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New Small Cell Challenges: What Electric Cities Need to Know

Electric Cities of Georgia

August 13, 2019

Disclaimer

This presentation does not constitute legal advice & should not be interpreted as such. For advice on federal, state or local legal issues, please consult your attorney.

Overview

The New Small Cell Challenge & Why It Matters

Existing Federal Regulatory Framework

- Industry seeking increased access to public infrastructure & ROW
- Pole attachment regulations
- Wireless siting regulations

Technical & Business Context

- What is small cell
- What is 5G
- What is projected deployment
- Infrastructure needs
- Installation considerations

Overview of Recent FCC Actions

- Current FCC Broadband Infrastructure Proceedings
- BDAC

Overview of Pending Small Litigation

Congressional Actions

New & Increasing Challenges

Everyone wants access to utility poles, now

FCC Chair Pai at White House 5G Summit 9/28/18

"Why does 5G matter? Because it could effectively remove speed, responsiveness, & capacity as meaningful constraints on wireless innovation. Wireless networks will be 100 times faster, maybe more. The lag time between a device's request for data & the network's response will be less than one-tenth of what it is today. Wireless networks that today support 1,000 connected devices per square kilometer could instead support 1 million."

…

"An Accenture study pegs 5G's potential at 3 million new jobs, $275 billion in private investment, & $500 billion in new economic growth. (They had me at 3 million new jobs.)"

The “Race to 5G” Against China

“Today, the U.S. finds itself in another innovation race — the battle for 5G supremacy against China. Yet its outcome will likely have *vastly*-greater significance than that of our race to the moon. That’s because the winner will see *billions* added in GDP. Beyond that, how this drama unfolds will affect how quickly you & I are able to enjoy the technologic advancements of tomorrow, as well as the degree to which our portfolios are able to benefit.”

Jeff Remsburg, “The US Is Losing This Key Battle,”
MSN Investor Place, Feb. 10, 2019, https://goo.gl/vafRHN

How? Heterogenous Wireless Network (HetNet -- network of different component parts)

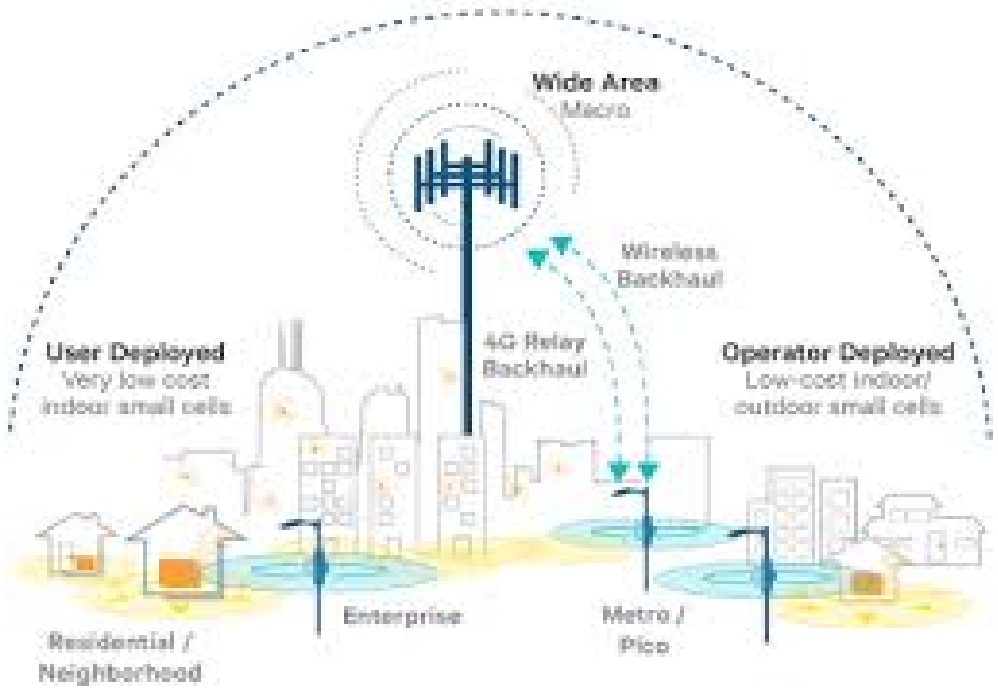
Vision: Future integration of macro & small cell technology into 1 network to support both broadband & IoT applications

- Wireless Towers (Macro-cells)
- Outdoor Small Cells (Micro-cells)
- Large Event Centers (Metro-cells)
- Office Buildings (Pico-cells)
- Residential Premises (Femto-cells)

But … wireless industry claims small cell investment requires dramatic increase in access to public assets

- Rights-of-Way (PROW)
- Conduits
- Poles
- Streetlight Poles

Wireless industry wants preferred rates, terms & conditions



Existing Federal Framework - Pole Attachments

Section 224 of Communications Act (47 U.S.C. 224)

- Regulates rates, terms & conditions of access for attachments to IOU utility poles, ducts & conduits
- **Exempts public power, coops & railroads (47 U.S.C. 224(a)(1)**
- Applies to wireline & wireless facilities for cable or telecommunications
  - Applies to distribution facilities, not transmission facilities
    - What about streetlight poles?
  - Rates – Attachment formulas based on an allocation of the net costs of pole
  - Non-Discriminatory Access
    - Prescribed timelines for access to poles
    - Cardinal Rule – Cost causer pays for make-ready
    - Similar treatment of similarly-situated entities, but not necessarily equal treatment

Pre-September 2018 Federal Framework – Wireless Siting

- Historically Wireless Facilities Have Mainly Been Located Outside of the ROW
- 47 U.S.C. 332(c)(7) -- Authorization to construct personal wireless service facilities
  - No unreasonable discrimination
  - No actions that "prohibit the provision of personal wireless services"
  - Shot clocks: must act "within a reasonable period of time":
    - 90 days for collocation applications (i.e., mounting of transmission equipment upon a support structure designed for, or currently used to support, wireless facilities)
    - 150 days for applications other than collocations
    - *Not* "deemed granted", only "*presumptively* reasonable"
- 47 U.S.C. 253 Prohibition against state & local barriers to entry
  - Safe harbor / affirmative defense for ROW management (253(c))
    - Nondiscrimination & competitive neutrality; Reasonable compensation
- Section 6409(a) of 2012 Spectrum Act (47 U.S.C. 1455)
  - Modifications to existing facilities
    - Modifications that do not make "substantial changes" *must* be approved
    - "Deemed granted" after 60 days

Pre-September 2018 Federal Framework – Access to ROW vs. Access to Infrastructure

- Access to ROW – Locality Acting in Governmental Capacity
  - Subject to federal law 253 (telecom), 332(c)(7) (wireless), 6409(a) (wireless), 521 (cable)
  - Subject to state law
- Access to Public Power Poles & Other Facilities – Governmental Unit Acting in “Proprietary Capacity”
  - Exempt from federal pole attachment law
  - Greater flexibility than when acting as regulator
  - Some states regulate
- In Smaller Communities Public Power Utilities May Wear Two Hats – Pole Owner & Regulator
  - Who owns and/or controls access to streetlight poles & “street furniture”?

Wireless Small Cell & 5G: Understanding the Infrastructure & the Marketplace

Aesthetic & technical standards, under FCC order

Standards must be	Decisions may not
• Reasonable • No more burdensome than those applied to other types of infrastructure deployments • Objective & published in advance	• Be based on utility's or city's assumptions about need for coverage • Use RF safety standards other than FCC's • Require use of utility-operated fiber or DAS • Discriminate against particular providers or technology choices

Possible approach to aesthetics

- Spacing, design/concealment & placement standards (such as setbacks) centered on aesthetics
- Consistent with prior zoning & planning practices
- Maintain character of area (pole types, heights, cabinet & pedestal placement)
- Consistent with industry practices (NESC, utility company standard practices, DOT standard practices)
- Not ruling out deployment

Key technical questions to address

Acceptable wireless use of power space for third-parties

- Antennas at the top of primary power poles
- Riser cables/conduits through the power space

Acceptable wireless use of comm space

- Antennas on the pole in the comm space
- Cabinets on the pole
- Risers on the pole
- Antennas & cabinets on cable strand

The industry

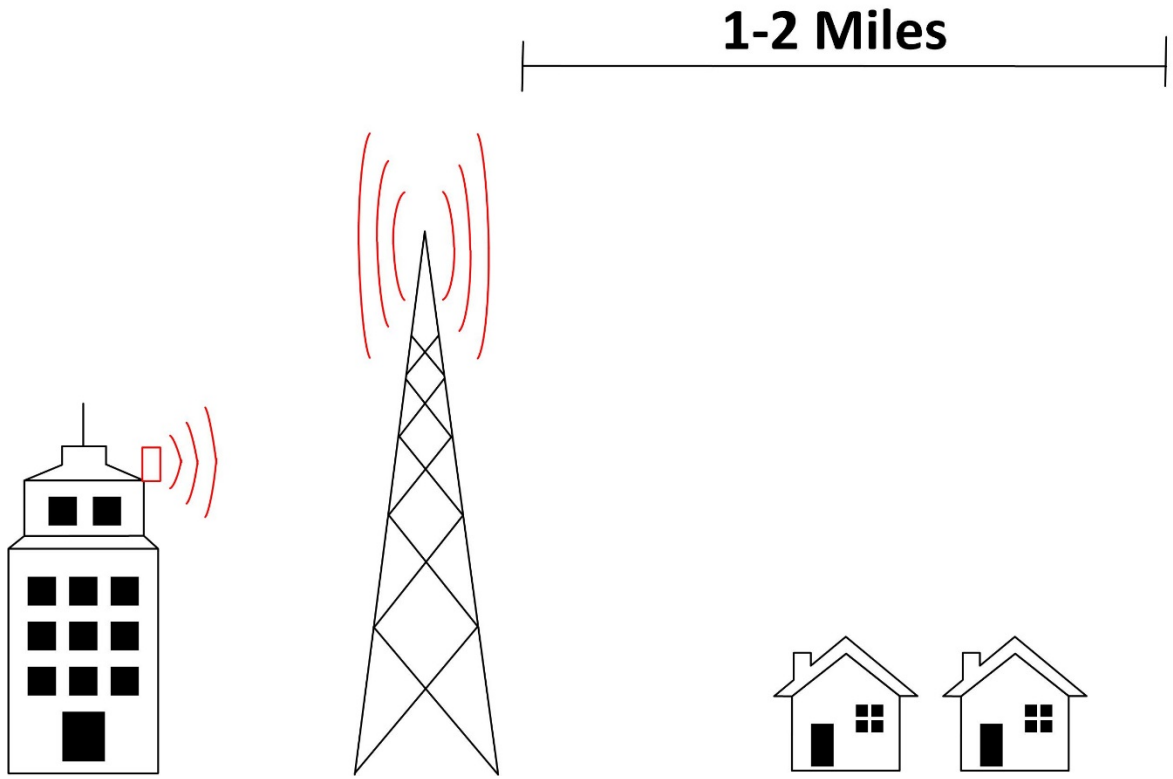
Wireline network operators	Phone
	Cable
Mobile network operators, carriers	AT&T Mobility, Verizon Wireless, T-Mobile, Sprint
	Cable companies…..
Enterprise Fiber backhaul	Crown Castle, Zayo, Level3
Tower/wireless infrastructure companies	Crown Castle, American Tower, Extenet, Mobilitie

