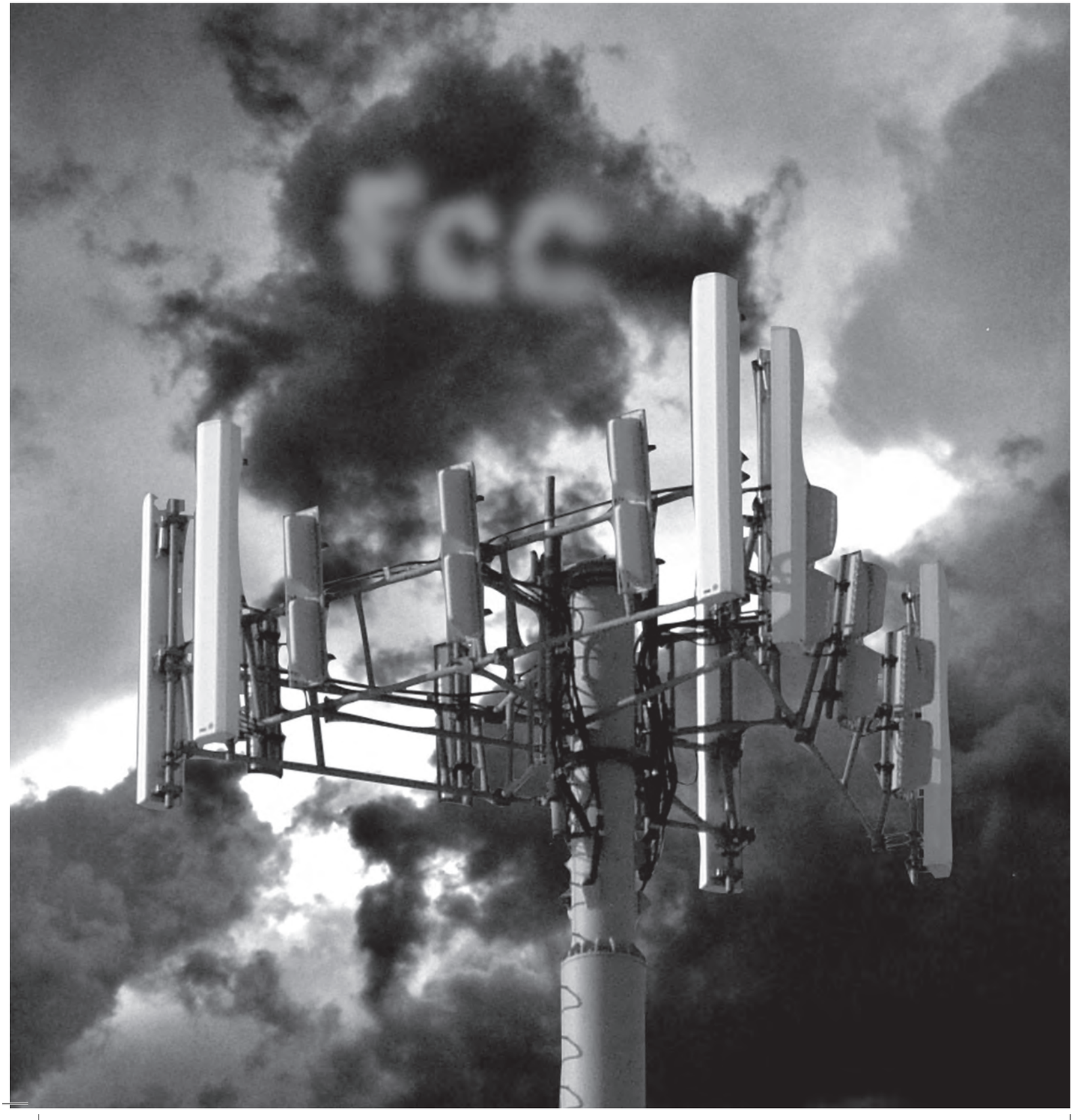
The FCC's "Shot Clock" Order: An Overview of the Risks and Concerns

by John Pestle



In November 2009, the Federal Communications Commission (FCC) issued its Order[1] creating "shot clocks" for cellular zoning applications. This article summarizes the Order, the major risks and concerns it creates for municipalities, and some practical suggestions on compliance.[2]

The Order is a declaratory ruling in response to a Petition by the cellular industry.[3] It is the latest round in a 15-year effort by the cellular industry to "federalize" the zoning of cell towers, which the industry previously attempted by way of FCC rulemakings, legislation, and court challenges,[4] all which have been largely unsuccessful (from the industry perspective). The Order is a declaratory ruling and thus, does not adopt a "rule" as would appear in the Code of Federal Regulations. Attorneys have to examine the text of various portions (which may not always be consistent) of the 29-page Order (and subsequent Orders) to divine its meaning and guide their clients.

