Wireless In the Rights of Way and on Public Property

Presented to the South Carolina Association of Municipal Power Systems Annual Meeting
June 12, 2017
Hilton Head Island, South Carolina

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Outline of Presentation

Part I  Background – Cell Tower Growth
Part II  Current and Developing Framework for Managing Wireless Development
Part III  Planning for the Future
Part IV  Negotiating (Non-Pole) Leases/Licenses for Facilities
Part I

Background – Cell Tower Growth
Why Wireless 2016 and Beyond Presents New Local Challenges

Source: SNL Kagan 2015
Wireless Challenges

What’s Happening?

• Delivering higher speed wireless data services requires “denser” networks – more antennas
• Providers want to cut costs (see Mobilitie)
• Public property, including Rights-of-Way (“RoW), street lights, utility poles, traffic signals a major target for deployment – particularly where utilities are otherwise underground
• Market includes wireless providers (T-Mobile/Verizon Wireless/AT&T) and facilities providers (ExteNet/Crown Castle, Mobilitie)
Types of Facilities - Glossary

- **Macrocells**
  - “Macrocell” = high-powered antenna in a mobile phone network designed to serve a large area from a single site. Examples: monopoles, or guyed or lattice towers. Towers may be shared by many providers.

- **Small Cells**
  - Small cells = low-powered antennas (nodes) w/ range of 10 m. to 1 or 2 km. May or may not be connected by fiber. Small refers to area covered, not size of facility; typically don’t require tall structures. Small cells typically serve one provider. Term includes many devices – e.g. picocells, femtocells and microcells.
Types of Facilities - Glossary

Distributed Antenna Systems (DAS)

- A network of spatially separated antennas (nodes) connected to a common source (a hub) via a transport medium (often fiber optics). DAS systems can be owned by one entity and shared by a few providers. Antennas do not need to be as high as traditional macrocells.
- There are many additional technologies and designs that affect how facilities look and perform.
“Small Cell” Does Not Equal Small

Small additions to existing utility poles...or

Requests for 120-foot towers in RoW...or

Light standard replacement/alteration
“Small Cell” Does Not Equal Small
Part II

Legal Framework for Managing Wireless Development
Regulatory Framework – Right of Way Use/Use of Public Property

What You Can Do Is Affected By:

- Whether application is for use of property locality owns or controls (proprietary)
- Whether application is for use of right of way (and what land use/management authority locality has over rights of way)
- Whether application is for use of state or federal property within a locality (and whether property is subject to local control/management)
- Whether application is subject to special controls (environmental/historical preservation) and what entity is responsible for applying those standards
- State law limits on regulation of wireless structures/charges that may be imposed on wireless facilities for use of rights of way
AS A GROSS OVERSIMPLIFICATION

- South Carolina communities/muni utilities are in good position to control the placement of wireless facilities – control pricing and access to proprietary property compared to communities elsewhere – although ability to charge for RoW is limited.
- Fourth Circuit precedent is very favorable, and less likely to result in preemption of local choices if basic rules are followed.
- Localities appear to have significant authority, through a combination of zoning/franchising authority to review applications for entry into the market.
Regulatory Framework

Laws Changing Dramatically in Other States

- Ohio: SB331 defines small cells as: 6 cu. ft. for antenna, 28 cubic feet for other equipment not including meters/cabling
- Access granted to street lights/muni poles/traffic signals/street signs poles for $200 per year or if lower, actual costs
- Texas: SB1004 allows FCC rate for pole attachment for utility poles
- $20 per year for service poles = light standards/traffic signals included
- Max application fee = $1000 for single pole/$500 each for 5 poles/$250 for each pole after 5; no recovery of external engineering review
Regulatory Framework – Federal Law

- Generally:
  - Currently federal law limitations do not apply where locality is acting in proprietary capacity – locality can control design, placement, growth, etc. unless those rights are given away in contract.
  - FCC interprets 47 U.S.C. Section 224 as the source of authority for regulating terms and conditions for access to utility property – and municipal utilities are excluded from its reach.
Regulatory Framework – Federal Law

- **Telecommunications Act [47 U.S.C. § 332(c)(7)]**
  - Applies to all applications for “personal wireless services facilities”
  - Generally preserves local authority to control placement of person wireless facilities, subject to certain substantive and procedural limits

