



COMMUNICATIONS ENVIRONMENTAL & LAND USE LAW REPORT

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Highlights

FCC Opens Inquiry to Study Impact of Towers on Migratory Birds

On August 20, 2003, the FCC adopted a Notice of Inquiry to gather comment and information on the impact that communications towers may have on migratory birds. The NOI is part of a continuing effort to protect environmental resources while accelerating communications infrastructure deployment. **Effects of Communications Towers on Migratory Birds**, Notice of Inquiry, WT Docket No. 03-187, FCC 03-205, 8/20/03. **Page 3**

LSGAC Rules Revised; Name Changed to Intergovernmental Advisory Committee

On August 11, 2003, the FCC adopted revisions to the rules governing its Local and State Government Advisory Committee which advises the Commission on a range of telecommunications issues affecting local, state, and tribal interests. **Modification of Subpart G, Section 0.701 of the Commission's Rules**, FCC 03-180, 8/11/03. **Page 5**

FCC Invalidates Pole Attachment Agreement

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TREA Name Changed to CELULR

Beginning with this September 2003 issue, the *Telecom Real Estate Adviser* newsletter and reference web site will be called *Communications Environmental & Land Use Law Report*. Internal references to the publication will use its acronym, CELULR. The name change, suggested by Advisory Board member John Clark of the Washington, DC office of Perkins Coie, defines the publication's scope and substance more clearly and accurately. Pike & Fischer's commitment to serving the telecom facilities practice remains the same.

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advisory board

Nels Ackerson

Sommer Barnard Ackerson, P.C.
Washington, D.C.

Emeline C. Acton

County Attorney
Hillsborough County, FL

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T. Scott Thompson

Cole Raywid & Braverman LLP
Washington, D.C.

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ENVIRONMENTAL &
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Managing Editor

Ted Hammerman
thammerman@pf.com

Database Managers

Michael M. Eisenstadt
Michelle Powers

Copy Editors

Mary Ann Nyamweya
Marie G. Unger

Group Publisher

Meg Hargreaves
mhargreaves@pf.com

Executive Editor

Robert E. Emeritz
remeritz@pf.com

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Environmental Impact

FCC Opens Inquiry to Study Impact of Towers on Migratory Birds

On August 20, 2003, the FCC adopted a Notice of Inquiry (NOI) to gather comment and information on the impact that communications towers may have on migratory birds. As part of the Commission's environmental and historic preservation action plan, the NOI is part of a continuing effort to protect environmental resources while accelerating communications infrastructure deployment. Depending on the record developed in this proceeding, the Commission will consider whether to support further action, including possible amendments of its environmental rules. *Effects of Communications Towers on Migratory Birds*, Notice of Inquiry, WT Docket No. 03-187, FCC 03-205, 8/20/03.

Background

To date, the FCC stated that there have been no studies sufficient to support a reliable estimate of the number of migratory birds that may have died as a result of collisions with communications towers located over wide geographic areas. While some literature suggests that tower height, lighting systems, type of antenna support structure, and location, may increase or decrease the hazards that towers pose to migratory birds, there does not appear to be systematic research on an adequate scale regarding exactly how and to what extent, if at all, these factors contribute to any risk to migratory birds.

Specifics

The FCC's inquiry is designed to gather comment and information on scientific research and other related data relevant to migratory bird collisions with communications towers. The NOI seeks the following:

- Evidence concerning the number of migratory bird collisions with communications towers and the role that specific factors associated with communications towers may have in increasing or decreasing the incidence of such collisions. Such factors may include lighting, height, and particular type of antenna

structure, meteorological conditions, location, physiographic features of sites, and known migratory bird migration corridors.

- Information on whether any current or proposed research may provide useful data regarding the subjects of this inquiry, and what other actions may be necessary to spur additional, necessary research.
- Comment on whether certain measures might minimize any adverse impacts of communications tower siting and construction on migratory birds, whether any such measures are supported by adequate and reliable empirical and/or scientific evidence, and how the use of such measures may affect the ability of licensees and other parties to provide efficient and reliable communications services.

The FCC stated that certain migratory bird species may hold particular cultural or religious significance to Indian Tribes, and that the FCC has made a commitment to consult with federally recognized Indian tribes prior to implementing any regulatory action or policy that will significantly or uniquely affect Tribal governments, their land and resources. Consistent with that commitment, the NOI requested comments from the Tribes and other parties.

Currently, 836 species are on the list of migratory birds maintained by the United States Fish and Wildlife Service (FWS). Birds that have been documented as vulnerable to collisions with communications towers include approximately 350 species of neotropical migratory songbirds, which generally migrate at night and may be most susceptible to collisions with lit towers on nights with low visibility due to fog, rain, or low cloud ceilings.

FCC Environmental Rules

The Commission has implemented Subpart I of the National Environmental Policy Act (NEPA) in Part 1, of its rules. Under these rules, any Commission action deemed to have a significant effect upon the quality of the human environment requires the preparation of an Environmental Impact Statement (EIS). Any action deemed potentially to have a significant environmental effect under categories specified in Section 1.1307(a)(1)-(8) and (b) of the rules requires the preparation of an Environmental Assessment (EA).

