Hot Regulatory Proceedings for 2009

–By T. Scott Thompson–

The year 2008 was highly active in terms of legal and regulatory issues for distributed antenna system (DAS) providers, and 2009 could be even more active. Carrying over from 2008 are several important judicial and regulatory actions that could directly affect the ability of DAS providers to deploy. In addition, 2009 may see new legislation adopted containing funding opportunities for DAS providers and perhaps even setting limits on local municipal delays on deployment. The following information reviews and discusses several of the top legal and regulatory issues at play as of the beginning of 2009.

Supreme Court

This year, the U.S. Supreme Court may take on the issue of municipal regulation of telecommunications services and facilities. The Supreme Court only accepts a fairly small number of cases per year, and in two cases involving Section 253 of the Communications Act, *Sprint Telephony PCS v. San Diego County* and *Level 3 v. City of St. Louis*, the parties have asked the Supreme Court to hear their appeals.

In *Sprint Telephony v. San Diego County*, Sprint challenged the County of San Diego's wireless telecommunications ordinance on the ground that, on its face, the ordinance prohibited or had the effect of prohibiting the provision of telecommunications services and thus violated Section 253 of the Communications Act, 47 U.S.C. § 253. In an initial decision by a three-judge panel, the Ninth Circuit applied the court's well-established *City of Auburn v. Qwest* precedent to hold that the ordinance was pre-empted by Section 253. The court based its decision on the burdensome processes of the wireless telecommunications ordinance and the unfettered discretion of the county to deny entry, in particular based on subjective, discretionary aesthetic judgments. In addition, the initial decision of the Ninth Circuit held that wireless providers have standing to challenge local zoning ordinances under Section 253, rejecting the county's argument that Section 332(c)(7) is the sole remedy for wireless providers to challenge local zoning ordinances.

In a significant move, on Sept. 11, 2008, the *en banc* Ninth Circuit reversed not only the initial decision of the three-judge Ninth Circuit panel but also its prior decision in *City of Auburn*

Municipal interests, together with San Diego County, successfully petitioned the Ninth Circuit to rehear the case *en banc* (with a panel of 11 judges, rather than a three-judge panel). In a significant move, on Sept. 11, 2008, the *en banc* Ninth Circuit reversed not only the initial decision of the three-judge Ninth Circuit panel but also its prior decision in *City of Auburn*. The *en banc* Ninth Circuit rejected the *City of Auburn* standard that a local ordinance violates Section 253(a) if it *may* have the effect of prohibiting service. Instead, the court stated that "[a] plaintiff must establish either an outright prohibition or an effective prohibition on the provision of telecommunications services." 543 F.3d 571, 579 (9th Cir. 2008).

At about the same time as the *Sprint* case, the Eighth Circuit in *Level 3 v. City of St. Louis*, 477 F.3d 528 (8th Cir. 2007), rejected Level 3 Communications' Section 253 challenge to the City of St. Louis telecommunications franchise and franchise fee ordinance. In so doing, the Eighth Circuit criticized the Ninth Circuit's *City of Auburn* decision, holding instead that "a plaintiff suing a municipality under Section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition. The plaintiff need not show a complete or insurmountable prohibition, but it must show an existing material interference with the ability to compete in a fair and balanced market." 477 F.3d at 533.

On Dec.10, 2008, Sprint petitioned the Supreme Court for a *writ of certiorari*, asking the court to hear its appeal regarding the pre-emptive scope of Section 253. Several DAS interests, including NextG Networks and the DAS

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Open Range Communications Inc.
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One Equity Partners
United States Department of Agriculture's Rural Development Utilities Program
Globalstar, Inc.
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InSite Wireless Group, LLC
has secured equity financing from
Viridian Investment Partners, L.P.
RBC Daniels acted as exclusive financial advisor to InSite.

GoAmerica, Inc.
has acquired the Telecommunications Relay Services division of
Verizon Communications Inc.,
merged with
Hands On Services
and has secured
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in equity and debt financing sponsored by
Clearlake Capital Group
RBC Daniels acted as exclusive financial advisor to GoAmerica.

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Utah Broadband, LLC
a provider of broadband wireless service in Salt Lake City, Provo, Park City and other areas along the Wasatch Front, has been acquired by
Metrobridge Networks International Inc.
RBC Daniels acted as exclusive financial advisor to Utah Broadband.

Ramcell, Inc.
has sold its managing general partner interest in
North Carolina RSA 1 Partnership
to a subsidiary of
United States Cellular Corp.
RBC Daniels acted as exclusive financial advisor to Ramcell.

InterConnect Towers LLC
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Hercules Technology Growth Capital, Inc.
RBC Daniels acted as exclusive financial advisor to JAB.

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a provider of wholesale advanced telecommunications and data services has acquired
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a Texas-based wholesale carrier.
RBC Daniels acted as exclusive financial advisor to Pac-West.

Minnesota Public Radio
has leased certain of its 2.5 GHz EBS spectrum to
Clearwire Corporation
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RBC Daniels acted as exclusive financial advisor to Minnesota Public Radio.

Oneida Broadband, LLC
has sold certain of its 2.5 GHz BRS and EBS spectrum to affiliates of
Sprint Nextel
RBC Daniels acted as exclusive financial advisor to Oneida Broadband.

Hargray Wireless, LLC
has been acquired by
Cricket Communications, Inc.
a wholly-owned subsidiary of Leap Wireless
The transaction covers approximately 825,000 POPs in the Savannah, GA BTA.
RBC Daniels acted as exclusive financial advisor to Hargray Wireless.

