Herrera Law & Associates

Alfred R. Herrera
816 Congress Ave., Suite 950
Austin, Texas 78701
512-474-1492 (ofc)
512-474-2507 (fax)
aherrera@herreralawpllc.com

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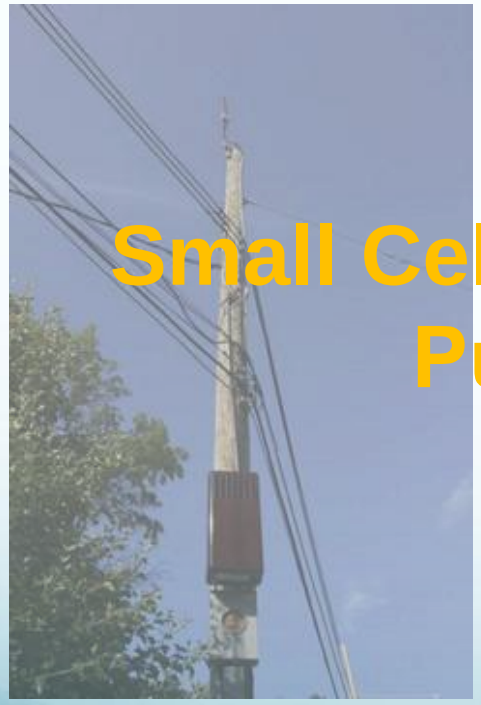

Small Cell Nodes: Here to Stay in the Public's Rights of Way

Herrera Law & Associates, PLLC, 816 Congress Ave., Suite 950, Austin, TX 78701 512-474-1492 aherrera@herreralawpllc.com

RECAP OF USE OF CITY'S RIGHTS TO MANAGE ITS RIGHTS OF WAY

Herrera Law & Associates, PLLC, 816 Congress Ave., Suite 950, Austin, TX 78701 512-474-1492 aherrera@herreralawpllc.com

Changes in City's Rights to Manage ROWs

- Historical Right and Duty to Manage ROW – Prior to 1999
- Advent of Competition in Local Exchange Market in 1995 Led to Major Change in 1999 – HB 1777 (Chapter 283 of Local Gov't Code)
- Disruption of Existing Model – Disagreement between Small-Cell Tech Companies and Cities
- Senate Bill 1004 (Chapter 284 of Local Gov't Code) – "Small-Cell Node Bill"

Long-Standing Right & Duty to Manage ROWs

- **Tex. Civ. Art. 1175 – Power to prohibit use of street by any character of public utility unless receive city's consent and pay compensation for use**

- **Tex. Constitution Art. III, Sec. 52 – A city may not grant . . . a thing of value in aid of, or to any individual, association or corporation whatsoever… .**

Fees Based on Percent of Revenue – Pre-Ch. 283

- **Fees were based on percentage of revenue**
  - **Electric Utilities – 3% - 5%**
  - **Gas Utilities – 3% - 5%**
  - **Cable TV – 5%**
  - **Telecommunications Providers – 3% – 5%**

Local Gov't Code Ch. 283 (HB 1777) (1999)

Major Change Compensation Framework for Use of a City's ROW by Certificated Telecommunications Providers (CTPs)

- Eliminated Franchise Agreements and Franchise-based Fees
- Allows CTPs to install equipment in ROW to provide telecommunications services
- Established compensation based on "Access Lines" in a city as proxy for "franchise fees"

Local Gov't Code Ch. 283

- **CTP has right to install equipment in ROW to provide telecommunications service**
- **City has right to compensation based on number of CTP's access lines**
- **City continues to have right to manage its ROW**

Loophole in Local Gov't Code Ch. 283

Small-Cell Node Companies:

- Obtain certificates from PUCT
- Contend that they may install "wireless" facilities in a city's ROW by virtue of their certificate from the PUCT and claim that their facilities provide "backhaul"
- Need no license or franchise from city and no need to compensate city for use of ROW

Loophole in Local Gov't Code Ch. 283

- **Small-cell node companies' facilities have no *access lines* associated with them therefore would be using the ROW for free in violation of the Texas Constitution**
- **Historically Chapter 283 is limited to landline telecom service**
- **Small-cell companies pushing limits of Ch. 283 to apply to wireless equipment in ROW**

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Ch. 283 – Four Cases at PUCT

- ***ExteNet v. City of Houston* – PUC Docket No. 45280**
- ***ExteNet v. City of Beaumont* – PUC Docket No. 46914**
- ***Crown Castle v. City of Dallas* – PUC Docket No. 45470**
- ***Crown Castle v. City of Austin* – PUC Docket No. 47045**

Ch. 283 – Four Cases at PUCT

- **Core of complaint is that cities are discriminating against small-cell node companies by:**
  - **Requiring license agreement from them to use ROW, while not requiring the same from landline CTPs**
  - **Requiring compensation for use of ROW outside of Chapter 283**

Ch. 283 – 4 Cases at PUCT

PUCT Addressed ExteNet case in 2 Phases:

Phase I

- What facilities small cell companies propose to install in the public right of way and what service(s) will they provide through use of these facilities?

