

FCC Cell Tower Shot Clock Order: Summary and Practical Response

by

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Introduction

- This is an outline, email us for copy of the FCC Order and our 60 page paper collecting, analyzing all significant Court of Appeals cases under 47 U.S.C. § 332(c)(7)
- Cell towers, antennas continue to increase
 - Approx 225,000 at end of 2008
 - Approx 12,000 more each year
 - To fill in gaps
 - To add capacity as phones used for Internet, data, pictures, etc
 - Plus approx 100,000 for WiMAX
- Major FCC goal is increasing provision of broadband services

Introduction (cont.)

- Goal of presentation is practical advice on compliance with the Order, while appeals, Petitions for Reconsideration are being decided

Background

- Federal preemption of local cell tower zoning an industry goal for 15 years
 - Sought FCC as Federal zoning authority for all cell towers
 - FCC zoning preemption case nearly complete in 1995, when voided by Congress
 - Industry hoped 1996 Federal cell tower zoning provisions would preempt local zoning
 - 47 U.S.C. § 332 (c) (7)
 - Industry position rejected by courts
 - As was attempt in 9th Circuit to reach similar result under 47 U.S.C. § 253

Background (cont.)

- Current industry attempts to overturn, limit local zoning by “forum shopping”
 - Legislation - - S. 1447 of current session, sponsored by Senator Kay Bailey Hutchison
 - FCC broadband initiatives
 - This FCC shot clock case
 - Continuing court cases

History of Proceeding

- Petition for Declaratory Ruling filed with the FCC on July 11, 2008
 - Filed by the Wireless Association, or CTIA, a trade group for the cellular industry
 - The FCC opened docket WT 08-165, and received numerous comments, reply comments, and other filings.
 - Industry asked the FCC to act on the Petition prior to the change in administrations on January 20, 2009. This did not occur.

Provider Claims

- Legally based on *Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008) ("ACM") upholding an FCC rule setting time limits for municipalities to act on requests for cable franchises by new provider
 - Providers claimed this gave FCC jurisdiction
 - ACM held FCC could interpret what was a "reasonable" time for action under 47 U.S.C. § 541 specifying that municipalities may not "unreasonably refuse to award" a second cable franchise
 - CTIA argued FCC has same authority under cell tower zoning provisions of 47 U.S.C. § 332 (c), requiring action "within a reasonable period of time"
- Providers also cited (without identification) claimed instances of excessive time for action on zoning requests and claimed that variances are rare and burdensome

Municipal Response

- Municipalities strongly challenged FCC jurisdiction
 - Jurisdiction solely with the courts
 - Statute's prohibition on FCC taking any action to "limit or affect" local zoning authority over cellular and similar towers
- Municipalities showed claims of problems were very overstated

Municipal Response (cont.)

- Municipalities cited statute's provision that the time for local action shall be a reasonable period of time, “taking into account the nature and scope” of each request
- And the Conference Report that the time frame for action on cell tower zoning requests under 47 U.S.C. § 332 (c) (7)(B)(ii) shall:
 - Be the usual period under such circumstances
 - Be the generally applicable time frames for zoning decision
 - Not give preferential treatment to the cellular industry

Municipal Response (cont.)

- Municipalities also
 - Cited the significant time periods required by
 - Public notice requirements, such as for hearings
 - Appeals to city council of zoning board decisions
 - Slow responses by providers
 - Requirements by some Federal courts for "written decisions" under 47 U.S.C. § 332(c)(7) which are best drafted by lawyers

Summary of Order

- FCC Order
 - At www.varnumlaw.com/celltower
 - Is a declaratory ruling, so no rule was issued, instead have to read 29-page text of Order
- Shot Clocks (Simplified)
 - 90 days for collocations
 - 150 days for new towers
- Variances for Cell Towers
 - Request to preempt same rejected for lack of evidence
- Gap in service
 - Must only be of provider in question, not lack of service by any provider

Shot Clocks--Authority

- FCC agreed with industry on its authority to set time limits for zoning requests
 - Statute requires action in “reasonable time” and allows applicant to file suit within 30 days after final action or “failure to act” on zoning request
 - Order sets “presumptively reasonable” time limit for “failure to act”, allowing applicant to file suit in Federal Court under 47 U.S.C. § 332(c)(7) if times are exceeded
 - “The court will [then] determine whether the delay was in fact unreasonable under all the circumstances of the case”

Shot Clocks--Remedy

- Good news –
 - FCC rejected industry request that applications be “deemed granted” if time limits are exceeded
 - Instead only removed “ambiguity in statute” as to when applicant could go to court for failure to act
 - “The court will then review the record to determine the appropriate remedy. . . Exceeding a reasonable time for action would not, in and of itself, [lead to] an injunction granting the application”

Shot Clock-Remedy (cont.)

