Testimony before the House Committee on Consumer Affairs

Public Hearing on HB 2061
Providing for the Streamlined Procedures for Reviewing Collocation Applications

Presented by

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Good Morning Chairman Godshall, Chairman Prestonand members of the Committee on Consumer Affairs. My name is Richard M. Williams. I am a shareholder in the law firm of Hourigan, Kluger & Quinn, P.C., located in Kingston, Luzerne County, Pennsylvania My practice includes the representation of individuals and business entities in land use proceedings throughout Northeastern and Central Pennsylvania. Since 1997, I have represented wireless carriers in securing zoning and land use approvals in hundreds of jurisdictions throughout the Commonwealth. In that time, I have witnessed first hand the issues wireless carriers have encountered in siting facilities. These issues have included difficulty in locating wireless facilities upon existing structures.

Prior to addressing the issues that I have noted upon my review of HB 2061, I wanted to provide a brief example of an issue that this legislation will alleviate if enacted In fact, this issue has just arisen with the last three weeks.

Specifically, a wireless carrier whom I represent is proposing to install or "collocate" its antennas and supporting equipment upon a nine story building owned by a University member of the State System of Higher Education. The antennas would be installed upon an elevator shaft. In addition, the supporting equipment cabinets would be placed on an elevated platform on the roof of the building. Both the antennas and the equipment cabinets would be entirely shielded from view.

In support of the application, I recently met with the municipal zoning officer. At that meeting, the zoning officer offered his opinion that the proposed application would require the grant of at least four variances from the provisions of the municipal zoning ordinance. One of the variances necessary would involve a request for a "use variance" as the municipality in question only permits collocation of facilities upon existing structures within three of its thirteen zoning districts. Interestingly, this municipality does not permit collocation in several industrial and commercial zoning districts.

As the Committee may know, a variance is perhaps the hardest form of relief to obtain under the Pennsylvania Municipalities Planning Code. According to o w courts, a variance should be granted sparingly and only under exceptional circumstances. In my own experience, out of the hundreds of zoning cases that I have handled in my practice, in only a handful have the criteria necessary for the grant of a variance existed.

The requirements of the municipal zoning ordinance coupled with the standards associated with the grant of a variance afford the municipal zoning hearing board almost unfettered discretion in the approval or denial of this application. In my opinion, the carrier's proposal to collocate its antennas and supporting equipment upon the roof of an existing nine story building constitutes the least intrusive alternative to providing and enhancing wireless service in this particular community. This proposal also serves the purpose of providing a public university with revenue outside of its traditional sources. Notwithstanding these facts, the success or failure of this

project rests squarely upon three individuals comprising the zoning hearing board who are not versed in the intricacies of wireless network design and who will possibly view the application in light of their own beliefs and prejudices.

As an aside, I would also note that the municipal zoning officer in this example advised me that a second wireless carrier was likewise interested in collocating its equipment upon another building owned by the University in the same zoning district, Accordingly, the same challenges and opportunities experienced by the carrier whom I represent will likewise be encountered by the future canier.

As this recent example demonstrates, the proposed streamlined process and procedure afforded by HB 2061 is critical to the prompt and orderly build-out of wireless networks within the Commonwealth. Given the significant increases in wireless customers as well as the fact the wireless traffic now includes a substantial data component, the ability of wireless carriers to utilize less intrusive alternatives to the construction of new towers without the ability of local governments to deny such applications is imperative.

With respect to provisions of HB 2061 itself, I would like to address three specific provisions of the Bill and their potential impact. First, and most importantly, Section 4(b)(2) of HB 2061 establishes a process which allows a municipality to notify a carrier that its application is deemed deficient. If the application is deemed deficient, the carrier will have fourteen days to provide the municipality with any additional information deemed required by the municipality. If the carrier fails to provide the information within this fourteen day period, the application will be deemed denied pursuant to Section 4(b)(3).

Preliminarily, Sections 4(b)(2) and 4(b)(3) do not appear to be supported by recent Federal legislation enacted since the introduction of HB 2061. As the Committee may be aware, Congress recently passed the Middle Class Tax Relief and Job Creation Act of 2012. Section 4225 of this Act mandates that local governments approve an "eligible facilities request" for the modification of an existing wireless tower or base station that does not substantially change the physical dimensions of the tower or base station.

Moreover, the Congressional Act effectively prohibits the denial of an "eligible facilities request" including applications governed by HB 2061. Because HB 2061 effects a deemed denial in the event information required by the municipality is not provided, it provisions appear to conflict with Federal law.

Sections 4(b)(2) and 4(b)(3) of HB 2061 likewise appear inconsistent with the provisions of the Pennsylvania Municipalities Planning Code generally. The Municipalities Planning Code does not contain any provision which allows an application to be deemed denied in the event information required by the municipality is not submitted.

For example, the Municipalities Planning Code requires that zoning hearings be held within sixty days "from the date of the applicant's request." If the zoning hearing board fails to hold a hearing within sixty days, the application is deemed approved.

Similarly, a local governing body or planning agency must either approve or deny a land development or a subdivision application within ninety days of the regular meeting of the governing body or planning agency next following "the date the application is filed." If the governing body of the planning agency fails to act within this ninety day period, the applicant is entitled to a deemed approval.

Unlike the provisions affording an applicant a "deemed approval," the Municipalities Planning Code does not provide for a deemed denial of the application in these instances. Accordingly, Sections 4(b)(2) and 4(b)(3) of HB 2061 would effectively create rights and obligations which presently do not exist under Pennsylvania zoning law.

