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Cell Tower Siting Update

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Towers and Timelines – What Cities Need to Know about the Federal Communication Commission's Declaratory Ruling Interpreting the Telecommunications Act of 1996, Section 332(c)(7) Relating to the Preservation of Local Zoning Authority

I. Introduction

Over the last few decades, there has been an explosion of demand for wireless transmission of digital data. Consumer-driven use of cell phones and the internet has joined reliance by police, fire, and 911 emergency services. Industry development is both driven by and limited by its ability to construct towers and other facilities to provide these services. Urban planners, zoning boards, and providers constantly struggle with finding locations that are both near enough to provide efficient access to wireless services while at the same time not compromising local zoning concerns. Towers are often aesthetically unappealing, and are often provoke protest from people that do not wish to have them in the neighborhood. At the same time, there is a public need for a nationwide wireless network. In response, the Telecommunications Act[1] attempts to balance this public need against local zoning authority by creating an environment of regulation that allows for competition between service providers while maintaining sensitivity to local laws. The Act attempts to provide guidelines that direct review by local governments regarding the "placement, construction, and modification of personal wireless service facilities." The section provides for few limitations, while making clear that nothing else shall limit or affect the authority of state or local government.

The TCA's flexible language allows local zoning boards the freedom to maintain normal procedures for reviewing permits when hearing applications for the siting of personal wireless facilities similar to procedures used to rule on other permits.[2] In practice, local zoning boards have been able to delay construction of

[1] The Telecommunications Act of 1934, as amended in 1996, 47 U.S.C. § 332(c)(7), titled "Preservation of Local Zoning Authority."

[2] "In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All

wireless facilities resulting in some places, permits have been pending a final decision for years. On July 11, 2008, the CTIA – The Wireless Association ("CTIA"), filed a petition requesting that the Federal Communications Commission issue a declaratory ruling to clarify provisions of the TCA relating to local review of wireless facility siting applications.[3] Primarily, the CTIA sought clarification of federal guidelines regarding the length of time for review of applications, clarification of the meaning of the prohibition of discrimination between providers of wireless services, and an opinion on the practice of some municipalities of requiring a variance or waiver for each application. On November 18, 2009, the FCC granted in part and denied in part the CTIA's petition. The FCC attempted to interpret the balance struck by the TCA in providing clear guidelines for municipalities and providers to follow.[4] The FCC's ruling has immediate and long-term consequences for municipalities, and policies should be adjusted where necessary.

II. Time Frames

Despite the TCA's express intent to prohibit unreasonable delays in the authorization of requests to provide wireless service facilities,[5] and despite "lengthy and unreasonable delays in the consideration of facility siting applications" in the form of hundreds of applications around the country pending over a year,[6] most of the litigation surrounding the TCA has not centered on these delays. The Act provides the ability to file suit within 30 days after a local

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Wireless Siting Proposals as Requiring a Variance," 24 F.C.C.R. 13994 at 16 citing H.R. Conf. Rep. No. 104-458, 104th Congress, 2nd Sess. 208 (1996). "It is not the intent of this provision . . . to subject their requests to any but the generally applicable time frames for zoning decisions." ("FCC Ruling").

[3] In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, WT Docket No. 08-165, *Petition for Declaratory Ruling*, filed July 11, 2008 ("Petition")

[4] FCC Ruling at 2-3.

[5] 47 U.S.C. § 332(c)(7)(B)(ii).

[6] The FCC accepted the petitioner's data that claimed that out of 3300 personal wireless facility siting applications currently pending before local governments, 760 had been pending for more than one year, and 180 are pending for more than three years. Of those, 350 collocation applications have been pending for more than one year, and 135 collocation applications were pending for over three years.

government has failed to act.[7] In practice, this does not give any clarity to an applicant. It demands a certain time period to enforce compliance with a nebulous time period. The TCA states that:

> "A State or local government or instrumentality thereof shall 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."[8]

Neither applicants nor local governments can say with any degree of certainty whether an application has been pending for an unreasonable amount of time. This also affects an applicant's ability to seek redress in court since they are unable to determine that a local government has failed to act and then file suit for expedited proceeding to compel action on an application. That is in essence the the remedy required by the TCA:

> "Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis." [9]

The FCC found it was "in the public interest to define the time period after which an aggrieved party can seek judicial redress for a State or local government's inaction."[10] It defined a reasonable amount of time to be, presumptively, 150 days for facility siting applications generally, and 90 days for collocation applications. After those periods, a failure to act is presumed, and an applicant may seek redress in court within 30 days after the 150 or 90 days has passed. In a victory for local governments, the FCC declined to deem an application granted in which a government has presumptively failed to act.[11] State and local governments will

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[7] 47 U.S.C. § 332(c)(7)(B)(v).
[8] 47 U.S.C. § 332(c)(7)(B)(ii).
[9] 47 U.S.C. § 332(c)(7)(B)(v).

[10] FCC Ruling at 12, 15.
[11] FCC Ruling at page 16.

thus have the chance to rebut in court a presumption of failure to act. The FCC clarification of timelines is only considered necessary to prevent what it perceived to be a problematic delay in deployment of advanced wireless services. It was not an attempt to contradict clear legislative intent to have courts serve as the arbiters of a government's failure to act or to prevent courts from fashioning appropriate case-specific remedies. In addition, the FCC states that a state or local government and wireless service provider may, by mutual agreement, extend the timelines and in doing so, not toll the 30-day period for filing suit. Negotiations may continue uninterrupted by a filing deadline.[12] Lastly, the 150 or 90-day timeline operates independently of local statutes or ordinances and only serves to interpret the federal requirement of action within a reasonable period of time. State and local governments must still obey their own regulations.