- **Telecommunications Act [47 U.S.C. § 253]**
  - Preempts local/state regulations that prohibit or have effect of prohibiting ability of any entity to provide telecom services
  - But does not reach nondiscriminatory RoW management or compensation requirements

- **Middle Class Tax Relief Act [47 U.S.C. § 1455(a)]**
  - Applies to all non-proprietary “wireless” applications (broader)
  - Preempts local discretion over certain collocations and modifications to existing wireless sites

- **FCC Regulations**
  - Interpret federal statutes; carries the force of law
Section 332(c)(7)

- Applies to “Personal Wireless Service [PWS] Facilities”
  - Commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services

- Preserves Local Zoning Authority, With Five Limitations. Meaning May Vary Between Circuits But Locality:
  - Shall not “unreasonably discriminate” among providers of functionally equivalent services (332(c)(7)(B)(i)(I));
  - Prohibit or effectively prohibit provision of PWS (332(c)(7)(B)(i)(II));
  - Must act on request within “reasonable period of time”;
  - Must make final decision to deny “in writing” and supported by “substantial evidence” in written record;
  - May not deny based on RF if facility satisfies FCC RF rules
Prohibitions/Effective Prohibition

- **Policy of Denial of All Applications.**
  - If locality has a clear policy of banning all wireless facilities, that will be a prohibition.

- **Denial of a Single Application. Circuits Split on When Denial of a Single Permit Is Prohibition:**
  - 4th Circuit: *T-Mobile Northeast LLC v. Fairfax County Bd. of Supervisors* 672 F.3d 259 (4th Cir. 2012) Applicant must show denial “tantamount” to general denial by showing:
    - a legally cognizable deficit in coverage amounting to an effective absence of coverage; and
    - it lacks reasonable alternative sites to provide coverage; and
    - further reasonable efforts to gain approval for alternative facilities would be “fruitless.”
What’s a “Written Decision” Mean?


  - The Telecom Act “does not require localities to provide [its] reasons in written denial letters . . . [so long as the locality] states its reasons with sufficient clarity in some other written record issued essentially contemporaneously with the denial.”
What’s “Substantial Evidence”?  

- **Substantial Evidence Test Similar to Judicial Review of Administrative Actions**
  
  “The substantial evidence inquiry is deferential: [we] may not overturn the [City’s] decision on ‘substantial evidence’ grounds if that decision is authorized by applicable local regulations and [is] supported by a reasonable amount of evidence (i.e., more than a ‘scintilla’ but not necessarily a preponderance).”

  *Am. Tower Corp. v. San Diego, 763 F.3d 1035, 1053 (9th Cir. 2014)*
Action within a Reasonable Time

- **Statutory Requirement**
  - Locality shall act “on any request for authorization to place, construct, or modify” facilities “within a reasonable period of time after the request is duly filed” considering “nature and scope of such request” 47 USC § 332(c)(7)(B)(ii)

- **FCC Says, Absent Agreement 332(c)(7)**
  - *Presumed Violated If Locality Fails To Act:*
    - On collocation application not subject to Section 6409 (47 U.S.C. § 1455) = 90 days
    - On new sites = 150 days

- **Applicant Must File Suit Within 30 Days**
Meeting Deadlines

- General “Shot Clock” Rules
  - Commences at submittal (even for incomplete apps)
  - Shot clock pauses (tolls) if app incomplete but never resets
  - Clock ends when local government “acts”
  - Extension by mutual agreement with applicant

- Complex Rules for Incomplete Applications
  - **General rule**: locality may generally toll the clock with a written incomplete notice given within the first 30 days
  - **10-day resubmittal rule**: application has 10 days to notify if resubmission incomplete
  - **Publicly-stated rule**: incomplete notice not effective if asks for information not publicly stated as a requirement
  - **One-bite rule**: incomplete notices not effective when it asks for information not requested in first notice
Meeting Deadlines – Open Issues

- **What Constitutes Action on Application?**
  - Decision of initial reviewer? Or resolution of any appeals within community (e.g. to zoning board or governing body)
  - What about state approvals that may also be required (historic reviews/environmental reviews)?