In addition, the Commission will require the preparation of an EA if it is determined that a particular action, which is otherwise categorically excluded under the rules, may have a significant environmental impact.

Section 1.1307(a)(3) provides that an EA is required for proposed facilities that may affect listed threatened or endangered species or designated critical habitats, or are likely to jeopardize the continued existence of any proposed endangered or threatened species or likely to result in the destruction or adverse modification of proposed critical habitats, as determined by the Secretary of the Interior pursuant to the ESA.

With respect to other birds, routine evaluation is not required, but an EA shall be required under Section 1.1307(c) or (d) if the relevant Bureau finds, in

response to a petition or on its own motion, that the proposed construction may have a significant environmental impact other than impacts specified under Sections 1.1307(a)(1)-(8) and (b) of the FCC's rules.

A Communication Tower Working Group (CTWG), with member representing the scientific, federal and state agency, environmental, consulting, and industry communities, was formed under the auspices of FWS to help develop research on the effect that communications facilities may have on migratory birds.

According to the FCC, at least one source suggests that an estimated four to five million birds may be killed each year due to collisions with communications towers. Another suggests that the number may be higher.

Intergovernmental

FCC Revises Rules Governing LSGAC; Changes Name to Intergovernmental Advisory Committee

On August 11, 2003, the FCC adopted revisions to the rules governing its Local and State Government Advisory Committee (Committee or LSGAC), which advises the Commission on a range of telecommunications issues affecting local, state, and tribal interests. The changes are intended to strengthen and improve the Committee's overall structure and operations. *Modification of Subpart G, Section 0.701 of the Commission's Rules*, Order, FCC 03-180, 8/11/03.

Background

The LSGAC was created in 1997 to provide guidance to the Commission on issues of importance to state, local and tribal governments, and to the Commission. Because it is composed exclusively of state, local and tribal officials, it is not subject to the procedures set forth in the Federal Advisory Committee Act (FACA), and presently, has no charter or expiration date. The Committee is composed of 15 elected and appointed officials of municipal, county, state, and tribal governments.

The Committee has provided ongoing advice and information to the Commission on a broad range of telecommunications issues of interest to state, local and tribal governments, including cable and local franchising, public rights-of-way, facilities siting, universal service, barriers to competitive entry, and public safety communications, for which the FCC explicitly or inherently shares responsibility or administration with local, county, state, or tribal governments.

Structural Modifications

Term of Operations; Service.

The new rules state that the Committee shall operate for two years following its first scheduled

meeting. The two-year limit on the Committee's term of operations also limits the duration of individual members' service.

Membership, Diversity, and Balance of State, Local and Tribal Representation.

The FCC found that 15 members was a workable number for balancing diversity with enough participants to promote effective discussion. The advisory committee shall be composed of seven local, five state, and three tribal officials, some of whom will have specific expertise in homeland security matters. In a Public Notice released August 27, 2003 (DA 03-2749), the FCC requested nominations for membership. The FCC stated that it was particularly interested in receiving nominations of individuals with the following credentials:

- Representatives from geographic areas that may not have been represented in the past, such as some Southern and Southwestern states.
- Nominees that represent rural areas.
- Nominees with specific expertise in homeland security matters, including expertise in, or responsibility for, public safety or other homeland security-type operations.

Nominees must be officials within the meaning of section 1534(b), the intergovernmental exemption from the FACA accorded intergovernmental communications between Federal officials and officials of state, local and tribal governments "acting in their official capacities."

Frequency and Location of Meetings.

The meetings will continue to be held at the Commission's headquarters in Washington, D.C. at least four times a year.

Land Use & Zoning

Wireless Bureau Seeks Comment on County's Application for Review

On August 26, 2003, the FCC's Wireless Telecommunications Bureau released a Public Notice seeking comments addressing an Application for Review filed August 6 by Anne Arundel County, Maryland. The Application requested review by the full Commission of a decision by the Wireless Telecommunications Bureau, Memorandum Opinion and Order DA 03-2196, released July 7, 2003 [*see story in the August issue, page 10*], granting Cingular Wireless LLC's Petition for Declaratory Ruling and finding that provisions of the County's zoning ordinance are preempted under federal law.

The County maintained that reversal of the Bureau's decision was required because the Order conflicts with 47 U.S.C. §332(c)(7)(B), and applies a precedent or policy that should be overturned or revised.

The County further stated that, pending implementation of the Commission's 800 MHz proceeding, the Bureau's decision leaves public safety systems of local governments such as the County's vulnerable to, and powerless to deal with, potentially deadly radio frequency interference from wireless systems of commercial mobile radio service providers operating in the 800 MHz band.

Interested parties may file comments on the County's Application for Review on or before September 26, 2003. Reply comments are due on or before October 14, 2003. *Wireless Telecommunications Bureau Seeks Comment on Application for Review of the Wireless Telecommunications Bureau's Order Granting a Petition for Declaratory Ruling That Provisions of the Anne Arundel County, Maryland Zoning Ordinance Are Preempted As Impermissible Regulation of Radio Frequency Interference*, Public Notice, WT Docket No. 02-100, DA 03-2734, 8/26/03.