- Does Chapter 283 apply where a CTP has installed, or proposes to install, in the ROW a wireless distributed antenna system, including fiber optic cables and an antenna?

Ch. 283 – 4 Cases at PUCT

Phase II:

- Appropriate muni ROW fees under Chapter 283?
- Is City violating Local Gov't Code by:
  - Requiring company to enter into license agreement?
  - Imposing discriminatory regulation on company?
  - Failing to promptly process permit applications?
  - Appropriate muni ROW fees under Chapter 283?
- If so, what is remedy?

Ch. 283 – 4 Cases at PUCT

Small-Cell Companies' Argument:

- **CTPs can install equipment in the City's ROW to provide telecom services.**
- **Small-cell companies provide "backhaul" lines and those lines don't count as Access Lines**
- **Compensation to city is based on Access Lines of which they have zero, means they owe $0.**

Ch. 283 – 4 Cases at PUCT

Cities' Argument:

- Ch. 283 is for landline services to end-use customers and excludes wireless facilities.
- Small-Cell companies provide no telecom services linked to Access Lines.
- Small-Cell companies' "backhaul" is not Interoffice Transport or Backhaul per PUCT description
- Not providing telecom service at all.

Four Complaints at PUCT

Cities' Position is that Chapter 283 Excludes:

- Antenna
- Electronics (Remote Radio Head, Base Band Unit, Base Station Equipment)
- Fiber Patch Panel
- Coax (connecting the Antenna to the RRH) & Fiber
- Power Supply

Small-Cell companies' Position is that Chapter 283 Includes these facilities

PUCT'S RULING IN *EXTENET V. HOUSTON CASE – Phase I*

PUCT concluded that ExteNet:

- **ExteNet is a CTP**
- **ExteNet's Facilities did not count as "Access Lines"**
- **ExteNet is not providing Backhaul service or lines**
- **ExteNet is providing telecom services**

PUCT'S RULING IN *EXTENET V. HOUSTON CASE*

PUCT didn't answer core issue:

Does Chapter 283 apply to a CTP that wants to install an antenna, including fiber-optic cable connected to that antenna, in a city's ROW?

Sen. Bill 1004 – Chapter 284

- **Prompts PUCT to initiate "Generic Proceeding" to address relationship between Local Gov't Code Ch. 283 and Ch. 284**
- **PUCT placed all Ch. 283 proceedings on hold to address the issue of effect of Ch. 284**

Chapter 284

- **Allows Network Provider to install wireless facilities – including antenna and associated fiber cable – in a city's ROW to connect "Network Nodes" to "the network" and to place facilities on city's poles**
- **"Network Provider" is a:**
  - **Wireless service provider - e.g., *AT&T Wireless*; or**
  - **Someone that builds or installs Network Nodes – e.g., *ExteNet and Crown Castle (§ 284.002(13)***

Chapter 284

- **A "Network Node" includes:**
  - **Equipment associated with provision of wireless communications**
  - **Radio Transceiver**
  - **Antenna**
  - **Battery back-up power supply**
  - **Coaxial, or Fiber-optic Cable, i.e., "Transport Facility" *(§ 284.002(12)***

Chapter 284

- **“Transport Facility” is:**
  - **“Each transmission path physically within a public right-of-way, extending with a physical line from a network node directly to the network, for the purpose of providing backhaul for network nodes.” *(§ 284.002(22))***

Chapter 284

- **Provides for compensation:**
  - **"*Network Node*": No more than $250 per node per year**
  - **"*Transport Facilities*" in the ROW: $28 per node per month**
  - **If Access-Line Fees under Ch. 283 are higher than Transport-Facilities Fees under Ch. 284, then no Transport-Facilities Fees are due**

Chapter 284

- **Provides for compensation:**
  - **City may charge application fee but only if charge similar fees to others for similar types of development**
  - **Fee may not exceed lesser of actual cost incurred by city, or**
    - **$500 per application for up to 5 network nodes**
    - **$250 for each additional node application**
    - **$1000 per application for each pole**