- **What Actions Are Subject to Shot Clock?**
  - Zoning/land use review only?
  - Building permit/electrical/other safety-permitting reviews?
  - Reviews for antennas/base stations? Or for all facilities entity may seek to build (fiber optics lines among sites)
  - Applications for franchises?
Section 6409 – 47 U.S.C. § 1455

(a) Facility modifications.

(1) In general. Notwithstanding section 704 of the Telecommunications Act of 1996 (Public Law 104-104) or any other provision of law, a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.

(2) Eligible facilities request. For purposes of this subsection, the term “eligible facilities request” means any request for modification of an existing wireless tower or base station that involves—

(A) collocation of new transmission equipment;
(B) removal of transmission equipment; or
(C) replacement of transmission equipment.
Oversimplified Analysis:

- Did Applicant Request Approval Under 6409(a)?
- Does It Qualify as an Eligible Facilities Request?
- Would It Cause a Substantial Change?
- Was Prior Installation Approved?
- Reminder: Not Currently Applicable to Proprietary Property.
Section 6409 Procedural Requirements

▪ Deadlines

• Absent agreement with applicant, state and local governments must act within 60 days of receipt of a complete application
• Applicant only required to submit information required by state or local law, and only information relevant to (a) determination as to whether change is eligible facilities request; or (b) determination as to whether change complies with general public safety laws
• Rules for notice and tolling the same as for Section 332(c)(7)
Remedies under Section 6409

- **Deemed-Granted Permits**
  - If 332(c)(7) deadlines missed, locality may show that delay was justified.
  - Under Section 6409, if deadline passes applicant may notify community that application is “deemed granted”

- **Judicial Review**
  - Flips normal process upside down: local government must sue applicant to prevent “deemed granted” permit from becoming effective
  - FCC suggests review limited to whether facility was eligible facilities request or unsafe
Key Terms: “Tower” and Base Station?

**Tower:**
- “[A]ny structure built for the sole or primary purpose of supporting any Commission-licensed or authorized antennas and their associated facilities.”
- A utility pole would not be a tower

**Base Station:**
- “[T]he equipment and non-tower supporting structure at a fixed location that enable Commission-licensed or authorized wireless communications...”
- A non-tower support structure (e.g., a building) becomes base station when wireless equipment is attached
## Substantial Changes - Thresholds

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Towers Outside of RoW</th>
<th>Other Support Structured &amp; ROW</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Height</strong></td>
<td>20 feet or ten percent</td>
<td>10 feet or 10 percent</td>
</tr>
<tr>
<td><strong>Width</strong></td>
<td>20 feet or tower width</td>
<td>6 feet</td>
</tr>
<tr>
<td><strong>Equipment Cabinets</strong></td>
<td>4 maximum</td>
<td>None if no ground cabinets; otherwise same, plus volumetric limits</td>
</tr>
<tr>
<td><strong>Excavation</strong></td>
<td>within the leased or owned area</td>
<td>same, but further restricted to proximity to other ground equipment</td>
</tr>
<tr>
<td><strong>Concealment</strong></td>
<td>cannot “defeat” the concealment elements</td>
<td></td>
</tr>
<tr>
<td><strong>Compliance with Prior Permit Conditions</strong></td>
<td>changes must comply with all prior conditions except where only non-compliance meets FCC thresholds on height, width, cabinets or excavation</td>
<td></td>
</tr>
</tbody>
</table>
What Is a Concealment Element?

- **FCC Has Not Clearly Defined:**
  - FCC suggested height limits designed to prevent an otherwise undisguised tower from extended above a tree canopy might be a “concealment” element
  - Painting requirements, requirements that limit visibility may be concealment elements (e.g. rooftop height limits)
  - Stealth facilities would have “concealment elements.”
  - What about other design requirements intended to make wireless facility blend into surroundings? E.g., proportions of antenna; size relative to supporting structure
Substantial Changes
Other Important Notes

- Except for Concealment Elements Rules Effectively May Preempt Local Zone Height Limits, Restrictions on Legal Non-Conforming Uses
- Height Limits Apply From Size of Facility As Initially Approved, Or As Increased Prior to February 22, 2012
- General Health and Safety Laws Not Preempted
  - Building codes
  - Some setbacks (but what about fall zones? AASHTO?)
Barriers to Entry – 47 U.S.C. § 253

