Hardy, Carey, Chautin & Balkin, LLP
ATTORNEYS AT LAW
1080 West Causeway Approach
Mandeville, Louisiana 70471
Telephone 985.629.0777
Facsimile 985.629.0778
www.hardycarey.com

Mark A. Balkin
Direct Dial 985.629.0750
mbalkin@hardycarey.com

TELECOMMUNICATIONS FACILITY SITING IN LOUISIANA

A. Real Estate and Site Acquisition

Obviously, both wireline and wireless telecommunications carriers require land to place their facilities. In addition to placing their lines in the streets and other public rights-of-way, wireline carriers often need to cross private property (especially in rural areas) and may need property to locate equipment. Cellular and PCS companies need land to construct their antenna with enough space around the base for the placement of an equipment enclosure.

1. Wireline Carriers.

There are several provisions in the Louisiana Revised Statutes related to telecommunications carriers' acquisition of title to or the right to use both public and private property. Louisiana Revised Statutes Title 45, Section 781 includes most of the concepts found in other provisions:

> *A. Corporations, domestic or foreign, formed for the purpose of transmitting intelligence by telegraph or telephone or other system of transmitting intelligence, may construct and maintain telegraph, telephone or other lines necessary to transmit intelligence along all public roads or public works, and along and parallel to any of the railroads in the state, and along and over the waters of the state, if the ordinary use of the roads, works, railroads, and waters are not obstructed, and along the streets of any city, with the consent of the city council or trustees. Such companies, shall be entitled to the right of way over all lands belonging to the state and over the lands, privileges and servitudes of other persons, and to the right to erect poles, piers, abutments, and other works necessary for constructing and maintaining lines and works, upon making*

just compensation therefor. If the company fails to secure such right by consent, contract or agreement upon just and reasonable terms, then the company has the right to proceed to expropriate as provided by law for railroads and other works of public utility, but shall not impede the full use of the highways, navigable waters, or the drainage or natural servitudes of the land over which the right of way may be exercised. No company, operating under the provisions of this Section, shall contract with the owners of land or with any other corporation for the right to erect and maintain any telephone, telegraph or other line for the transmission of intelligence over its lands, privileges or servitudes, to the exclusion of the lines of other companies operating under the provisions of this Section.

B. Nothing provided in Section A herein shall affect the right granted to parish governing authorities to grant franchises for the regulation of cable television outside municipalities.

La.R.S. 45:781.

Also of note is Louisiana Revised Statutes Title 19, Section 2 which provides in pertinent part:

Expropriation by state or certain corporations and limited liability companies

Where a price cannot be agreed upon with the owner, any of the following may expropriate needed property:

* * *

(6) Any domestic or foreign corporation created for the purpose of transmitting intelligence by telegraph or telephone.

La.R.S. 19:2.

Pursuant to these sections, telecommunications carriers, whether wireline or wireless have the ability to construct their facilities within the public road rights-of-way, whether state, parish or city (however a city franchise (or other permission is required), and along and over state waters. In addition, telecommunications carriers may install their facilities over private property by paying just compensation (either by agreement or through expropriation) and, despite the language above, over state land without paying

just compensation to the state (See *State v. South Central Bell Telephone Company*, 619 So.2d 749 (La.App. 4 Cir. 1993); *State v. Cumberland Telephone and Telegraph Company*, 27 So. 795 (La. 1899).)

It should be noted that the unfettered right to construct telecommunications lines along railroads is being challenged. In *Sprint v. State of Louisiana*, currently pending in the 19th JDC, a challenge has been made regarding the ability to place telecommunications lines along public roads and railroad rights-of-way when there is no proof that the road or railroad rights-of-way were actually acquired in fee as opposed to having only acquired a servitude.

2. Wireless Carriers.

Most often wireless carriers lease, rather than acquire property to install an antenna and tower. Other than the base rent and increases, the issues (in my experience) most often raised as part of lease negotiations are:

Option Period. How long is the option period and what happens if another offer is made during the option period.

Co-location. Does the property owner get paid a percentage of the rent paid to the tower owner when another carrier places an antenna on the tower and equipment on the ground. Note: Sometimes no money changes hands because of a deal allowing the carriers to place equipment on each other's towers.