PUCT Generic Proceeding – Docket No. 47530

- **Issues in PUCT's Generic Proceeding:**
  - **Does PUCT have any authority *under Ch. 284*?**
  - **Does PUCT have authority *under Ch. 283* regarding compensation, access to ROW, or complaints related to installation of "network nodes," "transport facilities," and "node support poles" in city's ROW?**

PUCT Generic Proceeding – Docket No. 47530

- **Issues in Generic Proceeding (cont'd):**
  - **Does answer to preceding question change if the network provider is a "CTP" that is providing a telecom service within meaning of Ch. 283?**
  - **Does Ch. 283 grant PUCT authority to resolve complaints regarding access to city's ROW for installation of DAS facilities that enable wireless communications between user equipment and a communications network?**

PUCT Generic Proceeding – Docket No. 47530

PUCT's Order:

- **PUCT has no authority under Ch. 284**
- **Ch. 284 established a *comprehensive & pervasive* regulatory scheme to *exclusively address network providers' access to city's ROW* for network nodes, node-support poles, and transport facilities**

PUCT Generic Proceeding – Docket No. 47530

PUCT's Order:

- **PUCT has no authority under Ch. 283 to set compensation for, or address complaints regarding a CTPs' access to ROW if that CTP is also a network provider to install node facilities**
- **Declined to address whether PUCT has authority under Ch. 283 regarding installation of DAS facilities in city's ROW**

ExteNet Complaints

Docket 45280 – ExteNet v. Houston

- **Ultimately the PUCT dismissed ExteNet's complaint after enactment of Chapter 284**

Docket 46914 – ExteNet v. Beaumont

- **ExteNet moved unilaterally to have its complaint dismissed**

PUCT Actions Post-Ch. 284

PUCT initiates proceedings to revoke Crown Castle's and ExteNet's Certificates

- Failed to provide telecom services
- Reported zeros access lines
- Has no Interconnection Agreement to reach end-use customers

PUCT Actions Post-Ch. 284

Docket 48976 – Revocation of Crown Castle's Certificate

- Crown Castle agreed to "relinquish" its certificate

Docket 48977 – Revocation of ExteNet's Certificate

- ExteNet's case pending and seemingly is not going away quietly

Pending State Litigation Against Chapter 284

39 Cities Challenge Constitutionality of Ch. 284

- **Seek a declaration that SB 1004 is unconstitutional because:**
  - **Requires gifting of public funds or other things of value to aid the commercial interests of a private enterprise**
  - **Delegates legislative power to private entities without providing for adequate standards of exercise or oversight**

Pending State Litigation Against Chapter 284

39 Cities Challenge Constitutionality of Ch. 284

- **Seek injunction against implementation and enforcement of S.B 1004 because it violates Article II, Section 1; Article III, Section 1; Article III, Section 52: and Article XI, Section 3, of the Texas Constitution**

Pending State Litigation Against Chapter 284

39 Cities Challenge Constitutionality of Ch. 284

- **Requires Texas municipalities to forego arm's-length negotiation and instead grants private wireless providers the use of the public ROW for a fraction of the market rate**
- **Places legislative powers relating to zoning and the management of city ROW in the hands of private entities without providing guidelines for, or oversight over, the exercise of these essential municipal police powers**

Pending State Litigation Against Chapter 284

39 Cities Challenge Constitutionality of Ch. 284

- **Alleges that the S.B 1004 is part of a multi-state push by the wireless industry in conjunction with the American Legislative Exchange Council (ALEC) to achieve a more relaxed regulatory environment and to obtain a public subsidy**

- **Alleges that the fee schedule is a gift to private parties because it requires cities to permit use of their rights-of-way in return for only 10% to 16.7% of the fair market value of the property interest conveyed**

Pending State Litigation Against Chapter 284

Alleges that the S.B 1004 fails 3-prong test to meet constitutional muster:

- **First Prong: Predominant purpose must be to accomplish a public purpose rather than to benefit private parties**
  - **No legislative finding or evidence that carriers have been prevented from creating their wireless networks by the free-market economy**
  - **Nodes can generally be placed on private property such as the side of a building located immediately adjacent to the right-of-way**

Pending Litigation Against Chapter 284

Fails 3-prong test to meet constitutional muster:

- **Second Prong: Local government must retain control to ensure that the public purpose is accomplished**
  - **Nothing to mandate continued oversight to ensure that the public purpose is accomplished**
  - **Nothing to establish measurable benchmarks for the development of the system, nothing to ensure that underserved areas rather than simply the most profitable areas are served**

Pending Litigation Against Chapter 284

Fails 3-prong test to meet constitutional muster:

- **Third Prong: Ensure that the political subdivision receives a return benefit, *aka*, adequate consideration**
- **Cities are limited to roughly 10% to 16% of market value with no additional benefit to compensate for the lost revenue**
- **S.B. 1004 rates are a fraction of the rates the state is free to charge for the same services**

Pending Litigation Against Chapter 284

Fails to Meet Test for Valid Delegation of Power to Private Corporations:

- **Delegates to private entities, with insufficient guidelines, the legislative authority to manage the ROW by making land-use decisions historically left to cities**
  - **Network providers' actions are not subject to meaningful review by any governmental agency**
  - **Public most affected by the network providers' actions are not adequately represented in the decision-making process**

Pending State Litigation Against Chapter 284

Status of Lawsuit

- **Court denied request for Temporary Restraining Order (TRO)**

- **No hearing on the merits set yet**

Pending State Litigation Against Chapter 284

- **Nod to Mr. Don Knight – Dallas City Attorney's Office who has often noted that in 1800s the telegraph companies were making the same arguments we hear today from the wireless folks.**
  - **Order is in violation of over 100 years of cases holding that ROW fees are rent paid to occupy real property and not cost based.**
  - ***St. Louis v. Western Union* (1893)**

Pending State Litigation Against Chapter 284

- ***St. Louis v. Western Union* (1893)**
- **"The city has attempted to make the telegraph company pay for appropriating to its own and sole use a part of the streets and public places of the city It is seeking to collect rent."**
- **"[H]ere, first, it may be well to consider the nature of the use which is made by the defendant of the streets; and the general power of the public to exact compensation for the use of streets and roads.**

Pending State Litigation Against Chapter 284

- ***St. Louis v. Western Union* (1893)**
- **"No one would suppose that a franchise from the Federal government to a corporation, State or national, to construct interstate roads or lines of travel, transportation or communication, would authorize it to enter upon the private property of an individual, and appropriate it without compensation."**

Pending State Litigation Against Chapter 284

- ***St. Louis v. Western Union* (1893)**
- **"No matter how broad and comprehensive might be the terms in which the franchise was granted, it would be confessedly subordinate to the right of the individual not to be deprived of his property without just compensation. And the principle is the same when, under the grant of a franchise from the national government, a corporation assumes to enter upon property of a public nature belonging to a State."**

FCC "Wireless" Order

Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment **(FCC 18-133 – Sep. 26, 2018)**

- **Addresses mobile-service providers' deployment of 5G technology, intended to offer increased transmission speeds and capacity**
- **5G requires more "small cells" placed closer together**

FCC "Wireless" Order

- **FCC order "clarified" that Telecom Act of 1996 preempts state and local requirements related to deployment of 5G wireless infrastructure**
- **Set "Shot Clock" for localities to review applications to install 5G infrastructure**

FCC "Wireless" Order

- **FCC says its order intended to limit state and local "regulatory barriers"**
- **FCC pointed to some localities that imposed high fees and onerous zoning requirements, or failed to rule on applications for extended periods**

FCC "Wireless" Order

- **<u>Preemption</u>: FCC Interprets Telecom Act of 1996 §§ 253 and 332(c)(7) as imposing a "material inhibition" standard**
  - **Sections 253 & 332(c)(7) preempt local requirements that "*prohibit or have the effect of prohibiting* the ability of any entity" to provide "telecommunications" or "personal wireless services."**
  - **FCC said a regulation has "effect of prohibiting" provision of service if it "materially limits or inhibits the ability of a competitor or a potential competitor to compete in a fair and balanced legal and regulatory environment"**

FCC "Wireless" Order

- **Preemption:**
  - **FCC acknowledges that some courts read the preemption provisions as requiring evidence of a "coverage gap" or "an existing or complete inability to offer a telecommunications service,"**
  - **But FCC rejects these interpretations, stating that the "'effectively prohibit' language must have some meaning independent of the 'prohibit' language."**

FCC "Wireless" Order

- **Preemption:**
  - **Applies "material inhibition" standard to fees, stating that local fees violate Sections 253 and 332(c)(7) unless they:**
    - **Are a reasonable approximation of the state or local government's costs**
    - **Only factor in costs that are "objectively reasonable," an**
    - **Are no higher than fees charged to similarly situated competitors; but ….**

FCC "Wireless" Order

- **Preemption:**
  - **Identifies specific fee limits that are presumptively allowed under Sections 253 and 332(c)(7)**
    - **For non-recurring fees, such as up-front applications for small cell site installations, localities may charge up to $500, subject to certain exceptions.**
    - **For recurring fees, such as access fees, localities may charge up to $270 per year.**
    - **FCC explains that localities may charge fees above these amounts by showing that they nonetheless comply with the three-part test due to local cost variances.**