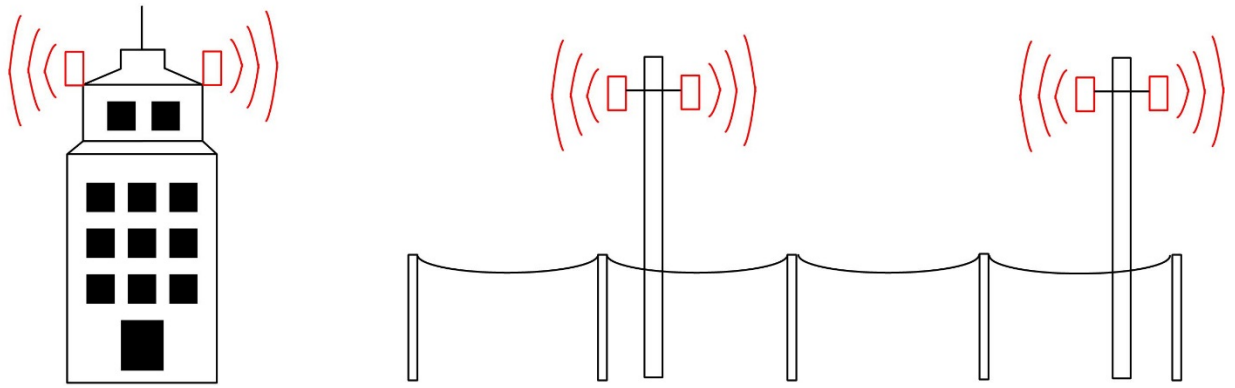
1G/2G

- 1990s urban/suburban
- 2000s/2010s rural
- Voice, text
- Low-speed data
- Antennas on towers & some buildings
- Microwave & copper backhaul

3G

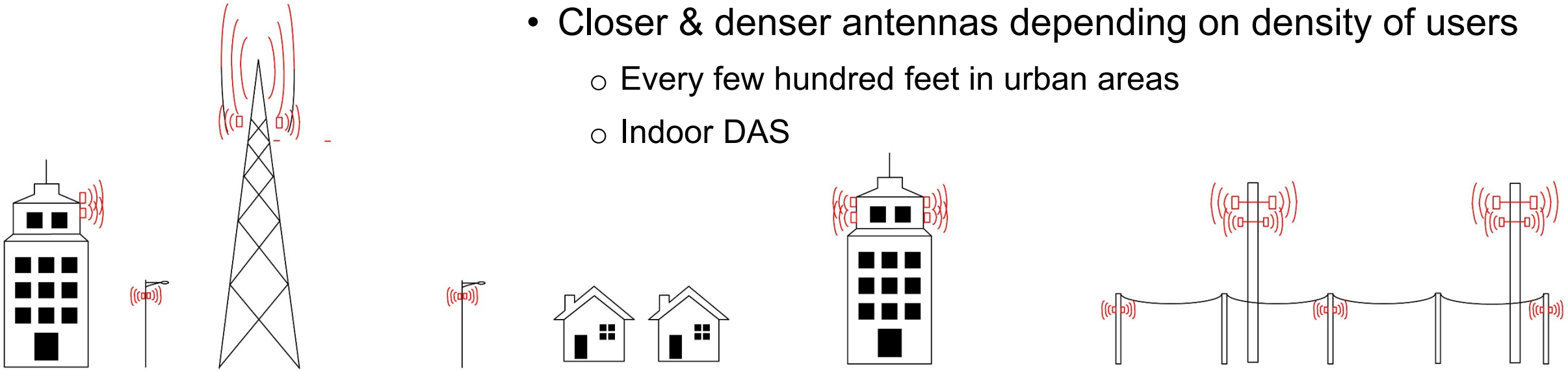
- 2000s urban/suburban
- 2000s/2010s rural
- Voice, text
- Medium-speed data
- Antennas on towers & buildings
- Fiber or microwave backhaul, copper in some areas
- Closer & denser antennas
- Fewer users per antenna





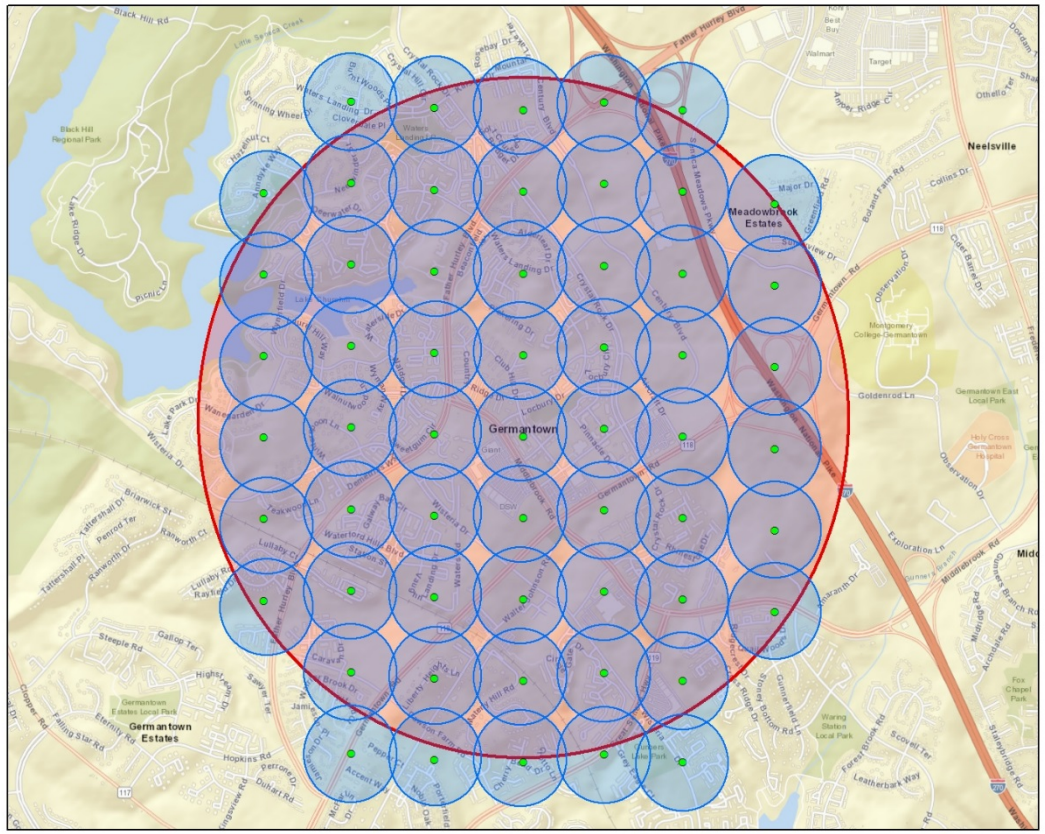
4G

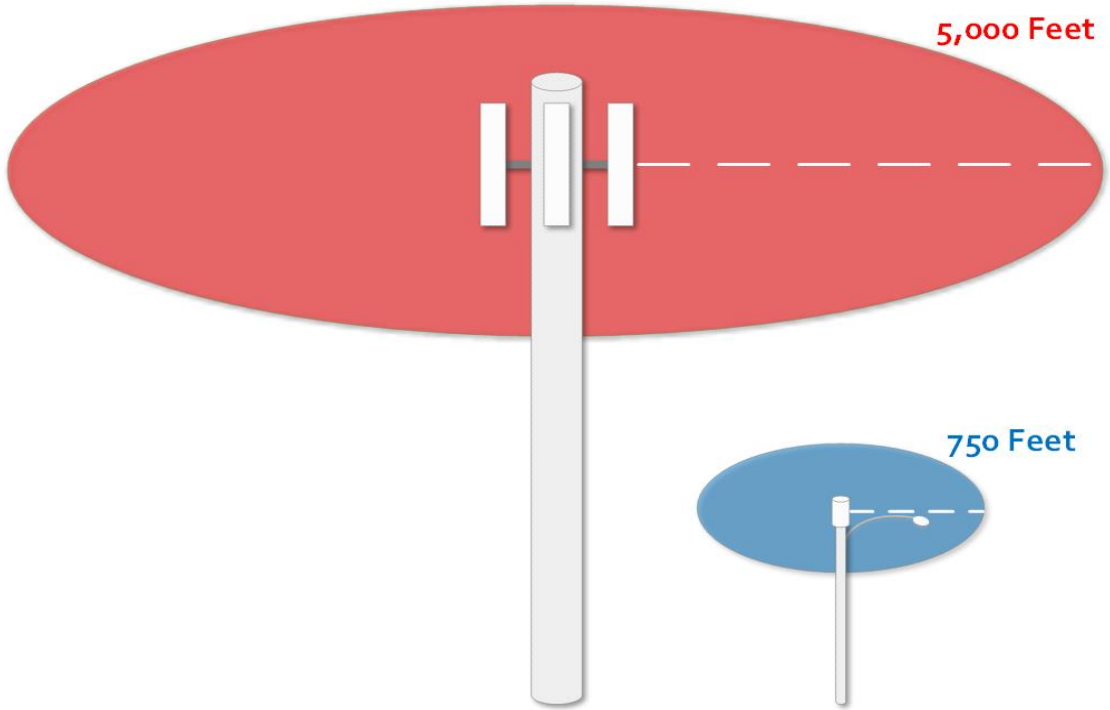
- 2010s urban/suburban, some rural
- Voice(VoIP), text (IP)
- Smartphone service, speed few to 50 Mbps
- Antennas on towers, poles & buildings
- Multiple spectrum bands on antenna
- Backhaul fiber, occasional wireless
- Closer & denser antennas depending on density of users
  - Every few hundred feet in urban areas
  - Indoor DAS