Utilities. Whether the carrier needs to obtain its own meter. If not, how are the increased costs determined and who paid.

Servitudes. Whether for access to the site or utility access, there should be an clear understanding as to whether the property owner has the ability to require the

changing of those servitudes and whether the property owner or carrier will pay for the new driveway and/or utility lines.

Taxes. Whether the property will be divided so that the tower site is taxed separately. If not, how are the increased property taxes determined and paid.

Post Lease. What happens to the tower and equipment after the lease expires.

B. Zoning and Permitting.

Municipal/Parish ability to regulate the siting of cellular/PCS antennas is governed by the Telecommunications Act of 1996. While the Act provides limitations on governmental entities' ability to deny an application for an antenna site, they may regulate the siting and construction of cellular/PCS antenna facilities through zoning and building codes so long as they do not "unreasonably discriminate among providers of functionally equivalent services" or "prohibit or have the effect of prohibiting the provision of personal wireless services." Municipalities may require that a special use permit or variation be obtained prior to the construction of an antenna structure and may regulate location, height and aesthetics -- landscaping, colors, etc. To some extent, municipal control of cellular/PCS facilities can be analogized to adult (and other First Amendment protected) uses. A municipality can regulate them, but it must permit them somewhere in the community.

Section 704 of the Telecommunications Act of 1996 provides in pertinent part:

> *(7) PRESERVATION OF LOCAL ZONING AUTHORITY. --*
> *(A) GENERAL AUTHORITY. -- Except as provided in this paragraph, nothing in this Act 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.*

(B) LIMITATIONS. --

(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.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the commission for relief.

(C) DEFINITIONS. -- For purposes of this paragraph --

(i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term "personal wireless service facilities" means facilities for the provision of personal wireless services; and

> *(iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in Section 303(v)).*

(Emphasis added).

Though there is now a fairly substantial amount of case law, the Conference Report which accompanied the version of the bill that was enacted is still a major source for help in interpreting the Act. It is clear from the Conference Report that Congress intended that the municipality's regular zoning requirements and processes could and should be imposed on wireless communications providers. The Conference Report states:

> If a request for placement of a personal wireless service facility involves a zoning variance or a public hearing or comment process, the time period for rendering a decision will be the usual period under such circumstances. It is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject the request to any but the generally applicable time frames for zoning decisions.

1. Substantial Evidence in a Written Record.

One difference from the normal zoning process is that the Act has specific requirements if the municipality/parish denies a request to place, construct or modify a personal wireless service facility. Such a denial must be "in writing and supported by substantial evidence contained in a written record." Interpretation of this phrase appears to be going through a change. Originally, it was interpreted very strictly against government entities. In *Illinois RSA #3, Inc. v. County of Peoria*, 963 F.Supp. 732 (C.D. Ill, 1997), the court ruled, consistent with previous decisions of other District Courts, that the requirement of a denial in writing is more than just a letter stating that the application

has been denied. Rather, the Court held that the denial letter must state all of the reasons why the application was denied. Further, upon review, there must be a written record with real and substantial evidence supporting the reasons for denial. *See also BellSouth Mobility, Inc. v. Gwinnett County, Georgia*, 944 F.Supp. 923 (N.D.GA, 1996).

Later, the Courts changed course and sided with municipalities on these issues. In *AT&T Wireless PCS, Inc. v. City of Virginia Beach*, 155 F.3d 423 (4th Cir. 1998), the Appellate Court reversed a District Court decision and held:

> The simple requirement of a "decision . . . in writing" cannot be inflated into a requirement of a "statement of . . . findings and conclusions, and the reasons or basis therefor."

The Appellate Court also reversed the District Court's ruling related to whether the evidence supporting denial of the towers was "substantial."