**Statutory Requirement**

- Preempts state and local legal requirements that “prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service”
- Even if prohibitory, requirements not preempted if:
  - Requirements are competitively neutral, consistent with Telecom Act, and imposed to advance universal service, protect public safety and welfare, safeguard consumer rights, or ensure quality of telecom services;
  - Requirements relate to rights-of-way management, or reasonable compensation on competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis and compensation is publicly disclosed
Barriers to Entry – 47 U.S.C. § 253

Application Issues for Wireless

- 332(c)(7)(A) seems to prohibit application of 253 to applications for siting personal wireless facilities
- Some entities argue that wireline facilities connecting antennas not subject to 332
- Some providers argue that franchise requirements/compensation would not relate to “placement, construction, and modification of personal wireless service facilities” and are subject to Section 253
Wireline NPRM

**In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment,** Notice Of Proposed Rulemaking, Notice Of Inquiry, And Request For Comment, WC Docket No. 17-84 (released April 21, 2017)

- Can Commission Use Section 253 authority to regulate access to municipally-owned poles?
- Can Commission set deadlines for franchising process, permitting fees and other charges for use of RoW?
- Should Commission speed pole attachment requirements for utilities? Limit fees that can be charged for poles attachments generally?
- Should Commission adopt “one touch” rules?
- Should Commission speed copper retirement and limit notice required for abandonment of services (including services to government)
Wireless NPRM

- *Removing Barriers to Investment Needed for America's 5G Future*, Notice of Proposed Rulemaking and Notice of Inquiry  WT Docket Nos. 17-79

- NPRM
  - Proposes to adopt some remedy that makes deadlines absolute – missing deadline means locality has violated law
  - Seeks comment on “reasonable period to act” – and whether there should be more and different shot clocks under 332.
  - Asks whether pre-application meetings count against shot clock
  - Moratoria – are any localities still imposing them? What can FCC do to stop them?
  - Should historical preservation rules/environmental reviews be more limited?
Wireless NPRM

**Notice of Inquiry**

- Should Commission revisit distinction between proprietary and non-proprietary facilities?
- How do Sec. 253 and 332(c)(7) apply to wireless? Can a locality deny access to RoW?
- Given different tests in different circuits for what is “effective prohibition,” should FCC provide guidance?
- Seeks comment on proper role of aesthetic considerations and whether FCC should issue guidance on what are ok specific aesthetic impacts and what are not ok – generalized concerns.
- Seeks comments on whether fees for review can be limited (and whether the same fees are charged non-wireless providers)
- Does preventing wireless providers from building in RoW in underground areas amount to unreasonable discrimination/ effective prohibition?
- Does law require wireless to be treated the same as other utilities?
Wireless – Wireline NPRM

- Together Threaten To Limit Local Authority To Control Placement of Wireless On RoW, Public Property (Including Utility Property), and Obtain Full Compensation for Costs/ Fair Compensation for Use
- May Result In Additional Burdens on Local Government and Publicly-Owned Utilities
Part III

Issues To Consider When Addressing Entry – And Protecting Your Rights
Do Recent Changes Require an Ordinance?

- **Legal Considerations**
  - No explicit requirement in new regulations that jurisdictions create new ordinance, but may implicitly preempt local ordinances.
  - If you cannot/do not regulate wireless, you need not do so, but, if you do regulate review of laws to ensure fed/state compliance important.
  - Particularly important: applications may be qualitatively and quantitatively different: for RoW; for residential areas; for active (and revitalized) downtown areas where aboveground structure are limited – are differences taken into account?
Land Use Code Revision DO’s

- Express Your Local Land-Use Values!
- Incentivize Preferred/Dis-Incentivize Discouraged
  - Be sure everyone understands that order does not grant right to use/collocate on gov’t property, but you may wish to encourage use of gov’t property
- Consider Requiring More Stealth/Concealment
- Consider Designating Official to Manage Applications
- Engage/Collaborate with Stakeholders
  - residents, businesses; wireless industry; staff members
- Include “Safety Valves” For Effective Prohibitions
Land Use Code Revision DO’s

- Use Terms Clearly And Consistently (Look to FCC Definitions)
- Be Clear As To What You Will Regulate
- Differentiate § 332 and § 6409 applications
- Consider Conditional Approvals Of Applications Under Section 6409 To Avoid Creating Property Rights
Land Use Code Revision DO’s