City's Permit Denial Does Not Violate Telecom Act

On August 19, 2003, the U.S. Court of Appeals for the Tenth Circuit held that a City's denial of a special permit to construct a cellular transmission tower

was supported by substantial evidence, reversing the district court's holding that city's denial violated the Telecommunications Act. *United States Cellular Telephone of Greater Tulsa, L.L.C., v. City of Broken Arrow, Oklahoma*, Nos. 02-5128, 02-5172 (10th Cir, 8/19/03).

Background

In February 2001, U.S. Cellular filed two applications for specific use permits with the Broken Arrow Planning Commission, seeking to construct a 120-foot monopole (SP-149), and a 240-foot, self-supporting cellular tower (SP-150).

The City's Planning Director prepared Agenda Packets setting forth the background information concerning SP-149 and SP-150. In his reports, he observed that SP-149 did not conform to the Zoning Ordinance's setback requirements; it was a non-conforming use for the site, and an alternative suitable site existed for U.S. Cellular's proposed 120-foot monopole tower, located one-half mile from SP-149's proposed site. Based on these findings, the Planning Commission recommended that the Planning Commission deny SP-149.

In his Agenda Packet for SP-150, he recommended denying SP-150 for the following reasons: (1) SP-150's proposed site was zoned AA-1, a transitional-zoning category, and under applicable law no new use could commence on land prior to the applicant obtaining appropriate conventional zoning and the completion of platting and site-plan review; (2) the City Council had approved SP-150's proposed site for A-1 zoning, towers were normally discouraged in A-1 zoning districts, and U.S. Cellular had not presented "clear and convincing evidence" supporting its application, as required under the Zoning Ordinance; (3) at least two alternative suitable sites existed for U.S. Cellular's proposed 240-foot tower, one located one-half mile south of the property and another located one and one-half miles southwest; and (4) SP-150 did not include a landscape plan, as required under the Zoning Ordinance. The report also noted that a subdivision bordered SP-150's proposed site to the north and west and stated that "[a] 240-foot high tower adjacent to single-family homes is not a desirable land use." All members of the Planning Commission received a copy of the Agenda Packets prior to the hearings. The Planning Commission recommended that

the City Council deny both applications. U.S. Cellular appealed.

Preservation of Local Zoning Authority

The court noted that except for the narrow limitations set forth in 47 U.S.C. §332(c)(7)(B), the Telecommunications Act expressly preserved local zoning authority over the placement, construction and modification of personal wireless service facilities. Section 332(c)(7)(B) places six restrictions on the authority of state and local governments to regulate the placement, construction, and modification of personal wireless service facilities, the court said. Three of these restrictions are procedural. First, “[a]ny decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing.” 47 U.S.C. §332(c)(7)(B)(iii). Second, such denials must be “supported by substantial evidence contained in a written record.” *Id.* Third, local authorities must “act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.” *Id.* §332(c)(7)(B)(ii).

The court identified the remaining three requirements limiting state and local authority over the placement, construction, and modification of personal wireless service facilities as substantive. First, local authorities “shall not unreasonably discriminate among providers of functionally equivalent services.” *Id.* §332(c)(7)(B)(i)(I). Second, local governments “shall not prohibit or have the effect of prohibiting the provision of personal wireless services.” *Id.* §332(c)(7)(B)(i)(II).

Finally, Congress provided that “[n]o State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission’s regulations concerning such emissions.” *Id.* §332(c)(7)(B)(iv).

The court held that this present inquiry pertained only to the second of the procedural limitations on state and local authority: whether the City Council’s denials of SP-149 and SP-150 were supported by substantial evidence. The court concluded that they were.

The Substantial Evidence Standard

U.S. Cellular raised two points contending that the City Council’s denials could not withstand substantial-

evidence review. First, U.S. Cellular argued that the City Council failed to apply the standards and criteria set forth in the Zoning Ordinance. Second, U.S. Cellular contended that the reasons set forth in the City Council’s letter were not supported by substantial evidence. The court held that both the Planning Director and the Planning Commission considered SP-149 and SP-150 under the relevant factors contained in the ordinance. Second, the court considered whether substantial evidence supported the reasons set forth in the City Council’s denial. The City Council based its denial, in part, on the fact that U.S. Cellular’s proposed sites were zoned in transitional-zoning categories, and applicable law provided that “[n]o new use may be commenced on land, which is assigned transitional zoning ... without obtaining appropriate conventional zoning.” The court concluded that substantial evidence contained in the written record supported the City Council’s denials.

Landlord Loses Suit to Broadcast TV Tenant

On August 15, 2003, the Texas Court of Appeals, El Paso, affirmed a partial summary judgment order and a directed verdict on insurance overcharge damages related to several landlord-tenant disputes concerning the rights and obligations of the parties under a twenty-year building lease to a television station. *Samuel v. KTVU Partnership*, No. 08-02-00010-CV (Tex. App.-El Paso, 8/15/03).

Background

On January 24, 1994, Appellant Robert C. Samuel and Station Manager Larry Pepin, on behalf of KCIK-TV/FOX-14, entered into a 20-year lease of a building to operate a television station.