> The Supreme Court has explained that "substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera v. NLRB, 340 U.S. 474, 488, 95 L. Ed. 456, 71 S. Ct. 456 (1951)
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> * * *
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> The Virginia Beach City Council is a state legislative body, not a federal administrative agency. The "reasonable mind" of a legislator is not necessarily the same as the "reasonable mind" of a bureaucrat, and one should keep the distinction in mind when attempting to impose the "substantial evidence" standard onto the world of legislative decisions. It is not only proper but even expected that a legislature and its members will consider the views of their constituents to be particularly compelling forms of evidence, in zoning as in all other legislative matters. These views, if widely shared, will often trump those of bureaucrats or experts in the minds of reasonable legislators.
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> * * *
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> Appellees correctly point out that both the Planning Department and the Planning Commission recommended approval. In addition, appellees of course had numerous experts touting both the necessity and the minimal impact of towers at the Church. Such evidence surely would have justified a reasonable legislator in voting to approve the application, and may even amount to a preponderance of the evidence in favor of the application, but

> the repeated and widespread opposition of a majority of the citizens of Virginia Beach who voiced their views -- at the Planning Commission hearing, through petitions, through letters, and at the City Council meeting – amounts to far more than a "mere scintilla" of evidence to persuade a reasonable mind to oppose the application. Indeed, we should wonder at a legislator who ignored such opposition. In all cases of this sort, those seeking to build will come armed with exhibits, experts, and evaluations. Appellees, by urging us to hold that such a predictable barrage mandates that local governments approve applications, effectively demand that we interpret the Act so as always to thwart average, nonexpert citizens; that is, to thwart democracy. The district court dismissed citizen opposition as "generalized concerns." Congress, in refusing to abolish local authority over zoning of personal wireless services, categorically rejected this scornful approach.

155 F.3d at 430-31.

In the only Louisiana case citing this section, *BellSouth Mobility, Inc. v. Parish of Plaquemines*, 40 F. Supp.2d 372 (E.D. La. 1999) the Court reviewed the denial of a special use permits for proposed 200 and 340 foot cellular towers. The Court, citing the *Virginia Beach* case, specifically found that the written denial did not have to detail all of the evidence supporting the denial. “For this Court, the Act’s words mean what they say; ‘[t]he simple requirement of a decision in writing cannot reasonably be inflated into a requirement of a statement of findings and conclusions, and the reasons or basis therefor.” 40 F.Supp.2d at 377.

Further, the Court found that the denial, based upon evidence presented by citizens that went “largely unanswered” including aesthetic concerns, property appraisals and questions regarding the site selection process was “substantial evidence,” sufficient to deny the permits.

2. Unreasonably Discrimination Among Providers.

Governmental entities have the ability to condition a conditional use permit or variation in order to protect the community and can, subject to the "substantial evidence" requirement, deny permission for a tower based on normal zoning considerations including aesthetics and safety. Though the municipality cannot "unreasonably discriminate among providers of functionally equivalent services," the Conference Report provides that municipalities have

> the flexibility to treat facilities that create different visual aesthetic or safety concerns differently to the extent permitted under generally applicable zoning requirements even if those facilities provide functionally equivalent services. For example, the Conferees do not intend that if a state or local government grants a permit in a commercial district, it must also grant a permit for a competitor's 50-foot tower in a residential district.

Again, both the District Court and the Appellate Court in the Virginia Beach case discuss this issue. The District Court stated:

> The fact that a decision has the effect of favoring one competitor, in and of itself, is not actionable, however. The question becomes whether, in making a decision that has the result of favoring one competitor over another, the governing body has acted reasonably. The actions of the governing body are reasonable if a legitimate basis for the contested action is presented.

979 F.Supp. at 425.

The Appellate Court basically agreed with this statement, but not with the ultimate finding of the District Court that there was unreasonable discrimination. The Appellate Court stated:

> We begin by emphasizing the obvious point that the Act explicitly contemplates that some discrimination "among providers of functionally equivalent services" is allowed. Any discrimination need only be reasonable. ("The fact that a decision has the effect of favoring one competitor, in and of itself, is not actionable."). There is no evidence that the City Council had any intent to favor one company or form of service

> over another. In addition, the evidence shows that opposition to the application rested on traditional bases of zoning regulation: preserving the character of the neighborhood and avoiding aesthetic blight. If such behavior is unreasonable, then nearly every denial of an application such as this will violate the Act, an obviously absurd result.

