

**From:** [Emily Anderson](#)  
**To:** [Emily Anderson](#)  
**Subject:** Manatee Email: FACA Cell Tower-ROW Task Force Conference Call - August 22, 2016  
**Date:** Tuesday, August 23, 2016 1:10:19 PM

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**From:** Robert Eschenfelder [<mailto:robert.eschenfelder@mymanatee.org>]  
**Sent:** Friday, August 19, 2016 9:45 PM  
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**Subject:** RE: REMINDER: FACA Cell Tower-ROW Task Force Conference Call - August 22, 2016

All,

I just got word of this phone meeting Monday, but I have a prior scheduled hearing beginning at 9:30 expected to last most of the day. Please do keep me posted on future calls and developments. To help the group, below is a recent response I provided to my client with respect to this topic:

In this **urgent** legal services request, you have indicated that your department's Right of Way Management Division has received various applications for right of way permits from companies called Mobilitie and USA Fiber. The applications are for the placement of poles supporting wireless communication facilities of between 40 and 100 feet tall (with associated support equipment at ground level). Prior to making final permitting decisions, you have asked for a legal analysis of these applications, which have not heretofore been experienced in the County and which seek to place a new kind of infrastructure into the County's rights of way.

I have researched the relevant laws, and advise as follows.

By way of background on the applicants, Mobilitie is a technology company based in California with offices around the world. It is the largest privately-held wireless infrastructure provider in the United States and is a global provider of wireless solutions; funding, designing, building and operating networks and infrastructure. Mobilitie's wireless infrastructure includes neutral host outdoor and indoor Distributed Antenna Systems (DAS), Small Cells, communication towers, as well as Wi-Fi networks. USA Fiber engineers, builds and operates mission critical underground conduit and dark fiber networks for clients, including major sports arenas around the Country.

Of additional note concerning Mobilitie, it is a known vendor for mobile service

provider Sprint. Sprint has been engaged in a major effort to deploy up to 70,000 small cells in cities across the Country -- largely through vendor Mobilitie. It is working to deploy its small cells, primarily to serve its 2.5 GHz spectrum. However, this investment effort has been slower than expected due in part to troubles obtaining permits for the transmitters. Nevertheless, it has been reported that Mobilitie has already accumulated over 1,000 permits and will begin a wide-scale rollout on behalf of Sprint when it has more.

While not a current applicant, I would note that as with Mobilitie and USA Fiber, the firm Crown Castle has been applying to local governments in Florida and in other states to obtain right of way permits for a Distributed Antenna System (DAS). Crown Castle is a successor in interest to Sprint and Nextel with respect to certain FCC license proceedings.

### *Evolution of Industry Trends and Policy Considerations Concerning DAS "Small Cells"*

Small cells, in their various incarnations, have been moving into the public right-of-way for nearly a decade, which have served to expand and improve wireless networks. But today, small cells have become essential for maintaining current levels of service because of increased smartphone data demands. Since 1978, the Congress and the Federal Communications Commission (FCC) have recognized the importance of using existing poles to support infrastructure for new technologies. In 2011, the FCC clarified that pole attachment laws cover wireless attachments, and it removed any ambiguity about how wireless attachments should be treated by utility pole owners.

The FCC said that wireless attachments get equal access to utility poles, including pole-top antennas; and that any denial must be on a "case-by-case" basis. It also clarified that wireless attachments get equal rate treatment and make-ready timeframes. While the wireless industry now supports (to a large extent) sharing pole space on towers, many such structures are overburdened due to the demand for high-bandwidth content, such as streaming video and mobile gaming. In practical terms, when the closest tower is at or over capacity, it may appear as though the user has five-bars on their phone, but the capacity is fully subscribed. Adding a small cell closer to handsets helps consumers use their phones without having to compete for space. This is called "network densification," and it may represent the least impactful means of keeping reception and service at a high level. For instance, industry experts contend that building and operating small cells costs approximately \$190,000 over 10 years, whereas a more traditional "macro" tower we are familiar with averages \$732,000 to build and operate.

