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The FCC's Small Cell Order – What It Says and How It Affects You – p.s. it does not exempt states with state laws.

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October 19, 2018

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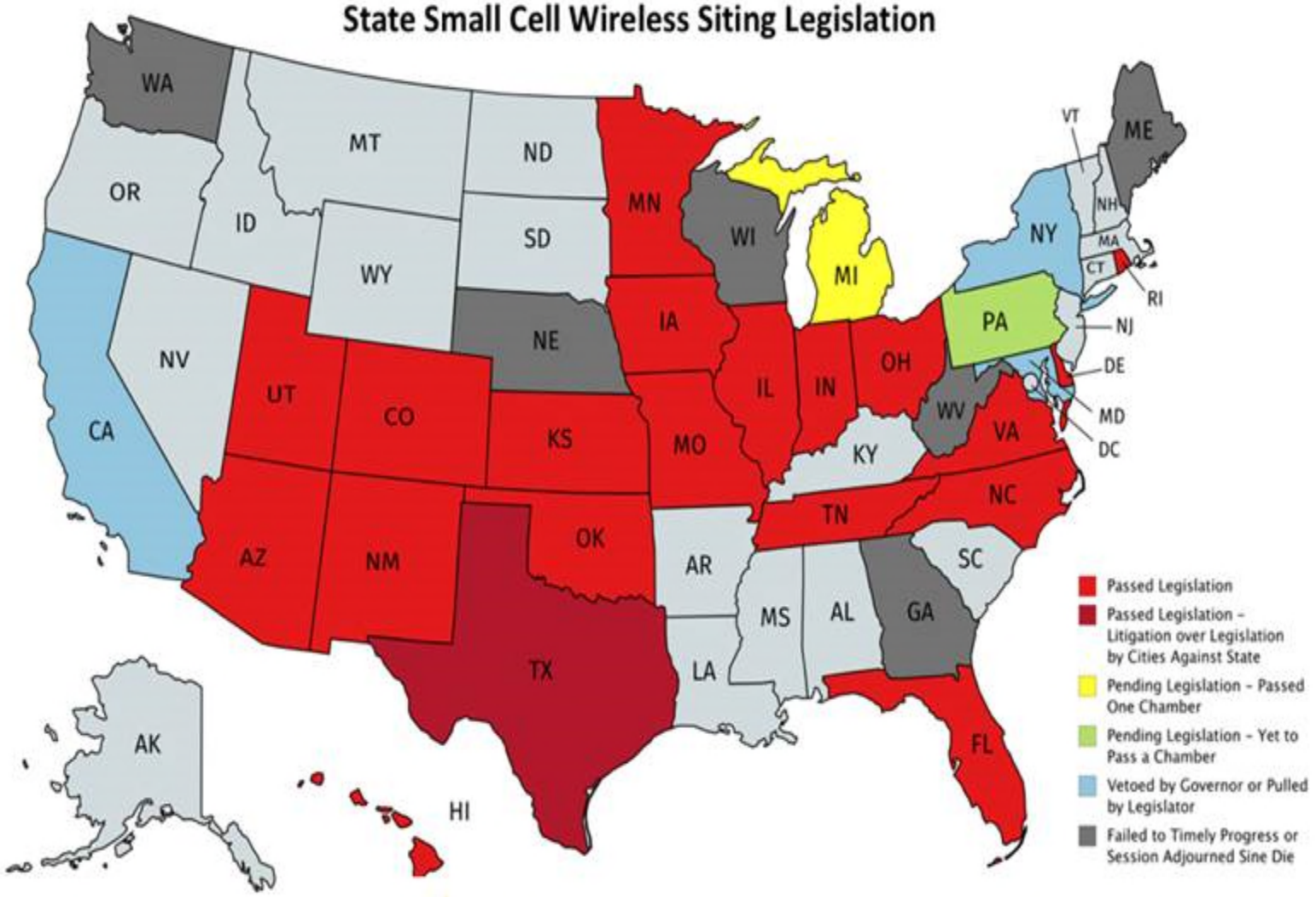
State Small Cell Wireless Siting Legislation



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Time Periods – What's Next?

