

Small Cell Wireless:

**How did we get here and
what does it mean for Ohio
communities?**

Presentation by Ice Miller LLP
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Ice Miller LLP

- ➔ 300+ lawyers, plus other professionals, including Government Relations subsidiary, *Whiteboard*
- ➔ 7 offices: Ohio, Illinois, Indiana, New York, Philadelphia, and D.C.
- ➔ Full-service AmLaw 200 firm
- ➔ 100+ year foundation of legal service
- ➔ 50 years and 70+ lawyers located in Columbus

The Need for Connectivity

- ➔ High-speed broadband connectivity, considered the “fourth utility” in several markets, offers economic growth and development advantages to clients
- ➔ *5th generation (“5G”) mobile connectivity*: the next wireless telecommunications standard; will support the proliferation of the Internet of Things and Smart Cities
- ➔ *Internet of Things (“IoT”)*: will create unprecedented new uses for internet-enabled devices and heighten demands for high-speed connectivity
- ➔ *Smart Cities*: intelligent transportation systems, traffic control, public safety, utility monitoring, and more

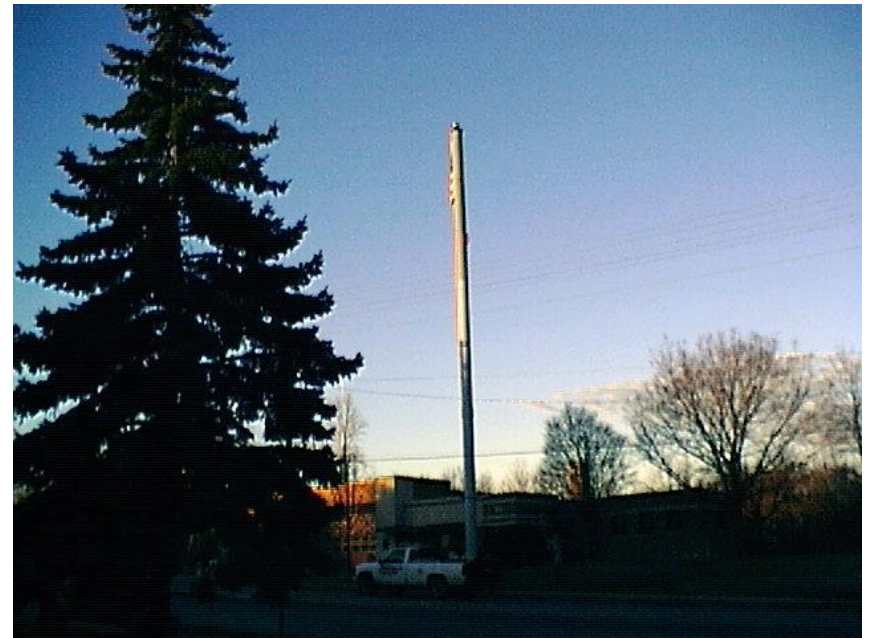
Anticipated Wireless Industry Antenna/ Tower Needs

- ➔ **Tall Sites** - Lattice Towers, Monopoles, Roof Mounts, Steeples, Bell Towers, and Water Towers



Anticipated Wireless Industry Antenna/ Tower Needs

- ➔ **Medium Sites** - Monopoles, Roof Mounts, Stadium Lighting, Flag Poles, and other types of Infill Sites



Anticipated Wireless Industry Antenna/ Tower Needs

- ➔ **Small Sites** – Street Light Poles, Building Mounts, Utility Poles, Mast Antennas, Roof Mounts, Flag Poles, and other Unique Sites (Micro Cells, Nano Cells, Distributed Antenna Systems, Microcell Networks, etc.)



➔ Small Sites



Small Cell Infrastructure

- ➔ Large-scale small cell deployment is not only imminent, but essential for cities to obtain the full benefits of the upcoming 5G revolution and the integration of IoT into municipal functions
- ➔ This new technology requires the proliferation of smaller, more numerous towers and antennas
- ➔ Municipalities are naturally protective of their ROW and the aesthetics of their communities - communities may resist the deployment of certain infrastructure in the local right-of-way, despite the need for modern communications systems



How did we get here?

- ➔ Ohio House Bill 283 (enacted June 1999)
- ➔ Franklin County Court of Common Pleas Judge Hogan decision (April 1, 2002)
- ➔ Ohio Senate Bill 255
- ➔ Ohio Senate Bill 331 (December 2016)
- ➔ Ohio Senate Bill 331 Litigation (2017)
- ➔ Ohio House Bill 478 (May 2018)
- ➔ Federal Communications Commission Order (October 2018)

Senate Bill 331 Litigation

- ➔ Ice Miller represented nearly 50 Ohio cities including Akron, Athens, Beavercreek, Columbus, Dayton, Dublin, Kettering, Lancaster, Miamisburg, Moraine, Monroe, Piqua, Springfield, Xenia.
- ➔ Received successful ruling for plaintiffs from Judge Fry in the Franklin County Court of Common Pleas, finding that the wireless provisions of S.B. 331 were unconstitutional and in violation of the Single-Subject Rule of the Ohio Constitution (Article II, Section 15(D)).
- ➔ State of Ohio and CTIA appealed to the Tenth District Court of Appeals.

