

**Report of the Florida Association of County Attorneys (FACA)
Cell Tower Right-of-Way Task Force**

January 2017

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BACKGROUND AND FACTUAL FINDINGS:

Numerous counties and cities in Florida have been confronted with applications from private companies wanting to place cellular telecommunication towers in the public right-of-way. These companies are seeking to classify these cellular telephone towers as “utility poles” which are generally permitted in rights-of-way under the Florida Statutes. However, these cellular telephone towers do not purport to connect to any utility lines as do traditional utility poles. Further, these proposed cellular telephone towers have typically been much taller, upwards of 120 feet, than traditional utility poles. Generally, vertical structures are not permitted in public right-of-way primarily because of safety concerns to the traveling public. Zoning codes may also have an impact on the placement of cell towers. The private companies have suggested federal and state law preempts local government right-of-way and zoning ordinances on this issue.

Internet research reveals this issue is facing local governments all over the country. News articles report that telecommunications companies are not only seeking the large 120-foot cell towers in the right-of-way, but hundreds if not thousands of small towers, also called small cells, in the range of 35 feet, the height of standard street lamps and telephone poles. It is reported the telecommunications firms need these additional towers and poles to support emerging smart phone technology and the number of towers and poles needed can only be accommodated by using right-of-way.

The goals of telecommunication firms are often in direct conflict with those of local government. There are safety and aesthetic issues with having any structures in the right-of-way. Therefore, local governments generally do not allow such structures or have significant restrictions on them.

The Federal Communications Commission has not entered any decision preempting local government with respect to cell towers in the right-of-way. However, the FCC is concerned about emerging technology and the apparent need for more small cell towers for this new technology to work.

As a result of these concerns, the Florida Association of County Attorneys (FACA) Board of Directors unanimously voted to create the Cell Tower-ROW Task Force at its meeting on June 29, 2016. The purpose of the Cell Tower-ROW Task Force is to gather information from around the state about how jurisdictions are responding to this issue and to prepare this report on the legal aspects of this issue.

MEETINGS / TELEPHONE CONFERENCES:

August 22, 2016

This was an organizational teleconference meeting and included a discussion of specific tasks to be undertaken.

September 26, 2016

At this teleconference meeting, the progress on researching various issues was discussed, along with a timetable for preparing this report.

October 24, 2016

Prior to this teleconference meeting, an initial rough draft of a Task Force report was circulated for review. During the telephone conference, a wide range of issues was discussed in connection with the preparation of the report.

November 18, 2016

Prior to the telephone conference, a revised draft of a Task Force report was circulated for review. During the telephone conference, a wide range of issues was discussed and members were invited to submit comments and revisions to the draft report. Upon receipt of the comments and revisions, the Chairman agreed to attempt to incorporate them into a revised version of the report. It was also agreed to try to complete the report by mid-December.

December 6, 2016

Prior to the telephone conference, a revised draft of a Task Force report was circulated for review. The discussion centered on how to bring the report to completion.

ISSUES:

Does federal or state law compel local governments to allow cellular communication towers in the right-of-way?

What are the arguments made by the telecommunication industry providers?

What is the Florida Department of Transportation's position on cellular facilities in the state right-of-way?

Is it advisable for local governments to adopt a moratorium to stop applications for cellular communications towers temporarily?

ANALYSIS:

Introduction.

As discussed below, the extent of a local government's right-of-way management affecting cellular communications towers turns on whether such action is considered proprietary or regulatory in nature and whether such regulation creates a prohibitory effect or is discriminatory. Both sides of these issues are discussed below along with other considerations.

Federal law and cellular communications towers in local government right-of-way.

Sprint Spectrum L.P. v. Mills, 283 F.3d 404 (2d Cir. 2002) provides an effective foundation for addressing this issue. In this case, the United States Court of Appeals for the Second Circuit held the Telecommunications Act of 1996, 47 U.S.C. § 151, et seq. (2016) (referred to below as the "1996 Act") does not preempt non-regulatory decisions of a local government acting in its proprietary capacity. *Sprint Spectrum*, 283 F.3d at 421. The Second Circuit also held that when a State owns and manages property, it must interact with private participants in the marketplace and is not subject to preemption by the 1996 Act because preemption doctrines apply only to local government *regulation*. *Id.* at 417. The court also held the telecommunications provider had no right of eminent domain to compel the erection of a cell tower on a private or public entity's property. *Id.*

Following *Sprint Spectrum*, the United States Court of Appeals for the Ninth Circuit in *Omnipoint Communications, Inc. v. City of Huntington Beach*, 738 F.3d 192, 201 (9th Cir. 2013), held the City of Huntington's exercise of its property rights in accordance with a city charter provision was non-regulatory and non-adjudicative behavior akin to an action by a private land owner. The court held the charter provision was not a legislative land use regulation because it did not classify public and private property or impose design and use restrictions on the different classifications. *Id.* at 200.

