinance and permits.

A right of way ordinance should clearly define the rules concerning installations, poles, height restrictions, and any disruptions and interference as a result of obstructions. The ordinance needs to explain any legal requirements about how and where antennas can be placed, how workers need to go about installing the equipment, and how public infrastructure must continue to operate smoothly both during and after the installation.

An ordinance should also require that the city maintain a complete inventory of existing cable and telecommunications infrastructure, cell towers, and small cell antennas. That way, cities can easily coordinate with other entities so that there are no conflicts or duplication with a telecommunication company's use of rights of way.

What type of permit is required, and what is the fee?

As part of a city's right of way ordinance, a right of way or construction permit may be required for small cell companies to place their equipment. Permits should follow state law and

procedures for fees, charges, insurance, and repair requirements. Cities need to follow a vetting process before issuing permits to ensure public safety, wellbeing, and quality of life.

And while cities can certainly prevent or restrict a company's attempts to place equipment by enforcing an existing right of way ordinance, they cannot arbitrarily discriminate against a small cell antenna provider just because they don't want its equipment in the city.

Numerous cities are reporting to MASC they are being contacted by companies claiming they are a "utility" and that they have the legal authority to install telecommunications equipment in the ROW. These companies further rely upon Certificates of Authority to provide telecommunications services issued by the South Public Service Commission – known as "CLEC" authority - as authority to install additional facilities in your ROW. In many cases, it does not appear these companies will actually be providing telecommunications services to residents of your city. Rather, according to various applications, it appears that these companies plan to construct "transport utility poles and facilities" ("Proposed Facilities") and thereafter rent/lease the Proposed Facilities to "other entities." It further appears that some of these "other entities" may be third party telecommunications carriers that would then place their small cell equipment on the Proposed Facilities. Stated differently, these companies would serve as the landlord of the Proposed Facilities in the City's ROW but would not actually provide any utility or telecommunications services in the City – rather they would simply resell the space on the Proposed Facilities (pole space) to third parties and generate a profit off of the city's ROW.

A CLEC merely having CLEC status does not invalidate a City's powers over its ROW. The fact that a company may have certification from the SCPSC to provide telecommunication services does not give a company the authority to install third party ***wireless*** equipment in the City's ROW any more than it gives a company the right to install a water line or a gas pipeline in the City's ROW.

Small towns are not exempt. Small Cells or micro cells are likely headed your way (*especially if you have a downtown or highway that attracts tourists*).

Please keep in mind that there may be specific deadlines for acting on requests received from such Resellers and you should keep your City attorney's office involved to ensure timely action is taken by your City.

Executive Summary

Under the South Carolina constitution, municipal consent is required before any telegraph, telephone or other such facilities may be placed in a municipal right-of-way.[1] That consent may, but need not, be in the form of a franchise.[2] Monetary compensation can be a condition of the municipal consent or franchise.[3] If the user of the right-of-way is a "telecommunications company," then compensation is proscribed by statute, ranging from $100 to $1,000 per year based on population of the city.[4] The statutory fees are "in lieu of any permit fee, encroachment fee, degradation fee, or other fee assessed on a telecommunications provider for its occupation of or work within the public right-of-way."[5] Finally, it is important to note that cities and telecommunications companies may deviate from the statutory payments pursuant to mutually agreeable leases, site licenses or other similar contractual arrangements.[6]

Cities may adopt "regulations to control the erection of buildings or other structures or changes in land use within the rights-of-way."[7] This power must be exercised "on a competitively neutral and nondiscriminatory basis" in regulating the placement of telecommunications equipment.[8] Several cities, including Columbia and Chester, have relied on a city's zoning power to establish comprehensive systems regulating the placement, height and appearance of telecommunications facilities in the right-of-way.