The nature of the consumer's use of wireless telecommunications services is also

rapidly changing. Fewer and fewer households subscribe to traditional telephone service over twisted copper wire. More and more homes and businesses subscribe to broadband providers and use Voice over Internet Protocol (VOIP) technologies for telephone service. Manatee County itself recently made this transition for its business phone needs. Also, local video use on hand held devices requires significantly more spectrum than data or voice uses. All these changes and trends are impacting demand for the placement of communications facilities. In fact, there are estimates that the number of wireless facilities in the U.S. will increase by 500 to 800 percent in the next few years. Thus, local governments, including growing and sprawling locations such as Manatee County, can expect new and increased attempts to use the public rights of way by providers of wireless broadband services.

While car-based services use frequency differently, more and more consumers use hand held devices for data-rich services in a stationary location. Thus, the ability of the wireless industry to meet this expanding use demand requires it to use higher frequency, shorter range spectrum to meet the needs of mobile and fixed wireless users

who are not communicating from moving vehicles. This "small cell" solution for offloading data from large cell mobile facilities is an important tool for managing mobile spectrum. Florida's local governments can expect wireless operators to seek access to rights of way to construct the numerous wireless transmission facilities needed to use higher frequency, shorter range wireless spectrum in small cell wireless systems, pursuant to state and federal laws.

Recent business practices of the wireless industry present additional issues with respect to locating wireless facilities in public rights of way. Specifically, the wireless operators frequently do not own the facilities they operate. Many, if not most, wireless traditional transmission towers are owned by third party owners. Based on this current wireless business model, it will be third party owners such as Mobilitie, and not the service providers such as Verizon, who will seek access to public rights of way to install wireless communications equipment.

### ***Distinctions Between Small Systems Technology May Influence Manatee County's Policy Decisions on Right of Way Allocation***

Nearly everyone knows what a traditional "cell tower" is. But the terms "small cell" and "distributed antenna system" ("DAS") are not nearly as familiar, even to County staff working in planning and right of way positions for many years. However, familiarity with these technologies has become imperative. An increasing number of small cells and DAS are already installed and operational in various locations within the Country. But these systems have distinctions of import to decisions on the management of the public's rights of way.

A DAS system is intended to supplement existing wireless communications networks in the locality by strengthening the signal between existing antenna towers providing cellular and digital communications signals to the modern digital network of smartphones, tablets and computers. Like a “macro” cell-site facility, a small cell is equipment

that transmits a wireless signal to and from a defined area. But because a small cell uses lower power than a traditional macro cell, it also provides coverage to a significantly smaller space. Small cells present two key benefits, however.

First, networks that employ small cells often use spectrum more efficiently, which leads to capacity gains. By way of example, a network of 10 small cells can use the same spectrum as a single macro cell and have 10 times the overall capacity. Second, because of their size, a small cell may fit where it would be impossible or infeasible to place a

macro cell. Providers currently use small cells to cover targeted indoor or outdoor areas, including stadiums, shopping malls, hospital, and other outdoor spaces. Small cells are typically operated by the wireless provider that delivers wireless service.

A distributed antenna system also uses smaller facilities than traditional macro cells, but it uses the equipment in a different way. A DAS typically consists of:

- (i) a number of communications nodes, each with an antenna;
- (ii) fiber-optic cable that connects each node to a central site; and
- (iii) radio transceivers at the central site that process or control the signals that the antennas transmit and receive.

Unlike a small cell, a DAS processes the communications at the central site, not at the site of each antenna. Some companies that deploy a DAS do not provide traditional wireless service at all. Instead, the DAS provider operates as a “carrier’s carrier”: it transmits the wireless provider’s traffic over the DAS, but the wireless provider typically operates and owns all the processing equipment at the central site. The DAS provider often uses the same DAS to serve multiple wireless providers.