Senate Bill 331 Litigation

- ➔ Litigation also filed by:
 - ➔ City of Cleveland (with Glenwillow, Bratenahl and Brecksville)
 - ➔ City of Toledo (with Maumee, Napoleon, Perrysburg and Sylvania)
 - ➔ 38 (approximately) Northeast Ohio communities (only court that ruled against the city plaintiffs; held that there was a unifying thread regarding a single subject - the State's intent to "deprive municipal corporations of the ability to regulate such issues by the adoption of local ordinances")
 - ➔ City of Cincinnati

Negotiation of House Bill 478

“On May 2, 2018, Governor Kasich signed HB478, legislation regulating the deployment of small cell wireless infrastructure throughout municipal rights of way. The signing of this bill marks the achievement of both municipal leaders across the state and the telecommunications industry representatives who spent countless hours the past several months to reach a compromise of both parties.”

- Ohio Municipal League, 5/4 Legislative Bulletin

City Authority under House Bill 478

- ➔ Reserve space in right-of-way or on a wireless support structure or pole owned by city if:
 - ➔ Space is reserved for future public safety or transportation use;
 - ➔ There is a documented and approved plan in place regarding the future public safety or transportation use at the time that the application for a small cell facility or wireless support structure is filed with the city;
 - ➔ Reserved space does not wholly preclude placement of a pole or collocation of a small cell facility.

City Authority under House Bill 478

- ➔ Restrict overall height of a new wireless support structure and any collocated antennas to 40 feet.
- ➔ Cap height at 35 feet in areas meeting the following:
 - ➔ Area is within 300 feet of the proposed site for a new wireless support structure in the same public way or a connecting public way;
 - ➔ Are no wireless support structures or utility poles taller than 30 feet in height AGL in the area; and
 - ➔ Maximum allowable height for building construction in the underlying zoning district is 35 feet or less.

City Authority under House Bill 478

- ➔ Require reasonable, technically feasible, and non-discriminatory design or concealment measures in a historic district so long as:
 - ➔ Facilities are not otherwise excluded from evaluation for effects on historic properties under 47 C.F.R. § 1.1307(a)(4) of the FCC's rules;
 - ➔ Design or concealment measures do not have the effect of prohibiting any operator's technology; and
 - ➔ Design or concealment measures are not considered a part of the small cell facility for purposes of the size restrictions in the definition of small cell facility.

City Authority under House Bill 478

- ➔ Impose reasonable requirements for bonds, escrow deposits, letters of credit, or any other type of financial surety to ensure removal of abandoned or unused wireless facilities or damage to municipal property caused by an operator or agent.
- ➔ Request that an operator relocate or adjust its facilities within ROW at no cost to the city to protect health, safety, and welfare, as long as such request similarly binds all users in or on such public way.

City Authority under House Bill 478

- ➔ Withhold, deny, or delay consent based on failure to possess financial, technical, and managerial resources to protect health, safety, and welfare.
- ➔ Establish priorities for access to or occupancy or use of a public way when the public way cannot accommodate all users, so long as priorities are not unduly discriminatory and are competitively neutral.

City Authority under House Bill 478

- ➔ Adopt written design guidelines with objective, technologically feasible criteria that reasonably match the aesthetics and character of the area regarding:
 - ➔ Location of any ground-mounted small cell facilities;
 - ➔ Location of a small cell facility on a support structure;
 - ➔ Appearance and concealment of small cell facilities, including criteria relating to materials used for arranging, screening, or landscaping; and
 - ➔ The design and appearance of a wireless support structure including any height requirements.

Sample Design Guidelines: Preferred Locations

“The following are the most preferred areas for new small cell facilities:

- ➔ *Industrial Areas:* if not already adjacent to a municipal park, residential area or architectural review district.
- ➔ *Highway Rights-of-Way:* if not adjacent to a municipal park, residential area or architectural review district.
- ➔ *Retail and Commercial Areas:* if not adjacent to a municipal park, residential area or architectural review district.”

Sample Design Guidelines: Least Preferred Locations

“The following are the least preferred areas for new small cell facilities:

- ➔ *Residential Areas*
- ➔ *Parks*
- ➔ *Historic District*
- ➔ *Architectural Review District*

Maps showing the boundaries of the Historic District and the Architectural Review District are available on the City’s website.”

Sample Design Guidelines: Order of Preference for Wireless Support Structures

- ➔ Existing Utility Poles
- ➔ Non-Ornamental Municipal Service Poles
- ➔ New Poles
- ➔ Ornamental Municipal Service Poles
- ➔ Sign Poles (15 feet or taller)

Sample Design Guidelines: Protrusion

“No protrusions from the outer circumference of the existing structure or pole shall be more than two (2) feet.

The pole and all attachments to the pole that are projecting, or any equipment or appurtenance mounted on the ground, shall comply with Americans with Disabilities Act and shall not obstruct an existing or planned sidewalk or walkway. The City, at its option may waive the requirement to limit the protrusion to no more that two (2) feet.”