- Decide Whether Zoning Requirements Apply To Row – And Whether Rules Should Be Different, Or The Same (Fall Zones)
- Provide Mechanism For Creation Of Application Forms – Ordinance Need Not Specify Requirements (But May Set Minimums)
- Provide Mechanism for Setting Fees
- Do Not Confuse Franchising Authority / Authority to Lease Property / Regulatory Authority
Land Use Code Revision DON’T’s

- Try To Use A Moratorium To Stop Shot Clocks
- Demand Showing of Need for Sec. 6409-Eligible Application (Different Rule Applies for Sec. 332 Applications)
- Re-codify State/Federal Process/Remedies (But Be Sure You Can Comply)
- Adopt Different Standards for Similar Impacts
- Assume Federal Law Always Controls
- Attempt to Regulate Technological Choices
Planning for the Future

- **FCC Proposed Rules On Pole Attachments**
  - 15 days to complete survey of poles
  - 7 days after survey – must provide cost estimate (unless request is denied)
  - Complete make-ready within 30 days (or 75 days for large order (3000 poles or 5% of poles held by utility in state))
  - Maintain a list of authorized contractors who can perform work above communications space

- **FCC Considering:**
  - One-touch rules with minimal or no notice in communications space, where no risk of outages
  - One-touch in communications or electrical space
  - Limit time for review of one-touch attachments
  - Limiting costs that can be recovered from attachers
  - Penalizing failure to move facilities on shared poles ($500 per pole per month)
  - Make it easier to obtain information about available conduit
Planning for the Future

- FCC Proposed Rules On Copper Retirement
  - Industry moving to retire traditional twisted pair copper plant, and replace with either new fiber-based plant using IP technology to deliver service, or wireless services
  - Rural areas particularly at risk
  - Some equipment will not function on new plant
  - FCC rules currently include significant notice provisions that protect consumers AND public bodies
  - Public notices may not be maintained under revised rules
  - FCC is specifically asking what protections (if any) it should provide to other government bodies that may face significant contracting issues in obtaining equipment required to perform mission-critical functions over new systems
Planning for the Future

- Assume You Will Face State and Federal Challenges to Basic Ability to Manage Property
- Stronger Together: Begin Working With Planning/Public Works To Define Interests
- Attempt to Define Your Costs / Risks Presented By Intrusion on Control Over Your Property
- Think About How Your Own “Smart Utility” Efforts May Be Threatened
Planning for the Future

- Have You Audited Your Telecom Resources – and How You Might Be Affected By Copper Retirement?
- Does Copper Retirement Create a New Case for Municipal Entry into Telecom Business?
Part IV

Leasing Facilities To Wireless Providers
Control the Drafting Process

- Avoid Using Anyone Else’s Standard Form – Develop Your Own
- WHY?
  - Wireless carriers’ standard forms are one-sided.
  - Substantial legal fees in editing.
- Wireless Carriers Can, Will and Maybe Should Take Advantage Naïve Property Owners
- Developing and Using A Standard Form Saves Time And Helps Avoid Overlooking Issues
Premises & Grant of Authority

- Include An Exhibit With Legal Descriptions, Drawings And/Or Photos
  - The more detail you have, the easier it is to police the agreement, especially regarding unauthorized collocations and subleases
- Control Signage, Conduct and Look
- Address Use Of Common Areas and Access Points
License/Lease Not Easement

- Granting an easement may be granting others access to the same property.
- License is all the legal authority a wireless carrier needs.
- Lease structure is also an acceptable alternative (but grants exclusive use, not shared use).
Term

- For General Leases, Define Term And Renewal Options
- For Wireless Sites, Typically Series Of 5 Year Terms – 20 To 30 Years Total
- Strategic Decision Re Auto Renewals Or Affirmative Notice Required
  - If notice is required, keep database of dates
  - Make sure that tenant in breach is not entitled to automatic renewal
  - Impose significant hold over fee so as to ensure tenant does not benefit from refusal to negotiate
Term (cont’d)

- Beware of “Options To Lease” or long “Due Diligence” periods tying up sites with no guarantee of rent.
- Avoid long delivery or construction periods for permitting with no rent – begin term immediately and add construction period to overall term.
- 30-60 days or commencement of construction, whichever comes first.
Due Diligence Period

