SMALL CELL PERMITTING PROCESS – A MUNICIPAL PERSPECTIVE: PART I

With the increasing usage of wireless devices and data, municipalities are facing increased demand for reliable wireless service and 5G technology is eager to meet that need. Small cell infrastructure is in the early stages of deployment across the nation to support this wireless network. Small cell antennas are being placed on poles and buildings, sometimes as close as 400 feet apart. Telecommunications providers have been supporting legislation to force municipalities to allow these antennas to be placed in the right-of-way on municipally-owned poles. This has been happening at the state level for years and is now being promoted federally.

Municipalities generally support implementation and advancements of small cell technology for their residents. However, efforts by the telecom industry to limit municipal participation in this deployment process through state and federal legislation may jeopardize the ability of municipalities to manage their rights-of-way (ROW). Because states with small cell legislation have different rules governing site selection, structure type and size, installation, and restoration, each municipality will face their own challenges when navigating through this process. The experiences and lessons learned by municipalities experiencing small cell deployments will hopefully help educate those yet to begin this process and streamline the process for the rest.

HISTORY

Although small cell legislation can vary greatly from state to state, many of the fundamental elements will be similar. The example this article will focus on is legislation enacted in the state of Kansas. Prior to 2016, Kansas had no state legislation in place specific to small cell regulations. State statutes, municipal codes and franchise agreements were the default guidelines. October 1, 2016 marked the date that House Bill 2131 (codified as K.S.A. 66-2019) took effect with the following implications:

- The use of public rights-of-way for small cell facilities is subject to the safety and welfare of the public
- Creates a shot clock with 60, 90 or 150 days for municipal review based on the type of installation. Initial applications must be rejected within 30 days if deemed incomplete
- If permit response (approval or denial) is not returned within the allotted timeframe, the permit application is automatically considered to be approved
- Allows up to 25 proposed locations per application
- Prevents denial of permits due to reasons such as aesthetics, preferred location, environmental effects of radio frequency emissions or exposure
- Cities are required to provide a minimum of 180 days advance written notice to owner of small cell facility for need to relocate for a roadway improvement project
- Prohibits cities from requiring co-location on single structure by another provider
- Requires consideration of input by adjoining property owners
- Legislation does not apply to state or federal rights-of-way

MUNICIPAL CONCERNS

Municipalities strive to provide the highest level of service and convenience for their stakeholders. However, the number one interest of any municipality should always be the protection of the public's safety and welfare. Finding the right balance between these interests can be tricky. Arguments can be made to support each side of the debate so it's important to know the facts and understand why municipal officials must maintain the ability to manage their rights-of-way.

Legislative provisions requiring the approval of a permit application if not processed within the "shot clock" timeframe undermine a municipality's ability to provide a thorough review. They hinder the

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fair and equitable treatment of all utility providers by forcing cities to reallocate resources to small cell permit application reviews rather than all the other responsibilities associated with right-of-way management. ***In fact, they threaten the primary premise of the 1996 Telecommunications Act***. While the "shot clock" is intended to expedite application processing and reduce regulatory barriers, no extra time is granted for consideration of the 25 individual site locations allowable per application resulting in further exhaustion of time and resources required for a single permit application approval. Furthermore, small cell providers are taking advantage of the existing system by selecting and permitting a site without making any progress towards installation. This practice results in providers racing to reserve prime locations before their competitors, even though they are not following through on installation in a timely manner. This abuse of statutory rights is one example of the many unintended consequences of Kansas House Bill 2131.

The items that should be scrutinized when reviewing a permit application include structural integrity, streetlight network compliance, public and municipal personnel safety when installing and maintaining the facilities, and aesthetics (cabinet locations, zoning requirements and other infrastructure conflicts). These items are typically reviewed by multiple departments including:

Traffic engineering – reviews design for possible impacts due to additional weight and loading stresses that could result in the collapse of a pole or tower without a structural analysis review. Reviews wiring schematics to avoid shorting out streetlight networks.

Building safety – if wiring isn't adequately installed or otherwise doesn't meet code compliance review, could cause shorts or electrocution.

Maintenance – provides inspection and oversight of construction and installation of municipal-owned and maintained structures.

Planning – ensures zoning requirements and municipal codes are met, including pole heights, screening and property owner notifications.

Engineering services – verify acceptability of cabinet location and prevent negative impacts to stormwater network.

Right-of-way – issues permits and provides electrical service addresses, verifies power source locations and potential additional equipment needed, performs right-of-way restoration inspection, and handles all administrative oversight.

The legislation includes clauses preventing denial of permits "for specific reasons" ignoring valid concerns related to a municipality's ability to protect the character of its neighborhoods. Several of these clauses also neglect to take into consideration the health, safety and welfare of the public.

The 180-day notification requirement presents unreasonable challenges in several instances:

- It does not take into account the fact that many municipal maintenance projects are designed and constructed within a time frame of only a few months
- Relocation notifications sometimes occur at a point in the design process that could push the advertisement and bidding process back and jeopardize funding or delay maintenance project schedules
- When deciding on project delivery method, design-build is no longer tenable
- Prohibiting cities from requiring co-location makes it possible for several providers to occupy adjacent poles resulting in aesthetic concerns
- Notification of nearby residents can result in anger from those opposed to placement of the small cell facility when there is no opportunity for municipal recourse
- How does it make sense for legislation enacted by state and federal lawmakers to dictate rules for municipal rights-of-way but exempt state and federal rights-of-way? Shouldn't each be held to the same standards?

