



# The FCC's Small Cell Order – What It Says and How It Affects Review



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# Time Periods – What Is Next?

- Effective Date – 90 days following publication in Federal Register
- Appeal – heard by U.S. Ct. of Appeals (not trial court) - time for appeal runs from date summary published in the FR (10 days for lottery; 60 days otherwise)
- Reconsideration – 30 days after summary published
- Order is not automatically stayed on appeal



# Major Elements of Order

- Creates rules for “small cells”
- Redefines what it means to prohibit or effectively prohibit a “small cell”
  - Establishes tests for when fees, aesthetic requirements, and other requirements effectively prohibit
- Establishes two new shot clocks for small cells
  - “Enhanced” remedy for failing to meet shot clocks



# What Is a Small Cell?

(1) The facilities—

(i) are mounted on structures 50 feet or less in height including their antennas ..., or

(ii) are mounted on structures no more than 10 percent taller than other adjacent structures, or

(iii) do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater;

(2) Each antenna associated with the deployment, excluding associated antenna equipment ... is no more than three cubic feet in volume;

(3) All other wireless equipment associated with the structure, including the wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than 28 cubic feet in volume...

(6) The facilities do not result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified in section 1.1307(b).



# Redefinition of Effective Prohibition

- 9<sup>th</sup> Circuit “significant gap” and “least intrusive alternative” appear abandoned – see n. 94
- A state or local legal requirement constitutes an effective prohibition 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”
- “We clarify that an effective prohibition occurs where a state or local legal requirement materially inhibits a provider’s ability to engage in any of a variety of activities related to its provision of a covered service. This test is met not only when filling a coverage gap but also when densifying a wireless network, introducing new services or otherwise improving service capabilities...also by materially inhibiting the introduction of new services or the improvement of existing services.”



# Fees and Effective Prohibition

- Three types of fees
  - Application fees (for facilities on and off rights of way)
  - Fees for access to RoW
  - Fees for rental of government-owned structures in RoW
- All small cell fees limited to reasonable costs



# According to FCC A Fee Is Permitted If...

- (1) The fees are a reasonable approximation of the state or local government's costs,
- (2) Only objectively reasonable costs are factored into those fees, and
- (3) Fees are no higher than the fees charged to similarly-situated competitors in similar situations.
- (4) Presumptively reasonable:
  - Non-recurring fees = \$500 for first 5/\$100 for each additional
  - Recurring fees = \$270 per facility including RoW fee or fee for attachment to municipal infrastructure
  - Specifically rejects rights of localities to act as a landlord in setting rates for infrastructure



# Existing Agreements

- 66. “... [T]his Declaratory Ruling’s effect on any particular existing agreement will depend upon all the facts and circumstances of that specific case. Without examining the particular features of an agreement, including any exchanges of value that might not be reflected by looking at fee provisions alone, we cannot state that today’s decision does or does not impact any particular agreement entered into before this decision....”





# Aesthetics

- Aesthetics requirements not preempted if:
  - (1) reasonable,
  - (2) no more burdensome than those applied to other types of infrastructure deployments, and
  - (3) objective and published in advance.
- “...aesthetic requirements that are reasonable in that they are technically feasible and reasonably directed to avoiding or remedying the intangible public harm of unsightly or out-of-character deployments are also permissible.”



# Undergrounding

- “Further, a requirement that materially inhibits wireless service, even if it does not go so far as requiring that all wireless facilities be deployed underground, also would be considered an effective prohibition of service. Thus, the same criteria discussed above in the context of aesthetics generally would apply to state or local undergrounding requirements”



# Spacing Requirements

- Order says prohibitory at one point, but at para. 91 says:
- “Some parties complain of municipal requirements regarding the spacing of wireless installations... ostensibly to avoid excessive overhead “clutter” that would be visible from public areas. We acknowledge that while some such requirements may violate 253(a), others may be reasonable aesthetic requirements.”
- “For example, under the principle that any such requirements be reasonable and publicly available in advance, it is difficult to envision any circumstances in which a municipality could reasonably promulgate a new minimum spacing requirement that, in effect, prevents a provider from replacing its preexisting facilities or collocating new equipment on a structure already in use.”



# Shot Clocks

- Apply to all permits required for deployment, not just wireless permits
- “We conclude that if an applicant proffers an application, but a...locality refuses to accept it until a pre-application review has been completed, the shot clock begins to run when the application is proffered...”
- Locality must accept “batched” applications
- Failure to meet shot clocks deemed an “effective prohibition”



# Small Cell Shot Clock Reset

- Siting authority must:
  - Notify the applicant on or before the 10th day after submission that the application is materially incomplete.
  - Clearly and specifically identify the missing documents or information and the specific rule or regulation creating the obligation to submit such documents or information,
- Shot clock date calculation “shall restart at zero on the date on which the applicant submits all the documents and information required...”
- But...operators will argue shot clock starts on resubmission additional incompleteness notice is required if resubmission is inadequate



# Collocation

- Two meanings:
  - Non 6409 context – there is a structure present, but not a wireless device. This provides 60 day shot clock for small cell and 90 day shot clock for all others
  - 6409 Context – there is a structure and the structure has a permitted wireless device.



# Putting Time Frames Together... New Concept of Collocation

← 10 Day Review of Amended Applications →

10 Days

30 Days

60 Days

90 Days

150 Days

Incomplete  
Small Cell  
with Reset

Incomplete for  
Non Small Cell

Small Cell  
On Existing  
Structure

Small Cell  
On New  
Structure //  
Any Cell on  
Existing  
Structure

New Cell on  
New Structure