Under the terms of the lease, Mr. Samuel, the landlord, was required to maintain the roof, foundations, and structural portions of the building’s walls in good order, repair, and condition except for damage due to the acts or omissions by the tenant, KCIK-TV/FOX-14, its employees or invitees. The lease provided that the tenant, after giving a request to the landlord, could make the repairs required of the landlord and deduct the costs from rent due or make emergency repairs as needed. Under Section 28.15(O), entitled “Additional Provisions,” Mr. Samuel at his sole cost and expense was responsible for providing space in front of the building for the placement of the station’s Simulcast Receiver, and for providing space for two

microwave dishes, each six feet across on the southern area of the roof. Mr. Samuel was also responsible for installing a new roof prior to April 1, 1994, at his sole cost and expense.

On September 10, 1997, KTVU filed suit against Mr. Samuel, alleging breach of the lease for failure to properly install a new roof or care for the existing roof. KTVU also sought a declaratory judgment that under the lease it could install additional satellite dishes beyond the three mentioned in the “Additional Provisions” of the lease. It also sought an accounting of insurance payments and return of any insurance overcharges.

Samuel filed a counterclaim, alleging that KTVU breached the lease by installing antennas and satellite/microwave dishes on the roof in numbers not permitted under the lease. In their counterclaim, Samuel sought a declaratory judgment that the lease restricts the tenant to two microwave dishes on the roof and that Samuel was entitled to indemnification pursuant to lease provisions. Samuel also sought permanent injunctive relief for placement of any antennas, aeri-als, or dishes on the roof except for the two micro-wave dishes specified in the lease.

During trial in the lower court, the jury found that Samuel had failed to comply with the lease provisions concerning the roof and insurance charges. The jury also found that when Samuel and KCIK signed the building lease they both did not intend that the lessee could install only two microwave dishes on the southern area of the roof and one simulcast dish in front of the building. Further, the jury found that KFOX leased the roof when it leased the building. The jury assessed damages at \$50,000 for Samuel’s failure to comply with roof-related provisions and measured attorney fees in the amount of \$45,000.

After the jury returned its verdict, the trial court rendered a directed verdict on the amount of insurance overcharges and rendered a final judgment in favor of KTVU. Appellants filed motions for judgment notwithstanding the verdict and for a new trial, which the trial court denied. Samuel appealed.

Appellate Decision

The court held that the issue of whether the building lease included use of the roof was ambiguous, and that the trial court did not abuse its discretion in submitting the issue to the jury. The court further held that the parties did not intend that the lessee could install only two microwave dishes on the southern area of the roof and one simulcast dish in the front of the building. The court upheld the jury’s determination

that the lease included the roof.

The court said that the appellants failed to establish as a matter of law that appellee’s placement of additional dishes constituted a violation of the lease, nor did they show the existence of a wrongful act; the existence of imminent harm; the existence of irreparable injury; and the absence of an adequate remedy at law.

As a direct and proximate result of the repeated roof leaks, KFOX suffered damage to its interior ceilings, carpet, and an impairment of the value of its tenancy. Additionally, KFOX was concerned with its ability to protect the interior of the Building including its equipment and furnishings from the roof leaks. The failure by Samuel to properly replace or maintain the roof constituted a breach of the Lease and KFOX was entitled to monetary damages and attorneys’ fees in excess of the minimum jurisdictional limits of the Court as a result of that breach, the court said.

Tenn. Construction Permit Held Invalid Without Certificate of Appropriateness

On July 30, 2003, the Tennessee Court of Appeals affirmed a trial court’s judgment to dismiss a tower company’s complaint and deny damages and interest for the “taking” of property in which the tower company never held an interest. *Far Tower Sites, LLC v. Knox County*, No. 1-782-98, Tenn App, 7/30/03.

Dial Call, Inc. entered into a sublease with Far Tower Sites, LLC (Far Tower) for Dial Call to sublet to Far Tower a 100 foot by 100 foot hilltop parcel in Knox County to construct a cell tower. After the sublease was executed, Far Tower secured a new building permit in its own name and was assured by the Knox County employee responsible for the issuance of such permits that Far Tower was “good to go, go build it.” After expending funds and doing on-site and off-site work in connection with the proposed tower, Far Tower ceased its construction efforts when Knox County issued a stop work order. The order was predicated upon Far Tower’s failure to obtain a Certificate of Appropriateness (COA)—a legal prerequisite to the issuance of a building permit—from the Tennessee Technology Corridor Development Authority (the Authority) under a private act of the General Assembly named the Tennessee Technology Corridor Development Authority Act (the Tech Act). Far Tower’s subsequent efforts to obtain a COA were ultimately un-

successful and, as a consequence, it abandoned the project.

Proceeding under a number of theories, Far Tower sued Knox County and the Authority for damages based upon an alleged taking of its property.

Misplaced Reliance

All parties agreed that the County had made a mistake in issuing a permit for the Tower Site. However, when the County issued the stop work order because of complaints from homeowners in the vicinity, Far Tower appealed the County's decision to the Board of Zoning Appeals.

The trial court held that the BZA did not have jurisdiction, and it could not waive or set aside any requirements of the Tech Act. The trial court further held that no building permit for construction on property located in the Corridor could be issued prior to the issuance of a COA.

Far Tower then applied for a COA, which was considered at the next meeting of the Authority's Board of Commissioners in November 1997. At that meeting, the Board of Commissioners approved the COA. A neighbor appealed the grant.