Notwithstanding *Sprint Spectrum* and *Omnipoint*, representatives of cell provider firms have attempted to cobble together various provisions of federal and state telecommunications statutes to argue that local governments are compelled to allow cellular communications towers in the right-of-way. These firms have not provided any case law to support their position. However, should a court determine that *Sprint Spectrum* and *Omnipoint* are not applicable to county-owned right-of-way, federal and state statutes can be relied upon to support a local government’s decision to regulate cellular communications towers within the right-of-way. One of the most significant federal statutes involved in this matter is 47 U.S.C. §253 (2016), part of the 1996 Act titled “Removal of Barriers to Entry” and which provides in part:

(a) 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.

* * *

(c) State and local government authority. Nothing in this section 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.

(d) Preemption. If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

Subsection (a) prohibits local regulation that has the effect of prohibiting the ability of any entity to provide telecommunications service, but a local government can arguably accommodate such an entity by allowing the telecommunications facility in areas other than the right-of-way. Subsection (c) reserves to local government the authority to manage its right-of-way, provided it does so on a “competitively neutral and nondiscriminatory basis.” Subsection (d) provides for the federal statute to preempt local regulation that does not conform to the federal statute.

An early case under the 1996 Act applying 47 U.S.C. §253 (2016) to pay telephones contains discussion that is supportive of local government on keeping cellular communications towers out of the right-of-way. See *N.J. Payphone Ass’n v. Town of W. N.Y.*, 299 F.3d 235 (3d Cir. 2002), which includes the following explanation of the meaning of Section 253:

[A] more reasonable reading of the section in context is that Congress simply intended to preserve local power to regulate the public rights of way for purposes unrelated to the competition to provide telecommunications services to the public and in a manner consistent with that competition. *Id.* at 245.

* * *

In deciding whether the Ordinance is protected under Section 253(c) we must thus determine whether it is competitively neutral and nondiscriminatory. We find that it is not. The Ordinance is facially discriminatory in that it permits the Town to choose one service provider allowed to provide pay telephone service to the public to the exclusion of all others based on criteria determined by it rather than the market. The Town may, of course, make distinctions that result in the de facto application of different rules to different service providers so long as the distinctions are based on valid considerations. It can, for example, have different policies for companies wishing to dig up the streets in order to lay new conduit, from those who wish to convert existing conduit and do not need to dig up the streets. What it cannot do is what it has tried to do: create a set of rules the purpose of which is to select one company over others for preferential treatment. *Id.* at 247.

Therefore, local government in its regulatory actions concerning the right-of-way must not attempt to direct business toward any specific provider and thereby stifle competition. Rather, the local government regulation must seek to regulate the placement of utilities without singling out any particular provider for special treatment. However, if the local government is acting in its proprietary capacity, *Sprint Spectrum* and *Omnipoint* may grant the local government even broader authority to manage the use of its right-of-way should a court apply these cases to County right-of-way.

The legislative history along with the text for 47 U.S.C. §253 (2016) supports a local government requirement for all telecommunication equipment to be placed underground. Obviously, such a policy is not very supportive of cell towers. If such a requirement applies to all telecommunication providers without exception, however, the requirement is competitively neutral and there can be no claim of discrimination. During debate on the bill in 1996, Senator Feinstein in her comments offered specific examples of the types of local government restrictions that Congress intended to permit under the exceptions set forth in subsection 253(c), including:

(4) Require a company to place its facilities underground, rather than overhead, consistent with the requirements imposed on other utility companies.

141 CONG. REC. S8172 (daily ed. June 12, 1995) (statement of Sen. Feinstein, quoting letter from the Office of City Attorney, City, and County of San Francisco).

State law and cellular communications towers in local government right-of-way.

Two sections of the Florida Statutes are relevant to this matter. One of them is Section 337.401, Florida Statutes (2016), concerning the use of right-of-way for utilities as subject to regulation, permit, and fees. This statute is essentially the state response to 47 U.S.C. §253 (2016). Section 337.401 provides in part:

(1)(a) The department and local governmental entities, referred to in this section and in ss. 337.402, 337.403, and 337.404 as the “authority,” that have jurisdiction and control of public roads or publicly owned rail corridors are authorized to prescribe and enforce reasonable rules or regulations with reference to the placing and maintaining across, on, or within the right-of-way limits of any road or publicly

owned rail corridors under their respective jurisdictions any electric transmission, telephone, telegraph, or other communications services lines; pole lines; poles; railways; ditches; sewers; water, heat, or gas mains; pipelines; fences; gasoline tanks and pumps; or other structures referred to in this section and in ss. 337.402, 337.403, and 337.404 as the “utility.” . . .

