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FCC SHOT CLOCKS 10, 9, 8… – WHAT ARE THEY GOOD FOR? MAYBE A FEDERAL LAWSUIT

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Shot clocks are intended to spur action on the part of opposing entities. For example, the National Basketball Association has the 24-second shot clock, and college basketball opted for a shot clock following the University of North Carolina's four-corners "offense". Even in chess, players must stop the clock after they make a move. The Federal Communications Commission took this to heart and applied the shot clock concept to approval of personal wireless facilities, thereby turning timeframes for municipal review and approval or disapproval of applications to deploy wireless facilities into a possible federal claim, if not met.

In general, Section 332(c)(7) of the Telecommunications Act of 1996 ("Telecommunications Act") preserves state and local authority over zoning and land use decisions for personal wireless service facilities, but sets forth specific limitations on that authority.[1] Specifically, a state or local government may not unreasonably discriminate among providers of functionally equivalent services; may not regulate in a manner that prohibits or has the effect of prohibiting the provision of personal wireless services; and must make any denial of an application in writing, supported by substantial evidence in a written record.[2] The Act also preempts local decisions premised directly or indirectly on the environmental effects of radio frequency ("RF") emissions, assuming that the provider is in compliance with the Federal Communication Commission ("FCC")'s RF rules.[3] As further discussed below, however, the primary mechanism affecting state and local authority over personal wireless service facilities is through the shot clock framework.

THE FIRST SHOT CLOCK (REASONABLE PERIOD OF TIME)

In addition to the above, the first shot clock is found in subsection (ii) of these statutory limitations, which states:

> (7) Preservation of Local Zoning Authority
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> **(ii)** A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities **within a reasonable period of time after the request is**

[1] 47 U.S.C. § 332(c)(7) (2018).

[2] 47 U.S.C. § 332(c)(7)(B).

[3] 47 U.S.C. § 332(c)(7)(B)(iv).

> **duly filed with such government or instrumentality, taking into account the nature and scope of such request**.[4]

This limitation requires a municipality to act on an application within a "reasonable time."[5] While not much of a "shot clock" on its own, this requirement does provide an avenue for the industry to take a municipality to court for unreasonable delay on applications. A personal wireless service facility applicant could allege that a state or local government has acted inconsistently with Section 332(c)(7) by failing to act on an application within a reasonable time period. However, even if a "reasonable period of time" is exceeded, the municipality may show that delay was justified based on the "nature and scope of such request."[6]

Because Congress' "reasonable period of time" mandate is somewhat vague, it spurred several lawsuits by frustrated industry providers. For instance, in *T-Mobile Northeast LLC v. Town of Ramapo*, following a twenty-two month application process and expiration of a one-year moratorium, the Town rejected a request to locate a tower at a public utility substation.[7] During the review, the Town requested analysis of numerous alternate sites, proof of a coverage gap, and listened to residents' complaints concerning aesthetics, property values, and health risks.[8] Eventually, the Town's consultant advised that T-Mobile's documentation established the proposed site would meet coverage requirements (i.e. fill the gap in coverage) and that the project as proposed will have the least impact on the environment. A negative declaration was then adopted.[9] The Town, however, continued to delay and question the documentation and ultimately denied the application.[10] Despite the Court's finding that the Town's denial constituted an effective prohibition of services, the Court noted with respect to T-Mobile's unreasonably delay claim that such a claim was found to be moot in a similar case where the municipality denied a permit shortly after litigation had been commenced.[11] However, this Court admonished that such a rule might "reward recalcitrant localities for waiting till [sic] litigation has commenced to act on applications they dislike."[12]

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[4] 47 U.S.C. § 332(c)(7)(B)(ii) (emphasis added).

[5] 47 U.S.C. § 332(c)(7)(B)(ii).

[6] 47 U.S.C. § 332(c)(7)(B)(ii).

[7] *T-Mobile Northeast LLC v. Town of Ramapo*, 701 F. Supp. 2d 446 (S.D.N.Y. 2009).