During the course of the hearing, the neighbor's lawyer argued that the permits were invalid, because they were issued prior to the issuance of a COA. Moreover, he claimed, the original permit had not been

validly renewed or transferred, and a new permit should not be issued because of new setback requirements imposed by a change in the zoning ordinance subsequent to the date the original permit was first issued.

The court held the original permit had expired; even if it had been validly issued and operative, moreover, it would have been rendered invalid by the transfer or by the purported transfer to Far Tower. The court further instructed that "a member of the public is not entitled to rely upon a Knox County official's advice without doing anything else." Thereupon, the court dismissed Far Tower's complaint.

Had a representative of Far Tower consulted the county's source documents, Far Tower would have learned that a COA was a prerequisite to the issuance of a permit to build a cellular tower, the court said. The original permit was not validly issued, because the county official who issued and renewed the original permit exceeded his authority in doing so. In addition, he was without legal authority to transfer the permit to Far Tower or issue the new permit in Far Tower's name.

The court held that Far Tower's failure to obtain a COA before seeking the permit rendered the issued permit invalid and inoperative; and that Far Tower acquired no vested property right in and under the invalidly-issued permit. The judgment of the trial court was affirmed.

Pole Attachments

FCC Invalidates Pole Attachment Agreement

By Cole, Raywid & Braverman, LLP

On August 8, 2003, the FCC issued an order to Georgia cable operators granting a pole attachment “terms and conditions” complaint against Georgia Power. The order challenged provisions of a pole attachment agreement that Georgia Power compelled cable operators to execute. The FCC reinstated the prior pole attachment agreement that Georgia Power had attempted to terminate three years earlier. *Cable Television Association of Georgia, et al. v. Georgia Power Company*, DA 03-2613, 8/8/03.

Background

In mid-2000, Georgia Power Company notified Georgia cable operators that it planned to terminate their long-standing pole attachment agreements. The utility informed cable operators that if they wished to remain on Georgia Power poles, they would have to execute a substantially revised pole attachment agreement (New Agreement).

After several months of failed negotiations, Georgia Power refused to extend the term of the existing Agreement, notified cable operators that they would be “deemed” to have accepted the terms and conditions of the New Agreement, and prohibited further attachments and upgrades until cable operators signed the New Agreement.

On January 17, 2001, the Cable Television Association of Georgia (CTAG), on behalf of its members, filed a complaint at the FCC. The Enforcement Bureau ruled on the complaint August 8.

Open-Ended Administrative Fees

The Bureau denied Georgia Power’s attempt to recover “open-ended” administrative expenses associated with enforcing the New Agreement, including attorneys’ fees, finding that separate recovery of such fees outside amounts recovered in the annual pole rental rate would permit “double recovery.” The Bureau also rejected the utility’s up-front, pre-paid \$150 per pole make-ready fee that Georgia Power required before it would permit access to its poles. The Bureau emphasized that Georgia Power may only seek reimbursement for actual costs incurred in permitting

attachments to its poles and ordered Georgia Power to refund those fees already paid by cable operators.

In addition, the Bureau also struck Georgia Power’s multifaceted unauthorized attachment fee that included elements for: back rent from the date of the last inspection; ten percent of back rent amounts as an administrative fee; interest at eight percent above the prime rate; and all out-of-pocket expenses, including legal fees.

While the Bureau noted that unauthorized attachment penalties are not unreasonable *per se*, it expressed concern that the unauthorized attachment provisions could result in cable operators “grossly overcompensat[ing]” the utility.

Prior Written Consent for Overlashing

The Bureau also invalidated as “unjust and unreasonable on its face” Georgia Power’s requirement that cable operators obtain prior written consent from Georgia Power before overlashing to their present attachments. The Bureau noted the Commission’s prior pronouncements that no prior consent was required for overlashing and observed that Georgia Power’s prior agreement allowed overlashing on one day’s (or no) notice unless the overlashing created a bundle in excess of six inches.

No Separate Agreement or Compensation for Rights-of-Way and Easements

The Bureau dismissed Georgia Power’s requirement that cable operators negotiate separate agreements and compensation to obtain access to Georgia Power’s rights-of-way and private easements, explaining that the Pole Attachment Act requires utilities to provide cable television systems with access to any rights-of-way the utilities own or control.

Rejection of Georgia Power’s ‘Safety Defense’

The Bureau rejected Georgia Power’s principal defense that the terms and conditions of the new agreement were justified because of numerous safety and engineering violations allegedly committed by cable operators. The Bureau observed that Georgia Power failed to explain how safety concerns provided the foundation for the new clauses, and that the purported “evidence” of cable operators’ supposed safety violations failed to establish that cable operators were re-

sponsible for widespread or egregious safety violations.