155 F.3d at 427 (also quoted in *BellSouth Mobility v. Parish of Plaquemines*, 40 F.Supp. 2d 372, 381).

3. Municipalities Can Turn Down a Specific Antenna Site, But Cannot Have a Blanket Prohibition on Wireless Facilities.

The next issue presented by the statute is whether denying approval of a specific antenna site can be considered prohibiting or having the effect of prohibiting wireless services. The Conference Report states that:

> It is the intent of this section that bans or policies that have the effect of banning personal wireless services or facilities not be allowed and that decisions be made on a case-by-case basis.

Again, the *Virginia Beach* case is helpful. This time however, the Appellate Court agreed with the District Court. AT&T had argued that denial of the application had the effect of prohibiting the provision of digital wireless service to the residents of the area and customers traveling through the area because a gap in coverage would exist without the applied for antenna site. The Courts rejected this argument finding that there must be a general policy of the city to deny such applications, resulting in a blanket prohibition of wireless services within the area, for the city to have violated this limitation. (Again, this case is cited as authority by the Eastern District of Louisiana in *BellSouth Mobility*, 40 F.Supp. 2d 372, 381.)

4. Governmental Entities Can Impose a Moratorium on Approvals for Antenna Sites Until it has had a Chance to Review its Zoning Ordinance and Land Use Map and Determine Appropriate Sites for Towers and Monopoles, But Cannot Impose Such Moratoria Unreasonably.

Despite the "prohibiting or having the effect of prohibiting" and "reasonable time period" language discussed above, there are cases that have upheld moratoria on issuing approvals for antenna sites. There are also cases that have found moratoria to be in violation of the Act.

In *Sprint Spectrum LP v. City of Medina*, 924 F Supp.1036 (W.D., WA, 1996) a one time, six month moratorium was upheld. The City made it clear that the moratorium was passed for the sole purpose of creating a policy on the siting of cellular facilities. Further, the City did not deny applications nor did it stop processing them. The moratorium only delayed final consideration of the application for a special use permit. The court found that the City's moratorium

> is not a prohibition on wireless facilities, nor does it have a prohibitory effect. It is, rather, a short term suspension of permit issuing while the City gathers information and processes applications. Nothing in the record suggests that this is other than a necessary and bonafide effort to act carefully in a field with rapidly evolving technology. Nothing in the moratorium would prevent Sprint's application or anyone else's from being granted.

924 F.Supp at 1040. Further, the court stated:

> There is nothing to suggest that Congress, by requiring action "within a reasonable period of time," intended to force local government procedures into a rigid timetable where the circumstances call for study, deliberation, and decision making among competing applicants. The City is seeking to determine, among other things, whether tall antenna towers are still necessary for the purpose at hand. It is entitled to find that out.

924 F.Supp. at 1040.

Finally, the Court found that the moratorium does not unreasonably discriminate among providers of functionally equivalent services. Under the moratorium, the City would consider any new applications by the already operating cellular companies under the same rules as those governing the PCS providers applications. The moratorium treats all service providers without discrimination. "Given the recent dramatic changes in the law and the market, [the City's] generally applicable moratorium is consistent with that requirement." 924 F.Supp at 1040.

In another case involving Sprint Spectrum however, a different district court ruled that a moratorium violated the Act. In *Sprint Spectrum LP v. Jefferson County*, 968 F.Supp. 1457 (N.D. AL, 1997) the court, in rejecting a moratorium, distinguished the *Medina* case. Medina issued a single moratorium for six months. The moratorium challenged in Jefferson County was a second extension of a moratorium that was in its fourteenth month. Additionally, Medina's moratorium only suspended the issuance of permits, not the processing of applications. Jefferson County's moratorium suspended the processing of applications. Based on these differences, the court held that Jefferson County was not deciding zoning decisions related to wireless providers within a reasonable time period and were therefore invalid.

To better resolve these disputes and the clearly legitimate, but conflicting, concerns by both local governments (planning) and the wireless industry (system construction), the Federal Communications Commission after “tentatively” concluding it had authority to ban moratoria, brokered an agreement between its Local and State Government Advisory Committee and several wireless industry trade groups. In addition to providing for alternative dispute resolution, the agreement provides

guidelines that follow the Washington District Court's reasoning in upholding the City of Medina's moratorium discussed above:

A. Local governments and the wireless industry should work cooperatively to facilitate the siting of wireless telecommunication facilities. Moratoria, where necessary, may be utilized when a local government needs time to review and possibly amend its land use regulations to adequately address issues relating to the siting of wireless telecommunications facilities in a manner that addresses local concerns, provides the public with access to wireless services for its safety, convenience and productivity, and complies with the Telecommunications Act of 1996.