Detailed Analysis

1. Management of Right-of-Way

Under the South Carolina constitution, municipal consent is required before any telegraph, telephone or other such facilities may be placed in a municipal right-of-way.[9] This constitutional

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[1] S.C. Const., Art. VIII, § 15.
[2] S.C. Code Ann. §§ 5-7-30; 58-9-2230; City of Cayce v. AT&T Communications of the Southern States, Inc., 326 S.C. 237, 242-43 (S.C. 1997)(finding presence of fiber optic cable in municipality was too attenuated to be characterized as a franchise, but that municipal authority under S.C. Const., Art. VIII, § 15 justified imposition of fee as a condition of consent to use right-of-way).
[3] City of Cayce, 326 S.C. 243. *See also* South Carolina Electric & Gas Co. v. Town of Awendaw, 359 S.C. 29, 38 (S.C. 2004)("We consistently have taken the view a utility provider generally should not be allowed free use of a municipality's stress in light of the constitutional and statutory authority reserving or granting power to municipalities to impose charges for such use.")
[4] S.C. Code Ann. § 58-9-2230 (A) and (B).
[5] S.C. Code Ann. § 58-9-2230 (A) and (B).
[6] S.C. Code Ann. § 58-9-2230 (D).
[7] S.C. Code Ann. § 6-29-340 (B)(2)(c).
[8] S.C. Code Ann. § 58-9-2230.
[9] S.C. Const., Art. VIII, § 15.

provision acts as a limitation on the statutory right of telegraph or telephone companies to use the rights-of-way.[10] Further, Cities are permitted "to control the erection of buildings or other structures or changes in land use within the rights-of-way."[11] This power must be exercised "on a competitively neutral and nondiscriminatory basis" when it comes to regulating providers of telecommunications services.[12] Together, these provisions provide a basis for cities to manage the type, location, and construction of telecommunications facilities in the right-of-way.

The South Carolina legislature has given cities the power to enact planning ordinances designed to "promote public health, safety, morals, convenience, prosperity, or the general welfare."[13] In fulfilling these duties, the city's planning commission has the power to:

> (1) prepare and revise periodically plans and programs for the development and redevelopment of its area as provided in this chapter; and
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> (2) prepare and recommend for adoption to the appropriate governing authority or authorities as a means for implementing the plans and programs in its area:
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> > (a) zoning ordinances to include zoning district maps and appropriate revisions thereof, as provided in this chapter;
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> > (b) regulations for the subdivision or development of land and appropriate revisions thereof, and to oversee the administration of the regulations that may be adopted as provided in this chapter;
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> > (c) an official map and appropriate revision on it showing the exact location of existing or proposed public street, highway, and utility rights-of-way, and public building sites, **together with regulations to control the erection of buildings or other structures or changes in land use within the rights-of-way**, building sites, or open spaces within its political jurisdiction or a specified portion of it, as set forth in this chapter;
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> > (d) a landscaping ordinance setting forth required planting, tree preservation, and other aesthetic considerations for land and structures;
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> > (e) a capital improvements program setting forth projects required to implement plans which have been prepared and adopted, including an annual listing of priority projects for consideration by the governmental bodies responsible for implementation prior to preparation of their capital budget; and

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[10] S.C. Code Ann. § 58-9-2030; City of Cayce v. AT&T Communications of the Southern States, Inc., 326 S.C. 237, 243 (S.C. 1997).
[11] S.C. Code Ann. § 6-29-340 (B)(2)(c).
[12] S.C. Code Ann. § 58-9-2230 (A) and (B).
[13] S.C. Code Ann. § 6-29-340 (A).

(f) policies or procedures to facilitate implementation of planning elements.[14]

The power to regulate the placement of telecommunications facilities in the right-of-way is limited in that it must be exercised on a "competitively neutral and nondiscriminatory basis."[15]

The phrase "competitively neutral and nondiscriminatory basis" tracks federal law. Under federal law, states or local authorities may not regulate in ways that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[16] States or local authorities also may not regulate the placement, construction and modification of personal wireless service facilities in a manner that "unreasonably discriminate[s] among providers of functionally equivalent services; and prohibit[s] or [has] the effect of prohibiting the provision of personal wireless services."[17] But outside of these prohibitions, Congress has been clear that states and local authorities retain significant power over the type, location, and construction of telecommunications facilities in the right-of-way:

> Nothing in [47 U.S.C. 253] affects the authority of a State or local government to manage the public rights-of-way or 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, if the compensation required is publicly disclosed by such government.
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> ...Except as provided in this paragraph, nothing in [47 U.S.C. Ch. 5] 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.[18]

A comprehensive review of federal case law regarding what constitutes acceptable and unacceptable local regulation is beyond the scope of this memorandum. The touchstone should always be regulation that is competitively neutral and nondiscriminatory.