Other Provisions

- *Inspection Rights:* The Bureau rejected as overbroad Georgia Power's provision allowing for pole inspections upon *any* violation (not just safety violations) of the Agreement. The Bureau also held that the costs of any routine inspections must be allocated among all attachers and the utility could not force cable operators to pay the entire cost of routine inspections.
- *Security Interests:* The Bureau rebuffed Georgia Power's indeterminate bond, access to financial records, and security interest requirements as unnecessary and promoting "arbitrary and anticompetitive conduct" that is at odds with the Pole Attachment Act.
- *Indemnities/Limits of Liability:* The Bureau held that Georgia Power's "safety defense" did not support demands for indemnification, without reciprocity for the pole licensee. The Bureau also concluded that Georgia Power failed to provide any support for a six-month limit on claims against Georgia Power or cable operators' right to defend any claims against them, which Georgia Power had sought to control.
- *Force Majeure:* The Bureau rejected as unreasonable Georgia Power's refusal to provide a reciprocal *force majeure* clause.
- *Rate Adjustments:* The Bureau found that Georgia Power's provision permitting rate adjustments at the end of the year to be applied to the current year's pole rentals violated the Commission's 60 days' advance-notice rule.
- *Termination:* The Bureau found that Georgia Power had not justified its provision allowing it to terminate agreements upon 90 days' notice, noting that such time was insufficient for the parties to re-negotiate the agreement.
- *Pole Replacements, Drop Poles and Make-ready Costs:* The Bureau determined that the parties had not sufficiently attempted to negotiate matters concerning pole replacements, treatment of drop poles and costs of subsequent make-ready caused by Georgia

Power, and ordered good-faith negotiation of these provisions.

Provisions Upheld

The Bureau sustained two aspects of the new agreement and called for clarification of another:

- First, the Bureau upheld Georgia Power's Assignment clause, noting that the utility has a right to know the identity of attachers on its poles and the provision prohibits Georgia Power from unreasonably withholding or denying its consent.
- Second, the Bureau concluded that Georgia Power's provision for annual inspections was not necessarily unreasonable. But, as explained above, allowing for inspections upon the occurrence of *any* violation of the agreement, not just a safety violation, was unreasonable and the costs of the routine inspections must be booked to the maintenance costs account and allocated among all attachers, not just paid for by the cable operator.
- Third, the Bureau ordered Georgia Power to clarify that the New Agreement's requirement that cable operators' workers sign a personal injury release does not apply in cases where Georgia Power is grossly negligent or engages in willful misconduct.

[The authors request that questions about the decision be directed to Cole, Raywid & Braverman LLP, 1919 Pennsylvania Avenue, N.W., Suite 200, Washington, D.C. 20006, 202-659-9750, www.crblaw.com.]

FCC Affirms Order Striking Down Utility's Efforts to Squelch Competitive Services

On July 28, 2003, the FCC unanimously upheld a 1997 Cable Bureau decision resolving a pole attachment complaint filed by Marcus Cable against the Texas Utilities Electric Company. **Marcus Cable Associates, L.P. v. Texas Utilities Electric Co.**, FCC 03-173, 7/28/03.

The dispute arose out of a November 1, 1995 pole attachment agreement between Marcus and TU Electric. Marcus filed a complaint with the Commission in 1996 challenging the reasonableness of a section of

the agreement requiring it to indicate whether it transmitted “data other than a TV signal” through its facilities attached to TU Electric’s poles (and if so, requiring Marcus to obtain a release from each of its non-video customers indemnifying both Marcus and TU Electric in connection with claims arising out of Marcus’s or TU Electric’s “negligence, strict liability or other fault of any nature”). Marcus alleged that TU Electric included this section of the agreement to gain competitively sensitive information, to eliminate Marcus’s efforts to deploy fiber optic communications facilities and market non-video services, and to destroy or interfere with Marcus’s non-video customer relationships.

Jurisdiction

The Commission first determined that it had jurisdiction over the dispute. Section 224 of the Act vests the Commission with authority to regulate the rates, terms, and conditions for attachments by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

The Commission noted that its authority does not supplant that of the local jurisdiction when the issue between the parties is limited to a breach of contract claim that does not include an allegation of unjust or unreasonable contractual rates, terms, or conditions. But the Commission is authorized by the statute to adopt procedures necessary to resolve complaints concerning such rates, terms, and conditions, and where onerous terms or conditions are found to exist

on the basis of the evidence, the term[s] or condition[s] may be invalidated.

The Commission rejected Texas Utilities’ claim that the real dispute before the Bureau was whether the attaching cable system violated its contract by subleasing its pole attachment rights by allowing a party to overlash its facilities to complainant’s facilities, and that that issue was beyond the purview of the FCC. The complaint expressly challenged the reasonableness of the terms and conditions of complainant’s attachments to respondent’s poles, the Commission reasoned, and the latter’s focus on the issue of breach was misplaced.

The Merits

The Commission generally denied review of the Bureau’s decision. The Bureau correctly determined that Marcus did not violate the terms of its agreement with TU, the Commission found, and correctly determined that TU acted unreasonably in imposing informational requirements concerning overlash.

Nor did the Bureau improperly shift the burden of proof or misapply the burden of production in the proceeding, the Commission added.

However, the Commission did find that the Bureau’s determination of unreasonableness was improperly extended to agreements between TU and other attachers. Only the agreement between TU and Marcus was before the Bureau, the Commission observed. Pole attachment complaint proceedings are limited in scope to the particular parties and agreements before the Commission.