- Limited Time In Which Wireless Carrier Has To Obtain Legal Clearances And Ensure That Site Works For Them.
- Try Not To Give This Time Away For Free.
- Require Indemnity And Insurance For Any Activities On Site By Licensee/Consultants And Require Prior Consent For Any Borings: Require Copies Of Any Consultant Reports Be Provided To You.
Rent/License Fee

- Basic Fee
- Collocation Fees (Or Address This Later)
- Late Fees, Interest And Hold-over Fees
  - Late fees are what you can get. (Ensure that you provide safe harbor referencing any state law cap.)
  - Interest limited by law (be sure to include savings clause to avoid usury claim).
  - Hold-over rent should be in the range of 125% to 150% of then-current rent.
- Negotiation Costs, Inspection Costs, Other Improvement Costs
Wireless Site Base Rent (Your Facilities)

- Rent: Wide Variations: $100 Per Month To $5K + Per Month, Paid On Annual Basis In Advance.
- Offer A Direct Deposit Option.
- Carriers Typically Offer Low Escalators – E.G., 15% Every 5 Years – that is not the same as 3% per year.
- Try For 4% -- But It Must Be On Annual Basis.
- Consider CPI With A Floor Of 3.5% (Might have to offer a ceiling Of 5%).
Responsibilities In Event of Change/Damage To Facility

- No Duty To Restore
- Right To Remove/Relocate Your Own Facilities On Your Own Or To Accommodate Other Projects (Road Widening, Undergrounding)
- If Special Facility Is Installed to Accommodate Lessee/Licensee (e.g. New Street Light Pole) Be Sure That Replacement Poles Are In Stock
- Duties With Respect to Maintenance of Shared Facility Clearly Defined
Assignment

- Require Landlord Approval
  - Wireless carriers usually want to be able to shift sites to related corporate entities without landlord approval.
  - Beware of assignments to “affiliates,” tower operating companies.

- No Release of Original Entity for Certain Clauses – Hazardous and Insurance Issues

- For “Neutral Hosts,” Esp: Address Treatment of Customers (Do They Require Franchise? What Are Their Rights/Obligations?)
Assignment or Subletting

- No Sublicensing Without Permission.
- Landlord Should Retain Ability To Consent To Any Proposed Sublicense That Involves The Collocation Of Another Carrier’s Facilities.
  - Additional rent for subs.
- Define Scope of License – Services That May Be Provided Without Additional Authority/Rent By Either Licensee or Its Customers
Interference

- Ensure that you do not cause any challenges for any existing tenants.
- Ensure that subsequent tenants/collocators do not cause interference.
- Burden is on newcomers to cure interference caused by their arrival (not existing users).
- Be sure licensor/landlord is not responsible for interference or cure.
- Protect your future uses (primary use preserved).
Improvements

- **Detailed Plans With Prior Approval**
  - Do not agree to “approval not to be unreasonably withheld, delayed or conditioned ...”
  - Control appearance of improvements

- **All Work By Licensee Shall Be Performed In Compliance With Applicable Laws, Codes/Standards And Ordinances.**

- **Licensee Is Not Authorized To Contract For Or On Behalf Of Licensor Or Impose Any Additional Expense. (i.e. Utilities)**
Improvements & Utilities

- Be Sure Improvements Will Be Maintained And Upgraded To Comply With Laws, But Any New Installations Must Not Be Heavier, Greater In Capacity Or More Space Than Originally Granted.
- Licensee Pays For Utilities; Licensor/Landlord Not Responsible For Any Interruptions.
- Clearly Address How Utility Services Are To Be Provided to Site – and Avoid Creating Overly Broad Rights of Access.
Removal of Improvements

- How To Handle Removal May Depend On Facility
  - Immediate ownership (e.g., of light pole).
  - Automatic conveyance of ownership to licensor
  - Option for licensor to retain improvements or require removal
  - Require removal of footings and foundations
Possible Requirement:

- Licensee agrees to comply with all applicable governmental laws and regulations and with such technical standards as may from time to time be established by licensor for the premises, including, without limitation, technical standards relating to frequency compatibility, radio interference protection, antenna type and location and physical installation.
Limit Access (Think Post-9/11)

- 24 Hour Notice?
- Escort?
  - But be careful about costs of Escort Service.
- Emergency Conditions For Access
Access Rights/Security

