

ORANGE COUNTY BUSINESS JOURNAL

The Case for In-Building DAS

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As we move well into the second decade of the 21st century, it is clear that wireless communications are not just a modern convenience or trendy gadget, but rather an integral part of the way we live, work and interact. Wireless service is as critical to modern society as other basic services such as electricity, natural gas, water and wired telephone service (perhaps now even more so than wired telephone service).

In the 1870s, Alexander Graham Bell had a vision of bringing telephone service to every home and business in America. He recognized that such an elaborate system of wires connecting the country and eventually the planet was “impracticable at the present moment” but that such “grand system” would eventually be realized. Though Bell was correct, he faced much opposition for infrastructure investment. That same skepticism and adversity plagued the early pioneers of electricity distribution, such as Thomas Edison. But with time and investment in infrastructure (both private and public), electricity and phone service have become utilities without which no individual or business in America could live or work.

Without question, the “utility” of the 21st century is wireless communications service. Just as the telephone began as a luxury and quickly became a necessary utility, in the near future all Americans will view wireless communication services as a necessary utility. For office buildings, corporate campuses, retail centers and industrial facilities, the best way for an owner or operator to provide this utility is to install a DAS network.

What is DAS?

DAS is an acronym for “distributed antenna system.” A DAS network is a group of small antennas working together to transmit wireless signals to improve coverage and reliability in areas where traditional cell towers have trouble reaching users. This type of system is perfect for a building, facility, or campus. Most DAS networks, however, are located in sports arenas, congested downtown areas or rail and subway systems (for example, the New York subway system has its own DAS). Whereas, a cell tower antenna broadcasts over a large geographic area providing limited coverage to a multitude of users, each antenna in the DAS network serves as a “mini” cell tower broadcasting exceptional signal strength and bandwidth over a much smaller area to only a few users.

Why Should Property Owners Install a DAS?

There are a number of reasons to have a DAS installed in your building, facility or campus. Among other things, (i) having a DAS improves the marketability of the property by increasing connectivity, (ii) in-building wireless coverage is historically difficult and getting worse with LEED certified buildings, and (iii) a DAS improves the safety of the building’s occupants by enhancing emergency services.

Better Connectivity Means More Business

For a retail shopping center or plaza, a DAS network will dramatically increase connectivity for customers. Heightened connectivity will attract consumers and, therefore, more and better retail tenants. For an office building, we expect that in the next few years no major office tenant will



take occupancy of new space without a DAS in place to ensure its employees will have mobile device coverage during the workday.

Providing In-Building Coverage is Difficult for Cell Towers

Most wireless calls are made indoors, and with the growth of smart phones, the need for data availability is increasing exponentially. In contrast to a car or outdoor area, wireless coverage inside buildings is historically difficult to obtain from a traditional cell tower. Further, more and more buildings are being constructed or retrofitted to Leadership in Energy and Environmental Design (LEED) specifications, which results in the usage of certain materials such as low-emission glass that are less conducive to a wireless signal. As such, unless the building has a DAS on-site, in-building wireless signal strength will be progressively weakened in the months and years to come.

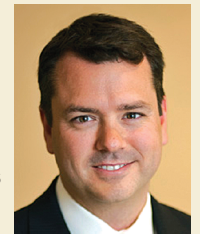
Better Connectivity May be Required by Law

An in-building DAS increases the safety of the building’s occupants. In cases of emergency, a DAS network facilitates indoor 911 calls and is better equipped to handle the multitude of simultaneous calls that would otherwise overwhelm the available wireless coverage. It also provides first responders with improved communication. Public safety personnel such as firefighters and policemen require a reliable wireless network to communicate – whether by voice or by data content. This is especially true in critical areas such as stairwells, where unaided radio frequency signals are weakest.

For these reasons, in-building amplification systems are already being *continued on page B-72*

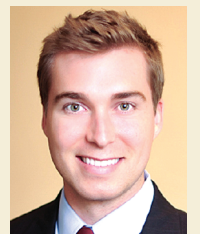
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required in certain municipalities. In 2009, two national fire codes – the National Fire Protection Association's NFPA-1 and the International Fire Code – addressed the need for an in-building system such as a DAS network. These codes are adopted in municipalities across the country. One notable example is Clark County, Nev., which last year adopted and expanded on Appendix J of the IFC to require amplification systems, such as a DAS network, to achieve the required level of radio coverage. We expect this trend to continue and ultimately become a requirement under all municipal fire codes.

Will the Wireless Carriers Come Calling to Pay for Your DAS?