2. Monetary Compensation

Monetary compensation can be a condition of a municipality's consent to use the right-of-way.[19]

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[14] S.C. Code Ann. § 6-29-340 (B) (emphasis added).
[15] S.C. Code Ann. § 58-9-2230.
[16] 47 U.S.C. § 253 (a).
[17] 47 U.S.C. § 332 (c)(7)(B)(i)(I) and (II). "Personal wireless service facilities means facilities for the provision of personal wireless services;... personal wireless services means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services." 47 U.S.C. § 332 (c)(7)(C)(i) and (ii).
[18] 47 U.S.C. §§ 253 (c); 332 (c)(7)(A).
[19] City of Cayce v. AT&T Communications of Southern States, Inc., 326 S.C. 237, 243, 486 S.E.2d 92 (S.C 1997)

Finally, there are two important limitations to S.C. Code Ann. § 58-9-2230. First, a telecommunications company is only using the right of way if it has "constructed or installed physical facilities in public streets or on public property."[23] Second, "use of public streets or public property under lease, site license, or other similar contractual arrangement between a municipality and a telecommunications company does not constitute the use of public streets or public property for purposes of [Title 58, Chapter 9, Article 20 of S.C. Code Ann.]"[24] This would appear to allow cities and telecommunications companies to enter into leases, site licenses, or other similar contractual arrangements that deviate from the provisions of S.C. Code Ann. § 58-9-2230. Such arrangements may be especially appropriate for the placement of telecommunications equipment on public property (water towers, city buildings, etc.).

3. Application of Principles to Requests to Place Equipment in Rights-of-Way

Given the above principles, cities have the following options when faced with requests to place telecommunications equipment in the right-of-way:

- **Consent**: A city's consent is required before equipment can be placed in the right-of-way. That consent can be conditioned on the payment of monetary compensation. Consent may, but need not, be in the form of a franchise. Compliance with zoning regulations can also be a condition of consent. Refusing petitions under any and all circumstances could violate federal law.

- **Compensation**: If the applicant is a "telecommunications company" seeking to place equipment in the right-of-way to provide "telecommunications service," then compensation may be limited to the amounts identified in S.C. Code Ann. § 58-9-2230 unless the city and the applicant can enter into a lease, site license, or other similar contractual arrangement.

- **Regulation of the Right-of-Way**: So long as regulations are competitively neutral and nondiscriminatory, cities have broad discretion in the regulation of the right-of-way. Cities can require applicants to adhere to existing regulations. Cities may also consider adopting new regulations that address the size, location and placement of telecommunications equipment in the right-of-way.

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[23] S.C. Code Ann. § 58-9-2230 (D).
[24] S.C. Code Ann. § 58-9-2230 (D).

Existing Federal Law

The Telecommunications Act is the controlling federal law and, though it does encourage development and entry of telecommunications/mobile services into marketplaces, it does not take away local zoning and land use authority completely. In fact, it states that local government still has authority to manage public ROW, to require fair and reasonable compensation, and to make decisions over placement, construction, and modification of personal wireless facilities.

As a result, cities can regulate (but likely not completely prohibit) the placement of towers and other personal wireless service facilities. City regulations can include controlling height, exterior materials, accessory buildings, and even location.

Federal law does place some limits on local authority, however. Cities:

1. Cannot unreasonably discriminate among providers of functionally equivalent services.

2. Cannot prohibit or pass regulations that have the effect of prohibiting telecommunications or personal wireless services.

3. Must act on applications within a reasonable time.

4. Must document denials in writing supported by "substantial evidence."

5. Also, municipalities cannot deny a request for environmental reasons when the antennas comply with the Federal Communications Commission (FCC) rules on radio emissions.

Modifications to existing FCC-regulated structures, however, are a different story. If a siting request proposes modifications to and/ or collocations of wireless transmission equipment on existing FCC-regulated towers or base stations, then federal law further limits local municipal control.

With modifications, cities cannot ask an applicant for documentation, other than that which relates to the impact on the physical dimensions of the structure. Accordingly, documentation illustrating the need for such wireless facilities or justifying the business decision likely cannot be requested. So if a city owns a pole that has small cell equipment on it and another request for additional equipment comes in, the city must allow it unless it substantially changes the physical dimensions of the structure.

FCC has recently requested comments related to Accelerating Wireline and Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment.