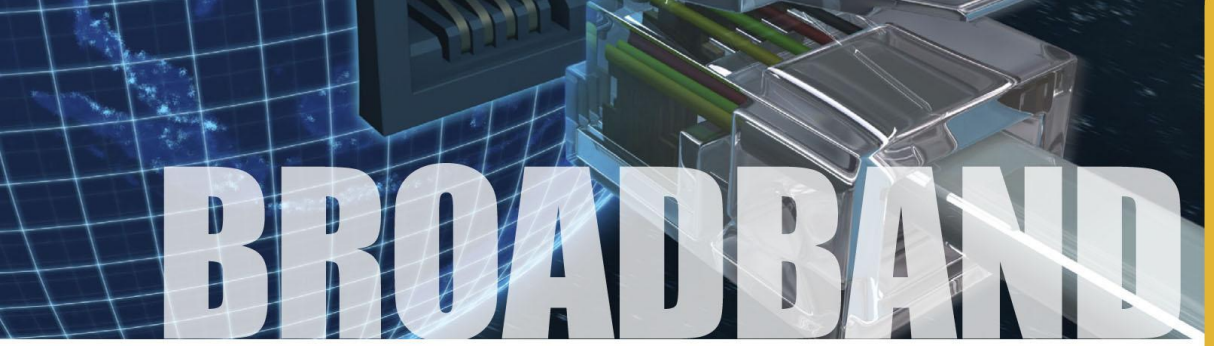

Connecting America's Public Sector
to the National Broadband Plan

SPIEGEL & MCDIARMID LLP

Recent Wireless Siting Developments:

The Fifth Circuit "Shot Clock" Decision and the New Wireless Preemption Provision in the 2012 Payroll Tax Cut Legislation

by

Tim Lay

2012 IMLA Mid-Year Seminar
Washington, DC

April 23, 2012

1333 New Hampshire Avenue, NW
Washington, DC 20036

www.spiegelmcd.com

202.879.4022
tim.lay@spiegelmcd.com



What Section 332(c)(7) Says

- Section 332(c)(7)(A) protects local zoning:
  - …"nothing in [the Communications Act]" may "limit or affect" state or local authority with respect to wireless siting, "except as provided" in Section 332(c)(7).
- Section 332(c)(7)(B) imposes five limitations on local governments – they:
  - may not "unreasonably discriminate" among providers of functionally equivalent services (332(c)(7)(B)(i)(I))
  - may not prohibit or effectively prohibit provision of PWS (332(c)(7)(B)(i)(II))
  - must act on request within "reasonable period of time" (332(c)(7)(B)(ii))
  - must make any denial decision "in writing," supported by "substantial evidence" (332(c)(7)(B)(iii))
  - may not regulate RF – but may require applicant to satisfy FCC rules (332(c)(7)(B)(iv))
- Provides (at (332(c)(7)(B)(v)) for court review on expedited basis of any violation of §332(c)(7)(B), and for FCC action *only* where a locality denies a wireless application on the basis of RF concerns; FCC otherwise not mentioned in (332(c)(7)(B)).



The FCC's Shot Clock Proceeding

- In 2008, wireless industry asked FCC to issue a ruling defining what "reasonable period of time" and "prohibit provision of" PWS mean – and to rule that if a locality failed to act within a specific period of time, the application would be deemed granted. Industry claimed – based on unsubstantiated allegations – that local governments were delaying deployment of wireless and broadband.

- Local governments argued that, except for RF issues, Congress intended for localities and the courts to implement Section 332(c)(7)(B), and the FCC had no authority to intrude on local zoning processes. Legis. history offers strong support.



The FCC's Shot Clock Ruling

- FCC ruled, among other things:
  - Local governments were delaying deployment; FCC action was needed.
  - Based on other provisions of the Act, it did have authority to interpret and implement any vague provisions of Section 332(c)(7).
  - It could decide what sort of local zoning actions were "prohibitions."
  - It could define what a "reasonable period" of time was.
- The FCC adopted nationwide presumptive "shot clocks" for a "reasonable period of time" to process wireless applications.
  - 90 days for collocation requests.
  - 150 days for new siting applications.
- Time runs from a "complete application."
  - But only if locality notifies the applicant within 30 days of filing that the application is incomplete.

SPIEGEL & MCDIARMID LLP



The FCC's Shot Clock Ruling

- The FCC declared that a State or local government that denies a siting application for personal wireless service facilities solely because "one or more carriers serve a given geographic market" has engaged in unlawful regulation that "prohibits or ha[s] the effect of prohibiting the provision of personal wireless services." (Circuits were split on this issue.)
  - But see *T-Mobile v. Fairfax County Bd. of Supervisors*, No. 11-1060 (4th Cir. filed March 1, 2012).



The FCC's Shot Clock Ruling

- NATOA asked the FCC to reconsider its decision and (among other things) clarify what was meant by a "complete application."
- City of Arlington, Texas, filed an appeal of the decision in the 5th Circuit. San Antonio and others intervened.
- After significant delay, the FCC denied NATOA's reconsideration petition. San Antonio appealed that to the 5th Circuit. NATOA and other national organizations intervened in the San Antonio appeal.



Why the Appeal?

- "Shot clocks" were inconsistent with many state and local laws governing zoning processes.
- "Shot clocks" created significant uncertainty as to how localities might manage zoning processes that involve multiple approvals – *e.g.*, public hearing requirements, admin. zoning appeals, FAA approvals, etc.
- More importantly: if FCC has *authority* to implement Section 332(c)(7), it could adopt still more stringent rules that could disrupt local zoning.



Why the Appeal?

- In the FCC's pending *ROW NOI* proceeding, it applied the same principle it used to construe Section 332(c)(7) (it can define any vague language in the Communications Act) in tentatively deciding it could define terms in Section 253, which (among other things) permits localities to obtain "fair and reasonable" compensation for use of rights- of-way (ROW).
- The FCC's "Shot Clock" decision therefore threatened to make traditional local zoning *and* ROW compensation subject to FCC regulation, with significant and adverse potential budget implications for localities:
  - Direct – Loss of local government fee revenue.
  - Indirect – Increased risk of litigation and thus increased litigation costs.



The Appeal: the Argument

- Arlington & San Antonio arguments included following:
  - Section 332(c)(7) itself gives FCC no authority over local zoning (except as to RF). FCC implemented Section 332(c)(7) relying on other provisions of Act. Because 332(c)(7) says "nothing" in the Act outside of 332(c)(7) may limit or affect local authority, FCC could not rely on those other provisions to limit or affect local zoning – FCC lacks jurisdiction over local zoning.
  - The FCC's process was defective, failing to comply with either the requirements that apply to rulemaking, or the requirements that apply to adjudications. (Notably, under a normal adjudication, the industry could not have relied on allegations regarding actions by unnamed communities to support claims that localities were delaying deployment.)
  - The resulting shot clocks were arbitrary, and inconsistent with Section 332(c)(7)'s language and legislative history. "Reasonableness" of local actions was to be assessed by considering whether wireless applications were being treated similarly to other non-wireless applications.



The Appeal: the Results

- San Antonio appeal dismissed on procedural grounds.
- Court said that while the filing of a reconsideration petition tolls the deadline for filing an appeal *for the entity that files for reconsideration, if the recon is denied,* the deadline is not tolled for others – even entities (like San Antonio) that participate in the recon proceeding.
- San Antonio intervened in Arlington appeal, but court refused to consider 2 San Antonio arguments – the "prohibition" & RegFlex arguments -- that it decided were not raised by Arlington.
- Effect: may require localities to file protective appeals to preserve rights to challenge FCC orders & to appeal rather than intervene.



The Appeal: the Results

- Court ruled: Scope of FCC jurisdiction under Section 332(c)(7) was unclear and therefore deference was owed to agency's interpretation of its own authority. Court acknowledged that this ruling was inconsistent with *Chevron* "step zero" decisions of some other circuits.
- Court barely considered meaning of "nothing in this Act" language – inaccurately suggesting Section 332(c)(7) was "silent" as to scope of FCC's authority. Court largely ignored legislative history.
- While processes FCC followed were questionable, court saw no harm that flowed from FCC's failure to follow procedures (court basically assumed no harm followed from industry's anonymous and unsubstantiated allegations).



The Appeal: the Results

- Court found shot clocks consistent with Congressional intent, because shot clocks only create a "bubble-bursting" presumption that locality has acted unreasonably; if locality rebuts that presumption, the burden shifts to the wireless provider to prove that the locality acted unreasonably.
- The "bubble-bursting presumption" language *may be helpful in practice* to local governments. May merely require that locality show that there was some claimed basis for a delay in acting (including a failure of an applicant to respond to information requests, or what the locality's usual processing time is).
- But local governments still face litigation cost burden and risk.



The Appeal: What's Next

- The decision, unless overturned, paves the way for assertion of broad FCC authority over local zoning, right of way management and right of way compensation.
- Two rehearing petitions filed on March 8.
  - City of Arlington *et al*.
  - New Orleans City Council Communications Committee
- Both argue (among other things) that the panel's decision departs from prior 5th Cir. precedent construing *Chevron* and federal preemption.
- If rehearing is not granted, next and last option would be to file a petition for certiorari to the Supreme Court.



…In Addition to the Appeal

- Congress enacted HR 3630, most publicized for extending payroll tax deduction (signed into law by President on 2/22/2012).
- Bill also allocates spectrum & $$ to public safety BUT establishes a new wireless siting preemption rule that applies notwithstanding Section 332(c)(7) or “any other provision of law.”
- FCC is given authority to implement the new wireless siting provision.



Wireless Collocation Under HR 3630

Sec. 6409. WIRELESS FACILITIES DEPLOYMENT.

(a) Facilities Modifications

(1) "IN GENERAL ….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*."

(2) ELIGIBLE FACILITIES REQUEST.—For purposes of this subsection, the term "eligible facilities request" means any request for modification of an existing wireless tower or base station that involves—

(A) collocation of new transmission equipment;

(B) removal of transmission equipment; or

(C) replacement of transmission equipment.

(3) APPLICABILITY OF ENVIRONMENTAL LAWS.—Nothing in paragraph (1) shall be construed to relieve the Commission from the requirements of the National Historic Preservation Act or the National Environmental Policy Act of 1969.

SPIEGEL & MCDIARMID LLP



Wireless Collocation Under HR 3630

(b) Federal easements and rights-of-way.—

(1) GRANT.—If an executive agency, a State, a political subdivision or agency of a State, or a person, firm, or organization applies for the grant of an easement or right-of-way to, in, over, or on a building or other property owned by the Federal Government for the right to install, construct, and maintain wireless service antenna structures and equipment and backhaul transmission equipment, the executive agency having control of the building or other property may grant to the applicant, on behalf of the Federal Government, an easement or right-of-way to perform such installation, construction, and maintenance.

(2) APPLICATION.—The Administrator of General Services shall develop a common form for applications for easements and rights-of-way…

(3) FEE.—

(A) IN GENERAL.—Notwithstanding any other provision of law, the Administrator of General Services shall establish a fee for the grant of an easement or right-of-way pursuant to paragraph (1) that is based on direct cost recovery.

(B) EXCEPTIONS.—The Administrator of General Services may establish exceptions to the fee amount required under subparagraph (A)—

(i) in consideration of the public benefit provided by a grant of an easement or right-of-way; and

(ii) in the interest of expanding wireless and broadband coverage.

(4) USE OF FEES COLLECTED.—Any fee amounts collected by an executive agency… may be made available…to such agency to cover the costs of granting the easement or right-of-way.

(c) Master contracts for wireless facility sitings.—

(1) IN GENERAL.—…the Administrator of General Services shall—

(A) develop 1 or more master contracts that shall govern the placement of wireless service antenna structures on buildings and other property owned by the Federal Government; and

(B) in developing the master contract or contracts, standardize the treatment of the placement of wireless service antenna structures on building rooftops or facades, the placement of wireless service antenna equipment on rooftops or inside buildings, the technology used in connection with wireless service antenna structures or equipment placed on Federal buildings and other property, and any other key issues the Administrator of General Services considers appropriate.

(2) APPLICABILITY.—The master contract or contracts developed by the Administrator of General Services under paragraph (1) shall apply to all publicly accessible buildings and other property owned by the Federal Government, unless the Administrator of General Services decides that issues with respect to the siting of a wireless service antenna structure on a specific building or other property warrant nonstandard treatment of such building or other property.

(3) APPLICATION.—The Administrator of General Services shall develop a common form or set of forms for wireless service antenna structure siting applications…

SPIEGEL & MCDIARMID LLP



What Does the New Zoning Preemption Mean?

Undefined terms	Maybe?
“Wireless tower”	FCC Programmatic Agreement: "Tower" is any structure built for the sole or primary purpose of supporting antennas and their associated facilities used to provide FCC-licensed services… A water tower, utility tower, or other structure built primarily for a purpose other than supporting FCC-licensed services is not a "tower" for purposes of the Agreement, but is a non-tower structure.



What Does the New Zoning Preemption Mean?

Undefined terms	Maybe?
“Collocation”	FCC Programmatic Agreement: Collocation "means the mounting or installation of an antenna on an existing tower, building or structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes.” Under the Agreement, the term "collocation" includes excavation and the placement of equipment necessarily or reasonably associated with the mounting or installation of an antenna.



What Does the New Zoning Preemption Mean?

Undefined terms	Maybe?
"Base station"	• Part 90 (Private Land Mobile Radio Services) defines as "A station at a specified site authorized to communicate with mobile stations." • Part 22 (Public Mobile Services) defines "base transmitter" as "A stationary transmitter that provides radio telecommunications service to mobile and/or fixed receivers, including those associated with mobile stations."



What Does the New Zoning Preemption Mean?

Undefined terms	Maybe?
"substantially change the physical dimensions"	• If a change in any physical dimension created a hazard to public safety (regardless of relative size) would that be substantial? A change that made an area inaccessible to the disabled? • Weight or wind-loading changes? • Noise characteristics? • Changes that cause facility to intrude on, or increase contaminant risk in, sensitive areas? • Changes that expose structures on a stealth facility? • What about changes to grandfathered, non-conforming use towers?



What Does the New Zoning Preemption Mean?

Undefined terms	Maybe?
“substantially change the” physical dimensions	FCC Programmatic Agreement: "Substantial increase in the size of the tower" means: 1) The mounting of the proposed antenna on the tower would increase the existing height of the tower by more than 10%, or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to avoid interference with existing antennas; or 2) The mounting of the proposed antenna would involve the installation of more than the standard number of new equipment cabinets for the technology involved, not to exceed four, or more than one new equipment shelter; or 3) The mounting of the proposed antenna would involve adding an appurtenance to the body of the tower that would protrude from the edge of the tower more than twenty feet, or more than the width of the tower structure at the level of the appurtenance, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to shelter the antenna from inclement weather or to connect the antenna to the tower via cable; or 4) The mounting of the proposed antenna would involve excavation outside the current tower site, defined as the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site.



We Can Expect…

- Challenges to local ordinances that treat collocation and new towers similarly.
- Challenges to collocation ordinances and local processes that allow consideration of factors other than "physical dimension."
- Challenges to, or preemption of, many local ordinances limiting changes to non-conforming use towers.
- Refusals to fill out forms that go beyond the "physical dimension" test, and (from some) aggressive interpretations of what constitutes a "wireless tower," "substantial change," "base station," etc.
- Possible FCC declaratory actions/rulemakings (DAS industry?).
- New, even shorter "shot clocks", & "deemed granted" effect of local failure to meet any new shot clock deadline. Possible "zero" shot clock (i.e., by FCC fiat, no local application required) for certain modifications.
- What does "shall approve" mean? Are localities compelled to affirmatively bless modifications falling within the provision?
- Possible damages/attorneys fees claims?

SPIEGEL & MCDIARMID LLP



Questions?

Tillman L. Lay

SPIEGEL & MCDIARMID LLP

1333 New Hampshire Avenue, NW
Washington, DC 20036

202.879.4022

tim.lay@spiegelmcd.com

www.spiegelmcd.com