* * *

(2) The authority may grant to any person who is a resident of this state, or to any corporation which is organized under the laws of this state or licensed to do business within this state, the use of a right-of-way for the utility in accordance with such rules or regulations as the authority may adopt. No utility shall be installed, located, or relocated unless authorized by a written permit issued by the authority. . .

(3)(a) . . . [I]t is the intent of the Legislature that municipalities and counties treat providers of communications services in a nondiscriminatory and competitively neutral manner when imposing rules or regulations governing the placement or maintenance of communications facilities in the public roads or rights-of-way. Rules or regulations imposed by a municipality or county relating to providers of communications services placing or maintaining communications facilities in its roads or rights-of-way must be generally applicable to all providers of communications services and, notwithstanding any other law, may not require a provider of communications services to apply for or enter into an individual license, franchise, or other agreement with the municipality or county as a condition of placing or maintaining communications facilities in its roads or rights-of-way. . .

(3)(b) Registration described in paragraph (a) does not establish a right to place or maintain, or priority for the placement or maintenance of, a communications facility in roads or rights-of-way of a municipality or county. Each municipality and county retains the authority to regulate and manage municipal and county roads or rights-of-way in exercising its police power. Any rules or regulations adopted by a municipality or county which govern the occupation of its roads or rights-of-way by providers of communications services must be related to the placement or maintenance of facilities in such roads or rights-of-way, must be reasonable and nondiscriminatory, and may include only those matters necessary to manage the roads or rights-of-way of the municipality or county.

Subsections (1) and (2) grant local governments the authority to control the placement of certain utility facilities in the right-of-way through a permitting process. Subsection (3)(a) tracks the same policy language as the federal statutes: “treat providers of communications services in a nondiscriminatory and competitively neutral manner.” Subsection (3)(b) notes that each local government maintains the authority to regulate the right-of-way with the caveat that any rules or regulations may only include matters necessary to manage the roads or rights-of-way. However, if such rules and regulations do not favor one private company over others, the local government otherwise has broad authority to manage the right-of-way under these subsections. Notably references to cellular communications or similar terminology are not specifically included in Section 337.401.

The other statute is Section 362.01, Florida Statutes (2016), concerning the authorization for traditional telephone companies to place telephone poles and lines in the right-of-way. Section 362.01, Florida Statutes (2016), is a short statute that reads in full as follows:

Any telegraph or telephone company chartered by this or another state, or any individual operating or desiring to operate a telegraph or telephone line, or lines, in this state, may erect posts, wires and other fixtures for telegraph or telephone purposes on or beside any public road or highway; provided, however, that the same shall not be set so as to obstruct or interfere with the common uses of said roads or highways. Permission to occupy the streets of an incorporated city or town must first be obtained from the city or town council.

Primary arguments made by telecommunication providers for placement of cellular communications towers in local government right-of-way.

“Small cell wireless technology falls within the definition of a utility”

Telecommunication firms argue that wireless technology falls within the definition of a utility in Section 337.401, and that counties cannot say no to the installation of communications towers in the right-of-way. The providers make this argument because Section 337.401(4) incorporates the definition of “communications services” found in Section 202.11(1), Florida Statutes into Section 337.401. The term “communications services” is broadly defined in Section 202.11(1), Florida Statutes (2016), as:

the transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals, including video services, to a point, or between or among points, by or through any electronic, radio, satellite, cable, optical, microwave, or other medium or method now in existence or hereafter devised, regardless of the protocol used for such transmission or conveyance. . . .

However, the argument of the telecommunications firms is flawed because Section 337.401(1)(a) concerning local government authority over the right-of-way references “communication services” only in connection with “lines.” Other references to “communications services” in Section 337.401 do not have this limitation. Therefore, only the lines can be considered part of a utility.