The Petition principally asked the FCC to eliminate an ambiguity which it contended existed in 47 U.S.C. §332(c)(7)—the cell-tower zoning section of the Federal Communications Act of 1934—by clarifying the time period in which a State or local zoning authority will be deemed to have "failed to act" on a "wireless facility" siting application, commonly known as a cellular antenna zoning request. It argued this was necessary because Section 332(c)(7) gave a provider only 30 days from the date of any final action or "failure to act" on an application to go to court. The Petition, accordingly, contended that the FCC needed to set a "shot clock," interpreting Section 332(c)(7)'s requirement for municipalities to act on applications "within a reasonable period of time," so that in the case of a "failure to act," a provider would know when the 30 days would start to run.

In response, municipal groups argued that the FCC lacked such authority due to the provision in 47 U.S.C. § 332(c)(7)(A) stating that, "[e]xcept as provided in this paragraph, nothing in this Act shall limit or affect" local authority on cellular zoning matters, and the 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 cellular zoning request.[5] They argued that the legislative history reinforced this provision—for example, by directing the FCC to terminate a then-pending rulemaking (when Section 332(c) was enacted in 1996) to preempt local zoning of cellular towers, and stating that the time frame for action shall be "the usual time period" under such circumstances, with no preferential treatment for the cellular industry.[6]

Jurisdiction

In the Order, the FCC sided with the cellular industry on the threshold jurisdictional issue. It ruled that it had the authority to set time frames for local action on zoning requests under the general provisions of the Federal Communications Act giving it the authority to interpret that Act as long as it did not "impose additional limitations on the personal wireless service facility siting process beyond those stated in Section 332(c)(7)."

It ruled that it had the authority to set time frames for local action on zoning requests under the general provisions of the Federal Communications Act to interpret ambiguous sections of Section 332(c), as long as it imposed no "new limitations" on local zoning.[7] In reaching this conclusion, the FCC relied on *Alliance for Community Media v. FCC*,[8] where the U.S. Court of Appeals for the Sixth Circuit upheld the FCC's establishment of timeframes for municipalities to act on applications by a new, competing provider (almost always a phone company) for a cable franchise. In that case, the FCC concluded it could set time limits or "shot clocks" for municipalities to act on applications for a second cable franchise, with a violation being an "unreasonable failure to award" a franchise in violation of the Cable Act. Likewise, in the Shot Clock Order, it found it could interpret what was a "reasonable period of time" in which to act on a cellular zoning request. The FCC found that it could set "presumptively reasonable" time frames[9] for local action on cellular zoning requests, which, under Section 332(c)(7), give providers 30 days to go to federal court if such time frames are exceeded. This jurisdictional issue, and whether the FCC has violated Section 332(c)(7) by imposing new limitations "limiting or affecting" local zoning, will be a central issue in the pending appeal of the Order, which has been filed in the U.S. Court of Appeals for the Fifth Circuit by the City of Arlington, Texas.[10]

Shot Clocks

In substance, the Order basically accepts, at face value, the allegations in the Petition regarding long delays in cell-tower zoning decisions holding up the expansion of broadband service. The FCC did this even though, first, the bulk of the examples given by the cellular industry were anonymous (in the sense that neither the provider nor the municipality were named), and second, where identifying information was provided, the municipal comments refuted the claims of municipal delay (e.g., by showing that the delays, in fact, were caused by the provider).

Based on these "facts," the FCC concluded that there was a need to reduce delay to expedite the rollout of wireless broadband service. The FCC, therefore, ruled that (a) because requests to co-locate a cellular antenna on an existing structure were relatively simple, a 90-day period was a "presumptively reasonable" time for local action on such zoning requests; (b) 150 days was the corresponding time period for new towers; and (c) a municipality and applicant could agree to extend these time periods. It held that the new rules applied to all cell-tower zoning applications that were pending as of the November 18, 2009 date of the Order, and all new applications filed thereafter.