- **Effective Date**
  - 90 days following publication in Federal Register (10/15).
    - Best estimate is January 15, 2019
      - *Consolidated forms and Aesthetic Standards.*
- **Appeal**
  - Heard by U.S. Ct. of Appeals (not trial court) –
  - Time to file an appeal runs from date summary published in the Federal Register.*
    - 10 days for lottery (10/25);
    - 60 days for non-lottery (12/14)
    - Reconsideration – 30 days after summary published (Please ask NATOA before filing.)
- Order is not automatically stayed on appeal

** Thanks to Commissioner Carr for uniform appeal date.*





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Major Elements of Order

- Establishes "materially inhibit" as what Section 253 and 332 mean to prohibit or effectively prohibit.
- Finds Congress did not include a blanket proprietary exception to Section 253 (a) and therefore rents for government property in RoW must be "fair and reasonable."
- Creates tests to see if local government action exceeds "materially inhibit" standard:
  - Tests for when fees, aesthetics, undergrounding & spacing, "act in a timely manner," and other requirements materially inhibit service.
  - Creates 2 new shot clocks for "small cells" with "cost caps" for regulatory fees both inside and outside of rights-of-way; caps rent within RoW.
- "Enhanced" remedy for failing to meet shot clocks
- Redefines "Collocate"




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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; (Note: no limit)

(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...

(4)… (5) … and

(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).





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Redefinition of Effective Prohibition (Para 34-43)

- "[P]rior approaches erred by requiring coverage gaps…"
  - "Significant gap" (9th Cir.) and "least intrusive alternative" (2nd, 3rd and 9th Cir.) 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." (Para. 35 quoting *California Payphone*.)
- "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." (Paragraph 37)

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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
  - $1,000 for new pole
- Recurring fees = $270 per facility including RoW fee and fee for attachment to municipal infrastructure

(5) Specifically rejects claim that localities are exempt from 253(c)'s fair and reasonable standard in setting rates for RoW infrastructure (See paras. 92-97.)





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Existing Agreements (Para 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…."





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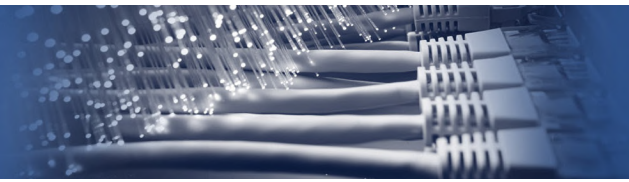
Aesthetics (para 84-89)

- 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."
- Focuses on cost of aesthetics?
- Can we still use "consistent with the design of the neighborhood, located to achieve x, y and z goals…?"



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Undergrounding (para 90)

- "…[You don't have to]…go so far as requiring that all wireless facilities be deployed underground, [to] …be considered an effective prohibition of service."
- Test: "same criteria of aesthetics generally…"
  - (1) reasonable,
  - (2) no more burdensome than those applied to other types of infrastructure deployments, and
  - (3) objective and published in advance.



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Spacing Requirements (Par. 91)

- "…a minimum spacing requirement that has the effect of materially inhibiting wireless service would be considered an effective prohibition of service." Para 87
- "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." Para. 91
- "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." Para. 91




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Shot Clocks

- Apply to all permits required for deployment, not just wireless permits
- Pre Application Meetings
  - "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…" Para 145
- Locality must accept "batched" applications and time frame is same for one as for many. Para 114, 115
  - "…[I]n extraordinary cases, a siting authority …can rebut the presumption of reasonableness of the applicable shot clock period where a batch application causes legitimate overload on the siting authority's resources." Para. 115
- Failure to meet shot clocks deemed an "effective prohibition" NOT DEEMED GRANTED.