“It is discriminatory to allow traditional telephone poles in the right-of-way but not cell towers”

Telecommunications firms have attempted to cobble Section 362.01, or alternatively, Section 337.401, Florida Statutes (2016), with 47 U.S.C. §253 (2016), to argue it is discriminatory to allow traditional telephone poles in the right-of-way but not cell towers. The firms misapprehend Section 362.01, however, by not recognizing it is strictly limited to traditional telephone poles and was written at a time when cellular technology did not exist. Expanding this statute beyond its stated meaning to include cell towers amounts to allowing an eminent domain right to take property without clear statutory authorization. *See De Soto County v. Highsmith*, 60 So. 2d 915, 916 (Fla. 1952) (proceedings for the acquisition of property by eminent domain must be as prescribed by law or by the Legislature). There is also no reasonable basis to extend Section 362.01 to cell towers

that are materially different in size, height, or bulk from traditional telephone poles. This statute grants permission by the state to place telephone lines in the right-of-way, but it explicitly requires local government permission for such placement. The firms' analyses also fails to recognize the discrimination prohibited by 47 U.S.C. §253 and Section 337.401, Florida Statutes (2016), concerns competition by or against specific companies and not the technological or physical nature of the items being regulated or prohibited in the right-of-way. Further, these statutes do not specifically address cellular communications.

“Telecommunications providers are a regulated utility”

Telecommunications firms have relied on certificates to provide Competitive Local Exchange Telecommunications (CLEC) service or certificates to provide Alternative Access Vendor (AAV) services granted by the Public Service Commission (PSC). The firms argue that these certificates make them a regulated utility with the right to use the right-of-way. This argument is flawed. A certificate to provide AAV or CLEC does not grant a telecommunications firm the right to provide cellular communications services. In fact, Section 364.011, Florida Statutes (2016) specifically exempts wireless communications from the PSC's jurisdiction. A local government is not required to allow a telecommunications firm with a certificate to provide CLEC or AAV use of the right-of-way.

Arguments relating to zoning

47 U.S.C. §332 (2016) is the section of the 1996 Act that concerns mobile or cellular communication services. Subsection (7) places limitations on the zoning authority of local government, but Section 332 is silent about local government management of its own right-of-way. It would seem that if the legislative intent had been to force local government to allow cellular facilities in the right-of-way, Section 332 would have been the logical and appropriate place to address this point. Instead, Section 332 seems concerned only with zoning regulatory authority. Therefore, telecommunication interests are balanced against zoning and land use matters under the 1996 Act and not against the proprietary interests of local government. *See TSprint PCS Assets, L.L.C. v. City of Palos Verdes Estates*, 583 F.3d 716, 721 (9th Cir. 2009) (the 1996 Act is intended to encourage the rapid deployment of new telecommunications technologies and to preserve the authority of state and local governments over zoning and land use matters).

Turning to the extent of regulations that may be imposed on communications towers within the right-of-way, in *BellSouth Telecommunications, Inc. v. Town of Palm Beach*, 252 F.3d 1169 (11th Cir. 2001), the Eleventh Circuit reviewed ordinances from two municipalities to determine which sections were preempted by federal or state law, including a review of Section 337.401(3)(b), Florida Statutes (1998), requiring “[a]ny rules or regulations adopted by a municipality or county which govern the occupation of its roads or rights-of-way by providers of communications services must be related to the placement or maintenance of facilities in such roads or rights-of-way, must be reasonable and nondiscriminatory, and may include only those matters necessary to manage the roads or rights-of-way of the municipality or county.” This case was decided under a prior version of Chapter 337, but the language regarding the regulations within the right-of-way has remained unchanged. The *BellSouth* court determined that the following regulations are considered necessary for the management of the right-of-way: indemnification;

performance bond requirement; security fund requirement; local government power to request information from an operator regarding their future plans concerning the right-of-way; housekeeping and administrative regulations; enforcement/fines; local government access to books regarding construction and repair within the right-of-way; requirement to retain and prepare reports regarding facilities within the right-of-way; requirement to maintain maps of all facilities within the right-of-way; and requirement to provide information relating to the physical management of the right-of-way. In contrast, the following regulations were determined by the *BellSouth* court to be preempted: local government's right to request information not relating to the right-of-way; requiring compliance with state and federal anti-discrimination laws; and local government access to books regarding operations.

Conclusion

In conclusion, the 1996 Act and the Florida Statutes do not support a right of telecommunication firms to force local government to allow placement of cellular communication facilities in the local government's own right-of-way. The arguments made by the telecommunications providers are not persuasive.

The Florida Department of Transportation's Position on Cellular Facilities in the State Right-of-Way.

The Task Force learned several things about the response of the Florida Department of Transportation (FDOT) on this issue. FDOT has two positions on the attempts of Distributed Antenna System (DAS)/small cell wireless communication companies to use right-of-way under FDOT's jurisdiction: (1) the companies are not utilities; and (2) as the property owner, FDOT should have the right to utilize its property as FDOT sees fit.

