Understanding Federal Laws, Orders AND Recent Changes Applicable to Cell Facilities

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Federal Laws and Orders Applicable to Cell Facilities

Generally five sets of Federal laws and orders applicable to cell tower and communications tower zoning, etc.

1. 47 U.S.C. § 332(c)(7), added in 1996 (cell antennas and towers)
2. Shot clock orders from 2009 and 2010 (same)
3. Public Law 112-96 § 6409(a) and Wireless Siting Order interpreting same (all communications towers)
4. August 2, 2018 FCC Moratoria Order (all telecommunications services)
5. September 26-27, 2018 Small Cell Order (small cells; all cells)

Small Cell Order adds to, but generally does not replace other Federal laws applicable to cell towers.

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On January 14, 2019, Federal Law and Orders Changed the Scope of Cell Facility Implementation

- Why should they listen?
  - Directly affects the quantity of and timeframe for application and review
    - Could your teams accept and process up to 50 applications in a 10 day period?
    - Do you have policies and procedures in place to maintain control of the process?

FCC Declaratory Ruling and Third Report and Order, Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment

WT Docket 17-79, WC Docket 17-84, adopted, September 26, released September 27, 2018 (“Small Cell Order” or “Order”)

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- These slides only summarize portions of the Order, please note there are more requirements and more detail in the Order itself
- Effective Date of Order, January 14, 2019
- We have provided a link to the full order below:

Scan me

https://www.fcc.gov/document/fcc-facilitates-wireless-infrastructure-deployment-5g

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FCC Declaratory Ruling and Third Report and Order, Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment

Two Portions of Order, with different legal bases

- Declaratory Ruling based on 47 U.S.C. §§ 253 and 332(c)(7), mainly addressing fees, non-fee requirements
- Third Report and Order (3rd R&O) based on 47 U.S.C. § 332(c)(7) mainly addressing shot clocks

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5G Wireless Services

- Justification: Order is expressly intended to speed transition to "next generation of wireless services, known as 5G"
- 5G still under development
- Requires thousands of small cells per community
- Numbers vary but estimates for each of four providers of . . .
  - Approximately 60 new small antennas per square mile,
  - One antenna every 300 to 600 feet in street, and
  - Verizon - - "Up to 100 times more antenna locations than currently exist" Order ¶ 47.
- Very expensive --Estimated at $275 billion to deploy
- Due to cost, will only serve dense areas

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Small Cells Defined

- Same definition for both parts of Order
- Definition (abbreviated) of "Small Wireless Facility" or SWF in Order, see, e.g. new Rule attached as Appendix A to Order.
  - Antenna of no more than 3 cubic feet in volume, associated equipment no more than 28 cubic feet
  - Height
    - Of structure on which antenna is mounted is 50' or less, including antennas, or
    - Mounted on structure no more than 10% taller than adjacent structures, or
  - Antennas do not extend height of structure to more than greater of 50' tall or increase it by more than 10% in height

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Shot Clock

Federal communications law now generally divides communications towers into several classes -- with shot clocks varying from 60 to 150 days

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Shot Clock

Type of Facility	Application Review Time	Approval Time
New Cell Tower that are not Small Cells	30 Days	150 Days
Co-location or that are not Small Cells	30 Days	90 Days
Small Cells – Co-location	10 Days	60 Days
Small Cells – New Pole	10 Days	90 Days
Communication tower modifications: If "substantial"	30 Days	60 Days
Communication tower modifications: If "insubstantial"	30 Days	90 Days

Note accelerated small cell application and approval times

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Shot Clock continued

- Time period may be tolled by mutual agreement, or by notice of incompleteness within 10/30 days of filing.
- "Siting authorities may not refuse to accept applications"
  - Problems if many applications filed at once - -Order does address "batch applications" to some degree
  - FCC August No Moratoria Order bans actual or effective moratoria
  - Mandatory pre-application meetings disfavored, don't toll shot clocks, voluntary ones encouraged. ¶¶ 145-146.
  - Risk for cities, public, is that violation of Order/clocks will lead to approval of application as submitted, as has happened in around half cases since 1996 under § 332(c)(7)

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Fees

The order outlines the scope and depth of associated fees that can be charged

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Fees

- Statutes - -No state or local requirement may "prohibit or have the effect of prohibiting" the provision of telecommunications services; 47 USC §§ 253, 332(c)(7)(A).
- Order interprets statutory language to mean requirements "cannot materially inhibit . . . the ability of competitor . . . to compete . . ." ¶¶ 31-37
- Fees - -Order, ¶55, says both sections, including § 253's right to receive "fair and reasonable compensation" for use of right of way, means fees can't exceed "reasonable approximation of . . . governments' actual and reasonable costs" for SWF to use
  - Rights of way, or
  - To attach to or use government structures in the rights of way (street lights, traffic lights, utility poles, etc.)