Rights of Way

Class Certification Granted in Commercial Fiber Optic Action

On August 13, 2003, the U.S. District Court for the Eastern District of Virginia granted a motion seeking class certification filed by class representatives of land burdened by easements in which defendants, Virginia Electric Power Company and Dominion Telecom, Inc., were allegedly unlawfully operating a commercial fiber optic network beyond the easements' scopes. *Wiley Vick Fisher, Jr., et al., v. Virginia Electric and Power Company*, No. Civ. A. 3:02CV431, ED Va, 8/13/03.

Plaintiffs, Wiley Vick Fisher Jr., John Fisher, Harmon Tomlinson, and Linda Tomlinson, filed an action against the Defendants, Virginia Electric and Power Company (VEPCO) and its affiliated company, Dominion Telecom, Inc. (DTel) alleging that the defendants were unlawfully operating a commercial fiber optic network on land that belonged to the plaintiffs, and others similarly situated, but as to which the defendants own certain easements. The plaintiffs sought class certification in accordance with Fed.R.Civ.P. 23.

Background

VEPCO constructed its electricity transmission network by erecting towers or poles to support high voltage transmission wires. The network is located on numerous rights-of-way that VEPCO acquired, by agreement or condemnation, from a variety of landowners.

In the 1980s, VEPCO began plans to replace its existing communications facilities with fiber optic cable, also known as Optical Ground Wire (OPGW).

The plaintiffs purported to represent a class consisting of all owners of land in North Carolina and Virginia, other than public streets or highways, that underlie VEPCO's electric transmission lines and on or in which fiber optic cable had been installed.

The easements that burdened their lands were all expressly limited in scope to certain explicit and exclusive purposes related to transmitting electric power; VEPCO could not lease, license, convey, or otherwise transfer or create any rights in the underlying land for any other purposes.

There was no dispute that the defendants had installed OPGW over the land of the potential class

members or that the defendants were using fiber optic cable for a commercial purpose unrelated to the transmission of electricity. It was also undisputed that, in deciding to install the OPGW, VEPCO and DTel acted, or refused to act, on grounds generally applicable to the putative class.

According to the plaintiffs, the use of the easements for a commercial purpose unrelated to the transmission of electricity exceeded the scope of VEPCO's property rights in the class land and, therefore, constituted a continuing trespass. The plaintiffs contended that the defendants had been and would be unjustly enriched by profits resulting from the installation and operation of the fiber optic network.

The plaintiffs sought declaratory and injunctive relief; an accounting for, and disgorgement of, all sums the defendants received as a result of the alleged trespass (or, alternatively, the reasonable value of the improper land use); and punitive damages.

Class Certification

Under Rule 23(a), every class action must meet four threshold requirements: (1) numerosity, which was undisputed in this action, and which requires that the class be so large that joinder of all class members is impracticable; (2) commonality—there must exist questions of law or fact that are common to the class; (3) typicality—the named plaintiffs' claims must be typical of the class; and (4) adequacy of representation—the class representatives must be capable of fairly and adequately protecting the interests of the absent class members.

The court found that liability aspects of this action met the requirements of Rule 23(a), were maintainable under either Rule 23(b)(2) or 23(b)(3), and could be certified on the condition that resolution of the easement scope did not require extensive individual adjudication.

Telecom Service Maintenance Enjoined in Sewer/Water Easement

On July 21, 2003, the South Carolina Court of Appeals held that an access easement lease used by telecommunications companies for installing and

maintaining telecommunications equipment was limited to servicing water and sewer lines. **Lighthouse Tennis Club Village Horizontal Property Regime LXVI v. South Island Public Service District**, No. 3664, SC App, 7/21/03.

Background

Lighthouse Tennis Club Horizontal Property Regime LXVI brought a declaratory judgment action to enjoin South Island Public Service District from leasing an access easement granted in connection with the operation of a water and sewer system to telecommunications companies for the unrelated activity of installing and maintaining telecommunications equipment. Lighthouse asserted South Island improperly leased the use of its access easement across Lighthouse’s property to five telecommunications companies, allowing them to travel over Lighthouse’s property to install and maintain telecommunications antennas and equipment on the adjoining property owned by South Island.

The circuit court ruled the easement did not permit South Island or its assignees to use the easement across Lighthouse’s property for any purpose except “to operate and maintain [Lighthouse’s] water and sewer systems.” South Island appealed.

The Easement

During the construction of a condominium complex the developer granted South Island’s predecessor an easement across its property to the water and sewer company’s adjoining property on which a water tower and related equipment were located. The easement granted South Island “the right to do whatever acts are necessary ... to operate and maintain the ... water and sewer systems ... [and] the right of reasonable access across the properties of [Lighthouse] as may be necessary from time to time to maintain the water and sewer systems.”

Almost two decades after the easement was granted, South Island began leasing space on top of its water tower to telecommunications companies for the installation of antennas, support equipment, and emergency power generation equipment. South Island also leased the use of its easement, permitting the companies to travel over Lighthouse’s property.

The Decision

The circuit court found the easement did not permit South Island to use the easement property for any purpose except “to operate and maintain [Lighthouse’s] water and sewer systems.” Thus, the circuit court

ruled the easement’s use, as contemplated in the lease agreements, was a non-permitted use of the easement property.

The court held that the grant of an easement did not create a complete and absolute estate that could not be limited by the subsequent description of the easement, and that decision was affirmed.