- But a risk that municipalities may not be aware of:
 - Courts often rule that the remedy for a violation of 47 U.S.C. § 332(c)(7) is mandamus or injunction approving zoning application as filed, not a remand to the municipality
 - Due to Act’s requirement that cases be decided on “expedited basis” and industry arguments that expanded service is essential
 - Cases remanding cases to municipality rely on items such as
 - Procedural vs substantive violations
 - Lack of authority for same in 47 U.S.C.
 - Federal Mandamus Statute (does not apply to state officials)
 - See cases at pp. 43 and following of our cell tower zoning paper

Shot Clocks

- Collocations
 - 90 days to act presumed reasonable. Reasoning:
 - Easier to process than new tower - - no new construction
 - No hearings required in some states
 - Many communities process same within 90 days
 - Collocation defined in Order at fn 146. Key points – not a collocation if:
 - More than 10% increase in height
 - More than 4 equipment cabinets (or 1 shelter)
 - New antenna extends more than 20' from the tower
 - Excavation needed outside current tower site

Shot Clocks (cont.)

- New Towers
 - 150 days to act presumed reasonable. Reasoning:
 - Seven state statutes require action within 150 days
 - Most routine applications conclude within 150 days
 - Applies to all requests that are not collocations

Shot Clocks (cont.)

- Zoning applications pending on November 18, 2009
 - 90/150 day shot clocks apply, start to run on November 18
- Extensions
 - 90/150 day time periods can be tolled by mutual agreement

Shot Clocks (cont.)

- Completeness/Additional Information
 - "When applications are incomplete as filed" 90/150 timeframes do not include time for applicant to respond to "a request for additional information"
 - Providers will argue preceding applies "only if" municipality notifies applicant within 30 days that application is incomplete

Gaps in Service

- Municipalities cannot "prohibit/ effectively prohibit service" under 47 U.S.C. § 332 (c) (7)
- Significant gaps in service are a prohibition (FCC rules and cases allow small gaps)
- Third and Fourth Circuits have ruled statute means that gap must not be just in the complaining provider's service. It must be an area unserved by any provider.
- First and Ninth Circuits ruled the opposite

Gaps in Service (cont.)

- FCC Order agrees statute is ambiguous, but
 - Correct interpretation is that of First and Ninth Circuits
 - Thus municipality cannot deny application solely because another provider serves the area
 - Its interpretation of statute trumps that of courts, because courts did not state statute was “unambiguous”, thus leaving room for agency interpretation

Appeals/Reconsideration

- Petition for Reconsideration filed by NATOA, NLC, Conference of Mayors
 - Challenges shot clocks as exceeding FCC's own statement that it "cannot impose additional limitations" beyond those in statute
 - Focuses on 30-day limit to review applications for completeness, and
 - Need for shot clocks to be tolled for omissions, items beyond city's control
 - We filed comments for IMLA supporting Petition
 - Fully briefed, decision expected soon

Appeals/Reconsideration (cont.)

- Appeal to Fifth Circuit filed by Arlington, TX
 - Challenges FCC jurisdiction to issue shot clock Order
 - FCC has asked for delay in briefing until it rules on Petition for Reconsideration

General Comments

- Order violates statutory prohibition on limiting or affecting local zoning - - that is intent and effect of Order
- Shot clocks violate statute, create compliance issues, especially for difficult applications
- Shot clocks do not follow Congressional directive that time for action is "usual time period", which depends on "nature and scope" of each request, without preferential treatment for cellular industry
- Order takes statutory time frames for zoning applications from 5-10 states and applies them to all 50 states, even though other 40-45 states have very different local zoning processes without such deadlines

General Comments (cont.)

- Creates unwarranted presumption of statutory violation for municipality to rebut
- Ignores delays outside city's control, such as
 - Internal appeals to City Council by provider, neighbors of Planning Commission decision
 - Delays in responses by providers to requests for information
- Encourages litigation, because
 - Provider has 30 days from 90/150 day deadline to file Federal suit
 - Challenges by providers to legality of extensions
 - Order states it does not affect separate deadlines under state law to file state law challenge

Responses to Order

- Two track approach
 - Comply with Order
 - Preserve challenges to its validity
- Make sure zoning personnel are aware of Order, track applicable clocks
 - Work backwards from "final action" deadline to intermediate steps necessary to meet it
 - Including deadlines to get on agendas, inclusion of documents in Council packages, etc

Responses to Order (cont.)

- Questions raised as to whether Order affects moratoria
- Pay particular attention to time necessary to accommodate
 - Notice requirements for public hearings (may take 2-3 weeks)
 - Time periods for internal appeals (e.g.--planning commission to board of zoning appeals).
 - Plan for same, but preserve argument initial decision (outside City's control on an internal appeal) meets Order's deadline

Responses to Order (cont.)

- And pay attention to time necessary to accommodate
 - Preparation by staff, attorneys, of "written decision" separate from "written record" with "sufficient explanation" of zoning decision, required under several Federal Circuit Court of Appeals interpretation of 47 U.S.C. § 332(c) (7)
 - Often accomplished by council, planning commission directing staff to prepare written decision for their consideration at their next meeting
 - Helps ensure compliance with 47 U.S.C. § 332(c)(7), other applicable law and prevent successful challenges to zoning decision, such as by neighbors, applicant or other affected parties

Responses to Order (cont.)