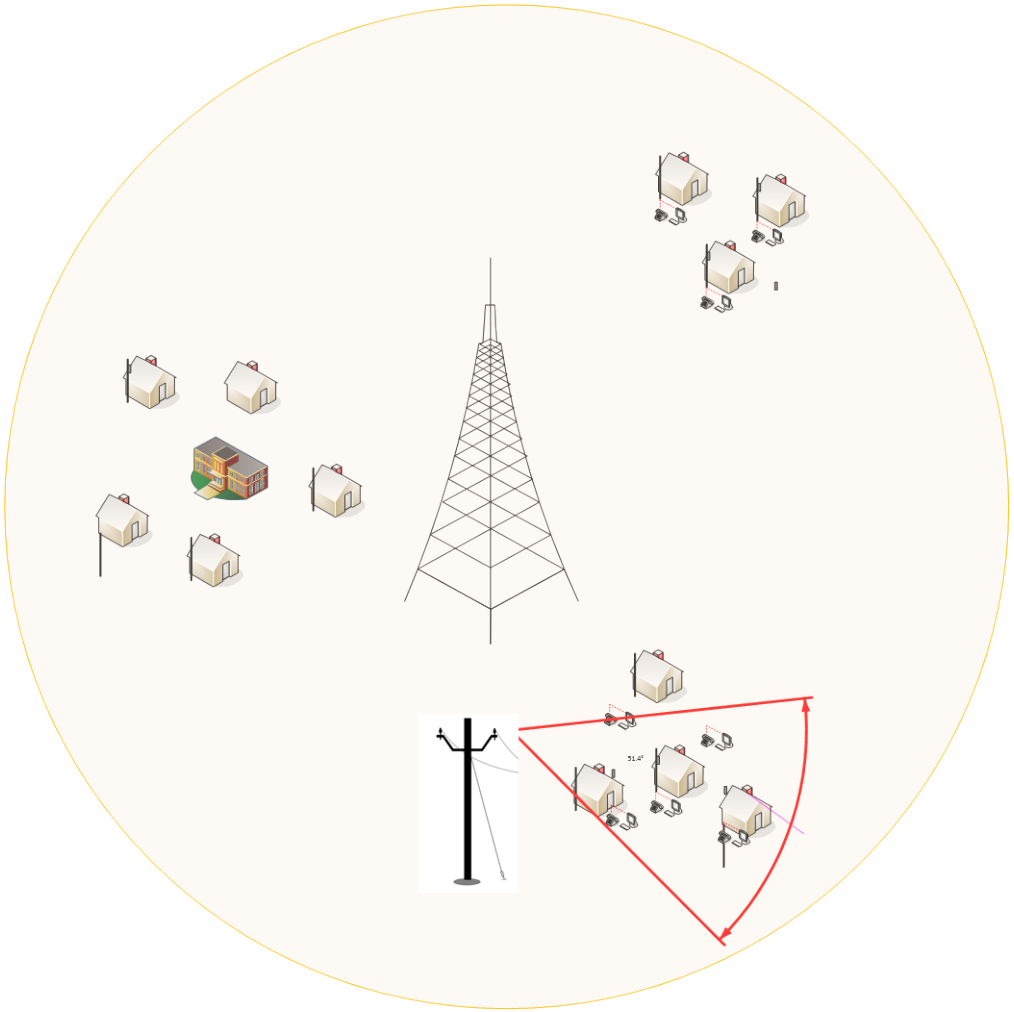
Where we are: 4G densification

Small cell sites added where needed to boost capacity





Small cells add capacity, not coverage



Densification: small cell impact

Augment tower & rooftop cells with small cells in ROW

200,000 cell towers to date--& millions of small cells to come

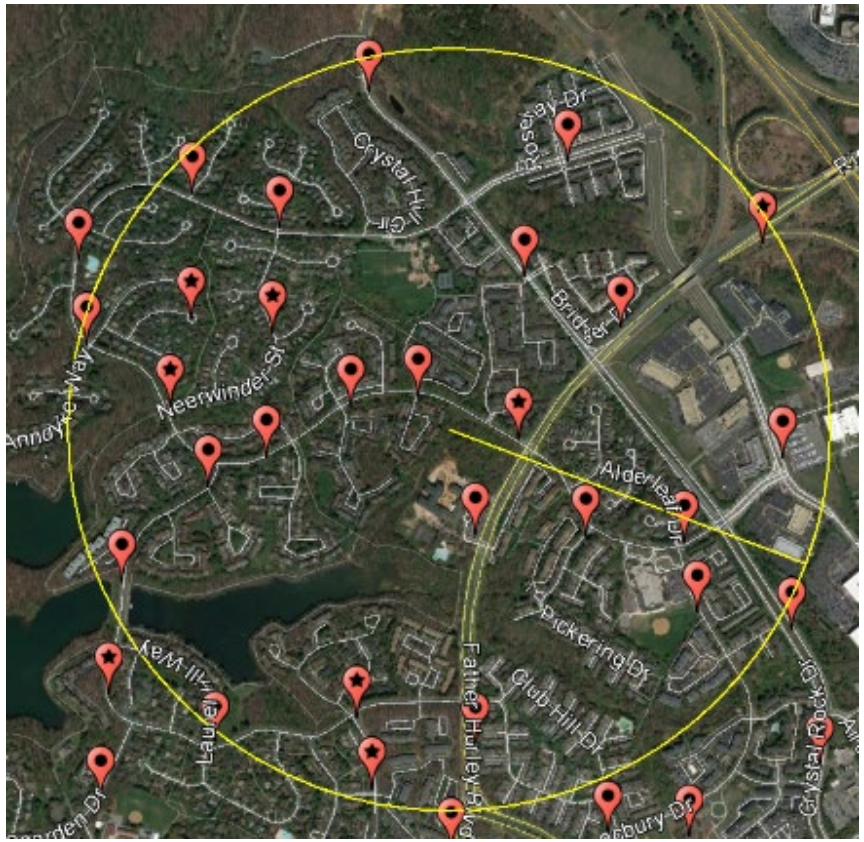
- Placed near the users — in-building, residential neighborhoods & business corridors

Voice & text often remain on macro sites (towers)

Vertical real estate critical

Fiber will need to push deeper

5-10 year wireless lifecycle



Trends to understand

5G in preliminary deployment stages	• Current small cell land (pole) rush is for 4G “densification” & placeholder for 5G
“5G” is marketing & lobbying term	• Almost any new wireless deployment is being called “5G” regardless of whether it aligns with 5G definition or standards
5G hype has trumped other considerations & local authority	• Small cell deployment entails safety, interference, & other challenges • Requires oversight

Technology categories: 2 forms of wireless to consumers

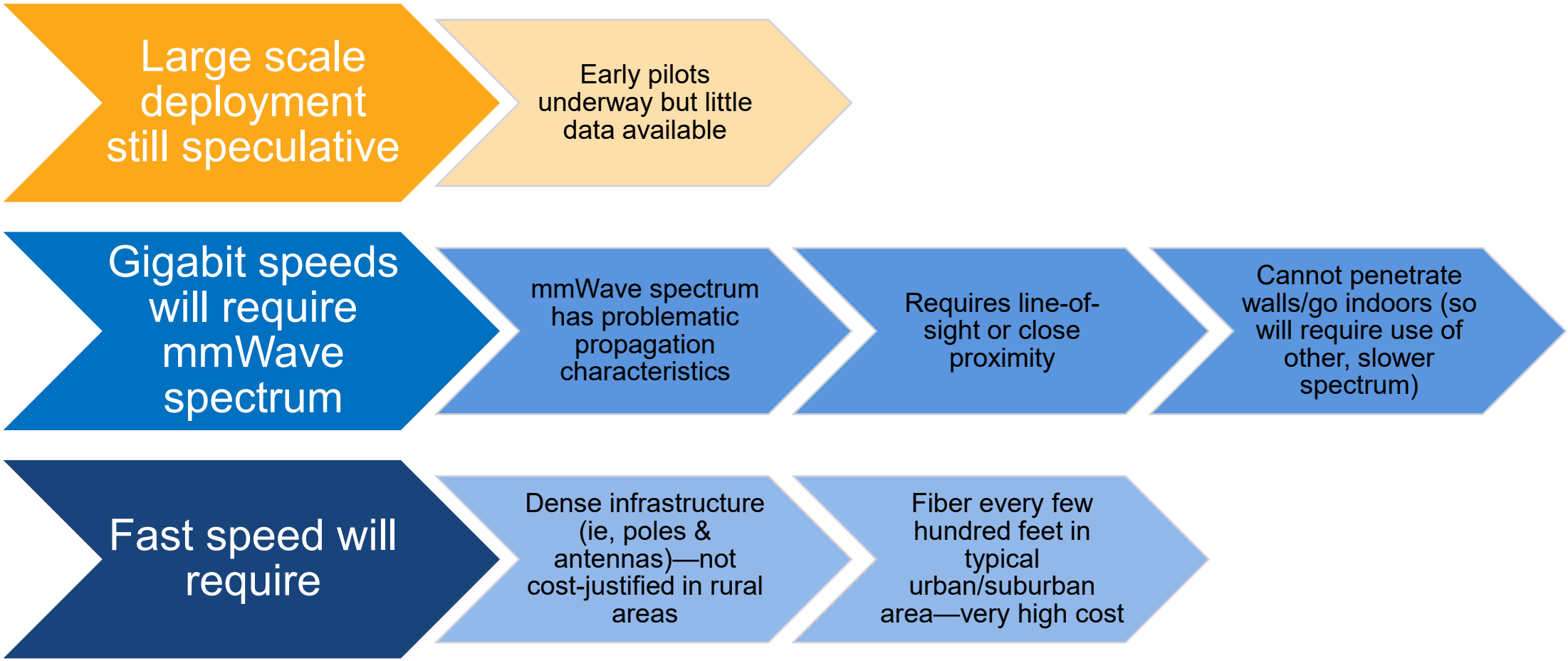
Mobile wireless

- Travels with us around town & around the country
- Service purchased is designed for mobility first (with speed a lesser goal)
- Comes with a price—usually slower & less reliable than “fixed”

Fixed wireless

- Attempts to replace a wire—is a service to a particular location
- Effort to compete with (or alleviate need for) cable or telco connection

5G technical challenges



5G economic challenges

High cost of deployment + fiber

- Unclear what the potential is in urban/suburban
- *No business case in rural areas*
- Wall Street thus far unconvinced

Market opportunity not yet apparent

- Fixed: Verizon pilots panned; AT&T holding back for now
  - Will compete with cable's huge advantages
- Mobile: Unclear whether consumers will pay more
  - Enormous incremental cost to deploy but modest incremental revenues (ie, 5G customers are not new customers; they are converted 4G customers)