When approached by the wireless communication companies, the first concern of FDOT was safety. The proposals by the companies often include tall towers within a small distance from the side of the road and within the "clear zone." A roadside "clear zone" is an area in a median or on the side of the road, off the pavement that is to be kept clear of fixed objects. For example, Mobilitie, LLC and its affiliates have submitted right-of-way utilization permit applications for towers 120 feet in height and within several feet of the edge of pavement. The FDOT Design Standards for roads currently in effect requires a clear zone of 18 feet from edge of pavement for speed limits up to 45 miles per hour and from 24 to 36 feet for higher speed limits. FDOT intends to make changes in the Utility Accommodation Manual (UAM) to limit wireless facilities in a right-of-way.

According to FDOT's interpretation of the Florida Statutes, FDOT only allows utilities in a right-of-way. FDOT does not consider the wireless towers as utilities, one reason being that the wireless devices do not need to occupy a right-of-way to serve a public need.

FDOT holds that as the owner of the right-of-way, FDOT as a property owner has a right to use its own land for transportation improvement projects in any manner it sees fit. FDOT's position in this regard is consistent with the holdings in *Sprint Spectrum* and *Omnipoint*. An argument can be made that the federal Telecommunications Act was not designed for companies to profit from the State. FDOT will allow commercial telecommunications facilities to be installed under a Lease and Operating Agreement. The Agreement requires the company to compensate FDOT for use of FDOT's right-of-way and provide certain assurances such as insurance, indemnification, maintenance, and removal.

Crown Castle (now known as Next G) filed an action against FDOT seeking declaratory and injunctive relief, claiming in part, that FDOT violated the Telecommunications Act by requiring this Lease Agreement. See *Crown Castle NG East, LLC v. FDOT*, U.S. Dist. Ct., S. Dist. of Fla., Case No. 9:16-cv-80871. FDOT moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction and sovereign immunity. Crown Castle ultimately dismissed the suit.

The use of a moratorium to stop applications for cellular communications towers temporarily.

47 U.S.C. § 332(c)(7)(B)(ii) (2016) provides that any state or local government shall act on a request for authorization to place, construct, or modify personal wireless service facilities “within a reasonable period of time” after the request is duly filed. In addition, any denial of a request for authorization must be in writing and supported by substantial evidence in a written record. 47 U.S.C. § 332(c)(7)(B)(iii). In 2009, the Federal Communications Commission (“FCC”) issued a Declaratory Ruling that addressed what constituted a “reasonable period of time” for a state or local government to act on a request for authorization to place, construct, or modify a personal wireless service facility. WT Docket No. 08-165, FCC 09-99; Petition for reconsideration denied, FCC 10-144. In the Declaratory Ruling, known as the “Shot Clock Ruling,” the FCC declared that state or local authorities must process collocation applications within 90 days and all other applications must be processed in 150 days. The “Shot Clock” begins when an application is filed, and state and local governments have a 30-day window to review the application for completeness and request additional information.

In *Omnipoint*, discussed *supra*, the Ninth Circuit Court held that 47 U.S.C. § 332(c)(7) has the following preemptive scope:

(1) it preempts local land use authorities’ *regulations* if they violate the requirements of § 332(c)(7)(B)(i) and (iv); and (2) it preempts local land use authorities’ *adjudicative decisions* if the procedures for making such decisions do not meet the minimum requirements of § 332(c)(7)(B)(ii) and (iii).

Omnipoint, 738 F.3d at 196 (emphasis added).

47 U.S.C. § 332(c)(7)(B)(i)-(iv) (2016) reads:

(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; and
- (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.

Omnipoint can be read to mean that the Federal "Shot Clock" time limits are applicable to a local government's review of a personal wireless service facility application, regardless of whether the application is for a communications tower on government owned property or private property. On the other hand, the term "right-of-way" does not appear in 47 U.S.C. §332 (2016). Therefore, arguably this section only applies to local government regulation of property not within the right-of-way.

Many local governments throughout the state have adopted moratoriums. A moratorium will avoid a situation where a cellular communications tower application is made and, due to a lack of an adequate response within the "Shot Clock" timeframe, a telecommunications firm demands an automatic approval. Any moratorium imposed must only prohibit consideration of communications towers within the rights-of-way. If a moratorium is drafted so broadly as to prohibit all communications towers within the local government's jurisdiction, it may be in violation of federal and state law. The reasons provided for the moratorium should be reasonable and not be the product of open and vocal hostility.

CONCLUSION

The ability of local government to control cellular communication towers in the right-of-way is a complex and evolving matter. However, as discussed in this report, current case law and statutes provide local government with alternative ways of responding to this issue.