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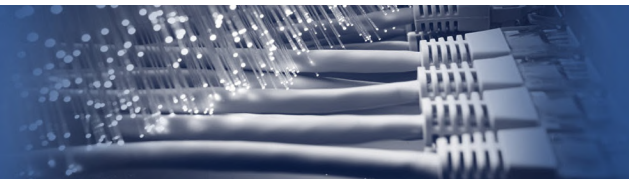
Small Cell Shot Clock Reset

- 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



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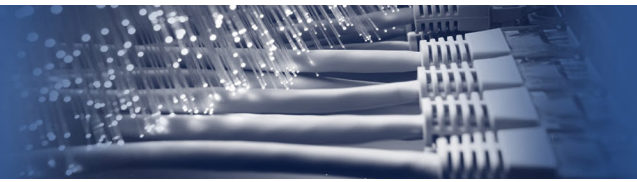
Collocation

- 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.



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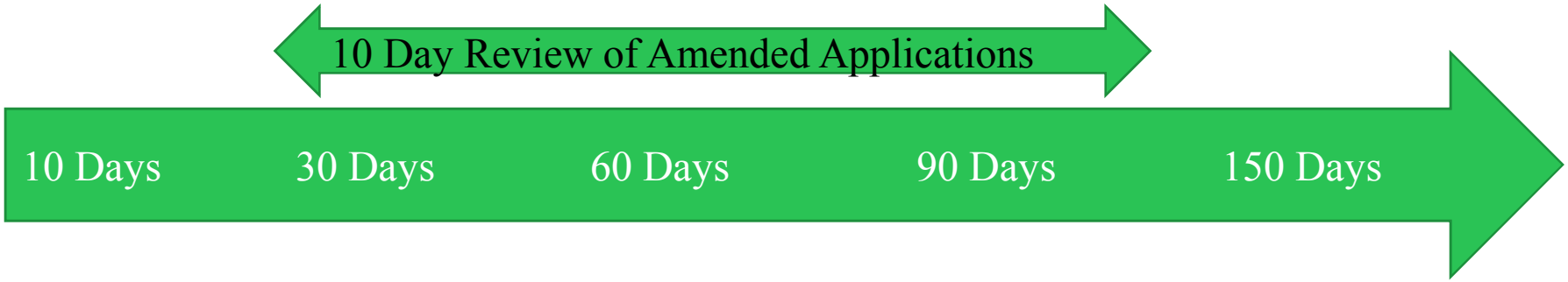
Putting Time Frames Together…
New Concept of Collocation



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

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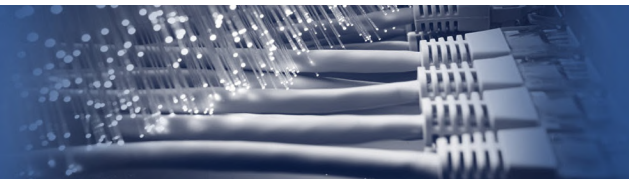
Requested Changes Not Made

- Batching Time Frames
  - No Additional Time Regardless of number of applications. – See exceptional circumstances reference.
  - Only relief is that if one application is for new pole, it makes batch a 90 day shot clock
  - Exceptional Circumstances could buy you additional time – not defined
- Application of 6409 to Small Cells
  - Small cells are eligible to grow.
  - How do you try and protect against such growth?



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Thinking Trough Impacts, i.e., Lots of Open Questions.

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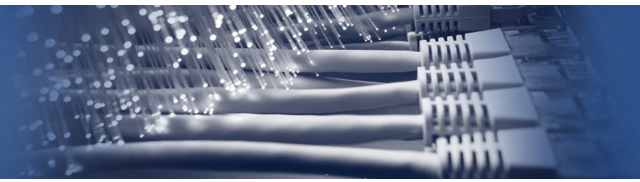
What and Where?

- **Cost-based rental fees** apply to small cells within RoW (¶50) and **cost based application and review fee** apply to any small cells inside and outside of RoW.
  - But expect industry to argue that if non-cost-based fees are unreasonable in RoW, they are unreasonable outside the RoW? (See Comm. O'Rielly speech and BDAC report)



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What and Where

- **Non-Fee Based Impairment Standard*** (aesthetics, undergrounding, spacing, etc.) clearly apply to small cells in RoW.
  - BUT, are the same standards applicable to non-small cells? Expect industry to say "yes," and localities to argue "the ruling is based on the Commission's findings regarding the economics of small cell deployment.

- Caveat: "…we do not attempt here to determine which of every possible non-fee legal requirements are preempted for having the effect of prohibiting service, although our discussion of fees above should prove instructive in evaluating specific requirements.



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ACCESS TO LOCAL PROPERTY

- FCC SAYS IT IS NOT REQUIRING ACCESS TO PUBLIC PROPERTY – JUST NOTING THAT THERE IS NO BLANKET EXEMPTION TO SECTION 253(C)'S JUST AND REASONABLE STANDARD FOR MUNICIPAL PROPERTY(¶94)
- BUT, what does it mean to suggest that we must act on a demand for access within 60 days, or have presumptively prohibited entry?



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Cable In-Kind Further Notice of Proposed Rulemaking – If adopted, does it negate state franchise laws?

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Proposal: In-Kind

- Allow a cable operator a credit against franchise fees for "in-kind" contributions required under cable franchise agreements, unless
  - PEG Capital expense
    - Asks are "costs for studio equipment" capital costs
  - Build Out Expense.
- Suggests In-Kind contributions to be valued for at "fair market value," but does ask parties if it should be limited to costs borne by cable operator.



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Examples of In-Kind contributions

- Free service to schools, libraries, and other government buildings,
- Value of channel capacity dedicated to public, educational, and government programming.
- Electronic Programming Guide.
- Discounts on Internet Service as part of the cable franchise





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Proposal: Mixed Use

- "..prohibit [local franchising authorities] from using their video franchising authority to regulate non-cable services offered over cable systems by incumbent cable operators."
  - The FCC excludes I-Nets from this restriction.
- Cable operators are trying to argue that cable franchise authorizes any equipment deployments in RoW.



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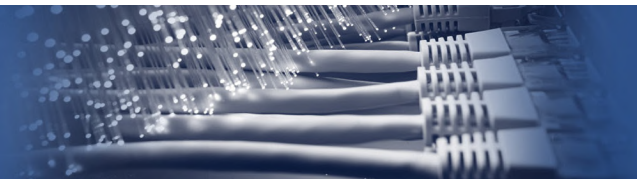
Time Tables

- Comments are due Nov 14.
- Reply Comments are Dec. 14.
- Publication took place on Oct. 15.



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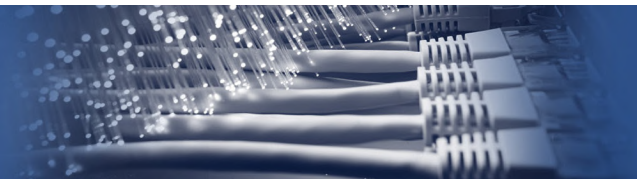
Strategies

- Show up at FCC/Congress/state legislatures
- Form coalitions at state level
- Be prepared to face multiple challenges, at multiple levels
- …Think about creating a counter narrative – and changing the legal facts on the ground



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Deadlines

Due Date	Proceeding and Deadline
Oct. 25	• Lottery for Small Cell Appeal
Nov. 14	• Comments Due in Cable In-Kind
Dec. 3	• Government runs out of money
Dec. 14	• Reply Comments in Cable In-Kind • Deadline to Appeal Small Cell Order
Dec. 14	• Targeted Adjournment of Congress.




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