B. If a moratorium is adopted, local governments and affected wireless service providers shall work together to expeditiously and effectively address issues leading to the lifting of the moratorium. Moratoria should be for a fixed (as opposed to open ended) period of time, with a specified termination date. The length of the moratorium should be that which is reasonably necessary for the local government to adequately address the issues described in Guideline A. In many cases, the issues that need to be addressed during a moratorium can be resolved within 180 days. All parties understand that cases may arise where the length of a moratorium may need to be longer than 180 days. Moratoria should not be used to stall or discourage the placement of wireless telecommunications facilities within a community, but should be used in a judicious and constructive manner.

C. During the time that a moratorium is in effect, the local government should, within the frame work of the organization's many other responsibilities, continue to accept and process applications (e.g., assigning docket numbers and other administrative aspects associated with the filing of applications), subject to ordinance provisions as may be revised during the moratorium. The local government should continue to work on the review and possible revisions to its land use regulations in order that the moratorium can terminate within its defined period of time, and that both local planning goals and the goals of the Telecommunications Act of 1996 with respect to wireless telecommunications services be met. Wireless service providers should assist by providing appropriate, relevant and non-proprietary information requested by the local government for the purposes of siting wireless telecommunications facilities.

D. Local governments are encouraged to include both the community and the industry in the development of local plans concerning tower and antenna siting. Public notice and participation in accordance with the local government's standard practices should be followed.

C. Network Construction/Right-of-Way Managment.

Facilities based telecommunications companies, whether long distance carriers who have a need to pass through a municipality or those seeking to build a local loop, often must obtain a franchise or license to construct their facilities within the municipality's rights-of-way. In some communities, obtaining a municipal franchise can be an expensive and drawn out process. Carriers can be faced with unanticipated delays in construction that can affect activation schedules, financing and overall business plans.

Municipalities, as is their nature and need, often look upon telecommunications franchising as a revenue source. While also concerned about safety and disruptions to residents and businesses, especially during construction, as well as aesthetics and infrastructure maintenance, payment for use of the rights-of-way is almost always the primary concern of the elected officials and most of the administrative staff. The municipality looks at this as "free" money. There is no political backlash. Virtually no one complains to the municipality about these fees (even if passed through) other than the carriers themselves.

In an effort to limit the deleterious effect franchising can have in the formation of facilities based competition, Congress included Section 253 in the Telecommunications Act of 1996 (47 U.S.C. §253). Entitled "Removal of Barriers

To Entry," Section 253 limits municipal franchising authority, providing in pertinent part:

> *(a) IN GENERAL.--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.*
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> * * *
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> *(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.*

One of the issues continually raised is exactly when permissible "management" of the rights-of-way begins to "prohibit or have the effect of prohibiting" a carrier from providing telecommunication services. Another, even more frequently raised issue, is the meaning of "fair and reasonable compensation" for use of the local rights-of-way. Should municipalities be able to obtain market priced rents or should they simply receive enough to cover their actual costs associated with regulating and maintaining their rights-of-way? More importantly, is it appropriate to charge carriers a franchise fee based on their "gross revenues" as opposed to the amount of facilities in the rights-of-way?

Though there are several more recent cases that have ruled on these issues, the decision in *Bell Atlantic-Maryland, Inc. v. Prince George's County*, 49 F. Supp. 2d 205

(D.C. Md 1999) provides a very complete discussion.[1] Generally, the court found that while it is legal for a local governmental body to require a franchise for entry into the rights-of-way, discretion in granting a franchise, certain materials and information requested of the potential franchisee and the compensation requirements violated Section 253 of the Telecommunications Act.