### *Current Regulatory Framework and Impacts on Local Governments*

Florida’s statutory provisions governing wireless facility siting were adopted at a time when wireless operators chiefly employed high-power, long range transmitting facilities operating from tall buildings or towers located on private property to provide wireless mobile service. These statutes did not address issues arising from widespread deployment of low power, short range radio transmitting facilities in public rights of way. Accordingly, gaps and ambiguities in the regulatory framework governing rights of way present challenges to municipalities seeking to integrate wireless telecommunication users into right of way management rules and

procedures.

Small cells and DAS present new challenges to local governments as regulators and as property managers. On the regulatory side, many local governments developed their zoning codes to address only macrocells. As a result, local ordinances may not clearly apply to the placement of smaller facilities in the rights-of-way – including on utility poles, street lights, and other similar facilities – even though small cells and DAS also can present safety, aesthetic, and environmental issues. In addition, because small cells operate at lower power, a provider typically must place many more facilities in a local government’s rights-of-way. A local government therefore may need to develop an efficient and effective way to review and process a larger number of applications. The regulatory issue is complicated further by § 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, which requires that local governments approve requests to collocate facilities that do not “substantially change the physical dimensions” of certain preexisting facilities. There is at least some valid legal concern that if a local government approves small facilities, providers could use this law to expand the small facilities later – in ways that harm the community.

Small cells and DAS also present new difficulties as local governments manage and lease their property. For example, a DAS may require the operator to place fiber in the rights-of-way, an asset that local governments often own and manage, and to attach antennas and other equipment to government-owned streetlights or other structures. Local governments may find that their traditional “leasing” models do not fit this new technology. Some small-cell providers also have sought blanket licenses to place their equipment on City property. This may not be the right approach to protect against harms in particular areas, or to maximize the value of the County’s assets.

### *Legal Issues To Be Mindful Of:*

The Federal Telecommunications Act of 1996, (the TCA) provides for the promotion of competition and the reduction of regulation in the telecommunications industry, in order to secure lower prices and higher quality services for American telecommunications consumers and to encourage the rapid deployment of new telecommunications technology. 47 U.S.C. § 332. See, Telecommunications Act of 1996, Pub. L. No. 104-104, purpose statement, 110 Stat. 56, 56 (1996). The Act accomplishes this in part through limitations, both procedural and substantive, placed upon local zoning authorities. 47 U.S.C. Sec. 332(c)(7). One such procedural limitation requires that “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 the written record.” 47 U.S.C. Sec. 332(c)(7)(B)(iii).

So, while in general the TCA (47 U.S.C. § 151 et seq.) provides that,

local governments retain control ‘over decisions regarding the placement, construction, and modification of personal wireless service facilities.’

Nonetheless, this control is now subject to several substantive and procedural limitations that subject local governments to an outer limit upon their ability to regulate personal wireless services land use issues.

*Southwestern Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 57 (1<sup>st</sup> Cir. 2001), it places the following four requirements on localities making zoning decisions that involve the placement of “personal wireless service facilities:”

- (1) not to discriminate among providers of functionally equivalent services, 47 U.S.C. § 332(c)(7)(B)(i)(I);
- (2) not to prohibit or have the effect of prohibiting the provision of personal wireless services, *id.* at (B)(i)(II);
- (3) to act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time, *id.* at (B)(ii); and
- (4) to provide a decision in writing that is supported by “substantial evidence,” *id.* at (B)(iii)

The writing required by the Act must contain a sufficient explanation of the reasons for the permit denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons. *Vertex Development, LLC v. Manatee County*, 761 F.Supp.2d 1348 (M.D. Fla. 2011).