The FCC then addressed incomplete applications, ruling that, "[w]hen applications are incomplete as filed," the 90- or 150-day time frames do not include

continued on page 26



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 continued from page 25

the time for the applicant to respond to "a request for additional information;" however, this applies "only if" the local government "notifies the applicant within the first 30 days that its application is incomplete."[11] The FCC rejected the request in the Petition that violations of the shot clocks would result in an application being automatically deemed granted. Instead, the FCC said its ruling allowed an applicant to proceed to federal court for a determination of "whether the delay was in fact unreasonable under all the circumstances of the case," and for an appropriate remedy.[12]

Gaps in Service

The Order also addresses the split in the circuit courts of appeal on the correct interpretation of the portion of Section 332(c)(7) which prevents municipal zoning from "prohibiting or effectively prohibiting" cellular service. Significant gaps in service due to local zoning are a prohibition, although FCC rules and the cases under Section 332(c)(7) allow for small gaps in coverage. Decisions of the Third and Fourth Circuit Courts of Appeals allow a municipality to deny a cellular zoning request where the applicant claims it needs to fill a gap in the applicant's coverage in that area solely because another cellular provider provides service in the gap in question.[13] However, the First and Ninth Circuits reject this position, and hold that it is sufficient for a "prohibition of service" claim under Section 332(c)(7) if the claimed "gap" is solely in the coverage of the applicant seeking to add a tower or antenna to fill the gap.[14]

The FCC agreed that the statute was ambiguous on this point, but sided with the First and Ninth Circuits.[15] Here, the FCC relied on the U.S. Supreme Court's decision, *National Cable & Telecommunications Association v. Brand X Internet Services*,[16] to the effect that the FCC is the "expert agency" on telecommunications matters, and that its interpretation of ambiguous portions of the Communications Act trumps those of the federal Courts of Appeal. The FCC also rejected the Petition's request to preempt zoning ordinances where, in some or all cases, cell tower applications are granted by variances.

A Risk with Remedy

Although the Order rejected the industry's request that shot clock violations automatically lead to applications being "deemed granted," municipalities should not rely on this rejection and its leaving of the remedy to the courts. The courts are often an unfriendly venue in this regard because cellular companies uniformly argue—and courts very often agree—that the remedy for violations of Section 332 is an injunction *granting the zoning application as applied for, not just a remand back to the municipality for* further proceedings in compliance with the Communications Act.

Courts ordering the application to be approved (e.g., by an order of mandamus or an injunction that local permission be given) do so based on Section 332(c)(7)'s directive to courts to decide such cases "on an expedited basis," the perceived statutory goal of expediting relief, and claims by providers that a remand would delay the rollout of needed broadband service or that "remand would serve no useful purpose."[17] However, there is another line of cases, ordering a remand of the matter to the municipality rather than ordering a tower approved as applied for, based on factors such as (1) procedural, as opposed to substantive violations, (2) the court's view that it lacked authority under Section 332(c)(7) to order approval, and (3) the inapplicability of the federal mandamus statute to state officials.[18]

Municipal attorneys should be aware that, for alleged shot clock violations, providers will advance the same claims under Section 332(c)(7) and the need for an immediate remedy as they have previously made; namely, that the only appropriate remedy for such "abuses" harming broadband rollout is an order approving the cellular zoning application as applied for. There is, thus, a significant risk that the remedy for a violation of the shot clocks will not be a remand back to the municipality, but an order granting the application as applied for.

Incomplete Applications and Additional Information

The Order's provisions on incomplete applications, requests for additional information, and a lack of tolling provisions due to delays outside local control are major causes for concern, and prompted the filing, last December, of a Petition for Reconsideration of the Order by various municipal interest groups.[19] The concern here is that providers will argue these provisions mean that: (1) requests for additional information don't toll the shot clocks unless the applicant is notified within the first 30 days that the application is incomplete, (2) there can only be one such request for additional information by the municipality, or (3) after 30 days, the applicant has no obligation to supply additional information![20]

Some of the problems with these provisions are that the need for additional information can and does come up at any time in the zoning process, regardless of whether the application was complete. This is especially true of difficult, controversial applications, such as those for new towers in residential areas. Further, tolling is needed for all requests for information (not just those made within the first 30 days) due to the notorious delays (often several months) in providers' responding to such requests.

As it stands, municipalities can face the Hobson's choice of (1) having to act within 90 or 150 days on zoning requests which are known to be incomplete or that contain erroneous information, or (2) taking their chances in court on a suit for violating the shot clocks (or improperly denying the application, if that is done to meet the shot clock). The latter risk is exacerbated because providers have only 30 days from the expiration of the shot clock to file suit.[21]

Delays Outside Local Control

A related point is the need to toll the shot clocks for delays outside a municipality's control. For example, many municipalities' zoning procedures require input from federal, state, or local agencies over which the municipality has little or no control, and which can take long periods of time in responding. Examples of such outside agencies include state environmental agencies, historical

review commissions, airport authorities or military bases located near a proposed tower.

