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Welcome to Lightspeed

Welcome to the inaugural issue of *Lightspeed*, the newsletter of the Cohen Law Group. We are a law firm that represents local governments in cable, telecom, and wireless matters. Our practice focuses on networks—both wired and wireless—that transport information at the speed of light. These networks are constantly changing as technology advances at an ever accelerating pace. Unlike any other sector in our economy, the telecommunications industry has launched new technologies with breathtaking speed.

Meanwhile, the companies that create these networks place more and more facilities in the public rights-of-way—property that is controlled by local governments as a public trust. These companies demand speed to market and local governments must be prepared to respond quickly. Unlike any other level of government, local government must coordinate these facilities, protect public safety, act as referee among competing companies, and ensure that its residents and businesses are offered advanced services. Our mission is to assist local governments to move just as quickly as the industry to prepare and respond to the changing communications landscape. Hence, *Lightspeed*.

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Our Mission

We're a small law firm with a big mission—to help local governments prepare for, respond to, and obtain fair benefits from the cable, telecom and wireless industries. Founded by a former municipal official, our firm believes that local government is the most important level of government. It is closest to the people and the most responsive to public needs. It is responsible for critical public services, such as public safety and road maintenance. It is the only level of government that can effectively regulate all of the telecommunications facilities in its public rights-of-way. Meanwhile, municipal costs continue to rise through increased expenses and unfunded mandates from state and federal authorities. Local governments need more resources to meet their daily challenges.

The attorneys of the Cohen Law Group are focused, aggressive, and dedicated to meeting three key objectives for our clients: 1) protect public safety and secure greater legal protections from the telecom industry's use of municipal property; 2) ensure that local governments and their residents benefit from advancements in communications technology; and 3) obtain and recover new revenues from the industry to compensate local governments for use of their property and for their expenses in managing the growing number of telecom facilities in their public rights-of-way.

Achieving these objectives requires more than commitment. It also requires a specialized knowledge of the law and regulations in this field, as well as experience negotiating with the industry. Collectively, our attorneys bring our clients over 60 years of experience in acquiring this knowledge and negotiating with cable, telecom, and wireless companies. We look forward to working with you to add value to your mission.



The wireless communications revolution has been waged for several years now, but recently it has opened up a new battleground. As is often the case, local governments are stuck on the front line. Based on several decades of experience, municipalities are generally well-equipped to respond to applications for traditional cell towers. Recently, however, the wireless industry has rolled out a new arsenal of equipment and municipalities have been caught off guard. The industry has begun to install wireless facilities in the public rights-of-way, which has forced local governments to adapt quickly to the new wireless landscape.

The new facilities range in size from mini-cell towers that are 25-40 feet in height to relatively modest “small cells.” The mini cell towers are part of a network called a “distributed antenna system” or “DAS”. The wireless companies that install these facilities first obtain utility status from the Public Utility Commission or Public Service Commission and then advise municipalities that this status gives them unfettered access to the public rights-of-way. Based on federal and state law, this is not necessarily the case. If your municipality enacts a well-crafted wireless ordinance (or amends its current wireless ordinance) to address these new facilities in the rights-of-way, you can have significant control over the location, design, and other aspects of these facilities.

The reason for this new front in the wireless revolution is simple—the public’s seemingly insatiable demand for wireless broadband service. Dramatic advances in mobile technology, including new and improved wireless applications, have driven this recent

boost in demand. For many of your residents, access to the internet through their smartphones or digital tablets is no longer a luxury; it is a necessity. In 2014 alone, average worldwide smartphone usage grew by 45%. Global mobile broadband traffic grew by 69%. Global broadband traffic is expected to increase five-fold between now and 2019. (Cisco Forecasts) Here in the United States, mobile broadband data usage doubled between 2012 and 2014, and it is expected to increase another 650% by 2018. (CTIA-The Wireless Association).

Due to this spike in demand for mobile broadband, the wireless industry is rolling out new infrastructure to boost capacity rather than coverage. The increased demand is not being met by traditional cell towers and a separate layer of infrastructure is being deployed to increase bandwidth to consumers. Between 2004 and 2014, the number of cell sites in the U.S. increased from 162,986 to 304,360, an increase of 87%. (CTIA) Much of this infrastructure is being placed in municipal rights-of-way.