A Florida local government’s ability to manage its rights of way is governed by Florida Statutes § 337.401, which allows the County to prescribe and enforce reasonable rules and regulations for placing and maintaining the facilities. Special provisions apply to "Providers of Communications Services". They are to be treated in a non-discriminatory and competitively neutral manner. They cannot be required to enter into or obtain a license, franchise or other agreement from or with the government as a condition of occupying the rights of way. A Provider of Communications Services seeking to place or maintain facilities in municipal rights of way can be required to register with the County (as already provided for in our right of way code) and maintain a valid registration. This registration process does not create a right to place facilities in the rights of way and actual construction of facilities is subject to the County's right-of-way permit process.

Florida Statutes also limit matters that can be considered in the permitting process

with respect to Providers of Communications Services seeking to place or maintain communications facilities in public rights of way. The County's rules and regulations must be related to placement of facilities in rights of way; must be reasonable and nondiscriminatory; and may include only matters necessary to manage the roads and rights of way. The County may not exercise regulatory control over Providers of Communications Services with respect to matters under the exclusive jurisdiction of the Federal Communications Commission or the Florida Public Service Commission, including RF radiation, control of operations, systems, qualifications, services, service quality, service territory or prices.

Most of the provisions of § 337.401 applicable to Communications Services aim at regulating a "Provider of Communications Services" and compensation to the local governments regulating these entities' use of rights of way comes in the form of the Communications Services Tax imposed under Chapter 202 of the Florida Statutes. Florida Statutes address the issue of communications facilities belonging to persons who do not pay the Communications Services Tax by defining a "Pass-Through Provider" as any person who places or maintains a communications facility in the roads or rights of way of a municipality that levies a Communications Services Tax and who does not pay that tax. Although Florida Statutes provide that Pass-Through Providers may be charged "an annual amount not to exceed \$500 per linear mile or portion thereof" based on "the linear miles of roads or rights of way where a communications facility is placed ...", there is no right of access to the right of way for those Pass-Through Providers who are not Communications Services Providers, and the use of linear mileage for compensation is applicable to underground fiber, but not does not relate to above ground wireless facilities.

The Florida Statutes' general imitations on local government power to regulate installation of wireless communications facilities in the commercial mobile radio service confine municipal regulation to land development and zoning issues. As in the case of right of way management, local governments may not base permitting decisions upon service, quality of service or customer demand for service. Local government may consider:

- (a) whether existing structures can reasonably be used for antenna placement instead of construction of a new tower,
- (b) whether a residential area can be served from outside the residential area and
- (c) whether the proposed height of a new or modified tower or antenna placement is necessary to provide designed service.

With certain limitations, local government is allowed to consider aesthetics, landscaping, land use location priorities, structural design and setbacks. Among the design requirements, the County may impose requiring towers to be designed to



support collocation and aesthetic requirements. Local governments may not impose building code requirements on wireless communications facilities beyond those that apply to all similar types of construction.

Federal rules and Florida Statutes impose timing limitations on municipal action on applications for permits to construct wireless communications facilities. Applications for permits to collocate wireless facilities must be acted upon no later than 45 business days after an application is determined to be complete. Applications for permits to construct all other types of wireless communications facilities must be acted upon no later than 90 business days after an application is determined to be complete. A local government has 20 business days from the submission of a permit application to determine the application's completeness. In addition, federal and State law fail to address many issues related to the attachment of wireless facilities to power company poles or street lights located in the right of way.

In my view (and perhaps a subject to consult with our lobbyist on), the Florida Statutes fail to recognize new technologies that were not widely deployed at the time these statutes were adopted, to appropriately address the use of wireless facilities in the rights of way by persons other than Communications Service Providers, and to address the likelihood of significant number of wireless facilities that may be placed in the rights of way.