A specific category of delays outside local control of particular importance to IMLA members results from the fact that many municipalities (especially larger ones) allow administrative appeals from an initial zoning decision to go to a Zoning Board of Appeals (ZBA) or the like. The question of whether the shot clocks are satisfied by a municipality's initial zoning decision, or, instead, whether the clocks continue to run until there is a final decision in internal appeals to a ZBA, city council, or equivalent entity, is the most frequent question in programs to date on the shot clock Order.

Unfortunately, the Order does not expressly address this point. However, in IMLA's January comments to the FCC, we stressed that (1) such appeals are outside a municipality's control; (2) they typically favor providers (for example, because the ZBA or the like can grant a variance from otherwise applicable requirements, such as height restrictions or setback requirements, whereas typically, the initial decider cannot); and (3) that tolling of the shot clocks during such appeals is required by the express language of Section 332(c)(7), which carefully distinguishes between initial and final action on cellular zoning requests, such that (4) the shot clocks can only apply to a municipality's initial zoning decision and must be tolled during any administrative appeal.

On the last two points, Section 332(c)(7) requires municipalities to "act" within a reasonable time on cellular zoning requests, but uses different language as to court appeals—namely, that a party aggrieved "by any final action" or failure to act has 30 days in which to appeal to the courts. Thus, Congress distinguished initial from final action by municipalities on cellular zoning requests, and did not require a municipality to take "final action" within a reasonable period of time, although it easily could have done so. The shot clocks can only apply to a municipality's initial zoning decision and must be tolled during any administrative appeals. Municipalities that are sued for violating the shot clocks should likely contend that, under Section 332(c)(7), the shot clocks only apply to a municipality's initial zoning decision, and are satisfied if that decision is made within the respective 90- or 150-day time frame.

On a more practical level, uncertainty as to when the shot clocks are satisfied may provide municipalities with some bargaining power. This is because, by statute, providers have only 30 days to appeal a zoning decision for violating Section 332(c)(7). Providers may be willing to agree to toll the shot clocks during administrative appeals, so as not to run the risk of losing their right to appeal an adverse initial zoning decision based on the 30 days running out while the administrative appeal is still pending.

Conclusion

A ruling on the Petition for Reconsideration or in the pending court appeal may address, clarify, or change the situation on these preceding issues of concern. Until municipalities have definitive rulings, some broad recommendations include the following: municipalities should not accept applications for filing without a clerical examination for basic completeness, and should attempt to complete the entire zoning process within the 90- or 150-day time frames, if possible. If this is not possible, seek to negotiate extensions with the applicant provider, but do not waive the right to challenge suits filed more than 30 days after the initial zoning decision. Lastly, remember that the existing uncertainty in the rules gives cities some bargaining leverage.[22]