FCC "Wireless" Order

- **Preemption:**
  - **Order applies the "materially inhibits" standard to three types of non-fee requirements - Aesthetic Requirements, undergrounding requirements, and minimum spacing requirements:**
    - **Aesthetic Requirements**
    - **Undergrounding Requirements, and**
    - **Minimum Spacing Requirements.**

FCC "Wireless" Order

- **Preemption:**
  - **Three-part test for evaluating these restrictions; such requirements are not preempted if they are:**
    - **Reasonable,**
    - **No more burdensome than those applied to other types of infrastructure deployments, and**
    - **Objective and published in advance.**
    - **But … notes that all wireless facilities be deployed underground would amount to an "effective prohibition," given the "propagation characteristics of wireless signals"**

FCC "Wireless" Order

- **Shot Clocks:**
  - **Sets time frames for how quickly localities must review applications for installing small cell sites:**
    - **Must decide applications within either 60 or 90 days, depending on whether the installation will be on an existing structure or new structure**
    - **Declined to adopt a "deemed granted" remedy**
    - **FCC explained that applicants should have a "relatively low hurdle to clear in establishing a right to expedited judicial relief," since missing the shot clock would amount to a presumptive violation of Section 332(c)(7)**

FCC "Wireless" Order

- **What to do:**
  - **Regarding the FCC order if complying with Chapter 284 low risk of being in violation of FCC Small Cell order**
  - **Coincidentally, the FCC's $270 fee approximates Ch. 284's fees ($250 annual ROW fee and the $20 service-pole fee**
  - **Reference to cost-based fees questionable**

Litigation Against FCC "Wireless" Order

- **Litigation: October 24, 2018 a number of municipalities filed petitions for review in the Ninth Circuit**
  - **Order exceeds the FCC's statutory authority, is arbitrary and capricious and an abuse of discretion, and is otherwise contrary to law**
  - **Mobile service providers (e.g., AT&T, Verizon, and Sprint) also filed petitions for review in various federal appellate courts, alleging that the FCC's failure to adopt a "deemed granted" remedy was "arbitrary and capricious."**

Litigation Against FCC "Wireless" Order

- **Litigation:**
  - **Petitions were initially consolidated in the 10th Circuit, but now all have been transferred to the 9th Circuit.**
  - **Before transferring to the 9th Circuit, the 10th Circuit denied petitioners' motion to stay the Order's effect pending the outcome of the litigation**
  - **The Order has been effective since January 14, 2019.**

Litigation Against FCC "Wireless" Order

- **Litigation: Awaiting Briefing – Potential Issues**
  - **Validity of the FCC's "material inhibition" standard**
    - **In *Sprint Telephony PCS, L.P. v. County of San Diego*, the 9th Circuit overturned its prior decision in *City of Auburn v. Qwest Corp.*, which held that Section 253 preempts state and local regulations whenever they "create a substantial . . . barrier" to the provision of services.**
    - **Court reasoned that *City of Auburn* erred in reading of Section 253 to preempt laws that "may" have the "effect of prohibiting" service, rather than only preempting laws that actually have the "effect of prohibiting service."**

Litigation Against FCC "Wireless" Order

- **Litigation: Awaiting Briefing – Potential Issues**
  - **In *County of San Diego,* 9th Circuit adopted a narrower standard, holding that plaintiffs "must show actual or effective prohibition, rather than the mere possibility of prohibition."**
  - **Court also held that this conclusion "rests on the unambiguous text" of the statute.**

Litigation Against FCC "Wireless" Order

- **Litigation: Awaiting Briefing – Potential Issues**
  - **Key issue likely will be whether *County of San Diego* forecloses the FCC's interpretation, which implicates the *Chevron Doctrine* (deference to federal agency's interpretation of a statute)**
  - **But Supreme Court has held that *Chevron* deference does not apply when there is "judicial precedent holding that the statute unambiguously forecloses the agency's interpretation."**

Litigation Against FCC "Wireless" Order

- **Litigation: Awaiting Briefing – Potential Issues From Wireless Companies' View:**
  - **Whether the FCC's decision not to include a "deemed granted" remedy for shot clock violations was arbitrary and capricious under Section 706 of the Administrative Procedure Act ("APA")**
  - **An arbitrary and capricious review generally favors the FCC, as the 9th Circuit has described it as "highly deferential."**

FINAL LESSON

From Railroads to Telegraph Companies to Wireless Companies – and all sorts of industry in between – the public's property is, and likely always will be viewed, as cheap land to exploit.

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QUESTIONS

COMMENTS

CURSES