### *The Orlando Experience*

In the spring of 2016, the City of Orlando received applications for two separate sets of DAS nodes and/or small cells. The applications were submitted by Crown Castle and Telemobilitie (a DBA of Mobilitie), both of whom purport to request planning approval for new poles and/or the replacement of existing poles. While the City of Orlando worked quickly to adopt revisions to its codes to attempt to deal with these new kinds of facilities (I have provided to you yesterday a copy of the Orlando regulation), the applications may, in part, have been filed to “test” the City of Orlando to see what it would approve and what the process would be. While a partial motive might have been to establish standing to sue for not approving the applications for poles in the public rights-of-way, it appears from correspondence your staff has had with Orlando that at least the initial applications were disposed of without litigation.

The key lesson Orlando learned was that it did not have a small cell policy and was unprepared for what an Orlando staff report characterized as the “large number of applications for outdoor Distributed Antenna System [DAS] installations in the public rights-of-way, including many applications for antenna and other equipment on or about various City utility structures” it received.



## *Consideration of Adoption of a Moratorium to Revise Regulations*

Since the administration is seeing a substantial number of permit applications from DAS providers, and the trend in other Florida local governments demonstrates a likely continued emphasis on this new technology, the administration may wish to seek a “time out” moratorium to revise its current land use and right of way regulatory schemes to account for this new technology. Federal courts generally examine four factors when determining whether or not a local government's enactment of a moratorium concerning new cell towers violates the TCA. These factors are:

- 1) the time between the adoption of the TCA and the moratorium;
- 2) whether or not there are circumstances calling for deliberation and study under the Act;
- 3) whether the moratorium was adopted before or after a comprehensive regulatory scheme governing tower applications was enacted; and
- 4) whether or not the moratorium operates as a de facto denial and is the product of open and vocal hostility.

*APT Minneapolis, Inc. v. Stillwater Township*, 2001 WL 1640069, \*6 (D. Minn. 2001). If a brief moratorium (I recommend no more than six months) is recommended to the Commission in this case for the purpose of quickly establishing revised regulations to take into account this new technology and its impact on the County's rights of way and land use designations, it is likely to be approved by the courts. For instance, in *Sprint Spectrum v. City of Medina*, 924 F.Supp. 1036 (W.D. Wash. 1996), the city council adopted a six-month moratorium on the issuance of permits for wireless communication facilities a mere five days after the TCA was enacted in an attempt to deal with “an expected flurry of applications.” 924 F.Supp. at 1037. The court determined that because the city lacked a comprehensive tower ordinance and the moratorium prohibited only the issuance of permits, the moratorium was a reasonable and bona fide effort to incorporate the requirements of this new legislation. See *id.* at 1040-41. In like manner, while Manatee County has an existing regulatory scheme concerning cell tower placement in its Land Development Code (see LDC § 531.37, entitled *Personal Wireless Service Facilities*, attached below), and an existing right of way management code (see Art. II of Chapter 2-28 of the Manatee County Code), these two bodies of County law fail, individually or collectively, to take into account a technology for wireless service delivery not commonly deployed in rights of way in Florida until very recently. As noted by the *Medina* court, the actions of a local government to adopt a temporary moratorium on new communications infrastructure for the purpose of revision of relevant regulations is legally proper where “a necessary and bona fide effort to act carefully in a field with rapidly evolving technology” can be shown. *Medina*, 924 F.Supp. at 1466. See also, *National Telecommunications Advisors v. Board of Selectmen of the Town of West*

*Stockbridge, 27 F.Supp.2d 284 (D. Mass. 1998)*(six-month moratorium was upheld because it was not based in general hostility to towers, and the town had not yet enacted a tower ordinance in response to the TCA's requirements).

I have copied a variety of other County officials outside of Public Works inasmuch as this issue clearly has implications across departmental lines. In particular, a review of the current LDC provisions concerning placement of personal wireless service structures seem to run contrary to the placement of *any* such structures within the County's right of way. However, such a blanket denial may not be the most desirable policy for the County and its citizens and businesses, particularly if the County continues to express a policy, through its LDC, of discouraging placement of large towers within residential zones demanding greater data bandwidth.