[8] *Id.* at 449-54.

[9] *Id.*

[10] *Id.* at 454.

[11] *Id.* at 456, n.3. *See Omnipoint Comm'ns, Inc. v. Vill. Of Tarrytown Planning Bd.*, 302 F. Supp. 2d 205 (S.D.N.Y. 2004).

[12] *Id.*

Likewise, in *Omnipoint Communications, Inc. v. Town of LaGrange*, T-Mobile sought a permit for approximately six years in order to site a facility to address a coverage gap in the Town.[13] Commencing in 2003, T-Mobile sought to collocate an antenna on an existing tower.[14] During the T-Mobile application process, the Town was involved in litigation with Nextel over another site, which was ultimately settled authorizing the siting of a new Nextel tower.[15] T-Mobile eventually sought to collocate on the Nextel site by withdrawing its pending application and reapplying for a special permit and site plan approval at the Nextel site.[16] Three and a half years after the Nextel litigation was settled, a building permit was finally issued for the Nextel site.[17] The Town then instructed that T-Mobile should return to its original proposed site set forth in its first application rather than collocate on the Nextel tower, and if T-Mobile continued to seek approval for the Nextel site, then an area variance would be required due to the site's location within 500 feet of a residence.[18] T-Mobile ultimately sued in federal court seeking, among other things, relief under the Telecommunications Act.[19]

In its decision, the Court noted that the Town and its residents have a history of attempting to keep cell towers out.[20] At each public hearing regarding the T-Mobile project, residents complained about the Nextel settlement and alleged health effects of antennae.[21] As the Court stated, "[m]ost of the delay in dealing with T-Mobile's application has been a product of the Town's recalcitrance – recalcitrance to allow construction of the [Nextel] Tower even after entering into a settlement that mandated its construction and recalcitrance in delaying T-Mobile's co-location application in order to deal with issues relating to the Tower, not T-Mobile."[22] Ultimately, the Court granted an injunction compelling the Town to act on T-Mobile's application because the Town engaged in a "lengthy and concerted effort" to prevent and delay T-Mobile from eliminating its coverage gap.[23]

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[13] *Omnipoint Comm'ns, Inc. v. Town of LaGrange,* 658 F. Supp. 2d 539 (S.D.N.Y. 2009).

[14] *Id.* at 546-51.

[15] *Id.* at 545.

[16] *Id.* at 546-51.

[17] *Id.* at 548.

[18] *Id.* at 548-49.

[19] *Id.* at 551.

[20] *Id.* at 543.

[21] *Id.* at 546-51.

[22] *Id.* at 564.

[23] *Id.* at 564-66.

These cases illustrate the frustration of service providers caused by unreasonable delay of the municipalities, and how the first shot clock requiring action within a reasonable time period provided frustrated service providers with a legally cognizable claim in federal court.

THE SECOND SHOT CLOCK (90 or 150 Days)

The FCC heard the industry's complaints that obtaining municipal approvals can, in some instances, take years. Therefore, the first actual "shot clock" in the wireless facilities context was promulgated by an FCC Declaratory Ruling on November 18, 2009, in an attempt to address the perceived problem of municipal delay on applications to install wireless facilities.[24]

In the 2009 FCC Declaratory Ruling, the FCC also interpreted the law and found that a "reasonable period of time" under Section 332(c)(7)(B)(ii) for review and approval or disapproval of wireless siting applications is presumptively 90 days for state or local governments to process collocation applications, and presumptively 150 days to process all other applications. In making such a determination, the FCC stated:

> In the event a State or local government fails to act within the appropriate time period, the applicant is entitled to bring an action in court under Section 332(c)(7)(B)(v) of the Communications Act, and the court will determine whether the delay was in fact unreasonable under all the circumstances of the case. We conclude that the record supports setting the following timeframes: (1) 90 days for the review of collocation applications; and (2) 150 days for the review of siting applications other than collocations.[25]