5G timeline & development path

Still in development stages

- Emerging in coming year or two
- Standards-writing largely complete
- Manufacturing path uncertain & pricing undetermined

Deployment path unclear

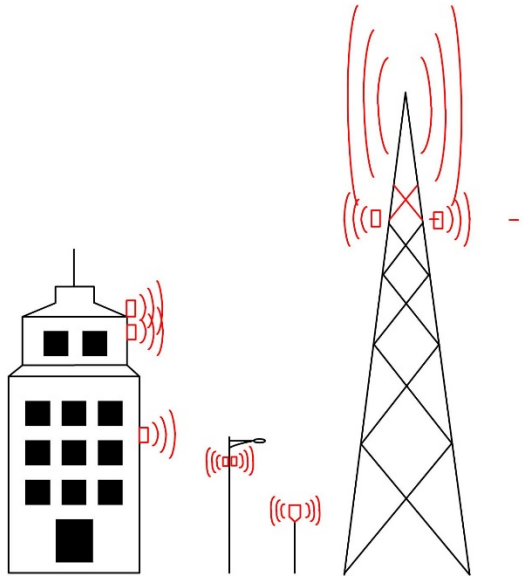
- Fixed: Verizon suggesting imminent deployment in some urban areas
- Mobile: Some deployment in 2020 for urban/suburban
- Neither mobile nor fixed deployment in rural, other than on major highways (possibly)

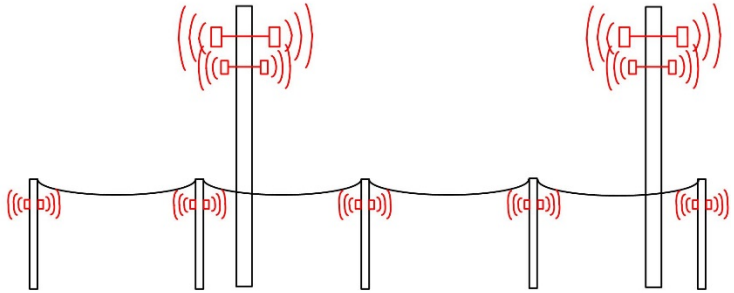
Even best case deployment will be uneven

- Focused on “high value” areas
- Service available only to some locations
- Likely increase in rural/urban & have/have not divides

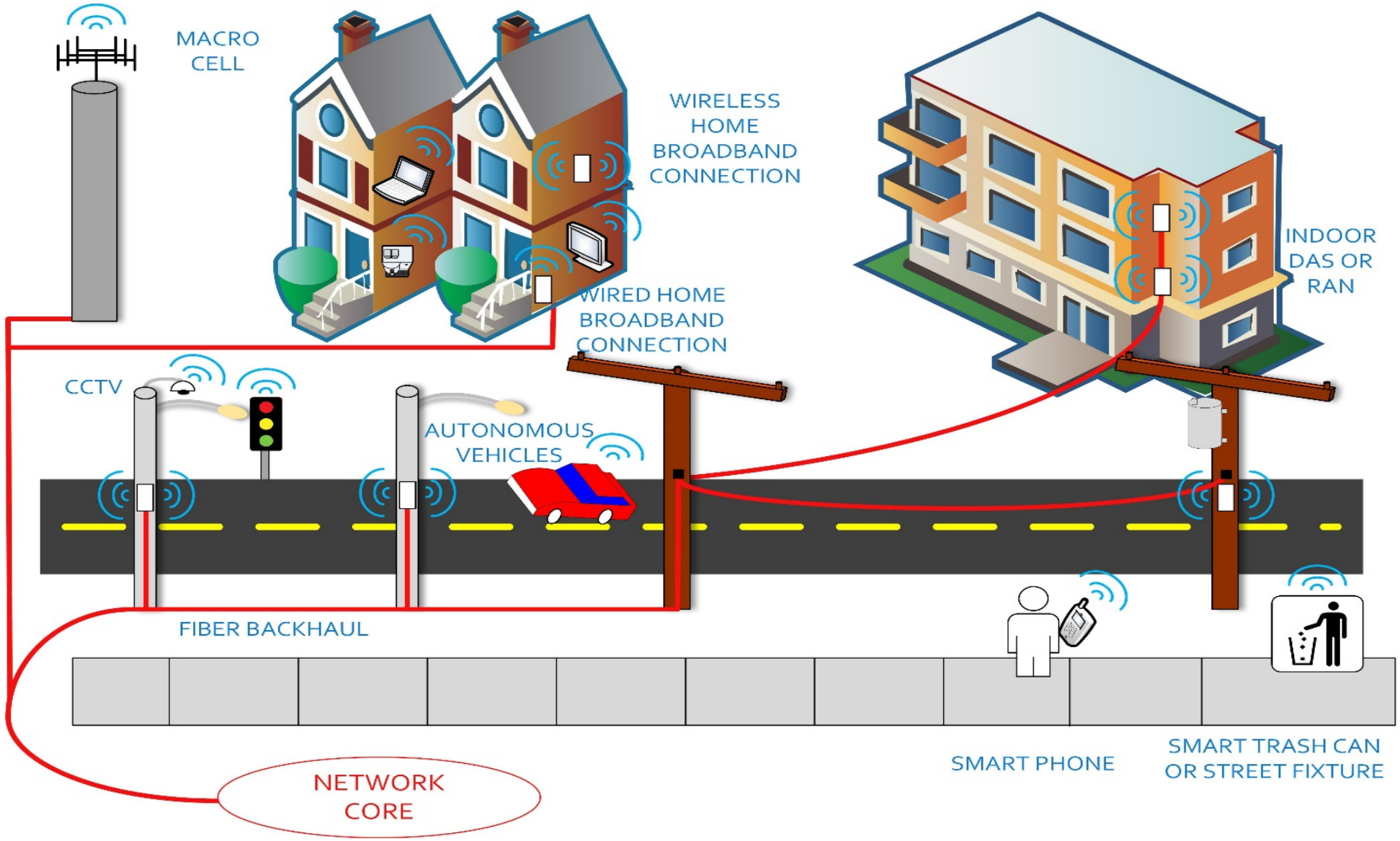
Potential 5G

- 2020 projected urban/suburban, unclear for rural
- Few hundred Mbps to Gbps (higher speeds require mmWave)
- Mixture of small & large multiple spectrum antennas
- Fiber every few hundred feet
- Closer, denser antennas depending on user density
- mmWave requires line-of-sight or close proximity
- Limited building penetration, depending on band