Notes

1. In the Matter of Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, Declaratory Ruling, FCC 09-99, WT Docket No. 08-165 (Nov. 18, 2009) (hereinafter "Order"). The Order is available online at www.varnumlaw.com/celltower and the FCC website.
2. Detailed suggestions on practical compliance can be found in the author's presentation, *FCC Cell Tower Shot Clock Order: Summary and Practical Response*, made at IMLA's 2010 Mid-Year Seminar in Washington, D.C. Copies are available from IMLA or online at www.varnumlaw.com/celltower.
3. Petition for Declaratory Ruling filed with the FCC by the Wireless Association, or CTIA, a trade group for the cellular industry, on July 11, 2008.
4. *See, e.g.,* Sprint Telephony, PCS, L.P. v County of San Diego, 490 F.3d 700 (9th Cir. 2007) (amended opinion, original opinion at 479 F.3d 1061 superseded), *rev'd en banc,* 543 F.3d 571 (9th Cir. 2008), *cert. denied*, 77 U.S.L.W. 3708 (U.S. June 29, 2009) (No. 08-759).
5. 47 U.S.C. § 332(c)(7)(B)(ii) (West 2010).
6. Conference Report to S. 652 and Joint Explanatory Statement of the Committee of Conference, HR-104-458, 104th Cong., 2d Sess. at 208-209 (hereinafter "Conference Committee Report").
7. Order, ¶ ¶ 24-25 (emphasis in original).
8. Alliance for Community Media v. FCC, 529 F.3d 763 (6th Cir. 2008), *cert. denied*, 129 S.Ct. 2821 (2009) (hereinafter "ACM").
9. Order ¶ 34, fn. 111.
10. City of Arlington, Texas v. United States, Docket No. 10-60039 (5th Circuit). Briefing of the appeal has been delayed, and the FCC has requested further delays in briefing until it rules on the Petition for Reconsideration of the Order, discussed below.
11. Order, ¶¶ 52-53.
12. *See, e.g.,* Order, ¶¶ 4 and 32 fn. 99.
13. The Order cites the cases of *APT Pittsburgh L.P. v. Penn Twp.*, 196 F.3d 469, 480 (3d Cir. 1999) and *AT&T Wireless PCS, Inc. v. Virginia Beach*, 155 F.3d 423, 428-29 (4th Cir. 1998).
14. The Order cites these cases for the opposite holding: *Second Generation Properties, L.P. v. Town of Pelham*, 313 F.3d 620, 633-34 (1st Cir. 2002) and *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 731-33 (9th Cir. 2005).
15. Presumably, municipalities can still reject cell tower applications on other grounds, such as too many cell towers in a given area.
16. 545 U.S. 967, 982-84 (2005).
17. *See, e.g.,* Cellular Telephone Co. v. Town of Oyster Bay, 166 F.3d 490, 497 (2d Cir. 1999); Omnipoint Corp. v. Zoning Hearing Bd. of Pine Grove Twp., 181 F.3d 403, 409 (3d Cir. 1999) (and cases cited therein). In particular, see Tennessee ex rel. Wireless Income Prop. v. City of Chattanooga, 403 F. 3d 392 (6th Cir. 2005) (court orders six cellular towers approved, as applied for, due to the lack of

