FCC NOTICE AND COMMENT PROCEEDING ON MUNICIPAL WIRELESS FACILITIES REGULATION
February 2017

On November 15, 2016, Mobilitie LLC, a wireless contractor for Sprint, petitioned the Federal Communications Commission ("FCC") to issue new regulations to prohibit "excessive and unfair fees" for the use of the public rights-of-way for its mini-cell towers (most of which are between 75-120 feet tall) and antennas. (Petition, pg. 1) In its Petition, Mobilitie claimed that "many localities are using their authority to manage rights-of-way as a pretext for raising revenue." (Petition, pg. 19) The Company further stated that "[t]hese profit generating regimes also frustrate the Commission's efforts to accelerate broadband deployment…" (Petition, pg. 19)

Mobilitie asked the FCC to declare that municipalities could only charge fees for wireless facilities that directly recover their costs in reviewing and issuing wireless permits and managing the rights-of-way. (Petition, pg. 36) Mobilitie also asked the FCC to declare that fees charged to one company for facilities in the rights-of-way must be equal to fees being charged to Mobilitie. In other words, local governments could not discriminate among providers in assessing fees for the use of the rights-of-way. (Petition, pgs. 31-34)

The FCC responded to the Mobilitie Petition by opening a notice and comment proceeding that expanded the areas of inquiry beyond those that were included in the Petition. In its Public Notice, the FCC stated that it wished "to develop a factual record that will help us to assess whether and to what extent the process of local land-use authorities' review of siting applications is hindering, or is likely to hinder, the deployment of wireless infrastructure." (Public Notice, pg. 2)

The FCC noted that the wireless industry is rolling out mini-cell towers and small cells (typically as part of a "distributed antenna system" or "DAS") in the rights-of-way on a massive scale. It said that 100,000-150,000 such sites will be built by the end of 2018 and that number is expected to reach 455,000 by 2020 and 800,000 by 2026. (Public Notice, pgs. 4-5) It referred to this phenomenon as the "densification of small wireless facilities." (Public Notice, pg. 4)

In its Public Notice, the FCC has asked local governments, the wireless industry, and other stakeholders to comment on the following:

1. Do local governments review DAS and small cell applications in the same manner as they review traditional cell towers or have they established a more streamlined process for DAS and small cells? (Notice, pgs. 7-8)

2. How much time typically elapses between the filing of DAS and small cell applications and either approval or denial by the local government? (Notice, pg. 9)

3. Section 253(a) of the Communications Act states that a local government cannot "prohibit of have the effect of prohibiting" wireless services. Should the FCC attempt to define the meaning of "prohibit or have the effect of prohibiting", especially as it relates to a denial of an application of a wireless carrier when that carrier has a significant gap in service coverage for that jurisdiction. (Notice, pgs. 10-11)

4. Are the FCC's current time frames for reviewing wireless facility applications reasonable? The current FCC time frames from application to a local government's decision are 90 days for collocated antennas and 150 days for towers. (Notice, pgs. 11-12)

5. Section 253(c) of the Communications Act states that a local government may charge "fair and reasonable compensation" for wireless facilities in the rights-of-way. Are the fees that local governments charge reasonable? Are they the same or similar to fees charged to other providers in the public rights-of-way? Should the FCC issue regulations on what constitutes "fair and reasonable compensation"? (Notice, pgs. 13-14)

Based on our experience working with local governments for many years in drafting wireless facilities ordinances and assisting in the processing of wireless applications, we have found that most local governments: 1) have established a separate process for reviewing DAS and small cell applications; 2) review and decide on wireless facilities applications in a very reasonable time frame when taking into account the size of their staffs; 3) do not "prohibit or have the effect of prohibiting" wireless services; and 4) if they assess fees on wireless contractors at all, the fees are extremely low when compared to private market rates.

The Cohen Law Group is concerned that the FCC will use this notice and comment proceeding to further restrict municipal zoning authority over wireless facilities, impose unreasonable deadlines, and/or prohibit the assessment of fees on facilities in the public rights-of-way. For that reason, our law firm has joined with many national and state municipal associations, cities, and other local governments to submit comments to the FCC that offer a different perspective from that of the wireless industry. Our comments will underscore the importance of municipal zoning authority, the fact that many municipalities have streamlined wireless application processes and time frames, and the reasonableness of our clients' fees on wireless facilities.

If you would like to join in this effort to defend municipal rights with respect to wireless facilities, please contact either Dan Cohen (dcohen@cohenlawgroup.org) or Natausha Horton (nhorton@cohenlawgroup.org).