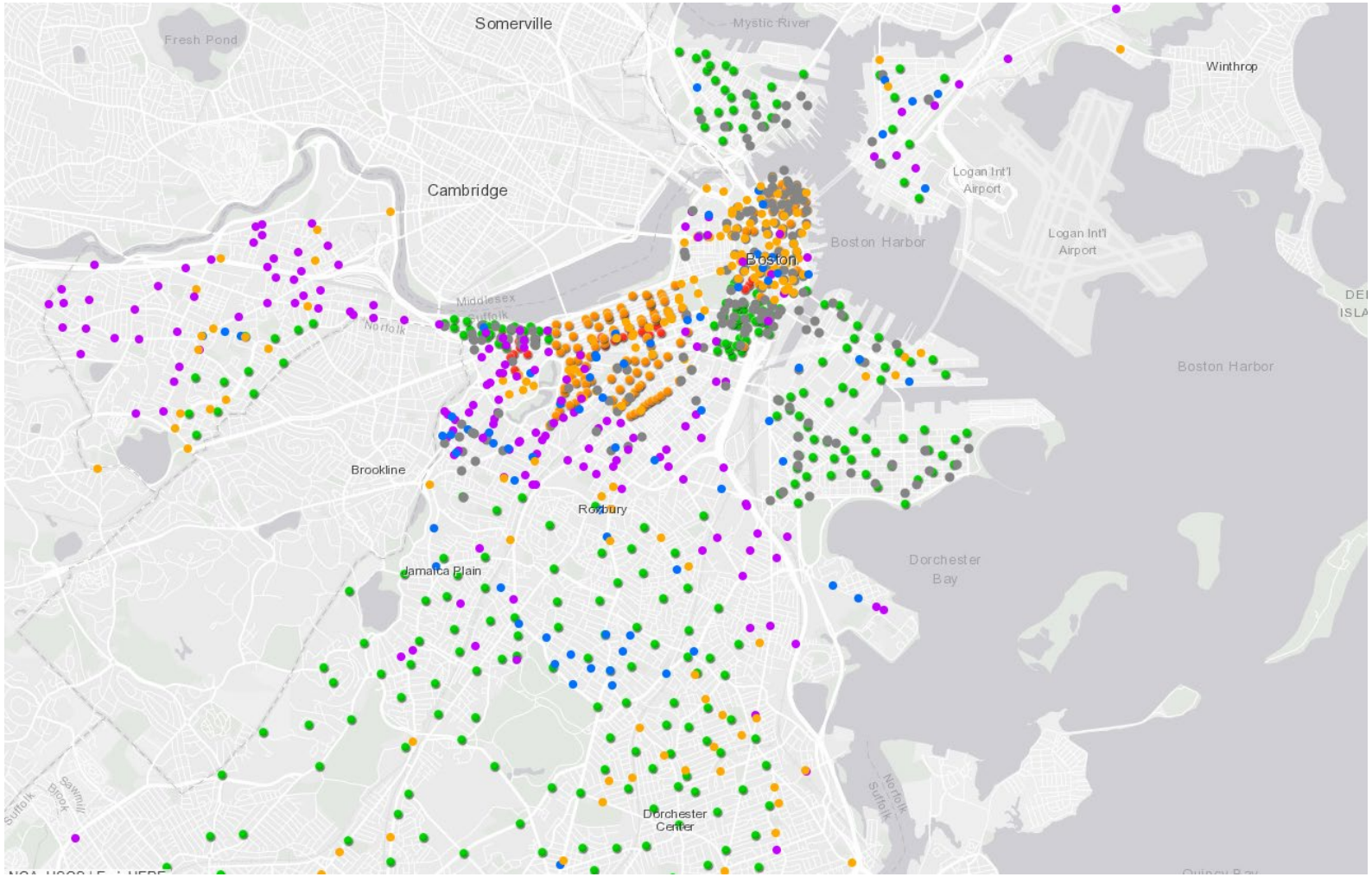




Emerging 5G promise



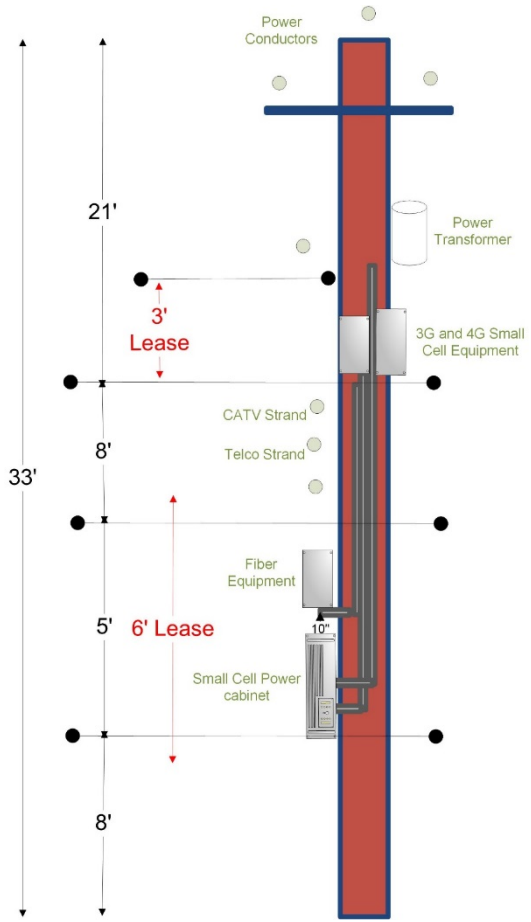
City of Boston



Small cells: a tool for 4G densification

Mounted on range of assets	• Utility, light, & traffic poles • Building façades
May require pole replacement or height increase	• For clearance from telecom & power • For structural stability
Size may range but is generally not decreasing	• 2’x1’ antenna, 3’x2’ cabinet • 5’ antennas & multiple cabinets (for DAS)
Additional components	• Cooling fans • Cabinets
Height depends on environment, clearances, zoning & coverage/capacity goal	• 20 to 40 feet typical
Primarily 4G	• May be holding space for 5G

Small cell attachments

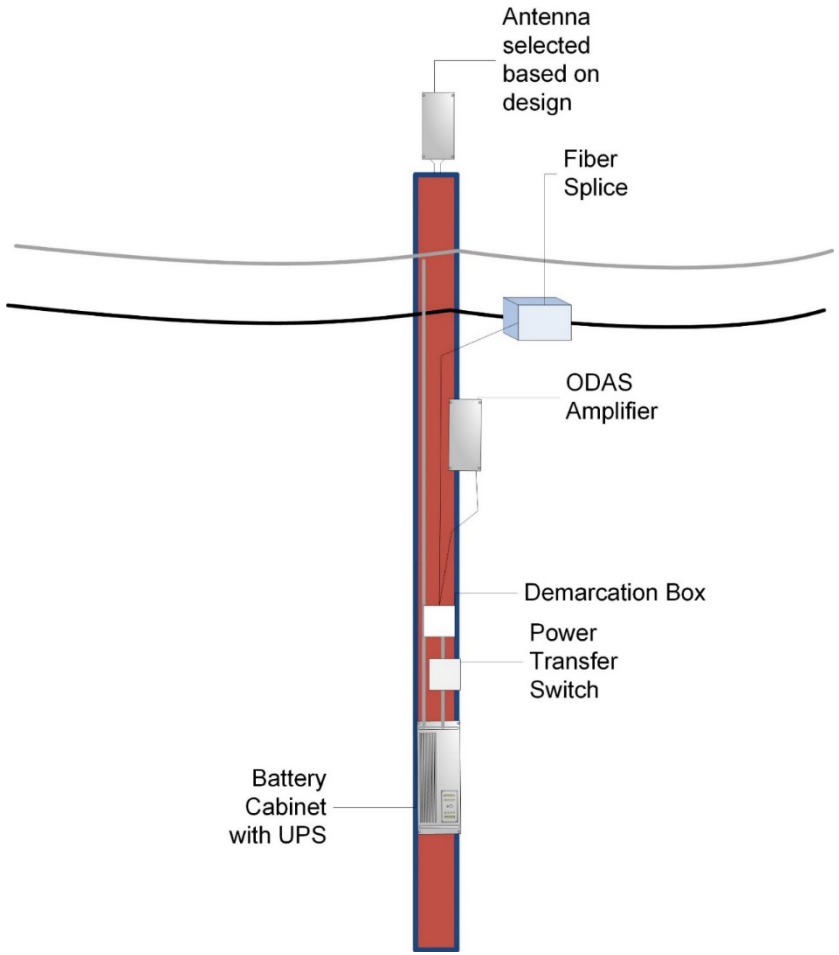


Four components of wireless attachments

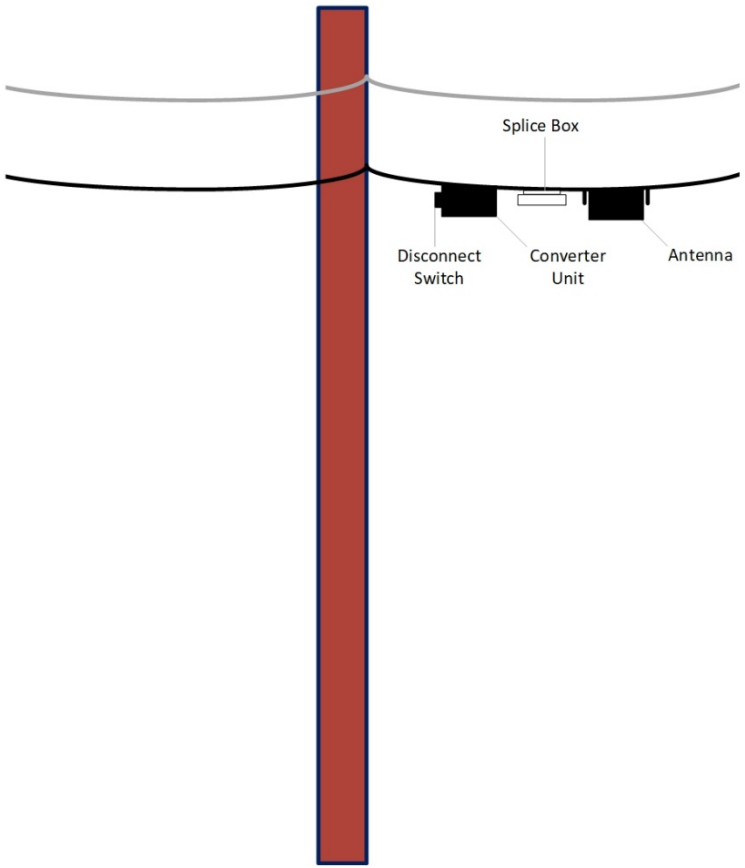
- Antennas
- Cabinet for equipment
- Backhaul
- Electricity

Small cell impact to poles: very different to traditional wireline attachments

- Space needed from top to bottom
- Safety & interference considerations
- Cabinets on poles
- Fiber or wireless backhaul
- Power & meter



New strand-mounted version emerging



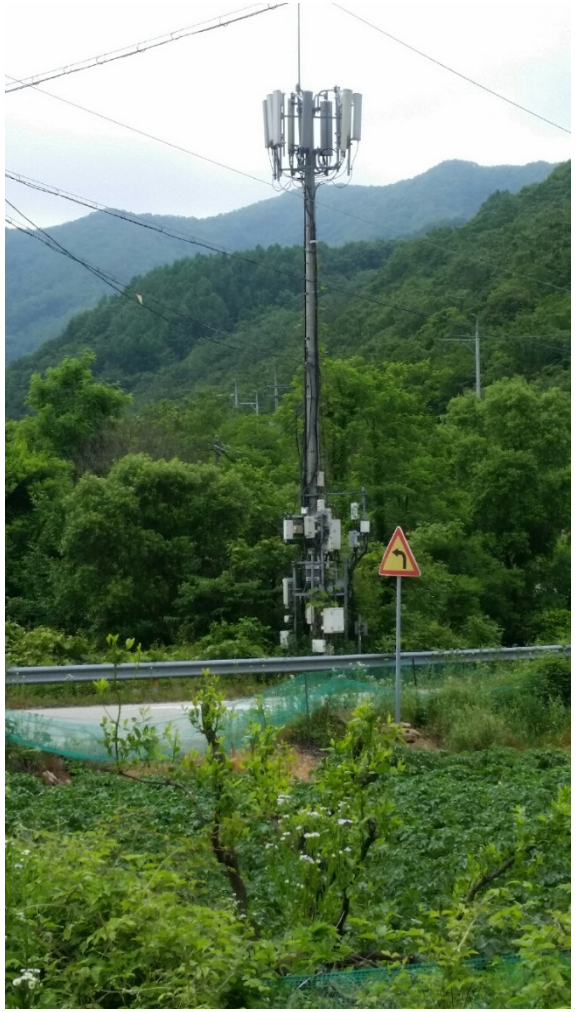
- Reduces pole crowding but adds to congestion in communications space
- Typically lower power than pole-mounted small cells
- Providers (e.g. Crown Castle) have just started using them
- Usually on new strand attachment along with new provider fiber & power-conducting cable
- Powered from adjacent pole or through cable

Small cell placement

Aesthetically focused approaches possible with collaborative input

Lack of coordination: crowded, messy installations

….crowded, messy installations abroad



Early 5G devices

- Smaller devices possible – 1 foot diameter

Cable cos poised to compete with 4G/5G in mobile

Cable mobile products now available

- Marketed as Xfinity Mobile, Spectrum Mobile

Uses WiFi & other unlicensed & lightly licensed

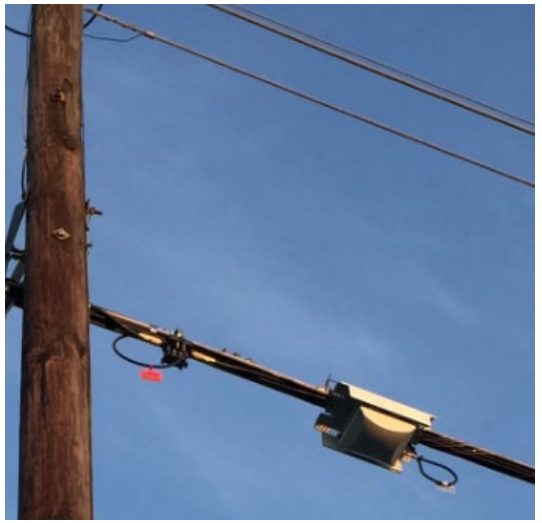
- May soon use CBRS (3.5 GHz) & licensed (600 MHz)