In *Bell Atlantic*, Prince George's County instituted a franchise ordinance that, like many franchising ordinances, required engineering plans and contact names as well as the provision of information regarding the carrier's financial condition, a description of the telecommunications services to be provided and the technical standards of the proposed system. After the provision of the information, the ordinance granted the County Board discretion in whether to "recommend" whether a franchise should be granted. In making its "recommendation," the ordinance provides that the County Board "may consider" factors such as the managerial, technical and legal qualifications of the carrier, the "nature" of the proposed facilities and services, the recent performance record of the carrier in other jurisdictions and the ultimate discretionary consideration -- "whether the proposal will serve and protect the public interest."

Even if the County Board recommended a franchise be granted, a franchise agreement still needed to be negotiated with the County Executive. All franchisees were required to pay three percent of gross revenues as a franchise fee, make quarterly and annual financial disclosures and permit the County to perform financial audits.

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[1] Other cases with significant discussions of these issues include: *AT&T Communications of the Southwest v. City of Dallas*, 52 F. Supp. 2d 763 (N.D. Tex. 1999) (the Court's opinion on a preliminary injunction request can be found 8 F. Supp. 2d 582); *BellSouth Telecommunications, Inc. v. City of Coral Springs*, 42 F. Supp. 2d 1304 (S. D. Fl. 1999) and *TCG Detroit v. City of Dearborn*, 16 F. Supp. 2d 785 (E.D. Mich. 1998).

Bell Atlantic challenged these requirements and disclosures. Without ruling on individual requirements, the court held that the combined franchising requirements "create a substantial and unlawful barrier to entry." *Bell Atlantic*, 49 F. Supp. 2d at 815. The court then analyzed whether the requirements fit into the "safe harbor" provisions of Section 253(c) -- nondiscriminatory and competitively neutral management of the rights-of-way or fair and reasonable compensation for their use.

Relying in part on FCC interpretations of Section 253(c) and the legislative history, the court found that management of the rights-of-way permitted municipalities only a "narrow scope" of regulations:

> Section 253(c) preserves the authority of the state and local governments to manage public rights-of-way. Local governments must be allowed to perform the range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, to manage gas, water, cable (both electric and cable television), and telephone facilities that crisscross the streets and public rights-of-way. . . . The types of activities that fall into the sphere of appropriate rights-of-way management . . . include coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them.

Bell Atlantic, 49 F. Supp. 2d at 815-816 (quoting *In re TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd 21396, p. 103 (FCC 1997)). The court also noted that "these activities were spelled out in somewhat greater detail" in another FCC interpretation, *In re Classic Telephone, Inc.* 11 FCC Rcd 13082 (FCC 1996), that quoted congressional testimony from Senator Diane Feinstein giving examples of intended restrictions that Congress intended to permit including:

> -- regulating the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize notice impacts;

> -- requiring a company to place its facilities underground, rather than overhead, consistent with the requirements imposed on other utility companies;
>
> -- requiring a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavations;
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> -- enforcing local zoning regulations; and
>
> -- requiring a company to indemnify the City against any claims of injury arising from the company's excavation.

Bell Atlantic, 49 F. Supp. 2d at 816 (quoting *In re Classic Telephone, Inc.* 11 FCC Rcd 13082, p. 39 (FCC 1996)).

The court specifically found that the requirement to produce financial information, information about other operations in other jurisdictions, and technical standards of the proposed system are "not directly related to the County's management of its rights-of-way." However, the Court found "most objectionable" the franchise ordinance's vesting of complete discretion in the County to grant or deny a franchise. "The County's decision to grant or deny a franchise may not be left to the County's ultimate discretion." *Bell Atlantic*, 49 F. Supp. 2d at 816-817.

The *Bell Atlantic* court's discussion of "fair and reasonable compensation" rejects the very common practice of municipalities -- using franchise fees to raise general fund revenues.[2]

> [L]ocal governments may not set their franchise fees above a level that is reasonably calculated to compensate them for the cost of administering their franchise programs and of maintaining and

[2] The *Bell Atlantic* court specifically rejected the holding of a Michigan District Court in *TCG Detroit v. City of Dearborn*, 16 F. Supp. 2d 785 (E.D. Mich. 1998) that held that the statute did not limit "municipalities to strictly their costs related to telecommunications providers' use of their rights-of-way" and upheld a four percent of gross revenues franchise fee and a one time payment of $50,000. *Bell Atlantic*, 49 F. Supp. 2d at 818 n. 27. It should be noted that the 6th Circuit Court of Appeals, 206 F.3d 618 (6th Cir. 2000)

> improving their public rights-of-way. Franchise fees thus may not serve as general revenue-raising measures.