LOST IN TRANSLATION

In Kansas, telecommunication providers are promoting the need for expansion of broadband to rural communities as justification for proposed legislation. However, small cell installations seem to only be happening in larger urban areas where they can maximize the return on their investment. In fact, small cells will have little impact on rural areas, regardless of the rules applicable to them. Small cells are best suited to add capacity to existing wireless networks in densely populated areas where demand outpaces supply. They are not designed or intended for rural areas where there are a limited number of users.

The telecommunication industry is promoting rules and regulations that will have detrimental effects on taxpayers resulting in unfunded mandates and associated costs for local agencies and their constituents. On the flip side, telecommunication providers are rightfully impatient when dealing with municipalities that are not prepared for or educated about what's required for a small cell installation process. Kansas telecommunications providers are using isolated incidents from other states to justify their attempts to impose new rules in Kansas that are overly restrictive to municipalities. Many municipalities have fair and reasonable permit fees, bonding requirements, plan review timelines, design requirements, etc. In fact, at the national level, telecom industry representatives have expressed satisfaction with the fees and processes used by Kansas communities.

Municipalities need to continue to remind telecommunication providers that rules and regulations are necessary for public health, safety and welfare considerations. The purpose of these rules and regulations is to ensure that the municipality's best interests are upheld; without creating obstacles or making money. Municipal officials should determine how they want to integrate the technology into their communities and be intentional about their priorities for deploying this process.

Small cell review and administrative costs and inspections can easily exceed $1,000 per location. Franchise fees and the $40 to $80 collected in permit fees don't come close to recouping these administrative and inspection costs. The fees levied by Kansas municipalities are far below the actual costs recovered. This is better understood by looking at the steps required for the review and approval of a typical small cell installation permit:

- Review for compliance with National Electrical Code (NEC)
- Review for height and aesthetics consistent with surrounding community
- Review of pole structural integrity analysis

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- Review of location for metering equipment (ROW, easement, etc.)
- Review of power and communications source locations
- Review location for proximity of other providers
- Review of site-specific design and constructability details
- Review of traffic control plans
- Verification of notifications to surrounding property owners
- Administrative review for pole address, electrical service address, resubmittals
- Review of bonding and insurance documents
- Repeat steps above as needed for EACH location and EACH revision submitted

Once construction begins, the municipality will review/verify the following:
- Material acceptability and installation inspections
- Inspect electrical wiring of municipal equipment
- Traffic control inspection
- Restoration
- Add to municipal asset management database
- Closure and filing of permit

To be fair, inconsistencies and heavy-handedness by some municipalities have resulted in difficult negotiations for communities that are trying to be fair and supportive of broadband expansion while maintaining control of their rights-of-way.

MODEL CODE

A model code could help standardize application review and approvals and benefit all parties. It could also help address the lack of understanding of the current laws and inconsistencies between adjacent city codes which result in schedule delays and increased costs to providers.

A municipal model code has been drafted by the Broadband Deployment Advisory Committee (BDAC) and another was created by the National League of Cities and National Association of Telecommunications Officers and Advisors. However, cities should use these model codes as a tool to accommodate wireless providers while incorporating city-specific aesthetic and public safety requirements. It is not recommended that states impose one-size-fits-all requirements on all municipalities without any consideration of local interests.

Because municipalities need to take steps to protect and manage their rights-of-way, here are a few examples of code provisions that could be adopted to comply with state requirements and federal communication commission rules:
- Permit denial for failure to meet city design standards
- Permit denial for failure to meet public safety requirements
- Permit denial for inadequate insurance or bonding
- Permit denial for poor performance on previous installations
- Permit denial for exceeding pole height restrictions

FEDERAL REGULATORY EFFORTS:

There are two other pending rules that play a role in the small cell discussion:
1. Federal legislation proposed by the Senate: S3157 “Streamlining the Rapid Evolution and Modernization of Leading-edge Infrastructure Necessary to Enhance (STREAMLINE) Small Cell Deployment Act” (https://www.congress.gov/bill/115th-congress/senate-bill/3157/text)
2. Federal Communication Commission Declaratory Ruling, Report and Order (FCC 18-133) titled “Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment” (https://www.fcc.gov/document/fcc-facilitates-wireless-infrastructure-deployment-5g)

An online article by CitiesSpeak (Angelina Panettieri, July 25, 2018) addressed S3157 that was sponsored by Senators John Thune (R-SD) and Brian Schatz (D-HI). In the article the National League of Cities voiced opposition to this bill or any House companion bills that may be introduced. (https://citiesspeak.org/2018/07/25/new-bill-threatens-city-authority-on-small-cell-infrastructure)

Several large municipalities are challenging the legality of the FCC order in court. (https://www.bna.com/cities-counties-challenge-n57982093269/)

Municipalities need to be familiar with their state legislation, as well as these pending federal actions. Education and advocacy are the best ways to manage the imminent evolution of broadband communication advancements.

Contact the APWA Utilities and Public Rights-of-Way (UPROW) Committee for more information. (https://www.apwa.net/MYAPWA/Groups___Committees/Technical_Committees/Utilities___Public_Rights-of-Way_Committee/MyApwa/Apwa_Public/Tech_Cmtes/UPROW/Utility_and_Public_Right-of-Way_Committee.aspx?hkey=ccaf4028-f95c-4855-80ac-7e7a6017a1b5)

There is more to come...