If Installation On Roof/Secured Area:

- Limit access to certain specific areas
- Require your roof contractor to approve; avoid roof penetrations which may invalidate roof warranties
- Limit cabling access to common shafts
- Limit size, weight and frequency of access to roof
- If installation across private or limited access land, limit access and protect fencing, private or municipal property or animals
- Put burden to maintain secure fencing on licensee
Events of Default / Termination by Licensor

- Non-payment By Tenant
- Habitual Late Payments From Tenant
- Violation Of Any Term, Including Non-permitted Collocations
- Bankruptcy Of Tenant
Termination by Licensee

- Carefully Define When Licensee Can Terminate.
- Wireless Carriers Want Ability To Terminate For “Technological, Economic, Or Environmental” Reasons. Please Don’t Accept Either Prohibit Terminations Or Require Payment (E.G., Rent For Remainder Of Term Or 12-24 Months Of Rent).
Casualty/Insurance/Indemnity

- Make Sure To Run By Your Risk Assessment Folks
- Typical Insurance Is General Liability, Auto Liability, Employer’s Liability, All-risk Property, And Workers’ Comp.
- Make Sure Insurance Requirements Apply To Contractors And Subs
- Don’t Accept Reciprocal Indemnity
  - Caveat: Many states and local government charters ban reciprocal indemnity.
Taxes

- Make Sure It Is Clear That Taxes Due Are In Addition To Rent.
- Address Possessory Interest Tax (Revenue And Taxation Code 107.6) Liability For Licensee.
- General Rule That Local Government Wants To Make Clear That It Is Acting As A Landlord, Not In Its Regulatory Capacity (Taxes, Permits Etc.)
Notices

- All Notices, Requests, Demands And Other Communications To Be In Writing And Delivered To Specified Addresses
  - Be sure to have multiple entities copied.
    - Counsel
    - Clerk of Records
    - Others?
Quiet Enjoyment, Title and Authority

- Traditional Obligation Of The Landlord.
- Make Sure You Have Authority – I.E. Make Sure Such Use Is Permitted Under Your Governing Documents.
  - Ensure that you have not granted another the right to deploy in a manner that could result in interference.
Hazardous Substances

- Strict Language To Prohibit Any Such Uses.
- Batteries For Back Up And Generators Can Trigger These Terms.
- Check With Your Environmental Folks For Most Recent Terms – Pay Special Attention That These Substances Do Not Prejudice Your Ability To Reuse The Site Or Co-use. (Typically Local Government Sites Are Water Towers, Or Gov’t Buildings.)
Miscellaneous

- Attorney Fees
- Entire Agreement
- No Liability For Broker/Agent Fees
- Governing Law And Venue
- Severability – But With Regulatory Threats In Minds, Note Severability May Not Be In Your Interests In All Cases
Miscellaneous (cont’d)

- Mortgage Subordination
- Limitation On Liability
- RF Signage And Notices
- Amendments
- No Relocation Assistance
- Time IS OF THE ESSENCE
Selling Your Wireless Leases

- Numerous Tower Operators Seeking To Buy Landlord Lease Rights
- Typically Offer Fraction Of NPV Of Lease Payments
- Will Emphasize Threat Of Nonrenewal, Certainty Of Being Paid
- May Ask For Amendments Allowing Unlimited Collocations
Technical and RF Issues

- **Signal Interference Issues**
  - Critical (mostly non-negotiable) issue for carriers
  - Standard: newcomer must cure
  - **Pointer**: avoid LL obligations to cure interference

- **Radio Frequency (“RF”) Exposure Liabilities**
  - FCC places primary obligations on carriers
  - FCC requires “reasonable” cooperation from LL
  - **Pointer**: require specific indemnities and consider periodic on-site tests for compliance

- **E-911 and Backup Power**
  - Federal law may require carriers to harden their facilities, but does not require LLs to give extra space for free
Best Practices
How to Police Your Lease

- **Regular Site Checkups**
  - Carriers seek forgiveness more often than permission
  - Take photographs, measure site boundaries
  - Audit revenues/usage by 3rd parties

- **Monitor Site Access**
  - Reasonable in/out records esp. important for rooftops

- **Keep Your Correspondence**
- **Keep Tabs on Permit Applications**
- **Get Advice from Counsel/Experts**
Questions