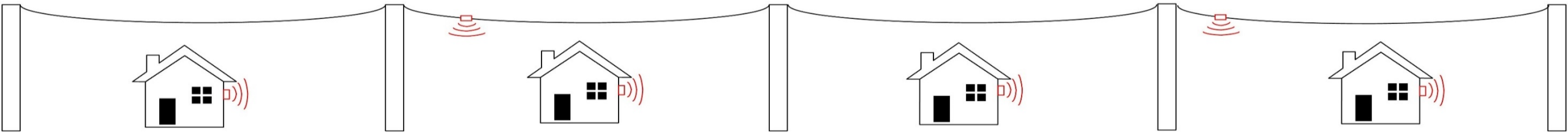
Backhaul

- Uses existing cable (hybrid fiber/coax) networks as community-wide backhaul networks

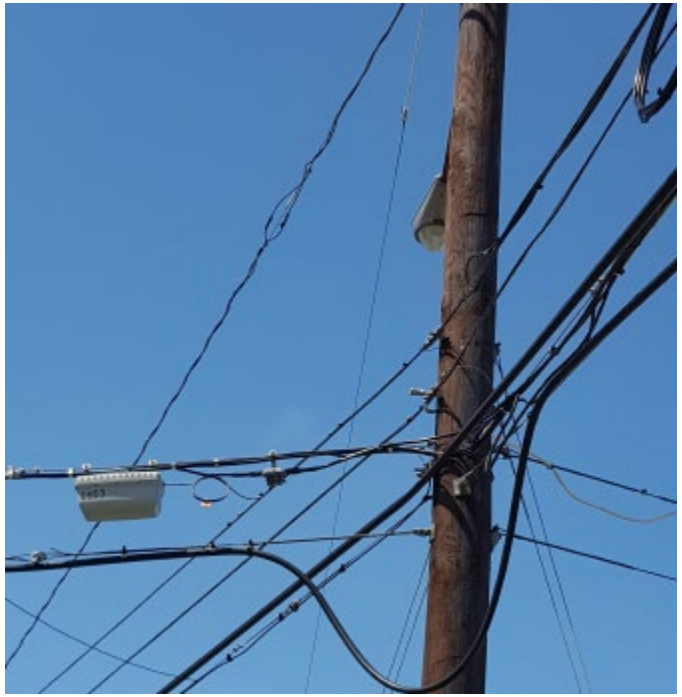
National footprint emerging

- Roams to other cable networks in other cities & to carrier mobile

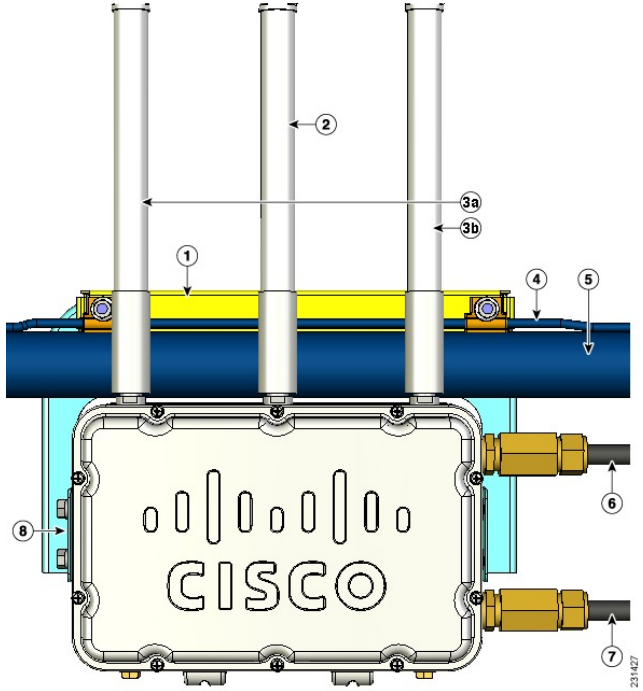




Strand-mounted radios



Comcast strand-mounted WiFi access point



Source: https://www.cisco.com/c/en/us/td/docs/wireless/technology/mesh/design/guide/MeshAP_52.html

Alternative rural technologies

Unlicensed spectrum

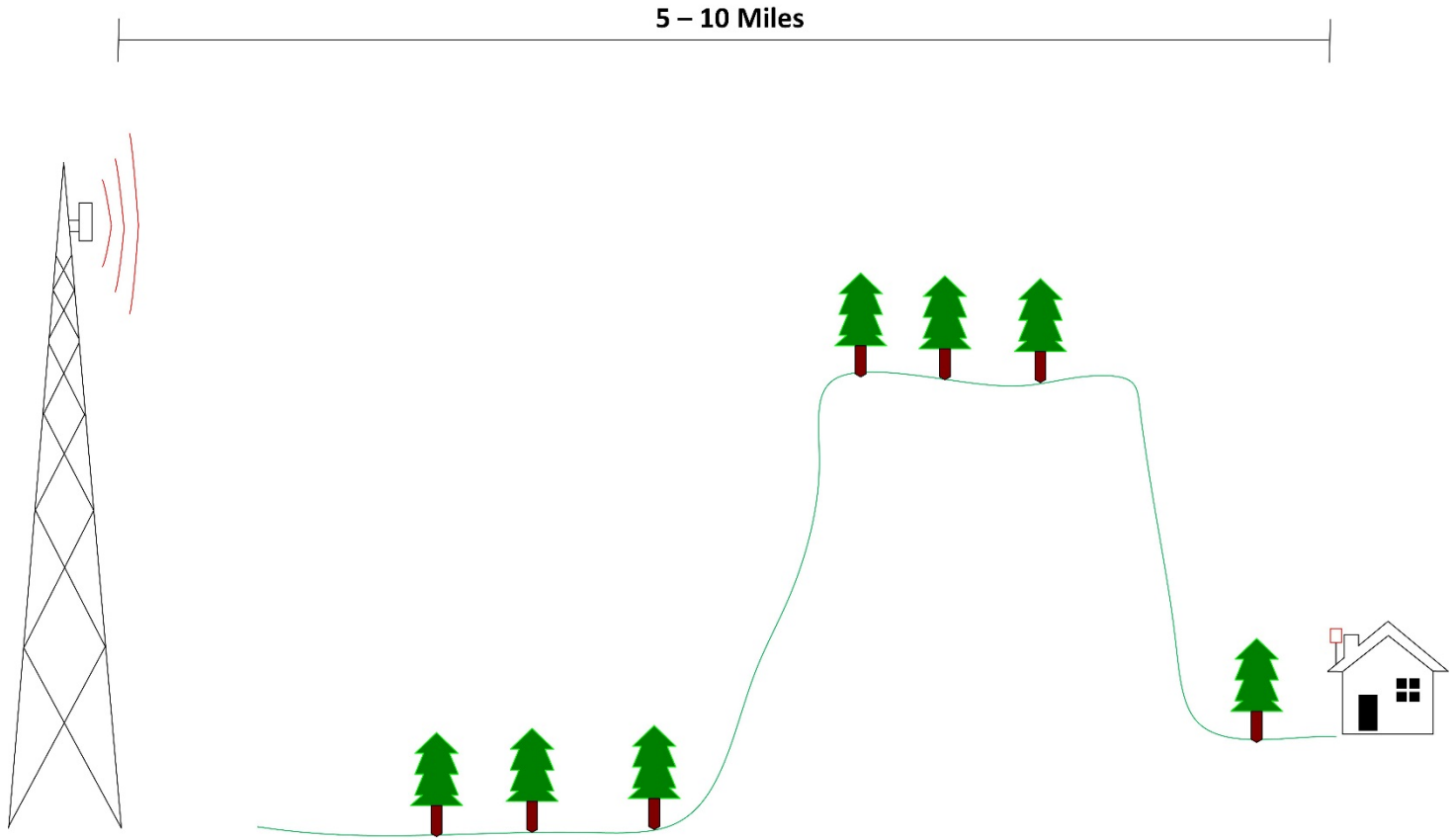
- 5 GHz similar to WiFi
- Longer-range 3.5 GHz CBRS spectrum potentially emerging
- 60/70/80/90 GHz mmWave for high-speed & backhaul
  - Unlicensed & lightly licensed, augments fiber

Large advantage to infrastructure owners

- Power companies on existing poles

Potentially low cost, low barrier to entry

Alternative fixed rural technologies



TV White Spaces

- can complement unlicensed
- well suited for terrain & foliage
- spectrum widely available in rural areas
- long range may reduce need for fiber