The FCC also provided for a tolling period for incomplete applications, commonly referred to as a notice of incompleteness, by stating:

> Accordingly, we conclude that the time it takes for an applicant to respond to a request for additional information will not count toward the 90 or 150 days **only if that State or local government notifies the applicant within the first 30 days that its application is incomplete**.[26]

Therefore, these 90- or 150-day shot clocks may be extended by two occurrences: 1) if the provider's application is incomplete and a notice of incompleteness is sent by the municipality within 30 days of receipt of the application, then the amount of time it takes the applicant to

[24] 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; WT Docket No. 08-165. [hereinafter referred to as "2009 FCC Declaratory Ruling"].

[25] 2009 FCC Declaratory Ruling at par. 4.

[26] *Id.* at par. 53 (emphasis added).

respond to the request will not count toward the 90 or 150 days; or 2) the provider and locality could, of course, agree to extend either time period. However, if the municipality simply does not act upon an application within the relevant timeframe, then a "failure to act" has occurred and the applicant may seek relief in a court of competent jurisdiction under Section 332(c)(7)(B)(v).[27]

Several local governments appealed this 2009 FCC Declaratory Ruling, alleging, among other things, that the FCC lacked authority to interpret Section 332(c)(7). The Fifth Circuit rejected these challenges in 2012,[28] and the United States Supreme Court ultimately affirmed the Fifth Circuit's decision, holding that *Chevron* deference applies to the FCC's own interpretation that it has the authority to interpret Section 332(c)(7)(B) of the Telecommunications Act, including the authority to establish the 90- and 150- day shot clocks.[29]

In *Bell Atlantic Mobile of Rochester L.P. v. Town of Irondequoit,* Verizon claimed that it had a significant gap in coverage within the Town and commenced the application process for a new monopole location, including analysis of a dozen alternative sites.[30] As part of the application process, multiple hearings were held, a crane test was conducted, and the Town hired an RF consultant who requested that the Applicant provide additional information.[31] Verizon and the Town agreed to extend the 150-day shot clock to allow more time for completion of this process.[32] Once completed, the Town Board designated itself as SEQRA lead agency and issued a positive declaration, through which it required public scoping and preparation of an environmental impact statement.[33] Verizon sued the Town, claiming unreasonable delay and failure to act on its application in violation of 47 USC 332(c)(7) and the 2009 shot clock order.[34] Finding in favor of Verizon, the Court agreed that the positive declaration was not warranted and pretextual, and that the use of SEQRA was done only to "delay the permitting process in contravention of the Federal statute and the FCC Order."[35]

In *Upstate Cellular Network v. City of Auburn,* Verizon sought site plan approval and a use variance for a 100' tower on private property.[36] On the same day, the City adopted a moratorium on applications concerning new telecommunications facilities, rejected Verizon's application, and

[27] *Id.* at par. 71.

[28] *See City of Arlington v. FCC,* 668 F.3d 229 (5th Cir. 2012).

[29] *See City of Arlington v. FCC,* 569 U.S. 290 (2013).

[30] *Bell Atlantic Mobile of Rochester L.P. v. Town of Irondequoit,* 848 F. Supp. 2d 391 (W.D.N.Y. 2012).

[31] *Id.* at 395-97.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.* at 401-02.

[36] *Upstate Cellular Network v. City of Auburn,* 257 F. Supp. 3d 309 (N.D.N.Y. 2017).

mailed the application back to Verizon.[37] Verizon persisted two more times, and each time the City returned the application.[38] After 150 days had elapsed, Verizon sued the Town, claiming that the Town improperly failed to act on and delayed its application to construct and operate a wireless telecommunications site in violation of the Telecommunications Act.[39]

In its decision, the Court stated, per the 2009 FCC Declaratory Ruling, that the Telecommunications Act limits the ability of a municipality to deny applications and presumptively provides 90 days to process collocation applications and 150 days for all others, both of which are reasonable limitations.[40]