It is not expected that this trend will abate any time soon. A case in point is Verizon's announcement in May of this year that it is buying AOL, once a dial-up internet service but now an online advertising giant, for \$4.4 billion. In his memo announcing the deal to his employees, AOL's Chief Executive, Tim Armstrong, said: "If there is one key to our journey to building the largest digital media platform in the world, it is mobile." He ended his memo with the phrase "let's mobilize." (New York Times, May 13, 2015)

Municipalities also need to mobilize to prepare for the onslaught of wireless facilities. The good news is that municipalities have strong zoning authority under federal and state law that allows them to control these facilities. The Telecommunications Act of 1996 states that local governments cannot prohibit wireless facilities altogether, but it expressly preserves local zoning authority "over the placement, construction, and modification of wireless facilities." Recent regulatory changes, including the FCC's Wireless Infrastructure Order of 2014 and various state statutes (in Pennsylvania, for example, the 2012 Wireless Broadband Colocation Act) have placed minor restrictions on this zoning authority, but municipal power in this area is still very strong.

Your municipality cannot exercise this power, however, without a wireless facilities ordinance that addresses these new facilities. Most municipal cell tower ordinances were enacted in the late 1990's after the passage of the Telecom Act and are woefully out-of-date. Unless these ordinances are updated, wireless contractors will have free reign to install mini-cell towers and other facilities in the rights-of-way without any municipal control. An amended ordinance also may enact fees for wireless providers' use of the rights-of-way and other public properties. These fees have become a new source of revenue for many municipalities.

We strongly recommend that you convert your old cell tower ordinance to a comprehensive wireless facilities ordinance that achieves the goals discussed above and strikes a balance between your residents' need for broadband service and the equally important goal of protecting the character of your community. You must act quickly, however, because one thing we know for sure. The wireless industry demands speed to market and will not wait while your municipality develops a new wireless ordinance. As with so much in life, you will save yourself money and future frustration if you are proactive rather than reactive.



If you haven't conducted a franchise fee audit of your cable company in the last five years, now is the time to do so. Most likely, the franchise fee revenue you receive from your cable company (or companies) is one of the few "unaccounted for" line items on the revenue side of your annual budget. While you receive periodic payments from the cable company, are you confident that the money you receive is accurate according to your franchise agreement, generally accepted accounting principles, and applicable law? Most likely, the answer is "no". Through a franchise fee audit, you can obtain an answer to that question and, in most cases, find that the cable company has not fully paid your municipality all of the franchise fee revenue to which it is entitled.

A franchise fee audit is a comprehensive review of all of the financial information that the cable company has in its possession for your municipality for a specified time period. It also includes a review of the cable company's "homes passed list", which is a list of serviceable addresses that the cable company has coded to your municipality. The federal

Cable Act grants municipalities the right to assess a franchise fee on cable companies of up to 5% of the company's "gross revenues" for cable services derived from your municipality. A cable company's "gross revenues" consists of approximately 40 revenue sources, including both customer based and non-customer based revenues.

An example of a customer based revenue source is a video tier service, such as Basic, Expanded Basic, Digital, or Premium cable package. An example of a non-customer based revenue source is advertising commissions. Every time the local auto dealership, for example, advertises on television, the cable company receives a fee for airing that ad. Your municipality may assess 5% of those fees as applied to your municipality. Remember that all franchise fees are passed through to cable customers as a separate line item on their bills.

Through a franchise fee audit, you can determine whether the cable company has applied the franchise fee to all 40 revenue sources. You can also find whether the cable company has correctly allocated certain of those revenue sources correctly among cable, internet, and phone services. The franchise fee applies only to cable services, but many revenue sources are derived from all three services. One example is late fees. Often the cable company will simply apply 33% of late fees (one-third of cable, internet, and phone revenues) across the board to franchise fees; however, many cable customers don't subscribe to phone service and/or internet service. Consequently, the allocation of late fee revenue to cable services should be higher than 33%, which means more money to your municipality.

Finally cable systems are not constructed along municipal borders. As such, cable companies are often unaware of the precise boundaries of your municipality. By comparing the cable company's "homes passed list" with your municipal address list, you can determine whether the cable company has failed to include certain municipal addresses in its database. If it is not including certain addresses, then the cable revenue generated from those addresses is not being included in the franchise fees to your municipality. This scenario always results in an underpayment of franchise fees. These errors can be discovered and corrected through a franchise fee audit.