Potentially low cost, low barrier to entry

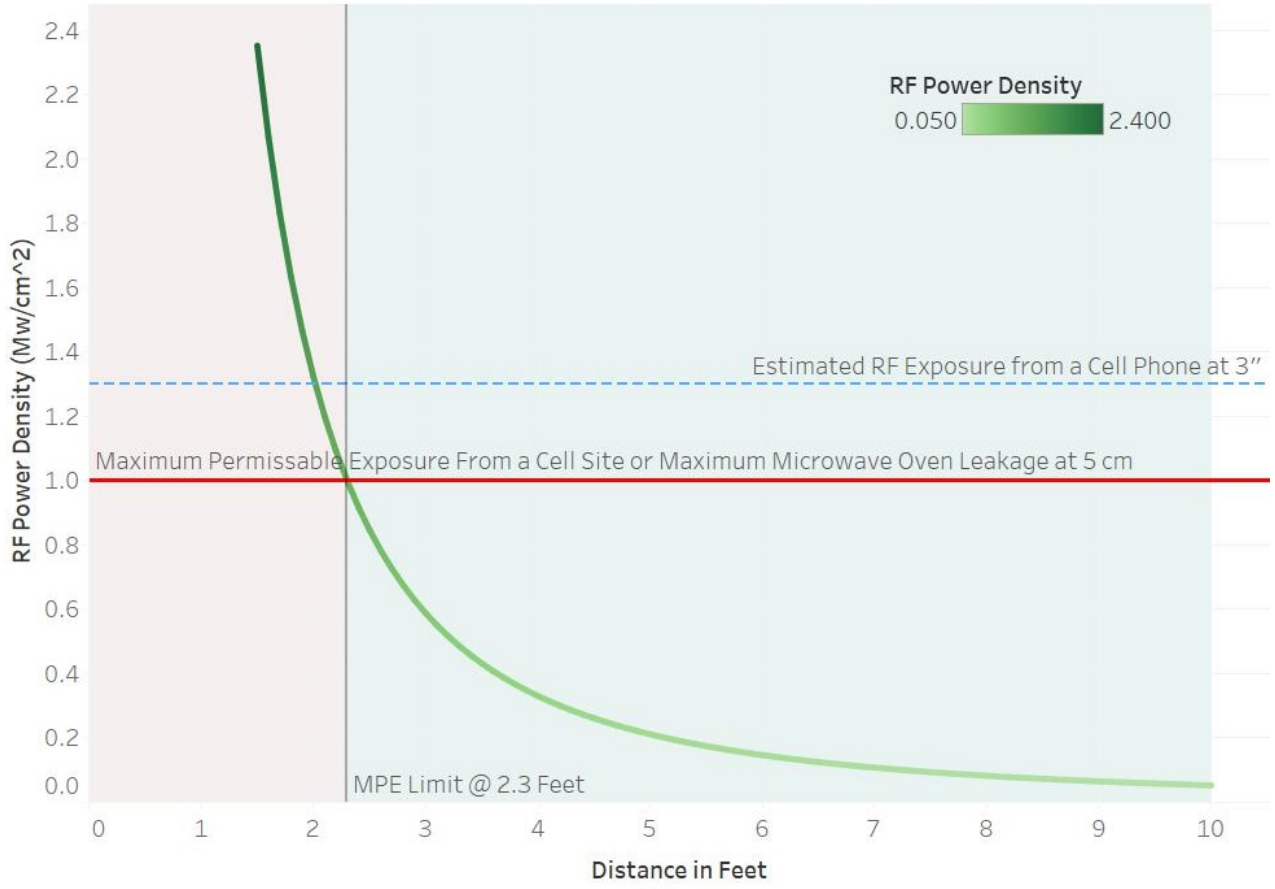
RF considerations

Regulated by FCC

Local review to ensure compliance

Comparing single small cell antenna

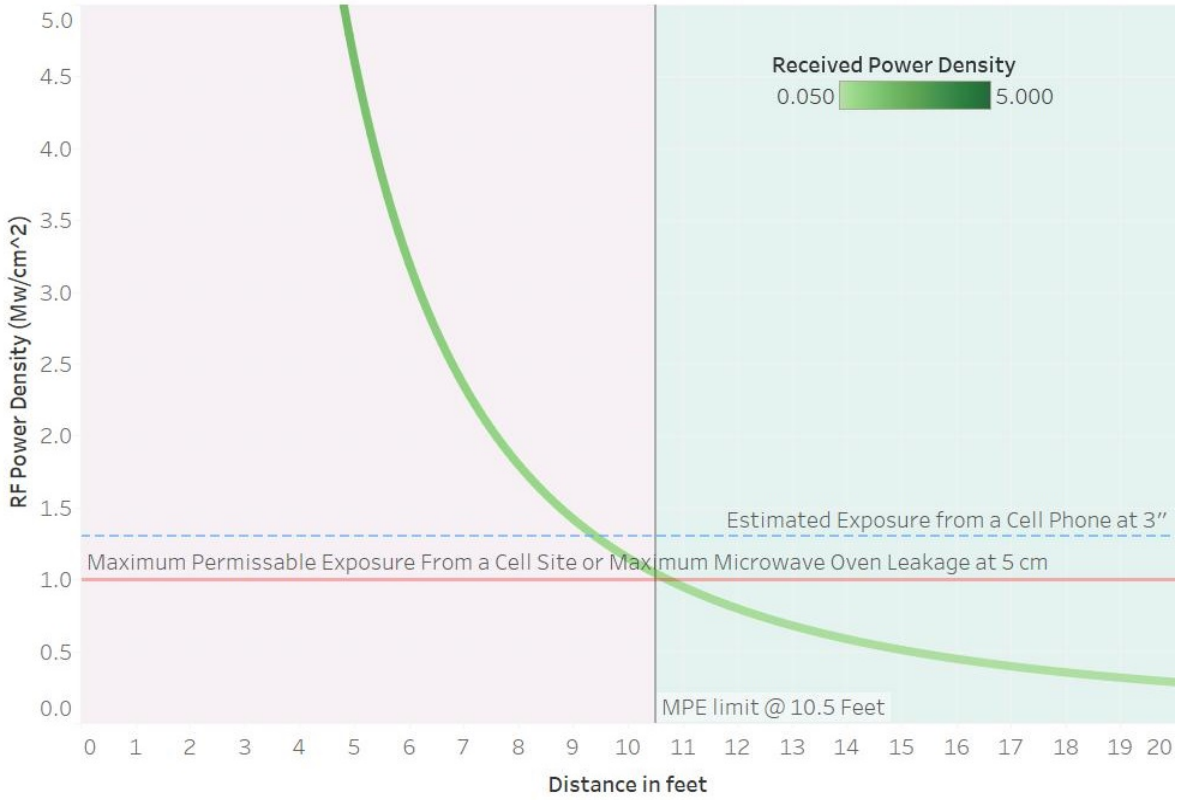
- At 2 feet– same as hand held cell phone
- At 2.3 feet– same as FCC exposure limits (and microwave oven leakage limits)



RF considerations

Comparing three 10 dB directional antennas

- Typical of DAS
- At 9 feet– same as hand held cell phone
- At 10.5 feet– same as FCC tower exposure limits



Establish process preferences

What are the current staff responsibilities in third-party attachment?

- Including large scale builds

Degree of process automation

- Desire for applicants to use portal
- Desire for applicants to provide engineering electronically

Separate wireline & wireless applications?

Engineering by applicant vs. by utility

- Required software or format
- Take into account limitations on cost recovery

Installation by applicant vs. by utility

Develop processes

- Training of utility staff
- Pre & post-construction survey
- Annual reporting
- Certifying contractors
- Process for jointly owned poles
- Utility areas moving underground
- How to handle multiple applications for the same pole
- Use of NJUNS & notification of other utilities

Develop technical standards & practices

Essentially a matter of prioritizing placement

Whether & how to permit use of power space

- Placement above conductors (often increasing pole height)
- Installation & maintenance

When to require replacement of poles

- Wooden & light poles

Develop technical standards & practices

Allowed & forbidden poles

- Existing & future distribution equipment
- Decorative lightweight streetlight poles
- Congested traffic areas
- Transmission, metal
- Double circuit
- Risers
- Traffic signal

Backup power

- Typically not proposed

Develop technical standards & practices

Variations from NESC & NEC

Considerations on use of communications space

- Clearances, boxing, standoff arms
- Overlash
- One-touch make-ready
- Strand-mounted & mid-span enclosures– spacing from nearest pole
- Pole-mounted cabinets vs. surface slab-mounted cabinets
- Power cutoff switch

RF exposure & signage

Use of utility fiber

Develop technical standards & practices

Metering of power use

Reservation of space for utility or city use (electrical, lighting, communications, safety)

Antenna sizes & placement

- 3 cubic foot volume in Order

Cabinet sizes & placement

- 28 cubic foot volume in Order
- Weight limit

Technical standards & practices: submittal by applicant

- Include utility fiber & rates in proposal form
- Location– street address, pole number, lat-long
- Design drawings
  - Including ROW/property lines, streets, surroundings, pole classification/condition, clearances
- Backhaul & power connection
- RF compliance certification & interference/intermodulation report for city/utility LMR frequencies
- Structural analysis
- Equipment cut sheets
- Frequency bands

Technical standards & practices: submittal by applicant

- Power levels
- Antenna beam pattern
- Licensee of spectrum (end-customer)
- Backhaul provider & technology & demarcation
- Sim photos
- Georgia PE certification
- Certification of contractors
- As-builts

Aesthetic standards: poles

- Applicants have significant latitude in designing poles, so municipalities & utilities can make requests
- In style or shape of existing light poles
- Limit of size
- Use or replace existing poles, otherwise special permission
- Limit on height of new poles
- Any new poles also function as a light
- Note: Likely tradeoff between size of equipment & number of poles
- Cabinet as part of base (may result in wide base—24 to 30”)
- Pole diameter (standard– or 12+” if concealment in pole)

Aesthetic standards: antenna size & shape

- 3 cubic foot from FCC order
- Panel & omni (and pseudo-omni)
- Sheathing of antennas creates smooth pseudo-omni
- Strategy for Verizon two-tiered millimeter-wave antennas

Aesthetic standards

Spacing & placement

- Consider a stated priority list
- Differences based on historic, residential, commercial, density, corridor
- At location of larger poles in mixed pole-size area
- At intersections
- Use of poles at property lines rather than directly in front of property
- Not in parks– or preferentially in parks
- Existing pedestal forests

Setback

- Consistency with existing requirements
- Consider proximity to windows of houses & businesses

Aesthetic standards

- Cabinets on poles or surface slab
- Landscaping
- Color of cabinets
- Sheathing/camouflage
- Flush-mount equipment on pole
- Banners & signs
- Cables inside pole
- City-adopted smart pole

Prepare yourselves

- Cost analysis
- Aesthetic standards
- Technical standards
- Application form

Current FCC Broadband Infrastructure Actions

FCC Proceedings on Barriers to Broadband Deployment

- FCC NPRM/NOI -- WC Docket No. 17-84 – on revising pole attachment rules
  - One Touch Make Ready (OTMR)
  - Revisions to other pole attachment rules
  - Inquired whether FCC has regulatory authority over public power utility poles & streetlights through Section 253
    - Carriers attempted to argue that public power poles & streetlight poles are governmental activity & public property akin to ROW
- FCC NPRM/NOI -- WT Docket No. 17-79 – on removing barriers to wireless deployment
  - 332(c)(7) vs. 253(a) (cumulative? independent?)
  - Asked whether non-cost-based fees are proper
  - Sought comment on statutory application to states/localities acting in proprietary vs. regulatory capacity
- FCC created Broadband Deployment Advisory Committee (BDAC)

One Touch Make Ready Rules Adopted (August) -- Overview

- Single contractor moves all communications facilities at the same time
  - Dramatically cuts down on costs & time to deploy
- Only use for “simple” rearrangement work – not where splicing/cutting a line or potential outage involved
- Only applies to wireline communications facilities located in communications space
  - Not clear on treatment of mid-span wireless facilities
- Must use utility-approved contractor
  - Utilities encouraged but not required to maintain a list of approved contractors that can perform survey work & simple OTMR
  - If no list of contractors attaching entity may use contractor that the attacher certifies possess the requisite qualifications -- utility may “veto” the selection
  - Contractors are required to carry insurance & may need to post a bond
  - Need not be union contractor
- No federal indemnification, parties should rely on contracts & state law
- States can adopt OTMR requirements that are consistent with FCC rules

WT Docket No. 17-84 –Removing Barriers to Wireline Deployment

August 2018 -- FCC Issues a Declaratory Ruling on Moratoria

- State & local moratoria on telecommunications services & facilities deployment are barred by Section 253(a) of the Communications Act because they "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."
- Defines "moratorium" barred by Section 253(a) to include both express & de facto moratoria that effectively halt or suspend the acceptance, processing, or approval of applications or permits.