The Court noted that, while these deadlines were presumptively reasonable, there could be instances where more time is required, and therefore the deadlines could be extended by agreement or the shot clock may be tolled to obtain certain required information.[41] However, the Court found that the City wholly failed to rebut the presumption that its delay was unreasonable.[42] In other words, the City failed to show that there was any reason why more time was required, that the deadlines were extended by agreement, or that the shot clock had tolled. Instead, the record showed that the City waited 175 days without reviewing or considering the application, and made no timely request for information.[43] Therefore, the City did not rebut the presumption that the delay was unreasonable and their actions constituted a failure to act or unreasonable delay in violation of the Telecommunications Act.[44]

What if the municipality misses the 30-day notice of incompleteness date? In *Crown Castle NG East Inc. v. Town of Greenburgh*, the Court addressed an applicant's argument that the municipality had "defaulted" by not sending the notice within 30 days and was therefore required to approve the application.[45] Not surprisingly, the Court found that the provider's rationale lacked merit and misstated the shot clock order.[46] Nothing in the shot clock order provides that a failure to issue a notice of incompleteness would operate as a default. Rather, the municipality would simply lose the benefit of the tolling provision.

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[37] *Id.* at 310-12.

[38] *Id.*

[39] *Id.*

[40] *Id.* at 314-16.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Crown Castle NG E. Inc. v. Town of Greenburgh*, 2013 WL 3357169 at *1 (S.D.N.Y. July 3, 2013).

[46] *Id.*

What happens if the locality and the applicant disagree as to the date the shot clock expires? In *Upstate Tower Co. v. Town of Kiantone*, the parties agreed on the application filing date and the expiration of the 150 days for a decision.[47] Plaintiff contended that it had evaluated 19 alternative sites and found that none were acceptable, and further contended that the Town was required to make a decision under the shot clock at its next meeting to be timely.[48] The Town argued that the shot clock was extended due to adjournments of meetings that were granted upon request of the applicant, and therefore had three more months to take action on the application.[49] In response, the Applicant stated that it had requested adjournments because it had not completed evaluation of the numerous alternative sites, and had never requested or agreed to an extension of the shot clock.[50] The Court was thus charged with determining whether the Town had rebutted the shot clock's presumption of reasonableness.

The Court ultimately found that the Town failed to provide notice within the 30 day time period for notice of incompleteness, and therefore, the shot clock had continued to run despite the applicant's request for adjournments.[51]

THE THIRD SHOT CLOCK (Spectrum Act; New 60 Days – FCC's Clarification of 2009 Order)

Congress and the FCC, apparently, were not satisfied with the 30-day period for notice of incompleteness and the 90- and 150-day decision time frames, and therefore introduced new rules governing "Eligible Facilities Requests" from providers. Section 1455(a) of the Telecommunications Act, enacted as part of the Middle Class Tax Relief and Job Creation Act of 2012 (the "Spectrum Act"), establishes a further limitation on state and local land use authority over certain wireless facilities.[52] Specifically, it provides that a State or local government:

> Notwithstanding section 704 of the Telecommunications Act of 1996 (Public Law 104–104) or any other provision of law, 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.[53]

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[47] *Upstate Tower Co. v. Town of Kiantone*, 2016 WL 7178321 at *1 (W.D.N.Y. December 12, 2016).

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id. See also Bell Atlantic Mobile of Rochester L.P.*, 848 F. Supp. 2d. at 403.

[52] Middle Class Tax Act and Job Creation Act of 2012, Pub. L. 112-96 (Feb. 22, 2012); Telecommunications Act of 1996 § 6409(a); 47 U.S.C. 1455(a) [hereinafter referred to as "§ 1455(a)"] (emphasis added).

[53] § 1455(a)(1).

An "Eligible Facilities Request" concerns any request for modification of an existing wireless tower or base station that involves: "(i) collocation of new transmission equipment; (ii) removal of transmission equipment; or (iii) replacement of transmission equipment."[54]

Like the Telecommunications Act, Congress did not impose a specific shot clock under the Spectrum Act for such Eligible Facilities Requests. Therefore, it was widely believed that the previous 90-day collocation shot clock from the 2009 FCC Declaratory Ruling was intended to apply.