In the last two years, our firm has conducted approximately 100 franchise fee audits and we have found cable company underpayments approximately 73% of the time. These underpayments have ranged from several thousand dollars to 1.3 million dollars. If your franchise agreement includes interest and/or penalties for underpayments, then these may be added to the corrective payments made to your municipality. Even when there are no cable company underpayments, a franchise fee audit sends a strong message to your cable company that your municipality is taking its role as cable compliance officer seriously

and is performing its due diligence under the franchise agreement.

Charter's Bid to Buy Time Warner: How It Will Affect Your Municipality

In late May of this year, Charter Communications ("Charter") and Time Warner Cable ("Time Warner") announced that they entered into an agreement by which Charter would acquire Time Warner for approximately \$55 billion in equity and another \$22 billion in debt financing. If this deal closes, it would be the largest cable acquisition deal in history. The



combined cable giant, including Charter's acquisition of a smaller cable company called Bright House, would serve approximately 17 million cable subscribers. It would be second only to Comcast, which currently has approximately 22 million cable subscribers.

The Charter-Time Warner announcement comes a little over 15 months after Comcast, with great fanfare, announced that it was acquiring Time Warner for approximately \$42.5 billion. That transaction was not consummated, because Comcast ran into regulatory resistance in Washington at the Federal Communications Commission ("FCC") and the Department of Justice. It is too early to predict whether the Charter deal will face the same regulatory obstacles that sunk Comcast's earlier bid. Charter's CEO, Tom Rutledge, is making the case that Charter is not Comcast. He emphasized that the combined Charter-Time Warner will be smaller than Comcast, that Charter won't impose usage-based caps on its internet service, and that Charter doesn't own a large media division as Comcast does with NBC Universal. Mr. Rutledge said: "We will not have market power in high-speed broadband or video." (*Wall Street Journal*, May 26, 2015)

Nevertheless, expect the federal government to give this new Charter deal close scrutiny. Comcast and the new Charter would control most of the wired cable market as well as landline high speed internet service. In addition, Charter has a much smaller lobbying presence in D.C. than Comcast has. To date, the FCC has given no indication of its reaction to the announcement. FCC Chairman Tom Wheeler said only that the Commission "will look to see how American consumers would benefit if the deal were to be approved." (FCC Press Release) The FCC will take at least six months, and probably longer, to render a decision. Meanwhile, Charter and Time Warner will soon be asking local governments currently served by Time Warner to approve the transfer of their cable franchises.

If all or a portion of your jurisdiction is served by Time Warner, you may be eligible to participate in the transfer process. Federal law grants municipalities the right to approve or deny the transfer of their cable franchise if their franchise agreement or ordinance includes applicable transfer language. By participating in the transfer from Time Warner to Charter, municipalities have an opportunity to require Time Warner to correct any past non-compliance issues and ensure that Charter addresses any non-compliance issues that become known after the transfer occurs. These may include, but are not limited to, unpaid franchise fees, unpaid PEG channel financial support, customer service violations, or cable system upgrades that have not been completed. In the past, local governments have also been able to obtain tangible benefits from participating in the process, including increased franchise fees and free internet services to the administration building. It is too early to say whether Charter will be open to these considerations.

Charter and Time Warner will begin the process by deciding whether to send you a binder, known as an FCC Form 394, which requests approval of the transfer and includes financial and legal information about the corporate transaction. This decision depends on the transfer language in your agreement and on how the cable operators define the financial transaction. During the Comcast-Time Warner transfer process, we advocated for a number of clients that did not receive 394's and persuaded Comcast to send 394's to them. We expect that Charter to send 394's within the next several weeks.

The federal Cable Act gives municipalities 120 days from the receipt of the Form 394 to act upon the transfer request. If you need additional information to make an informed decision, you must notify Comcast within 30 days of receipt of the Form 394. If your municipality fails to act on the transfer within the 120-day time period, the transfer of your franchise is deemed approved under federal law. Due to the short timeframes involved, we recommend that your municipality prepare for the transfer process now.

