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ALERT

Recent FCC Workshop Confirms Government Interest in Wireless Operational and Technical Standards

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With exploding demand for wireless services and the rollout of new 4G services and infrastructure, the wireless industry is looking to increase coverage and capacity and modernize and update their networks. The federal government has adopted nationally uniform technical regulations that leave the development of wireless technology to the market, and that leave decisions about deployment of particular technologies to licensees and carriers. Nevertheless, the importance of broadband deployment as a federal policy matter has led the Federal Communications Commission (FCC) to take an interest in new technologies that may help meet this goal. Similarly, state and local governments have always played a role in zoning matters related to the siting of wireless facilities, but over the past few years these governments have become increasingly interested in influencing the design and deployment of wireless infrastructure in their jurisdictions.

A recent area of particular interest for both federal and local governments is "alternative technology," which includes distributed antenna systems (DAS) and similar network designs. There is no indication that the federal government is prepared to change its longstanding policy allowing the market to drive technology choices, nor is there any suggestion that the exclusive federal control over this area will be relaxed. However, because of the importance of these issues to all members of the wireless industry, the surge in interest in DAS and other technologies at the federal and local level bears careful monitoring and attention.

Authors

Joshua S. Turner
Partner
202.719.4807
jturner@wiley.law

Megan L. Brown
Partner
202.719.7579
mbrown@wiley.law

Practice Areas

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Recent FCC Attention on DAS Illustrates Governments Interest at All Levels in Wireless Technology

On February 1, 2012, the FCC's Wireless Telecommunications and Wireline Competition Bureaus, along with the National Association of Telecommunications Officers and Advisors (NATOA), hosted a workshop focused on DAS. The workshop provided a discussion of the history of DAS, the economic drivers behind its deployment and examples of how major institutions are using DAS to improve their mobile connectivity. A recording of the workshop and links to panelist presentations can be found here.

The Workshops Focused on Technology and Practical Challenges.

FCC representatives at the workshop made clear that the session's purpose was not to address regulatory or legal issues. Nonetheless, the day-long workshop and high-level interest by FCC and local government officials signals that both federal and local governments are increasingly paying attention to DAS as a potential tool in an era of scarce spectrum.

Opening remarks were made by a variety of FCC and local government representatives, including Rick Kaplan, Chief of the FCC Wireless Telecommunications Bureau and Sharon Gillett, Chief of the FCC Wireline Competition Bureau. Rick Kaplan emphasized how the use of DAS and small cell networks may present a solution for spectrum shortages in the face of an increasing mobile data usage. Sharon Gillett encouraged DAS users to submit statistical or anecdotal evidence of its effectiveness to the FCC.

Several panels addressed different aspects of DAS. The first focused on the history of DAS, challenges to DAS implementation and the economic drivers behind its deployment. Panelists included representatives of companies serving, building and investing in DAS, including NextG Networks, Inc., Alcatel-Lucent and American Tower Corporation. The panel discussed hurdles to deploying DAS, including negotiating with utility companies over antenna placement on utility poles, dealing with states and municipalities on permitting and rights of way and considering a community's aesthetic needs when designing the DAS network.

The second panel discussed the use of small cell technology in public and community spaces, like schools and hospitals. Panel participants included former public safety and public health officials, as well as industry representatives serving those markets. Seth Buechley, President of Solid Technologies, kicked off the panel by proposing the formation of a Shared DAS Coalition that would bring DAS stakeholders together to develop best practices for DAS deployment.

The third panel focused on mobile broadband connectivity through DAS in cities and communities, such as Philadelphia, PA, Paradise Valley, AZ and Charlotte, NC. Participants included local government officials and those invested and involved in deploying municipal DAS systems, including NextG Neworks, Inc., Crown Castle USA and ATC Outdoor DAS, LLC.

The Workshop May Portend Future Action, So Industry Should be Watchful

The industry should keep close track of potential efforts by federal, state and local officials to play a greater role in the design of wireless networks. While DAS and similar technologies clearly can play a role in meeting a carriers' coverage needs, current federal policy does not countenance regulatory interference with network operational and technical choices. Carriers should be mindful that increased government interest in how wireless coverage is provided may lead to changes in this "hands off" approach.

With respect to state or local action, existing federal law generally prevents state and local governments from interfering in the technical and operational choices of wireless carriers. In that regard, courts have rejected local attempts to put in place preferences for particular wireless technologies. As the United States Court of Appeals Second Circuit concluded when it invalidated a local preference for DAS, "provisions setting forth a preference for 'alternate technologies' are ... preempted because they interfere with the federal government's regulation of technical and operational aspects of wireless telecommunications technology, a field that is occupied by federal law." *New York SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 105 (2d Cir. 2009).

At the federal level, the FCC has a long history of letting the market cultivate the most efficient wireless technologies. Taking its cue from Congress, the FCC has for many years sought to "promot[e] opportunities for economic forces-not regulation-to shape the development of the [wireless] market." *Implementation of Sections 3(n) and 332 of the Communications Act*, Third Report and Order, 9 FCC Rcd 7988, 8004 (29) (1994). The FCC has thus consistently taken the position that carriers are to be "provide[d] the maximum flexibility in technical standards so as to allow [wireless services] to develop in the most rapid, economically feasible, diverse manner." *In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services*, 8 F.C.C.R. 7700, 7755 (136) (1993). These successful policies should continue to inform any regulatory response to wireless technology.

The FCC has clearly taken notice of DAS. In the most recent *Competition Report*, the FCC noted that "mobile wireless operators are also taking steps to improve indoor coverage through the use of new technologies such as distributed antenna systems (DAS) and femtocells. DAS provides enhanced coverage in highly trafficked areas such as shopping malls and office buildings." *Fifteenth Competition Report*, 26 F.C.C.R. 9446, 9741 (117). In a footnote, the FCC discussed DAS, writing that "[a]n alternative to the use of tall structures for cell sites is distributed antenna systems (DAS)" and observing that "[b]ecause DAS sites are not visible beyond the immediate vicinity, they may be particularly desirable in areas with stringent siting regulations, such as historic districts. Providers of such networks include most of the major tower companies, as well as independent firms like NextG Networks, ExteNet, and Mobilitie." *Fifteenth Competition Report*, n. 878.

There is no sign that the FCC intends to alter its regulatory approach to the deployment of wireless networks. Nor is there any indication that federal primacy over local regulation of wireless services will be relaxed. Nonetheless, the increased focus on the need for broadband deployment at the federal level, coupled with concerns at the local level about additional wireless deployment, have created an environment in which technologies such as DAS are drawing increased attention. The industry has an interest in ensuring the continuation of successful federal policies, and that regulatory decisions are made based on all relevant facts.

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In an era of increasing demand for service and spectrum constraints, the wireless industry is innovating and upgrading its services and infrastructure. To maintain flexibility in network design and deployment, the industry should keep a close eye on federal, state and local regulatory interest and action that affects wireless technology choice.

Wiley Rein's Communications Litigation team regularly advises on and litigates issues surrounding regulation of emerging technology and efforts at all levels of government to restrict or influence to development and deployment of technologies. We have led industry litigation around DAS and wireless technologies, and have secured important victories that preserve the wireless industry's flexibility in designing and deploying networks, litigating to victory the *Clarkstown* case referenced above.