LEGAL ALERTS | JAN 14, 2019

New FCC Shot Clocks and Other Rules Preempting Local Authority Over Wireless Take Effect Today

Federal Shutdown Does Not Delay Implementation

A pair of orders by the 10th Circuit U.S. Court of Appeals in the litigation over the FCC's controversial small cell order were issued Thursday. First, the court denied local government requests to stay the FCC's small cell order pending resolution of the litigation. That means most of the FCC's small cell order went into effect today. Second, the 10th Circuit granted local government requests to transfer the small cell order appeal back to the Ninth Circuit. That means both the small cell order and the FCC's earlier moratoria order will be heard together in the Ninth Circuit. The FCC orders do not preempt state laws that may limit control over wireless facilities — both state and federal requirements apply, and if there is a conflict, the rule that most limits local authority will control. Here is what to expect going forward.

Stay Denied: Major Portions of the Small Cell Order Go Into Effect

Companies that Submit Applications for Permits for Wireless Facilities Will Expect, Based on the FCC Order, that:

- Applications for "small wireless facilities" (as defined by the FCC) must be processed in accordance with the new shorter 60-day and 90-day shot clocks.
- Initial incompleteness determinations for applications for "small wireless facilities" (as defined by the FCC) must be sent out within 10 days.
- For all FCC shot clocks (except "eligible facilities requests"), all permits and authorizations for wireless facilities must be approved or denied within the applicable shot clock period unless the applicant agrees to a different time frame. This would include all types of permits, and if applicable, a franchise and a license agreement to use city infrastructure, such as street lights.
- Permit fees must be reasonable and cost-based. Although your application

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fees most likely are already cost-based, applicants may argue that the FCC has established caps on fees for small wireless facilities applications ($500 for up to five small wireless facilities in the same application and $100 per additional facility, or $1,000 for each application involving a new pole). This is not correct. The fees established by the FCC are “safe harbor” amounts in the absence of a cost justification for the fee.

To address this situation, at a minimum, it is imperative to modify application forms so that they solicit the right information to enable you to assess which FCC shot clock applies and make a timely response to incomplete applications. You must also be aware if there are different timing restrictions under your state law.

For Communities Allowed Under State Law to Charge Telephone Companies for Use of the Public Right of Way and/or Publicly Owned Vertical Infrastructure:

- Companies seeking to use your street lights or other vertical infrastructure may argue that the FCC order requires you to make your public right of way and facilities available at a cost-based rate. The FCC established a “safe harbor” amount of $270 per year. Applicants will argue that this is all you can charge. Know that is not the case under the FCC order.
- Companies that already have an agreement to use your public right of way and/or street lights may demand that the rates in your existing agreements change to $270 per year. The FCC order does not require this change. It stated that the situation would depend on a number of factors and should be evaluated on a case-by-case basis.

To address this situation, whether with new requests or existing agreements, please do not agree to the safe harbor amount without qualifying language that allows the rate to go up if the FCC order is stayed or invalidated by a federal court. The FCC order indicates that you can recover your costs of managing the public right of way, as well as costs associated with the licensing or leasing of vertical infrastructure, such as street lights you own or control. It may be useful to track the work required to review a request for use of the public rights-of-way, negotiate related agreements and conduct facilities inspections, as well as additional planning costs that may be associated with use of public rights of way or other facilities. You must also be aware if there are any different restrictions under your state law, such as restrictions on license rates or your ability to charge for use of the public right of way.

Some Portions of the FCC Small Cell Order Do Not Go Into Effect Until April 15

It is important to note that, though applicants may tell you otherwise, the portion of the FCC small cell order that requires aesthetic standards for “small wireless facilities” (as defined by the FCC) to be reasonable, no more burdensome than on other infrastructure, and objective and published in advance, does not go into

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effect until April 15.

To address this situation, while you may continue to judge applications based on more subjective criteria, if you have no standards for judging applications for small wireless facilities publicly available, it would be a good idea to make some standards available with your application materials — even if those standards are interim in nature.

Motion to Transfer Granted: Both Major FCC Infrastructure Orders to be Heard by Ninth Circuit

The second order issued by the 10th Circuit on Thursday was a positive for local governments, which wanted their appeal heard in the Ninth Circuit, but had ended up in the 10th Circuit under the judicial lottery after industry representatives filed appeals in other circuits. In deciding to transfer the appeal to the Ninth Circuit, the 10th Circuit court concluded that the FCC's August moratoria order and its September small cell order were the "same order" for purposes of federal law. Accordingly, the motion to transfer was granted.

Final Words of Caution - Stay Flexible. Stay Tuned.

There may be another request for a stay in the Ninth Circuit. While the 10th Circuit denied the stay request, it did so on the basis of a failure to show irreparable harm, not a failure to show a likelihood of success on the merits. Therefore, if the facts on the ground change, a stay may still be warranted. Therefore, please recognize that, while the order has gone into effect, it could be put on hold in the future. If you are facing threats or costs, or feel you are suffering an imminent harm as a result of the rules, please document the problem. Relief may be possible.

The order(s) may eventually be overturned. We believe there are substantial questions as to whether the FCC small cell order is valid and lawful, and we are representing numerous jurisdictions challenging it and the August moratoria order. We are not recommending that you incorporate the FCC standards into local law per se. If you do so, then you will be bound by your own requirements, even if the FCC order is vacated. Therefore, we think it is useful to develop regulations that provide you with maximum flexibility to make substantive determinations that you would be comfortable making — even if the FCC had not changed it rules — while still complying with procedural requirements, such as shot clocks that, if not complied with, may result in a loss of rights. If you are faced with a situation where you feel compelled to grant an application because of the FCC rules, you may wish to make the permit conditional, so that it terminates if the FCC rule is overturned.

If you have any questions about how these decisions or orders impact your

community, contact the authors of this Legal Alert listed to the right in the firm's Telecommunications Law practice group, or your BB&K attorney.

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