However, the FCC's subsequent 2014 Order resolved this ambiguity.[55] The 2014 FCC Order was intended to clarify and implement requirements of Section 1455(a), and provide further clarification on Section 332(c)(7)).

Regarding Congress' "deemed granted" language found in the Spectrum Act, the 2014 FCC Order states:

> After a careful assessment of the statutory provision and a review of the record, we establish a deemed granted remedy for cases in which the applicable State or municipal reviewing authority fails to issue a decision within 60 days (subject to any tolling…) on an application submitted pursuant to Section 6409(a) [1455(a)]. We further conclude that a deemed grant does not become effective until the applicant notifies the reviewing jurisdiction in writing, after the time period for review by the State or municipal reviewing authority as prescribed in our rules has expired, that the application has been deemed granted.[56]

Therefore, a municipality reviewing an application under Section 1455(a) for an Eligible Facility Request has 60 days to act on an application and may only require applicants to provide documentation that is reasonably related to determining whether the eligible facilities request meets the requirements of Section 1455(a).

Regarding tolling, the 2014 FCC Order provides a somewhat elaborate, reciprocal process between the municipality and the applicant:

> (1) The shot clock begins to run once an application is first submitted, rather than when it is deemed complete by the reviewing government;

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[54] § 1455(a)(2).

[55] *See In re Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 29 FCC Rcd. 12865 (Oct. 17, 2014), amended by 30 FCC Rcd. 31 (Jan. 5, 2015) [hereinafter referred to as the "2014 FCC Order"].

[56] *Id.* at par. 226.

(2) A determination that the application is incomplete tolls the shot clock only if the State or local government provides notice of incompleteness to the applicant in writing within 30 days of the application's submission, specifically delineating all missing information, and specifying the code provision, ordinance, application instruction, or otherwise publicly-stated procedures that necessitate such information to be submitted;

(3) Once the applicant makes its supplemental submission in response to the notice of incompleteness, the shot clock begins to run again;

(4) Following an applicant's supplemental submission, the shot clock may once again be tolled if the State or local government finds that the supplemental submission did not provide the specific information identified in the original notice of incompleteness, and provides the applicant with another notice of incompleteness to that effect within 10 days of receiving the applicant's supplemental submission.[57]

Notably, the 2014 FCC Order prohibits a municipality from "requir[ing] an applicant to submit any other documentation, including but not limited to documentation intended to illustrate the need for such wireless facilities or to justify the business decision to modify such wireless facilities."[58]

Accordingly, applicants must provide to the municipality all relevant materials to determine whether the proposed modification is an "Eligible Facilities Request." The shot clock for an Eligible Facilities Request is 30 days for a completeness determination, which must be put in writing by the municipality and clearly and specifically delineate the missing information, and 60 days for a decision on the application. All missing information should also be identified. If the applicant's response fails to supply sufficient information, then additional 10-day tolling periods to review and identify missing information are once again available to obtain information missing in the original request. However, after these time periods expire, a municipality can still ask for more information, but such a request will no longer stop the shot clock.

This process is significantly difference from the prior shot clocks because if the municipality misses the Section 1455 shot clock, then the applicant may notify the community that application is "deemed granted." Another significant difference is that, in an ensuing lawsuit, the burden of proof is flipped upside down by requiring *the municipality* to sue the applicant to prevent the permit from being "deemed granted" by operation of missing the requisite time period for action under Section 1455.

In support of these differences, the FCC reasoned that:

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[57] *Id.*

[58] *See Extenet Sys., Inc. v. Vill. of Pelham*, No. 18-CV-5281 (S.D.N.Y. Mar. 27, 2019), citing 47 C.F.R. 1.6100(c)(1).