Bell Atlantic, 49 F. Supp. 2d at 817. Rejecting as a "fundamental error" the percentage of gross revenues calculation as a method for determining the franchise fee, the *Bell Atlantic* court stated:

> The appropriate benchmark is not the "value" of Bell Atlantic's "privilege" of using the County's public rights-of-way to provide telecommunications services in Prince George's County. Rather, the proper benchmark is the cost to the County of maintaining and improving the public rights-of-way that Bell Atlantic actually uses. Furthermore, to be "fair and reasonable," these costs must be apportioned to Bell Atlantic based on its degree of use, not its overall level of profitability.

Bell Atlantic, 49 F. Supp. 2d at 818.

D. Administrative Issues.

Because carriers are usually reluctant to challenge local zoning or franchising requirements in the courts or at the FCC. Any money that might be saved by lowering the franchise fee" or removing seemingly overzealous regulations may be lost in the costs to challenge the requirement and the delays in constructing facilities and entering the market. Further, municipal officials communicate with each other; the "bad blood" created with one community often has a negative effect on a company's chances for friendly dealings with other nearby communities.

Below are some ideas on how to move quickly (and less painfully) through a municipal zoning and franchising processes.

1. Begin The Process At Least Six Months Prior To Your Planned Construction Start Date. Recognize that local governments do not move as quickly as business. Those with professional staffs still have procedural and political processes that must be followed. Even in the most sophisticated and business friendly

communities, an application for a municipal telecommunications franchise or zoning approval or negotiation of a lease agreement may take months to process. In addition to the time necessary to complete the application, answer the staff's questions and receive engineering approval, zoning relief, a proposed franchise or a lease agreement may also be required to be published and approved by a commission or committee before being presented to the City Council. The Council may only meet once a month and an ordinance may require two readings before it can be approved.

2. Be Prepared. Know the desired route or exact location for your facilities the first time you speak with staff. Know where existing facilities are overhead and try to know where available conduit already exists. Be able to explain the reasons for your desired locations. Get copies of recently approved franchises, zoning ordinances or lease agreement and read them. Find out the preferred format for review of the engineering plans and provide them in that format.

3. Ask Questions. Ask about issues that are of concern to the staff and elected officials. Request a tentative timetable for the entire process. Find out when the Council meets, how many readings an ordinance requires before passage, and whether there is a committee chair who should be copied on submissions.

4. Listen To The Staff. Respond to their concerns and answer their questions. The elected officials rely on staff explanations and recommendations.

5. Make Sure That There Is At Least One Schematic Allowing A Non-Engineer To Follow The Plans. City Councils are rarely made up of engineers. They want to see where you will be building and need to be able to understand what they are presented. Further, complaints to the municipality from residents and businesses

affected by your construction can be minimized or deflected if your plans clearly show the location of your facilities and can be understood by persons other than the engineers.

6. Appear Flexible. Don't take and then change bottom line positions anymore then you would in any business negotiation. While you should not be shy about advising the staff of requirements you believe violate Sections 253 or 704 of the Act, if your goal is quick approval and construction, be ready to compromise.

7. Don't Make Idol Threats To Sue. Municipal governments are often stubborn and arrogant. Threats to sue will not move the process along quicker nor do they instill fear. Municipal officials know that suing will cost you more in money and time than it will cost them.

8. Find Out About All Fees And Taxes. Find out if there are building permit, inspection or street blocking fees that are separate from the franchise fee or rent. If these fees do exist, try to negotiate them away. Also, find out if there is a utility or other excise tax on telephone bills. This can help you determine the true effect of passing through a franchise fee.

9. Be Professional. Finally, don't treat (or let your clients treat) the municipal process as an unnecessary hassle. Municipalities' legitimate concerns regarding liability, traffic safety, business disruption, roadway maintenance, property values and zoning are all affected by the installation of telecommunications facilities. Acknowledge these legitimate concerns and work with the municipality to resolve them.