continued on page 37

2006 WL 2381565, 2006 U.S. Dist. LEXIS 57705 (S.D. Ohio, Aug. 16, 2006).
17. U.S. Department of Justice, Civil Rights Division, Disability Rights Section, *The ADA & City Governments: Common Problems*, http://www.ada.gov/comprob.pdf (last visited Mar. 24, 2010).
18. 28 C.F.R. § 35.150(a)(3) (2009).
19. *Id.*; *see also* Jones v. City of Monroe, 341 F.3d 474 (6th Cir. 2003).
20. Culvahouse v. City of LaPorte, 679 F. Supp.2d 931 (N.D. Ind. 2009).
21. 28 C.F.R. § 35.150(a)(3) (2009).
22. *Id.*
23. *Id.*
24. Kinney v. Yerusalim, 9 F.3d 1067, 1069 (3d Cir. 1993).
25. *Id.*
26. Culvahouse v. City of LaPorte, 679 F. Supp. 2d 931 (N.D. Ind. 2009).
27. 28 C.F.R. § 35.150(a)(1) (2009).
28. 28 C.F.R. § 35.150(b)(1).
29. Parker v. Universidad de P.R., 225 F.3d 1 (1st Cir. 2000).
30. *Id. See also* Schonfeld v. City of Carlsbad, 978 F. Supp. 1329, 1339 (S.D. Cal. 1997).
31. *See* 28 C.F.R. § 35.104 (2009) (defining "facility" as "all or any portion of buildings, structures, . . . roads, walks, passageways, parking lots, or other real or personal property"); Iverson v. City of Boston, 452 F.3d 94 (1st Cir. 2006); Ability Ctr. of Greater Toledo v. City of Sandusky, 385 F.3d 901, 911 (6th Cir. 2004); Kinney v. Yerusalim, 9 F.3d 1067, 1069 n. 3 (3d Cir. 1993) (noting that streets and walkways are "facilities," given particular priority in the regulations).
32. 28 C.F.R. § 35.150(a) & (a)(3) (2009); N.J. Prot. & Advocacy, Inc. v. Twp. of Riverside, No. 04-5914 (RBK), 2006 WL 2226332, 2006 U.S. Dist. LEXIS 56478 (D.N.J. Aug.02, 2006).
33. Barden v. City of Sacramento, 292 F.3d 1073, 1076 (9th Cir. 2002).
34. *Id.*
35. *See, e.g.*, Hainze v. Richards, 207 F.3d 795 (5th Cir. 2000), *cert. denied*, 531 U.S. 959 (2000); Zimmerman v. Oregon Dept. of Justice, 170 F.3d 1169, 1174 (9th Cir. 1999); Rosen v. Montgomery County, MD., 121 F.3d 154 (4th Cir. 1997).
36. *Zimmerman*, 170 F.3d at 1174.
37. *Hainze*, 207 F.3d at 795; *Rosen*, 121 F.3d at 154.
38. Frame v. City of Arlington, 575 F.3d 432, 436 (5th Cir. 2009).
39. Deck v. City of Toledo, 56 F. Supp. 2d 886, 892 (N.D. Ohio 1999). *See also Frame*, 575 F.3d at 441.
40. *Compare* Mosier v. Kentucky, 675 F. Supp. 2d 693 (E.D. Ky. 2009) *with Deck*, 56 F. Supp. 2d at 436 and *Frame*, 575 F.3d at 441.
41. Californians for Disability Rights, Inc. v. California Dept. of Transp., C 06-5125 SBA, 2009 WL 2987115, 2009 U.S. Dist. LEXIS 91490 (N.D. Cal. Sept. 15, 2009); *see* Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 122 (2002).
42. FED. R. CIV. P. 68(d). Occasionally, cities are awarded attorney's fees in ADA litigation. *See, e.g.*, Access Now, Inc. v. Town of Jasper, No. 1:02-CV-059, 2004 WL 1873734, 2004 U.S. Dist. LEXIS 905 (E.D. Tenn. Jan. 07, 2004).
43. *See* Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. Health & Human Res., 532 U.S. 598, 603 (2001). *See also* Forestier Fradera v. Municipality of Mayaguez, 440 F.3d 17, 20 (1st Cir. 2006).
44. Kasten v. Port Auth.of New York & New Jersey, No. 98-CV-4988, 2002 U.S. Dist. LEXIS 17888, 2002 WL 31102689 (E.D.N.Y. Sept. 10, 2002); *see also* Melton v. Dallas Area Rapid Transit, 391 F.3d 669 (5th Cir. 2004).
45. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997).
46. *Id.* at 520.
47. *See* 42 U.S.C. § 12101(B)(4) (2005) (delineating sources of congressional power in enacting the ADA as powers to enforce the 14th Amendment and the Commerce Clause).
48. Reickenbacker v. Foster, 274 F.3d 974, 983 (5th Cir. 2001).
49. Tennessee v. Lane, 541 U.S. 509, 531-32 (2004).
50. *Flores*, 521 U.S. at 507; *see also Lane*, 541 U.S. at 509.
51.28 C.F.R. § 35.150(b) (2009). *See* Young v. City of Claremore, 411 F. Supp. 2d 1295 (N.D. Okla. 2005) (the ADA reasonable modification claim, requesting the plaintiff have unlimited access to operate his golf cart on all roads at all times, failed. He was not being deprived of all access to transportation on the city's roads by reason of his disability, since he was able to operate an automobile).
52. *See* Alford v. City of Cannon Beach, No. CV-00-303-HU, 2000 WL 33200554, 2000 U.S. Dist. LEXIS 20730, at *4 (D. Or. Jan. 17, 2000) (no duty under the ADA to construct new sidewalks). Also, for example, in 36 C.F.R. 1191 (2009) (Final Rule), the technical standards for the public rights-of-way are reserved.
53. 28 C.F.R. § 35.150 (a)(2) (2009).
54. *Young*, 411 F. Supp. 2d at 1295.
55. 28 C.F.R. § 35.150 (a)(1) (2009); Iverson v. City of Boston, 452 F.3d 94 (1st Cir.2006) (Title II's emphasis is on "program accessibility"); *see also Lane*, 541 U.S. at 531-32.
56. U.S. Department of Justice, Project Civic Access, at http://www.ada.gov/civicac.htm (last visited Mar. 24, 2010).
57. 28 C.F.R. § 35.107(a) (2009). ML

"SHOT CLOCK" ORDER

cont. from page 27

timely action by the City).
18. Cases on remedies are summarized in our 60-page cell tower zoning paper, which collects all significant court of appeals cases on Section 332(c)(7). This is available on request from jwpestle@varnumlaw.com.
19. In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, *Petition for Reconsideration or Clarification*, WT Docket No. 08-165, filed Dec. 17, 2009. The FCC promptly requested comments and reply comments, which were filed by early February. We filed comments for IMLA supporting this Reconsideration Petition.
20. This is in addition to such provisions violating the Order's own conclusion that it cannot impose "new limitations" on local zoning.
21. Although, as noted above, the Order states that parties can agree to extend the shot clocks.
22. *See Presentation*, *supra* note 2. ML