> We find that these clarifications will provide greater certainty regarding the period during which the clock is tolled for incompleteness. This in turn provides clarity regarding the time at which the clock expires, at which point an applicant may bring suit based on a "failure to act." Further, we expect that these clarifications will result in shared expectations among parties, thus limiting potential miscommunication and reducing the potential or need for serial requests for more information. Accordingly, these clarifications will facilitate faster application processing, reduce unreasonable delay, and accelerate wireless infrastructure deployment.[59]

While the 2014 FCC Order attempts to clarify many issues relating to applications for wireless service facilities, the Spectrum Act and these shot clocks and tolling provisions only apply to collocation applications involving Eligible Facilities Requests. Thus, the Spectrum Act did not result in substantial changes to *existing approved* towers or base stations.[60]

What constitutes a "substantial change" to a tower or base station for a collocation application? The FCC ruled that a proposed Eligible Facilities Request modification[61] "substantially changes" the physical dimensions of a tower or base station, as measured from the dimensions of the tower or base station, if it meets any of the following criteria:

1. For towers outside of public rights-of-way, it increases the height by more than 20 feet or 10%, whichever is greater; for those towers in the rights-of-way and for all base stations, it increases the height of the tower or base station by more than 10% or 10 feet, whichever is greater;

2. For towers outside of public rights-of-way, it protrudes from the edge of the tower more than twenty feet, or more than the width of the tower structure at the level of the

[59] *Id.* at 262. The FCC also clarified that the presumptively reasonable timeframes run regardless of any applicable moratoria. *See Upstate Cellular Network*, 257 F. Supp. 3d at 314 (finding that the FCC's 2014 Order could not be clearer that "any moratorium that results in a delay of more than 90 days for a collocation application or 150 days for any other application will be presumptively unreasonable" (citations omitted)).

[60] *See Portland Cellular P'ship v. Inhabitants of the Town of Cape Elizabeth,* 139 F. Supp. 3d 479 (D. ME 2015) ("The Spectrum Act preempts State and municipal authority to block the placement of certain wireless equipment on existing structures which already house wireless transmission equipment") (finding that water tower was not base station for purposes of Eligible Facilities Request because it was not previously approved site and Town was not preempted from applying its zoning ordinance).

[61] It is important to note that these rules only apply to "Eligible Facilities Requests." A utility pole is not a "tower" or an eligible facility. A monopole is a tower and likely an eligible facility only if it was previously approved by a municipality. Modification of an existing pole, by replacing it, would not constitute a modification.

appurtenance, whichever is greater; for those towers in the rights-of-way and for all base stations, it protrudes from the edge of the structure more than six feet;

3. It involves installation of more than the standard number of new equipment cabinets for the technology involved, but not to exceed four cabinets;

4. It entails any excavation or deployment outside the current site of the tower or base station;

5. It would defeat the existing concealment elements of the tower or base station; or

6. It does not comply with conditions associated with the prior approval of the tower or base station unless the non-compliance is due to an increase in height, increase in width, addition of cabinets, or new excavation that does not exceed the corresponding "substantial change" thresholds.[62]

Therefore, an applicant for an Eligible Facilities Request is only required to submit information required by state or local law, and relevant to determining: (a) if a change is an Eligible Facilities Request modification, including proof that there is no "substantial change" to the tower or base station; or (b) a change complies with general public safety laws. Absent agreement by the applicant, municipalities must act within 60 days of receipt of a complete application subject to the rules for notice and tolling the same as for Section 332(c)(7).

FOURTH SHOT CLOCK (2018 5G Order)

The FCC's latest revision to the shot clock concerns a new technology, commonly referred to as 5G (the fifth generation of wireless services). 5G networks are the latest generation of wireless technology and are currently being deployed across the country. The industry targeted existing municipal infrastructure, such as streetlights or other vertical infrastructure, to deploy this new technology and made its case to the FCC.