Two options are available for applications already pending when the FCC issued its November 18, 2009 ruling. For applications pending less than the 150 or 90-day timeline, a government will be presumed to have failed to act after 150 or 90 days after the date of the ruling. For applications pending more than the 150 or 90-day timeline, an applicant may give notice of failure to act along with a copy of the ruling, to the state or local government and then file suit 60 days later.[13]

The FCC additionally provides that for incomplete applications, state and local governments will have 30 days to notify applicants and request additional information. The 150 and 90 day timelines will not begin to toll until applicants have complied with requests for additional information and the applications are successfully reviewed for completeness. Regulating the local process by which

[12] FCC Ruling at page 20.
[13] FCC Ruling at page 21. Though by the time you are reading this, both of these transitional time periods have already passed.

applications are reviewed for completeness is arguably beyond the scope of the FCC's authority.[14]

III. Prohibition of service by a single provider.

A fair amount of litigation has surrounded both the TCA's prohibition of unreasonable discrimination and the requirement that local governments not prohibit or have the effect of prohibiting the provision of wireless services. These provisions are implemented differently around the country with varying results, not always resulting in Congress' apparent desire to facilitate an environment of competition between providers of wireless services. The TCA states that:

> "The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof-- (I) shall not unreasonably discriminate among providers of functionally equivalent services; and (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services."[15]

Circuit courts have split over what a prohibition against the provision of personal wireless services would look like, and what unreasonable discrimination might be. The CTIA's petition particularly objected to the narrow reading that prohibition means a total prohibition of all wireless services, and that applications may be denied as long as a single provider serves an area.[16] Other courts objected to this interpretation for fear of creating a "crazy patchwork quilt of intermittent

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[14] Fcc decision at page 22. The FCC seems to have reached this conclusion by comparing the review procedures of five different states and taking a rough average. While reviewing applications for completeness ultimately affects the total time in which a government acts on an application for siting wireless facilities, which must be within a reasonable amount of time by federal law, the ability to review applications for completeness is a local affair subject to many variables of different local governments. The FCC notes specifically that North Carolina requires review for completeness within 45 days. They are now required to review applications in two-thirds the time. While the lack of a 30-day deadline could potentially produce the same types of lengthy delays, the TCA specifically contemplates that an unreasonable delay occurs "after the request is duly filed" which certainly means a completed application. Imposition of a 30-day deadline for review of completeness may be outside the FCC's scope of authority to interpret federal law.

[15] 47 U.S.C. § 332(c)(7)(B)(i)(I) & 47 U.S.C. § 332(c)(7)(B)(i)(II).

[16] See *APT Pittsburgh L.P. v. Penn Township Butler County of Pa.*, 196 F.3d 469, 480 (3d Cir. 1999).

coverage."[17] The FCC, citing the pro-competitive purposes of the TCA, as well as the TCA's reference to providers of wireless services in the plural, rejected the "one-provider rule"[18] interpretation. Denying an application solely because "one or more carriers serve a given geographic market" violates the TCA.[19] This does not mean that local governments are compelled to grant every application that asserts a coverage gap. Local governments still have authority over "bona fide local zoning concerns" and are merely prevented from denying an application solely because it is already served. [20]

IV. What cities can do now.

At the time of this writing, the FCC ruling has been in effect long enough that the initial time periods triggering litigation have expired. Local governments will need to ensure that ordinances and policies establishing timeframes, approval criteria, and other regulations for review of applications for siting wireless services facilities now comply with the FCC ruling. Generally speaking, governments should evaluate their ordinances and policies as follows:

1. Revise local ordinances to comply with FCC timelines for reviewing wireless facility siting applications. A local government now has 150 days to make a final determination on a complete application for construction, modification, or placement of a wireless services facility, or 90 days to make a final determination on a complete application for collocation.

2. The initial review for completeness and any request for additional information must take place within 30 days. The FCC ruling does not claim that local governments forfeit the right to request additional information after 30 days, and does not actually prescribe any kind of remedy for a local government's

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[17] See *MetroPCS, Inc. v. City and County of San Francisco,* 400 F.3d at 732 (result of "one-provider" interpretation might have the effect of driving the industry toward a single carrier," *quoting Second Generation Properties, L.P. v. Town of Pelham*, 313 F.3d at 631).
[18] See *AT&T Wireless PCS, Inc. v. City Council of Va. Beach*, 155 F.3d 423, 428-29 (4th Cir. 1998).
[19] FCC ruling at 23
[20] FCC ruling at 23

failure to do so. It is likely that the 150-day and 90-day timelines will be applied upon the expiration of 30 days without a request for additional information. The clock will continue to count down during the time it takes an applicant to comply. If the request were made within 30 days, the 150-day and 90-day timeline would not begin to count until the applicant had complied with the request and had its application considered complete.

3. Implement policies and practices for mutually extending deadlines beyond the 150-day or 90-day timeline. This will alleviate pressure from negotiations with providers that have a mere 30 days to file suit once that timeline has expired.

4. Review approval criteria to ensure compliance with federal requirements that local governments not "unreasonably discriminate" or "prohibit or have the effect of prohibiting the provision of personal wireless services." Specifically, the FCC has interpreted prohibiting the provision of personal wireless services to mean a prohibition for each provider, not general prohibition across the city. Local governments may no longer invoke the "one-provider rule" and deny applications solely because "one or more carriers serve a given geographic market." Each provider must be given the opportunity to provide personal wireless services in an area.

(7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof--

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall 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.

(iii) Any 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 and supported by substantial evidence contained in a written record.

(iv) No 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.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the

Commission for relief.

(C) Definitions

For purposes of this paragraph--

(i) the term ``personal wireless services'' means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term ``personal wireless service facilities'' means facilities for the provision of personal wireless services; and

(iii) the term ``unlicensed wireless service'' means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v) of this title).