Sample Design Guidelines: Spacing

“The City strongly discourages more than one (1) new wireless support structure per block and will not approve more than 250 (300) feet on each side of the street to minimize the hazard of poles adjacent to roadways and minimize visual clutter and distractions to vehicular traffic. An exemption may be granted if the applicant can demonstrate that this restriction has the effect of preventing wireless service to this location. Wireless support structures shall be spaced apart from utility poles or wireless support structures supporting small cell facilities at the same spacing between utility poles and immediate proximity.”

Sample Design Guidelines: Installations on Traffic Signals and Street Lights

“Installations on all traffic signal structures or street lights must not interfere with the integrity of the facility in any way that may compromise the safety of the public. The installation must not interfere with other existing uses on the pole such as traffic signals, street lights, hanging flower planters, flags, and/or banners. Installation of small cell facilities on any traffic signal structure or street light shall:

Sample Design Guidelines: Installations on Traffic Signals and Street Lights (cont'd.)

- ➔ be encased in a separate conduit than the traffic light electronics;
- ➔ have a separate electric power connection than the traffic signal/street light structure; and
- ➔ have a separate access point than the traffic signal/street light structure.”

Sample Design Guidelines: Equipment Enclosures

“Equipment enclosures, including electric meters, shall be as small as possible. Ground-mounted equipment shall incorporate concealment elements into the proposed design. Concealment may include, but shall not be limited to, landscaping, strategic placement in less obtrusive locations and placement within existing or replacement street furniture.”

Sample Design Guidelines: Allowed Colors

“All colors shall match the background of any wireless support structure that the facilities are located upon. In case of existing wood poles, finishes of conduit shall be zinc, aluminum or stainless steel, or colored to match those metal finishes and equipment cabinets shall be the color of brushed aluminum. Ground mounted equipment cabinets shall be the color of brushed aluminum.”

Sample Design Guidelines: Residential Areas

“In residential areas, new wireless support structures should be located to avoid obstructing the view of building facades by placing the wireless support structure at a corner, intersection or along a lot line. New wireless support structures should be located in the yard location where other overhead utilities are located unless it is not technically feasible to do so. Applicants shall clearly explain the rationale for requests that deviate from this exception.”

FCC Small Cell Order

On September 26, 2018, the FCC adopted a Declaratory Ruling and Third Report and Order regarding wireless broadband/small cell deployment in public rights-of-way.

Accelerating Wireless and Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, Declaratory Ruling and Third Report and Order, FCC 18-133 (2018).

FCC Small Cell Order

- ➔ On October 15, 2018, the FCC Small Cell Order was published in the Federal Register.
- ➔ The Order went into effect on January 14, 2019.
- ➔ The Order adopts rules to “streamline the wireless infrastructure siting review process to facilitate the deployment of next-generation wireless facilities.”
- ➔ Set new fee levels for the deployment of Small Cell Wireless Facilities to comply with Section 253
- ➔ Limits State and Local consideration of aesthetic concerns that effect the deployment of Small Cells

FCC Order Requirements

- ➔ Shot Clocks for Small Cell Deployments
 - ➔ 60 days for Collocation
 - ➔ 90 days for New Construction
- ➔ Fees
 - ➔ Application fees for small cells limited to \$100.00/ site
 - ➔ Recurring fees limited to \$270.00/ site annually
 - ➔ Prohibits fees other than those that are a “reasonable approximation” of “reasonable costs” directly related to maintaining rights-of-way and small cell facilities

FCC Order Requirements

- ➔ Aesthetics
 - ➔ Limits aesthetic review and requirements (including undergrounding and historic/ environmental) to those that are reasonable and comparable to requirements for other rights-of-way users, published in advance
- ➔ Totality of Permit
 - ➔ 60-day application review for collocation of small cell facilities on an existing structure (all permits required)
 - ➔ 90-day application review for attachment of small cell facilities on a new structure (all permits required)

FCC Order Litigation

- ➔ Municipalities filed a petition for review in the Ninth Circuit alleging that the Order exceeds the Commission's statutory authority, etc.
- ➔ Mobile providers filed a petition for review in various federal appellate courts regarding the Commission's failure to adopt a "deemed granted" remedy
- ➔ Petitions were consolidated in the Tenth Circuit, then transferred to the Ninth Circuit (i.e., west coast)

**Regardless, as of January 14, 2019,
the Order is in effect.**

What does this mean for Ohio communities?

- ➔ Ohio providers have been willing to continue to comply with the negotiated language of H.B. 478.
- ➔ Cities should enact comprehensive rights-of-way ordinances and Small Cell Design Guidelines
- ➔ Avoid challenges by:
 - ➔ Ensuring that fees are reasonable/ actual and direct
 - ➔ Ensuring that permits are approved/ denied within 90 days for collocations and 120 days for new structures
 - ➔ Communicate with the providers regarding their plans and determine whether separate agreements would be mutually beneficial (but proceed with caution)

Questions?

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