Shortly after the 2014 FCC Order, the FCC received and acted upon a petition for the next generation of wireless services that specifically targeted deployment on municipal and other existing infrastructure within public rights-of-way. In the request for public comment notice, the FCC expressed interest in using its preemptive powers to speed up the successful deployment of the next generation of technological services; expressed concerns about the costs to the industry; noted unduly restrictive zoning rules and unfounded denials or delays in the processing of permit applications; and stressed that the fees charged by municipalities needed to be "fair and reasonable," "competitively neutral and nondiscriminatory", and "publicly disclosed."[63]

[62] 2014 FCC Order, par. 21.

[63] *See Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling;* WT Docket No. 16-421.

On September 26, 2018, to clarify the scope of sections 253 and 332(c)(7) of the Telecommunications Act and promote small cell deployment, the FCC issued the "5G Order."[64]

As set forth in the 5G Order, the primary goal of the FCC was to promote fast review and approval of new 5G technologies nationwide in a race to be the first country to provide such services. The 5G Order recognizes that municipalities play a key role in the approval of applications for deployment of the new facilities. In order to ensure such fast municipal approvals, the 5G Order does several things, including:

1. Defines "Small Wireless Facility";
2. Specifically authorizes "Small Wireless Facilities" to be deployed within municipal rights-of-way;
3. Provides specific fee structures that are presumed to be reasonable; and
4. Provides new shot clocks for deployment of "Small Wireless Facilities".[65]

Because the 5G Order applies to "Small Wireless Facilities", this definition is key. Generally, Small Wireless Facilities must meet each of the following conditions:

> (1) The facilities—
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> > (i) are mounted on structures 50 feet or less in height including their antennas as defined in section 1.1320(d), or
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> > (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;
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> (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;
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> (4) The facilities do not require antenna structure registration under part 17 of this chapter;

[64] *See In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*; WT Docket No. 17-79; WC Docket No. 17-84 Declaratory Ruling and Third Report and Order (hereinafter referred to as the "5G Order").

[65] *See id.*

> (5) The facilities are not located on Tribal lands, as defined under 36 CFR 800.16(x); and
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> (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).[66]

Accordingly, the FCC is targeting deployment of such "Small Wireless Facilities" that are of certain height, size and weight limitations.

The 5G Order also implemented the following presumptively reasonable periods of time (i.e. shot clocks) for the deployment of "Small Wireless Facilities":

(i) Review of an application to collocate a Small Wireless Facility using an existing structure: 60 days.

(ii) Review of an application to collocate a facility other than a Small Wireless Facility using an existing structure: 90 days.

(iii) Review of an application to deploy a Small Wireless Facility using a new structure: 90 days.

(iv) Review of an application to deploy a facility other than a Small Wireless Facility using a new structure: 150 days.[67]

Under these shot clocks, municipalities must decide applications within either 60 or 90 days for Small Wireless Facilities, depending on whether the installation will be on an existing structure or new structure. The FCC did not adopt a "deemed granted" rule for such facilities. The FCC reasoned that where a municipality misses the shot clock deadline, the applicant should be able to obtain expedited relief under Section 332(c)(7), which directs courts to make decisions on an expedited basis. Also, per the 5G Order, in such cases, applicants have a "relatively low hurdle to clear in establishing a right to expedited judicial relief," because missing the shot clock would amount to a presumptive violation of Section 332(c)(7).[68]

The FCC also recognized and anticipated that the industry would be filing numerous applications at once to promote faster deployment and endorsed "batching" of applications.[69] The 5G Order therefore provides that municipalities may not refuse to accept batching of applications:

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[66] *See id.* at par. 11 n.9; *see also* 47 C.F.R. 1.1312(e)(2).

[67] *Id.*

[68] *Id.* at par. 120

[69] *Id.* at pars. 113-115.

(i) If a single application seeks authorization for multiple deployments, all of which fall within a collocation for a Small Wireless facility or for a new structure for a Small Wireless Facility, then the presumptively reasonable period of time for the application as a whole is equal to that for a single deployment within that category (i.e. 60 or 90 days).