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Fees Include

- One-time fees, such as application, building or construction permit and review fees, and road closure fees
- Recurring fees to attach to a gov't owned or controlled pole or other fixture in the right of way
- Recurring fees for use of the rights of way

Fees must be

- Non-discriminatory
- A reasonable approximation of reasonable costs "specifically related to and caused by the deployment" Fn. 131
- No specific accounting methodology required

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Fees

- Presumption - - Order says fees up to the following amounts are presumed to comply with §§ 253, 332:
  - One-time fee of up to $500 for one application for up to 5 small wireless facilities, $100 per additional SWF
  - $1,000 for new pole in street with SWF. ¶ 79.
  - Recurring fees (both kinds) not to exceed $270/SWF per years
- Can charge more if meet standards on prior slide, but Order expects this will occur only in "very limited circumstances" ¶ 80
- Excessively high consultant fees cannot be recovered
- Gross revenue based fees are not cost based and thus "are preempted" under § 253
- In-kind contributions, if not cost-based, are preempted

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Aesthetics

The order outlines aesthetic requirements for small cells

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Aesthetics

- Aesthetic requirements for small cells (¶¶ 86 ff) must be:
- Reasonable
- No more burdensome than those imposed on similar infrastructure
- Objective,
  - Means "must incorporate clearly-defined and ascertainable standards, applied in a principled manner" with "sufficiently clear level of detail as to enable providers to design and propose their deployments in a manner that complies with those standards" ¶ 88 and Fn. 247, and
- Published in advance of application (may mean available to the applicant, so that it can know what will be required before submittal). Apparently have 180 days from Fed'l Record publication of Order to publish. ¶ 89.
- Undergrounding, etc.:
  - A requirement that "all" wireless facilities be deployed underground "would amount to an effective prohibition given the propagation characteristics of wireless signals" ¶ 90.
    - May be able to require equipment other than antennas to be placed underground
  - Cell tower/antenna minimum spacing requirements that materially inhibit wireless service are an effective prohibition of service, and therefore preempted. ¶ 87.

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Cell Sites Outside of Rights-of-Way

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Cell Sites Outside of Rights-of-Way

- Order is principally focused on small cell sites in rights-of-way
- But Order expressly makes several of its provisions applicable to cell sites outside the rights-of-way
  - Redefines "collocation": "Attachment of facilities to existing structures constitutes collocation, regardless whether the structure or the location has previously been zoned for wireless facilities." ¶ 140.
  - Until now collocation meant adding antennas to an existing cell tower -- now basically means adding antennas to any structure capable of holding them, whether they have antennas on them now or not.
  - 90 day shot clock thus applies to zoning, building permit or other approvals needed to put cell antenna on a building (even though often more complicated, more code and safety issues than adding cell antenna to cell tower)

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Cell Sites Outside of Rights-of-Way continued

- Requirement to issue "all necessary permits" necessary to start construction within the shot clocks applies to all cell sites. See Appendix A of Order, 47 CFR § 1.6002 (f) (definition of "authorization" in shot clock rules adopted by Order in Appendix A to same).
  - For example, "all permits" applies to local approvals for a cell tower on private property, or cell antenna on private building
  - Again per FCC Chairman Pai, if it is a 90 shot clock, "construction can start on day 91"
  - Cost based fee requirement and $500/$100 presumed reasonable standard/cap for all one-time application fees "are not specific to the ROW". Fn. 71.
    - "Apply to all deployments of Small Wireless Facilities". Id.
    - Apparently applies to SWF's on non-ROW municipal property, such as city buildings, parks, and the like
    - Providers will argue applies to all SWF's outside the ROW, including any on private property

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What do you do now?

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The changes went into affect, January 14, 2019. Is your city, county or department prepared?

What are your next steps?

- Do your cost studies; count EVERYTHING
- Develop your aesthetic standards; Uniformity
- Develop your application(s); Ask every question
- Develop your intake and processing procedures

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