Finally, a FCC ruling issued in 2009 commonly known as the "Shot Clock Ruling" requires that local governments act upon collocation requests on existing structures within ninety days. By granting municipalities the rights to reject applications deemed by them to be "incomplete," HB 2061 effectively conflicts with the requirements of the Shot Clock Ruling by potentially allowing the period for review to extend beyond ninety days.

Given the apparent inconsistency of Sections 4(b)(2) and 4(b)(3) of HB 2061 with Federal law and the fact that commensurate rights and obligations do not exist under the Pennsylvania Municipalities Planning Code, it is recommended that they be removed from the Bill.

In addition to the provisions of HB 2061 which allow a denial of any application deemed incomplete by the municipality, the sections addressing when collocations upon misting structures may be regulated is likewise problematic. Specifically, Section 3(b)(1) of HB 2061 allows a municipality to regulate a collocation application if: (i) the collocation will require the structure to be lighted, (ii) the collocation will cause the structure to exceed the maximum height limitation of the local governing authority for wireless structures; and (iii) the collocation will cause the wireless support structure to exceed the minimum setback requirement for wireless support structures.

As with the provisions of HB 2061 allowing fot a deemed denial of *an* application, Section 3(b)(1) likewise appears preempted by the recently enacted Middle Class Tax Relief and Job Creation Act of 2012. The Middle Class Tax Relief and Job Creation Act of 2012 allows collocations involving a "substantial change" to the physical dimensions of the structure to be regulated by a state or local government. A "substantial change" is defined by the FCC to include two specific modifications of the structure. First, the FCC considers any modification that increases the existing height of a structure by more than ten percent (10%) or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet (20'), whichever is greater as a "substantial change" allowing for heightened

regulation. The FCC also defines a "substantial change" as the addition of an appurtenance to the tower that would protrude from the edge of the tower more than twenty feet (20') or more than the width of the structure at the level of the appurtenance, whichever is greater.

Federal regulations do not, however, allow local regulation of collocations based upon the three factors outlined in Section 3(b)(1) of HB 2061. Given this inconsistency, it is recommended that HB 2061 be revised to mirror existing Federal law when affording municipalities the right to regulate collocations upon existing structures.

The wireless carriers appearing before you today have submitted a revised draft of HB 2061 which depicts for the Committee's convenience certain modifications to the proposed language of the Bill. The draft submitted to you today mirrors Federal law by deleting the provisions of HB 2061 which specify the three instances allowing for heightened municipal review and by allowing such review in the event of a "substantial change" to the structure. In addition, the revised draft adds the defined terms "substantial change" and "substantially change" to Section 2. The definitions of the terms "substantial change" and "substantially change" in the revised draft comport with Federal law.

Based on the foregoing, I recommend that the provisions of HB 2061 allowing for heightened regulation be revised in accordance with the draft submitted by the carriers testifying before you today. The acceptance of this revision will ensure that the Pennsylvania legislation is entirely consistent with Federal mandates.

The final issue that I would like to address involves the definitions of "collocation" and "wireless support structure" as set forth in Section 2 of HB 2061. As currently drafted, the streamlined process afforded by HB 2061 would apply to the collocation, modification or replacement of wireless facilities upon existing monopoles or towers. The revised draft being submitted to you today by the wireless carriers would expand these definitions to specifically include utility poles, buildings and water towers. In other words, HB 2061 would afford a streamlined process for collocations upon all existing structures.

As the Committee may be aware, wireless carriers utilize all types of existing structures to house their facilities. These structures include existing towers, water tanks, utility poles, hospitals, schools, apartment buildings, farm structures and other types of buildings. In fact, may zoning ordinances throughout the Commonwealth require that a carrier disqualify an existing structure as a location for its facility prior to constructing a new tower within the municipality.

Structures such as buildings, utility poles and water tanks are often chosen by a carrier as the best candidates for collocation. Such structures, because of their location and height, are ideal for the installation of wireless facilities. In addition, such structures generally afford the community with the least obtrusive alternative to the construction of a new tower.

Allowing a carrier to pursue a streamlined process for collocation, regardless of the type of structure, may further serve to reduce the proliferation of new towers. If faced with a choice between the streamlined process afforded by HE3 2061 and the lengthy delays generally encountered in the permitting of a new tower, a carrier, in the majority of circumstances, will choose to collocate its facility to take advantage of the process.

Given the fact that a significant number of collocations involve structures that cannot be classified as a monopole or a tower, this modification to HE3 2061 is likewise recommended.

As a final note, I have personally witnessed the change in how municipalities have approached the siting of wireless facilities. In 1997, few municipalities had provisions in their ordinance addressing wireless facilities. Today, almost all municipalities with whom I deal have an ordinance specifically addressing and regulating the use. Many of these ordinances establish unreasonable barriers to collocation. The example of the ordinance sited in my introductory remarks is a good one. That particular ordinance permits collocation only in three of thirteen zoning districts. A collocation in any other zoning district would require the grant of a use variance.

Unreasonable barriers to the prompt and efficient build-out of wireless networks as noted by my example exist throughout the Commonwealth. These barriers serve to hamper and limit the communications infrastructure which will be critical to residents and business of the Commonwealth in the twenty-first century.

HE3 2061 will assist in alleviating the issues experienced by wireless carriers in the development of their networks. The passage of HB 2061, with the revisions noted by the carriers testifying before you today, will serve to assist in removing these barriers. Given the issues experienced by wireless carriers and the current state of municipal regulation, now is the time to pursue moving forward in the implementation of HB 2061.

Thank you for the opportunity to speak today. Upon conclusion of this panel's testimony, I will welcome questions from the Committee.