(ii) If a single application seeks authorization for multiple deployments, the components of which are a mix of deployments that fall within a collocation for a Small Wireless facility or for a new structure for a Small Wireless Facility, then the presumptively reasonable period of time for the application as a whole is 90 days.[70]

Tolling still applies but is somewhat different for "Small Wireless Facilities" under the 5G Order. The tolling rule for Small Wireless Facilities is:

> For an initial application to deploy Small Wireless Facilities, if the siting authority notifies the applicant on or before the 10th day after submission that the application is materially incomplete, and clearly and specifically identifies the missing documents or information and the specific rule or regulation creating the obligation to submit such documents or information, the shot clock date calculation *shall restart at zero* on the date on which the applicant submits all the documents and information identified by the siting authority to render the application complete.[71]

It is important to note that Small Wireless Facilities applications to be deemed complete must contain all required information for all permits and approvals for the collocation or new tower (i.e. including building permits, grading permits, etc.). Otherwise, the municipality will have a valid basis to deem the entire application incomplete. The industry contends that execution of an agreement authorizing use of the rights-of-way must also be approved within the shot clock time frames, although that appears up for debate. In any event, the 5G Order encourages the providers to file complete applications at the outset, lest they be deemed incomplete. It also encourages municipalities to establish a process for efficient review and processing of applications.

Therefore, the 5G Order's new, 60-day and 90-day shot clocks appear to be specific to deployment of "Small Wireless Facilities," and provides municipalities with a new 10-day notice of incompleteness requirement from the filing date of an application to notify the applicant of

[70] *See* 47 C.F.R. 1.6003(b)(2).

[71] *See* 47 C.F.R. 1.6003(d)(1) (emphasis added).

missing documentation and information. If such notice is provided, then the shot clock will "restart at zero" once the information is provided.

As expected, the 5G Order was greatly panned by a host of municipal commenters and has been challenged on several fronts, including that the 5G Order exceeds the FCC's statutory authority, is arbitrary and capricious and an abuse of discretion, and is otherwise contrary to law. The cases are still pending in the United States Circuit Courts;[72] however, the 5G Order has been in effect since January 14, 2019.

There are no reported cases yet interpreting this 5G Order.[73] The 5G Order is mentioned in *Upstate Tower v. Town of Kiantone*, where a provider sought summary judgment based upon lack of substantial evidence and cited the FCC's 5G Order in support.[74] However, the Court found that the FCC was informative, but not dispositive of the issues.[75]

In a harbinger of things to come, the D.C. Circuit Court recently sided with Native American tribes in a victory over the FCC when it ruled that the FCC did not sufficiently justify its Second Report and Order (March 30, 2018) allowing the industry to deploy small cell infrastructure at heritage sites without consulting tribes or undertaking NEPA or NHPA review.[76] By extension to the 5G Order, this appears to be good news for municipalities and their current challenge.

This article is intended to be a general summary of the law and does not constitute legal advice. If you have concerns about the impact and effect on your municipality, you should consult with counsel to determine applicable legal requirements. For a specific factual situation, or for additional information please do not hesitate to contact the author, Thomas A. Shepardson, Esq. at 518-487-7663 or tshepardson@woh.com, partner at Whiteman, Osterman & Hanna, LLP, One Commerce Plaza, Albany, New York 12260.

[72] The main case is *City of San Jose v. FCC*, No. 18-9568 (10th Cir. January 10, 2019).

[73] It is noted that the FCC did provide some relief to localities by providing an additional 90 days to promulgate aesthetic design standards for Small Wireless Facilities.

[74] *See Up State Tower Co. v. Town of Kiantone*, 2019 WL 1117220 at *1 (W.D.N.Y. Mar. 11, 2019).

[75] *Id.* at *2.

[76] *See United Keetoowah Band of Cherokee Indians in Oklahoma v. FCC*, __ U.S. ___; 2019 WL 3756373 (Aug. 9, 2019).