No time soon – unless you own an airport, a large shopping center or sports arena. Carriers have demonstrated an increased reluctance to finance the installation of DAS in office buildings, retail locations and corporate campuses, as they seek to concentrate their efforts only on the most high-profile targets. The costs to install and operate the DAS networks are significant and typically cannot be justified by the wireless carriers from a return on investment perspective. As a result, although the carriers may install and operate a DAS in stadiums and airports, the costs cannot be justified for those locations where people live, work and shop daily. As a result, the major carriers will not agree to broadcast on your DAS network unless the cost to them is minimal.

If Not the Carriers, Who Will Pay for the Installation, Operation and Maintenance of This Much Needed Infrastructure?

Under the terms of most commercial leases, the tenants. Most commercial leases permit the owner to pass through the cost of operating and maintaining the building to the tenants in the form of additional rent. Despite the infinite variety of pass-through arrangements, as well as the fact that such clauses are often heavily negotiated, there are remarkably few appellate cases interpreting pass-through clauses. Commentators have attributed this to the fact that the parties, knowing they are bound to a long-term lease relationship, elect to negotiate rather than litigate. Nonetheless, with careful structuring, building owners should be able to install, operate and maintain a DAS at little or no out-of-pocket cost by passing the costs onto their tenants (who are the real beneficiaries of the improved wireless service).

Many existing leases will define common area maintenance (CAM) expenses broadly enough to include an ongoing expense of a DAS. Under the terms of the AIR Standard Multi-Tenant Office Lease – Net (2012), "Lessee shall pay to Lessor...Lessee's Share of all Operating Expenses." The term "Operating Expenses" includes "all costs incurred by Lessor relating to the ownership and operation of the Project,...including, but not limited to...communication systems and other equipment used in common by, or for the benefit of lessees or occupants of the Project." In addition, there is a catch-all provision that sweeps in the costs of maintaining "all other areas and improvements that are within the exterior boundaries of the Project but outside of the Premises." Such language is broad enough to include the ongoing expenses of a DAS network incurred by a building owner. Leases with larger landlords may be even more specific by explicitly naming the costs of maintaining and replacing "intra-building cabling and wiring" as CAM expenses.

There May be Some Limitations

Even under well structured DAS purchase or financing

arrangements, if the lease is a so called "gross" lease, there may be limitations on the pass-through nature of DAS expenses. In some gross leases, the tenant may have negotiated a provision where new categories of expenses that arise in subsequent years are added to the base year rather than treated as an increase over the base year (the argument being that increases are designed only to account for inflationary increases). This may prevent the landlord from passing through DAS costs without first obtaining tenant approvals. There may also be certain exclusions and limitations that need to be carefully considered. Many of these limitations, however, will not apply if the DAS transaction can be structured such that the costs are classified as a "utility" charge.

Are DAS Costs a "Utility" Charge?

We believe they can be, under certain structures. If the DAS infrastructure is paid for by the DAS provider, and the wireless communication service is sold back to the building as a "utility," we believe substantially all commercial leases would cover this charge as a tenant utility expense. Utilities are sometimes handled under separate sections in the lease but are nonetheless treated as pass-through expenses. In order to appropriately structure the transaction, the DAS provider would ideally be a licensed competitive local exchange carriers (CLECs) with the transaction structured as a utility easement in gross, coupled with a "utility service agreement" provided by the CLEC for a fixed term (with optional renewals). Under this arrangement, the costs of installation, maintenance and provision of the system can be paid over a period of years to deliver the DAS provider its required return on investment and the property owner its desired in-building DAS as a current "utility" charge.

Not only does this structure further reinforce the pass-through nature of the expense by characterizing it as an ongoing operational expense, but also it better tracks the real characterization of wireless communication service – as a utility.

Will Tenants Object?

We don't think so. Tenants are unlikely to object to the increase in pass-through charges because (i) such increases are likely to be marginal and (ii) they are the direct beneficiaries of improved coverage.

Don't Go It Alone

Owners should consider installing a DAS through a well-established wireless network infrastructure provider, as this offers several advantages over contracting directly with technicians.

For one, direct contracting is more likely to be characterized as a capital improvement, which may require the consent of tenants and may require the costs to be amortized when passing them through.

In addition, a DAS is only valuable to the extent carriers agree to use it, and carriers have strict requirements regarding signal strength and reliability. An experienced wireless network infrastructure provider will have existing relationships with the major carriers to ensure that those carriers join the DAS network to maximize its effectiveness. The wireless network infrastructure provider will also maintain the DAS, ensure certain levels of performance required by the carrier agreements, and cover incremental staffing costs to perform monitoring, maintenance and optimization work.

Lastly, property owners should consult counsel familiar with DAS networks and commercial leasing to ensure their existing leases permit them to pass through DAS costs and to further understand the risks and advantages of an in-building DAS.