WT Docket No. 17-79 –Removing Barriers to Wireless Deployment

September 2018 -- FCC Declaratory Ruling & Report & Order

Declaratory Ruling (Report & Order discussed separately below)

- The Ruling adopts a broad interpretation of the "effective prohibition" provisions of Sections 253 & 332(c)(7) of the Communications Act, finding that a state or local government need only "materially inhibit" a small cell deployment to violate the Act & be subject to preemption
- The Ruling applies to access to ROW & facilities, including publicly-owned poles, streetlights & structures in the ROW
    - The FCC found that Section 253 applies to access to government owned poles **despite** the specific Section 224 pole attachment exemption for public power utilities
    - The FCC disavowed prior recognition of the distinction between governmental vs. proprietary activities, finding that: (1) Section 253 applies to both regulatory & proprietary activities by a governmental entity; & (2) access to government structures within the ROW is a govern-mental activity
    - The Ruling does not reference the need for pole attachment agreements or the make-ready process

WT Docket No. 17-79 –Removing Barriers to Wireless Deployment

September 2018 -- FCC Declaratory Ruling

- Definition of “Small Wireless Facility”:
  - The structure on which antenna facilities are mounted
    - —is 50 feet or less in height including antennae, or
    - —is no more than 10 percent taller than other adjacent structures, or
    - —is not extended to a height of more than 50 feet or by more than 10 percent above its preexisting height as a result of the collocation of new antenna facilities, whichever is greater; &
  - Each antenna associated with the deployment (excluding the associated equipment) is no more than **three cubic feet** in volume; and
  - All antenna equipment associated with the facility (excluding antennas) is cumulatively no more than **28 cubic feet** in volume; &
  - The facility does not require antenna registration under part 17 of this chapter; &
  - The facility is not located on Tribal lands, as defined under 36 CFR 800.16(x); &
  - The facility does not result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified in Rule 1.1307(b).

WT Docket No. 17-79 –Removing Barriers to Wireless Deployment

September 2018 -- FCC Declaratory Ruling

- Fees & charges assessed by a government entity are “only permitted to the extent that they are nondiscriminatory & represent a reasonable approximation of the locality’s reasonable costs” … “specifically related to & caused by the deployment.”
- Ruling assumes that lowering costs in attractive markets will accelerate deployment in unattractive markets
- The following fee amounts are presumptively acceptable under Sections 253 & 332:
  - Non-Recurring Fees -- $500 “for a single up-front application that includes up to five Small Wireless Facilities, with an additional $100 for each Small Wireless Facility beyond five”
    - The Ruling is silent on make-ready costs although there is a general suggestion of the ability to recover specific costs caused by the attacher
  - Annual Fees -- $270 per facility, per year for all recurring fees (including “any possible ROW access fee or fee for attachment to municipally-owned structures in the ROW”).
  - Higher fees than those set forth above can be charged if the party can show the fees are:
    - A reasonable approximation of costs;
    - Those costs themselves are reasonable; &
    - They are non-discriminatory

WT Docket No. 17-79 –Removing Barriers to Wireless Deployment

September 2018 -- FCC Declaratory Ruling

- FCC – “According to a study submitted by Corning, our action would eliminate around $2 billion in unnecessary costs, which would stimulate around $2.4 billion of additional buildouts. & that study shows that such new service would be deployed where it is needed most: 97 percent of new deployments would be in rural & suburban communities that otherwise would be on the wrong side of the digital divide.”
- FCC -- ”When evaluating whether fees result in an effective prohibition of service due to financial burden, we must consider the marketplace regionally & nationally & thus must consider the cumulative effects of state or local fees on service in multiple geographic areas that providers serve or potentially would serve.”

WT Docket No. 17-79 –Removing Barriers to Wireless Deployment

September 2018 -- FCC Declaratory Ruling

- The Ruling preempts aesthetics requirements for small cell wireless facilities unless they are:
  - reasonable;
  - no more burdensome than those applied to other types of infrastructure deployments;
  - objective; &
  - published in advance.
  - Aesthetic requirements – as of April 15, 2019 – must be:
    - —(1) reasonable;
    - —(2) no more burdensome than those applied to other types of infrastructure deployments;
    - —(3) objective; &
    - —(4) published in advance

- The Ruling preserves state laws that are consistent or more restrictive but preempts inconsistent state laws.
- The Ruling does not grandfather existing agreements, which may be preempted to the extent they conflict with the Ruling.

WT Docket No. 17-79 –Removing Barriers to Wireless Deployment

September 2018 -- FCC Report & Order

- The R&O adopts new, shortened “shot clocks” for local governments to act on applications for small wireless facilities:
  - Requests to site SWFs on preexisting structures (collocation): **60 days**
  - Requests that involve construction of new structures: **90 days**
  - **10 days to indicate that application incomplete**
- The R&O’s shot clocks are not limited to zoning or ROW permits but also apply to associated requests for building permits, electrical permits, road closure permits, & architectural or engineering permits
  - [W]e find that “any request for authorization to place, construct, or modify personal wireless service facilities” under Section 332(c)(7)(B)(ii) means all authorizations necessary for the deployment of personal wireless services infrastructure. ¶ 132
- The R&O is silent on whether the shot clocks apply to pole attachment permit attachment requests or make-ready
- State & local non-compliance with shot clocks ≠ “deemed granted” – A would-be attacher would have to bring a Section 253 or Section 332 complaint to the FCC or to a federal district court

THE FCC’s BROADBAND DEPLOYMENT ADVISORY COMMISSION (BDAC)

Broadband Deployment Advisory Committee

- Stated Purpose – To provide advice & recommendations to the FCC on how to accelerate the deployment of high speed internet access
- Despite recent additions, membership heavily industry-oriented (no public power reps)
- BDAC developed model codes for states & municipalities
- BDAC process & proposals could pose significant problems for public entities
  - FCC relied heavily on BDAC to support its recent declaratory ruling
  - Models to be widely distributed across the US in 2019 – significant battles over PROW management, pole attachments, municipal broadband & public-private partnerships
  - Government entities getting “some” more representation but still outgunned

SMALL CELL LITIGATION

Small Cell Litigation

- In September a coalition of local governments appealed the FCC's August Moratorium Order in the U.S. Court of Appeals for the 9th Circuit ("Portland Appeal")
  - A group of IOUs filed an appeal of the FCC' OTMR Order in the 11th Circuit
  - A group of IOUs filed a petition for reconsideration of the FCC's OTMR Order with the FCC
- APPA appealed the FCC's September Small Cell Order in the U.S. Court of Appeals for the DC Circuit
  - Similar appeals were brought by multiple coalitions of local governments in other federal circuits
  - Multiple carriers filed appeals in multiple jurisdictions
  - A judicial lottery determined that the cases would be held in the 10th Circuit
  - In December, the 8th & 10th Circuits denied motions to stay the FCC's September Small Cell Order
  - In December, the 10th Circuit granted a petition to move all of the September Small Cell Order litigation to the 9th Circuit based on its conclusion that it arose out of the same underlying proceeding as the Portland Appeal of the August Moratorium Order.
  - Given the large number of parties & diverse issues the appellants have requested that 9th Circuit appoint a case manager

Small Cell Litigation – Briefing Schedule

- APPA Filed its Brief – June 10
- Amicus Supporting Briefs – June 17
- FCC Response Brief – August 8
- APPA Reply Brief – September 4
- Oral Argument Late October/Mid-December

Small Cell Litigation -- APPA APPEAL

- APPA Arguments
- The FCC has exceeded its statutory authority under the Communications Act
  - The FCC's Only authority over electric utilities operating as such is Section 224
  - Section 224 explicitly exempts public power utilities
  - The FCC is ignoring statutory language, legislative history & its own prior findings
- Section 253 does not apply to public power facilities
  - Section 253 does not apply to facilities
  - Section 253 does not apply to proprietary activities
  - Public power utilities act in a proprietary capacity
- FCC's preemptive authority must be interpreted narrowly
- No compelling need for FCC's action
- FCC shot clocks impractical for pole attachments
- FCC ignored unique public safety & operational issues related to accessing electric poles

Small Cell Litigation -- FCC Response

- FCC Arguments
- Nothing in Section 224 says that the FCC cannot regulate public power through other means
- Section 253/332 are separate statutory schemes from Section 224
- Section 224 does not exclude proprietary activities
- FCC appears to hedge on several issues :
  - Argues that its ruling does not necessarily require access to all poles or any specific poles
  - Argues that utilities have the ability to argue that poles are proprietary activity
  - Says that it only focused on government poles located within ROW owned by the same governmental entity

DEVELOPMENTS IN CONGRESS

House

- H.R. 530 -- Accelerating Wireless Broadband Development by Empowering Local Communities Act
  - Bill would nullify the FCC's August Moratorium Order & the September Small Cell Order
  - House Commerce and Energy Committee
  - Introduced by Eshoo (D-CA) – 49 co-sponsors
- H.R. 2784 – Climb Once Bill
  - Energy & Commerce Committee
  - Introduced by Eshoo (D-CA)
  - Bill would clarify that local governments can adopt OTMR requirements

Senate

- S. 2012 – Restoring Local Control Over Public Infrastructure Act
  - Companion bill to H.R. 530
  - Commerce Committee
  - Sponsored by Feinstein – Handful of Co-Sponsors
- S. 3157 – STREAMLINE Small Cell Deployment Act
  - Amends 332 – Non-discriminatory access to ROW and Poles
  - Would apply to Public Power
  - Applies FCC Rates
  - Commerce Committee
  - Co-Sponsored Thune (R-SD)/Schatz (D-HI) – No Action

Resources

Baller Stokes & Lide Memo on FCC Small Cell Ruling & Shot Clock Order

- http://www.baller.com/wp-content/uploads/BSL-Memo-on-FCC-SWF-Decl-Ruling-and-3rd-RO-10-8-18.pdf

Baller Stokes & Lide Memo on FCC OTMR Order & Moratoria Ruling

- http://www.baller.com/wp-content/uploads/BSL_Analysis-OTMR-Order-08-16-18.pdf

APPA's Comments & Reply Comments in Broadband Barrier Dockets

- https://tinyurl.com/APPA-Comments
- https://tinyurl.com/APPA-Reply-Comments

Guidance regarding technical analyses to protect your interests

- http://www.ctcnet.us/blog/documenting-the-true-and-high-local-administrative-costs-of-small-cell-siting/
- http://www.ctcnet.us/blog/the-three-ps-of-managing-small-cell-applications-process-process-process/
- http://www.ctcnet.us/blog/ten-strategies-to-protect-state-and-local-property-after-the-fccs-small-cell-preemption-order/

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