- Document each time whether provider contends 90 day collocation clock applies, respond accordingly
 - FCC definition of “collocation” very detailed, likely to be different from any local definition
 - Avoids risk of parties operating under different clocks
- Keep track of timing throughout zoning process
 - If additional time is needed to properly process application then
 - Request extension from provider
 - If provided, fine
 - If not, prepare accordingly

Internal Appeals, ZBA's

- Many cities allow administrative appeals of initial zoning decisions - - such as to “Zoning Board of Appeals” or ZBA (names vary)
 - Whether there will be appeal is outside city’s control
 - Favors providers (ZBA’s often can effectively waive ordinance requirements, initial body usually cannot)
 - Extends time for “final decision” - - due to time needed for notices, schedule hearing, issue “written decision”
- Do shot clocks apply to such appeals, or only to city’s initial zoning decision?
 - Most frequent question in programs on shot clock Order
 - FCC Order does not expressly address this issue

Internal Appeals, ZBA's (cont'd)

- Communications Act distinguishes between “initial” and “final” action by municipalities
- Such that shot clocks can only apply to city’s initial zoning decision, must be tolled during internal appeals to ZBA’s and the like
 - Raised by IMLA in Reconsideration proceeding
 - No FCC or court ruling as yet
- Significantly affects
 - Cities - - Must entire local zoning process be completed within 90/150 days? Or just initial decision?
 - Providers - - Risk losing Federal rights if suit no filed within 30 days of initial zoning decision

Internal Appeals, ZBA'S (cont'd)

- Practice Pointers
 - Until definitive ruling, attempt to complete entire zoning process within 90/150 days, if possible
 - If not possible, attempt to negotiate extensions with provider
 - But in extensions do not waive right to challenge suits filed more than 30 days after initial zoning decision
 - Current uncertainty gives cities bargaining leverage

Completeness

- Completeness Issues
 - Major defect is that providers will argue it means that requests for additional information don't toll time periods unless applicant is notified within first 30 days that application is incomplete,
 - Or that after 30 days additional information can't be requested at all!
 - Need for additional information can come up at any time in process, regardless of whether application was complete
 - Is especially true of difficult, controversial applications, such as new towers in residential areas
 - Exacerbated by providers' notorious delays (often several months) in responding to requests for information
 - Providers typically subcontract site acquisition, zoning process to local contractors with little knowledge and high turnover

Completeness (cont'd.)

- Completeness Suggestions (cont'd).
 - Do not accept applications for filing without clerical examination for basic completeness
 - Expand filing requirements for applications, especially those in residential areas or otherwise needing great scrutiny, e.g.
 - Require field strength survey showing contours of claimed "gap" and minimal tower height to fill same
 - Require balloon test for visibility of site
 - Require submission of camouflage option appropriate for area (pine tree in temperate areas, palm tree in south, saguaro in southern Arizona)

Completeness (cont'd.)

- Completeness Suggestions (cont'd.)
 - Require independent engineer's certification that collocated tower will comply with ANSI and other industry safety, structural codes and standards (many do not comply)
 - Require details on alternate sites and options to provide service, including DAS (series of very small antennas on light poles) and more but less-obtrusive towers
 - Require State Historic Preservation Officer sign-off or conditions to be filed with application
 - Documentation for site showing compliance with all prior zoning, other approvals for the site, and with current codes, applicable laws. Especially needed for collocations.
 - All other approvals (environmental, etc) from State, other entities, needed for site
 - Coverage maps/field tests for antennas at different heights

Completeness (cont'd.)

- Completeness Suggestions (cont'd.)
 - Carefully scrutinize applications once accepted for filing for completeness, notify within 30 days if incomplete
 - Be aware some dispute whether incompleteness notice tolls shot clock or resets it to 0 once complete application is filed
 - Require responses to all requests for additional information within short time frame (perhaps 3-5 days), noting this is necessary to comply with Order which providers sought
 - Document all delays in responses
 - Seek extensions due to delays

Assistance

- Assistance
 - Seek timely assistance on complicated, controversial applications
 - Where allowed, require applicant to pay cost of such assistance
 - Technical
 - Legal

Conclusion

- Support Arlington TX appeal
 - If filed comments below, can participate of right
 - Or file amicus brief
- In meantime, comply with Order, with suggestions such as noted above
- Challenge/do not concede Order's validity if sued for violation
- Preserve rights on shot clocks not applying to internal appeals, such as to ZBA

Varnum Law Firm

- One of Michigan's largest firms, over 100 years old, 150 attorneys
- Corporate law firm with significant communications and municipal law practice, assists cities nationwide and property owners in dealings with cable and telecommunications utilities
- Represents cities, property owners on cell tower, WiMAX tower leases and zoning
- Provides model cell and WiMAX tower leases, drafted from property owners' perspective at www.varnumlaw.com/lease

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