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SOURCE: Thomson Reuters

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Forum (filing together) and Newpath (filing individually), filed *amicus curiae* (friend of the court) briefs in support of Sprint's petition. Likewise, Level 3 has also petitioned for *certiorari* of the Eighth Circuit's decision.

Whether the Supreme Court will hear either the *Sprint* or *Level 3* case is uncertain. The Court accepts few cases per year and, from a purely statistical standpoint, rejects the vast majority. If it does take either case (or consolidates both), the Court's interpretation of Section 253 could be important to the ability of DAS providers to deploy. In the wake of the *Sprint* case, numerous cities in California, for example, have already moved to expand their oversight of telecommunications deployment, particularly deployment involving wireless elements, in a manner that may significantly delay or deter deployment of new DAS networks. A decision by the Supreme Court reversing the Ninth Circuit or Eighth Circuit would help providers to fight municipal overreaching. However, a decision by the Court confirming the narrow reading of the Ninth Circuit could have the opposite, adverse effect.

The Supreme Court is expected to announce in late March whether it will hear either case. If the Court grants review, a decision likely would be issued in early 2010.

FCC Rulemaking

Pole Attachments — Another important proceeding for DAS providers that may be resolved in 2009 is the FCC's pole attachment rulemaking. Initiated on Nov. 20, 2007, the FCC's rulemaking raises a host of pole attachment issues, and while pole attachment rates for cable operators and incumbent local exchange carriers (for example, AT&T and Verizon) have garnered the bulk of public attention, the rulemaking also raised critical issues regarding wireless pole attachments.

The FCC and the U.S. Supreme Court confirmed years ago that Section 224 of the Communications Act (also known as the Pole Attachment Act) requires mandatory access and just and reasonable rates, terms and conditions for wireless telecommunications attachments. *National Cable & Telecomms. Assn, Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002). Yet, wireless providers have continued to encounter significant problems from many pole owners. Comments submitted to the FCC, including some from DAS providers, identified pole-owner demands for annual per pole rentals of thousands of dollars (when the regulated rate would be as low as $20), refusals to allow wireless attachments to the tops of poles, multiyear delays and even outright denials of access. Accordingly, commenters have asked the FCC to adopt specific rules confirming that

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attachment of wireless devices qualifies for mandatory access, regulated rental rates, and reasonable terms and conditions, including specific deadlines for timely makeready and installations. In addition, commenters have asked the FCC to reject utility industry claims that wireless attachments can be rejected universally based on alleged safety concerns. Commenters have demonstrated that the National Electric Safety Code already contains standards and rules for the safe attachment of wireless devices to utility poles, including to the tops of poles. Accordingly, they have asked that wireless attachments, including to the pole top, be deemed presumptively safe.

Broadband deployment policies

The FCC is expected to address the pole rulemaking this year in furtherance of its broadband deployment policies. FCC clarification of the rights of providers, such as DAS providers, to attach wireless facilities to utility poles at just and reasonable rates, terms and conditions would be an important development for DAS providers that have suffered delays and unnecessary costs.

Similar proceedings addressing wireless and DAS pole attachment issues are also pending before several state utility commissions that have exercised authority over pole attachments, including the Connecticut Department Of Public Utility Control and the New York Public Service Commission. Timing for action on those proceedings is less clear, and they may wait to follow the FCC's lead.

Declaratory ruling requested

Local Siting Shot Clock — Another potentially important proceeding pending before the FCC is CTIA's request that the FCC adopt a shot clock for municipal consideration of wireless siting applications. On July 11, 2008, CTIA – The Wireless Association filed a petition requesting that the FCC issue a declaratory ruling clarifying provisions of the Communications Act regarding state and local review of wireless facility siting applications. In its petition, CTIA asked the Commission to take four actions relating to the time frames in which zoning authorities must act on siting requests, their power to restrict competitive entry by multiple providers in a given area and their ability to impose certain procedural requirements on wireless service providers.

The primary issue garnering attention from CTIA's petition is a request to establish a shot clock to clarify the time period in which a state or local zoning authority will be deemed to have failed to act on a wireless facility siting application. CTIA proposed a 45-day shot clock for wireless facility siting applications only involving collocation, and a 75-day shot clock on any other wireless siting facility applications. CTIA's

petition asks the FCC to implement procedural steps whereby if the local authority failed to act within the time set by the shot clock, the application would be deemed granted. In the alternative, CTIA asked for a presumption entitling the applicant to a court-ordered injunction granting the application unless the zoning authority can justify the delay.

Public statements

CTIA's petition has received significant attention. Indeed, shortly after CTIA's filing, Commissioner Jonathan Adelstein made several public statements that appear to support CTIA's call for a shot clock. It is expected that the FCC will take up the CTIA shot clock proposal this year. Although President Barack Obama will appoint a new FCC chairman, his administration has made broadband and technology deployment one of the centerpieces of its economic stimulus initiatives, so it would not be surprising for the new chairman to take on issues such as pole attachments and municipal overreaching to stimulate deployment.

DAS traction

Indeed, 2009 has already seen legislation introduced in Congress that includes funding for telecommunications and wireless infrastructure deployment. And CTIA and other groups are lobbying to have the legislation address municipal delays. Although it is impossible to predict whether Congress will pass pro-wireless deployment legislation, or the details if it does, the inclusion of specific infrastructure deployment provisions suggests that the legal and regulatory issues shared by DAS providers are gaining traction on a national level and may receive important attention. agl

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