Local Consent Not Required Prior to PSC Project Approval

By Irene Zaki

On June 5, 2003, the Michigan Court of Appeals affirmed a Public Service Commission (PSC) order approving Wolverine Pipeline Company’s alternative pipeline running 22 miles through I-96’s right of way. The court held that local consent was required prior to construction, but that such consent was not required prior to project approval by the PSC. **Mayor of the City of Lansing v. Public Service Commission**, 666 NW 2d 298 (Mich App, 6/5/03).

Appellants, Mayor of the City of Lansing, the City of Lansing, and the Ingham County Commissioner, argued that the PSC’s decision was unlawful due to the lack of the city’s prior consent as required by Michigan’s constitution and the PSC’s Rules of Practice and Procedure. The PSC distinguished construction requiring city consent and an application requiring city consent. The case turned on issues of statutory construction.

Laws and Rules

Under M.C.L. §247.183(1) utility companies are required to obtain consent of city officials before work is commenced within city limits. The court defined work as “to enter upon, construct or maintain” structures. However, it held that no local consent for work was required before an application was submitted to the PSC when seeking project approval.

Under the PSC’s rules an application to construct facilities must contain a true copy of a municipality’s consent, but only if required by the rules. The PSC rules required a certificate of public convenience and necessity for construction of a plant, equipment, property or facility by a gas or electric utility or a natural gas pipeline company, but not for oil pipeline operations.

The Decision

The court found Wolverine’s application to construct facilities to transport crude oil and petroleum required only the PSC’s approval. The court invali-

dated arguments of foul play in early negotiations between the PSC and Wolverine, and arguments of environmental racism by running the pipeline through areas heavily populated by minorities. Because these two arguments were raised only at the appellate level, the court of appeals declined to consider them.

Although Wolverine's application was found to be properly approved, it was still required to obtain consent by all affected governing city officials including the Michigan Department of Transportation. In addition, Wolverine was ordered to obtain easements through approximately four miles of privately owned land.

Upcoming Events

September 8-9, 2003, Seattle, WA

Wi-Fi Implementation and Deal making

Law Seminars International presents Wi-Fi Implementation and Deal making at the Renaissance Seattle Hotel in Seattle.

This conference is devoted exclusively to the business and regulatory issues confronting the burgeoning Wi-Fi industry and how Wi-Fi technology will co-exist with other forms of wireless communications technology.

For more information or registration, call (800) 854-8009; or visit <http://www.lawseminars.com/htmls/seminars/03wifiwa/about.htm>

September 9-13, 2003, Denver, Co

NATOA 2003 Annual Conference: New Frontiers in Telecommunications

The National Association of Telecommunications Officers and Advisors hosts its 23rd annual local government telecommunications conference at the Adam's Mark Hotel in Denver.

For more information or registration, call (703) 506-3275; or visit <http://www.natoa.org>

September 22-23, 2003, Chicago, Il

Negotiating Telecommunications User Deals

Law Seminars International presents a conference on negotiating telecommunications user deals and service acquisition issues at the Hyatt Regency Chicago.

The conference states that professionals will provide important insights into the issues that telecommunications service providers and enterprise customers must consider.

For more information or registration, call (800) 854-8009; or visit <http://www.lawseminars.com/htmls/seminars/03telil/about.htm>

October 1 - 3, 2003, Hollywood, Fla.

PCIA Tower Show

PCIA, the Wireless Infrastructure Association, presents its Wireless Infrastructure Conference & Expo at Westin Diplomat Resort & Spa in Hollywood, Florida.

In addition to its industry trade show, PCIA and the law firm of Perkins Coie will host a full day training seminar offering guidance on FCC environmental regulation of communications and broadcast towers. Participants will receive explanations and advice for tower companies, attorneys and consultants to understand and comply with complex and rapidly changing FCC environmental regulations and policies.

For more information, see <http://pcia.expoplanner.com/index.html> or call (703) 739-0300. Register at <http://pcia.expoplanner.com/register.html>

October 28-29, 2003, Las Vegas, NV

6th Annual Tower Summit and Trade Show

Shorecliff Communications LLC, presents the 6th Annual Tower Summit and Trade Show at the Mandalay Bay Convention Center and Trade Show.

The networking and trade show is dedicated exclusively to the companies and individuals who own, operate, maintain, and develop communications sites and wireless infrastructure worldwide.

Register at <http://www.shorecliffcommunications.com/tower03/default.asp?showid=T021&info=477>

November 6-7, 2003, Atlanta, GA

Negotiating Carrier-to-Carrier Telecommunications Deals

Law Seminars International hosts a conference on negotiating commercial carrier deals with an emphasis on practice pointers, negotiation techniques, deal points, contract drafting tips, pricing, and deal protections at the Hyatt Regency Atlanta Hotel in Atlanta.

For more information or registration, call (800) 854-8009; or visit <http://www.clenews.com/LSI/03/03telga.htm>

November 20 & 21, 2003, Los Angeles, CA

Municipal Broadband Conference

Law Seminars International presents a conference hosted by national experts and community leaders to thoroughly examine local government options for suc-

cess related to municipal broadband implementation at the Crowne Plaza Los Angeles-International Airport Hotel in Los Angeles.

For more information or registration, call (800) 854-8009; or visit <http://www.clenews.com/LSI/03/03brdca.htm>