

# STREAMLINING SMALL CELL REVIEW AND OTHER REGULATORY UPDATES

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# Wireless Regulatory Background

- Communications Act of 1934
- Pole Attachments Act
  - **47 U.S.C. § 224(b)(1)**: FCC “shall regulate the rates, terms, and conditions for pole attachments”
  - **47 U.S.C. § 224(f)(1)**: “A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.”
- Telecommunications Act of 1996
- Spectrum Act of 2012
  - **Section 1455(a)(1)**: “A state or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.”

# Telecommunications Act of 1996\*

- **Section 253(a):** “No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”
- **Section 253(c):** “Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.”

# Telecommunications Act of 1996 (cont'd)

- **Section 332(c)(7)(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.”
- **Section 332(c)(7)(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.”
- **Section 332(c)(7)(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.”

# Interpretations of Telecommunications Act of 1996 Provisions

- *Puerto Rico Tel. Co. v. Telecomm. Reg. Bd. Of Puerto Rico*, 189 F.3d 1, (1<sup>st</sup> Cir. 1999): Section 253 represents a “broad preemption of laws that inhibit competition.”
- *California Payphone Ass’n*, 12 FCC Rcd 14191, 14206, para. 31 (1997): state or local laws have the effect of prohibiting telecommunications services if “the ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”
- *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2002): a legal requirement can constitute an effective prohibition of services even if it is not an insurmountable barrier.

# Interpretations of Telecommunications Act of 1996 Provisions (Cont'd)

- *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994, 14016, para. 56 (2009): interpretation of what a “reasonable period of time” for a municipality to act.”
- *City of Arlington v. FCC*, 688 F.3d 229 (5<sup>th</sup> Cir. 2012): FCC may interpret Sections 253 and 332 to further clarify what types of state and local legal requirements run afoul of Congress’ statutory parameters.
  - Affirmed the FCC’s authority to interpret the Telecommunications Act of 1996

# Shot Clocks

- 47 USC § 332(c)(7)(ii): local government must act on an application in a “reasonable period of time”:
  - 47 C.F.R. § 1.6003: “presumptively reasonable periods of time”
    - New facility: **150 day** shot clock
    - Non-small cell collocations on existing structures: **90 day** shot clock
  - 47 C.F.R. § 1.6100: “presumptively reasonable periods of time”
    - Modifications to existing towers:
      - Insubstantial\*: **60 day** shot clock
      - Substantial: **90 day** shot clock

\* 47 C.F.R. § 1.6100 defines exactly which modifications are “substantial”

# Recent Developments

- **Small Cell Order\***:
  - Updated shot clock for small cells
  - Limitations on fees local governments can impose for small cell placement in Rights-of-Way
  - Limitations on aesthetic controls and regulations
- **Moratorium Order\*\***:
  - Ban on Moratorium

\*FCC Third Report and Order and Declaratory Ruling, *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment* [WT Docket No. 17-79; WC Docket No. 17-84; FCC Docket No. 18-133]

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# Small Cell Order

- FCC's ongoing efforts to **remove regulatory barriers** that would unlawfully inhibit the deployment of infrastructure necessary to support deployment of 5G network.
  - Deployment requires additional density be added by way of scattered antennas, which raises different policy and regulatory controls than single, large towers

# Small Cell Order (Shot Clocks)

- FCC now defines “**a reasonable period of time**” specifically for review of small cell applications:
  - 47 C.F.R. § 1.6003:
    - Collocation of small cells on pre-existing structure: **60 day** shot clock
    - New structure to support small cell: **90 day** shot clock

# Small Cell Order (Fees)

- Fees for Right-of-Way Access:
  - Sections 253(a) & 332(c)(7)(A): No state or local requirements shall **“prohibit or have the effect of prohibiting”** the provision of wireless services:
  - Section 253(c): state & local governments may seek **“fair and reasonable compensation from telecommunications providers...for use of public rights of way on a nondiscretionary basis”**
    - “Fair and reasonable compensation” is either of the following:
      - One time fee:
        - New Pole: up to \$1,000;
        - Collocation on existing pole: \$500 for single application with up to five small cells plus \$100 per additional small cell; OR
      - Recurring fee:
        - \$270 per small cell facility per year
- Includes fees for: application or permit fees such as siting applications, zoning variance applications, building permits, electrical permits, parking permits, or excavation permits.

# Small Cell Order (Other Local Requirements)

- Local requirements violate Sections 253(a) & 332(c)(7)(A) if it “**materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.**”\*
  - Aesthetic Requirements/Underground Requirements/ Spacing Requirements:
    - not preempted if they are:
      - (1) reasonable,
      - (2) no more burdensome than those applied to other types of infrastructure deployments, and
      - (3) objective and published in advance.
        - Objective = “must incorporate clearly-defined and ascertainable standards, applied in a principled manner”

\* *California Payphone*, 12 FCC Rcd at 14206, para. 31.

# Moratorium Order

- Section 253(a): “**No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting** the ability of any entity to provide any interstate or intrastate telecommunications service.”
  - FCC: “Express moratoria are facially inconsistent with section 253(a).”
    - Includes:
      - *Express Moratoria*: statutes, regulations, or other written legal requirements that expressly, by their very terms, prevent or suspend the acceptance, processing, or approval of applications or permits necessary for deploying telecommunications services and/or facilities;
      - *De facto Moratoria*: actions that are not express moratoria, but that effectively halt or suspend the acceptance, processing, or approval of applications or permits for telecommunications services or facilities in a manner akin to an express moratorium