Whether the administration elects to recommend a moratorium to the Commission or not, the relevant sections of the right of way management code and Land Development Code should be revised to reflect the policy and resource priorities of the County Commission. Until that occurs, the right of way manager may attempt to process the pending right of way permit applications. But he would, if he denied any of them, need to have a basis founded in the current codes.

When the administration (with such assistance from consulting code or technology consultants as desired) examines a revised regulatory scheme to address the regulation of these new Small Cell and DAS technological methods of service delivery, it should examine questions such as:

- Does the County's zoning ordinance apply to smaller facilities in the rights-of-way?
- Will the County's regulatory process allow staff to review a request to place a number of facilities at multiple sites in a timely way?
- Can the County ensure that small facilities, once approved, will not expand into harmful facilities later?
- Does the DAS provider have wireless customers, or is it only placing facilities with the hope of obtaining them?
- Has the County developed an approach to leasing County-owned property for new wireless uses that protects the community and maximizes the value of County assets?

Additional policy and resource management questions the County has a degree of discretion with and thus may wish to examine in formulating any new regulatory

framework are:

1. Who will be given access to the right of way?
2. How many telecommunications facilities can be allowed per any unit length of right-of-way and in residential communities?
3. What types of equipment can be located in the right of way
  - a. Antennas
  - b. Transmitters
  - c. Air conditioning units
  - d. Transmission lines
  - e. Backhaul facilities (wired and wireless)
  - f. Shelters
  - g. Auxiliary power/battery/generator/fuel tanks
  - h. Poles/Towers
  - i. Collocation
4. What does it mean to provide nondiscriminatory access to rights of way?
  - a. Does the County need to consider the effect of potential preclusion of future users when adopting regulations for the granting of present permits?
  - b. Does nondiscriminatory access mean each Communications Service Provider gets to build its own separate facilities? What would this mean for collocation?
  - c. To the extent the County has its own communications services resources in the rights-of-way, how does this impact the ability to regulate the right of access of third parties and the planning for future use and expansion of such resources?
5. How is the County to be compensated by parties other than Communications Service Providers that pay the Communications Services Tax locating wireless transmission facilities in the rights-of-way?
  - a. Is each tower a separate facility for purposes of calculating the \$500 per mile per year?
  - b. What, if anything, do we charge if wireless facilities are mounted on existing poles or towers?

6. Will the administration continue to maintain “right of way management” as a distinct unit separated from the land use and zoning function, or will operational and regulatory interaction be designed into the permitting system?

7. Should poles between 70'-100' be prohibited from the rights of way?

I trust this response to your urgent request for advice has provided you with the information and guidance you need. However, please feel free to contact me should you have further questions or desire additional advice or legal assistance.

Regards,  
Robert Eschenfelder  
Chief Assistant County Attorney  
Manatee County Attorney’s Office



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**From:** Emily Anderson [<mailto:eanderson@fl-counties.com>]

**Sent:** Friday, August 19, 2016 12:01 PM

**To:** Emily Anderson

**Cc:** Ginger Delegal; Anne Brown

**Subject:** REMINDER: FACA Cell Tower-ROW Task Force Conference Call - August 22, 2016

**TO: FACA CELL TOWER-ROW TASK FORCE MEMBERS**

This email is a reminder that a FACA Cell Tower-ROW Task Force conference call has been scheduled for **Monday, August 22, 2016 at 10:00 a.m. ET**. The agenda is attached hereto. Additionally, attached is an updated Task Force member list reflecting the addition of Robert Eschenfelder, Chief Assistant County Attorney from Manatee County. The call information is as follows:

**DIAL-IN NUMBER : 1-888-670-3525**

**PARTICIPANT CODE: 185 688 4172#**

Should you have any questions or need additional information, please contact Ginger Delegal at [gdelegal@fl-counties.com](mailto:gdelegal@fl-counties.com) or myself at the contact information listed below. Thank you!

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**Emily Anderson**

Senior Executive Assistant to the General Counsel

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