Small Wireless Facilities in the Public Rights-Of-Way
-
A Legal Overview

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Federal Statutory Foundation
The Telecommunications Act of 1996

State and local governments must "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 duly filed" 47 U.S.C. § 332(c)(7)(B)(ii).

"[n]o . . . local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of [RF] emissions to the extent that such facilities comply with [FCC] regulations concerning such emissions." 47 U.S.C. § 332(c)(7)(B)(iv).

Any denial must be supported by substantial evidence contained in a written record. § 332(c)(7)(B)(ii)&(iii).

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. 47 U.S.C. § 253(a).

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government. § 253(c).

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FEDERAL COMMUNICATIONS COMMISSION DECLARATORY RULING AND THIRD REPORT AND ORDER

Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79; WC Docket No. 17-84

- Adopted: September 26, 2018 / Released: September 27, 2018
- Published in the Federal Register October 15, 2018
- 83 Fed Reg 51867
- Effective January 14, 2019

"This *Declaratory Ruling and Third Report and Order* is part of a national strategy to promote the timely buildout of new 5G infrastructure across the country by eliminating regulatory impediments that unnecessarily add delays and costs to bringing advanced wireless services to the public."

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What is expected from 5G?

- Significantly faster speeds (10 to 100 times faster than 4G)
- Lower latency
- Capable of handling 1000 times more traffic
- Utilizes higher frequencies – millimeter waves – that have wider available spectrum to handle the data demands
- Will support new technologies such as the Internet of Things, autonomous vehicles, virtual reality and applications still not imagined

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What is a Small Wireless Facility?

A small wireless facility, or small cell, is an antenna facility that is smaller in size than a traditional antenna installation and one that covers a smaller geographic area.

The FCC has also established a size limit for the application of the Order to such facilities. 47 CFR § 1.6002(l)

- The structure on which antenna facilities are mounted must be 50 feet or less in height, or is no more than 10 percent taller than other adjacent structures, or is not extended to a height of more than 10 percent above its preexisting height as a result of the collocation of new antenna facilities; and
- Each antenna (excluding associated antenna equipment) must be no more than three cubic feet in volume; and
- 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; and
- The facility does not require FAA antenna structure registration, is not located on Tribal lands, and does not result in human exposure to radiofrequency radiation in excess of the FCC's safety standards.

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Small Wireless Facilities

Some examples of Small Wireless Facilities include:

- Strand Mounted
- Pole Top
- Pole Attachment
- Decorative
- Other

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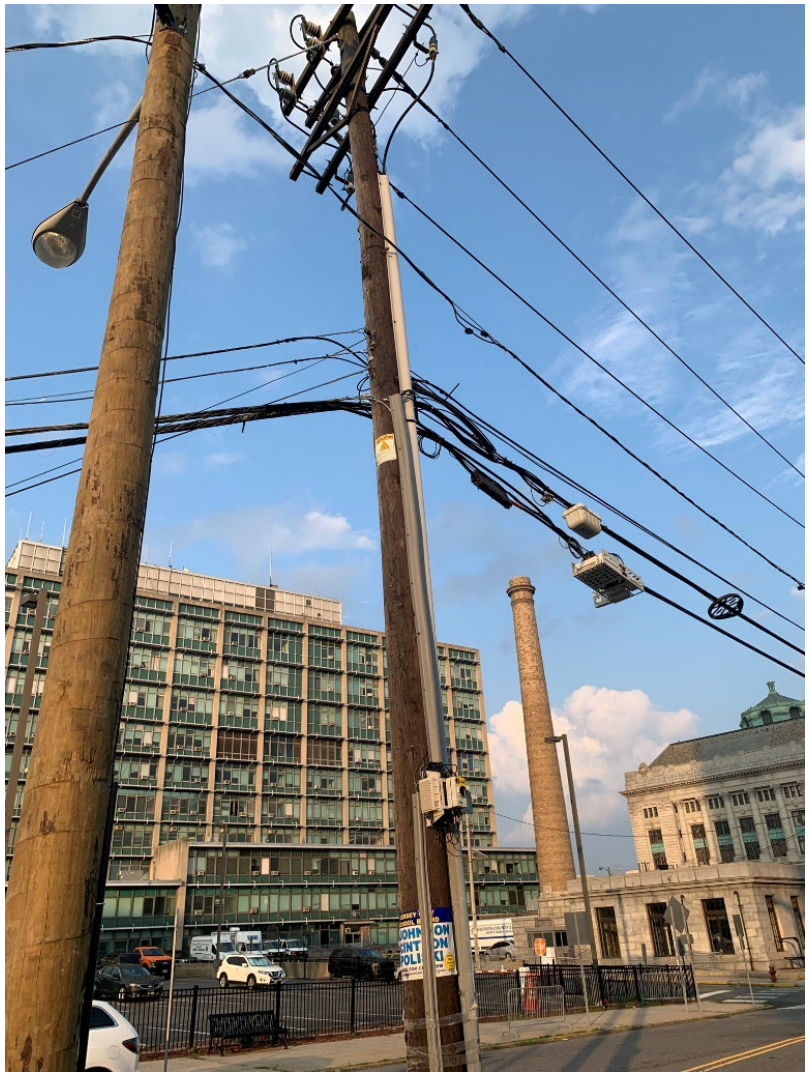
Strand Mounted Antenna



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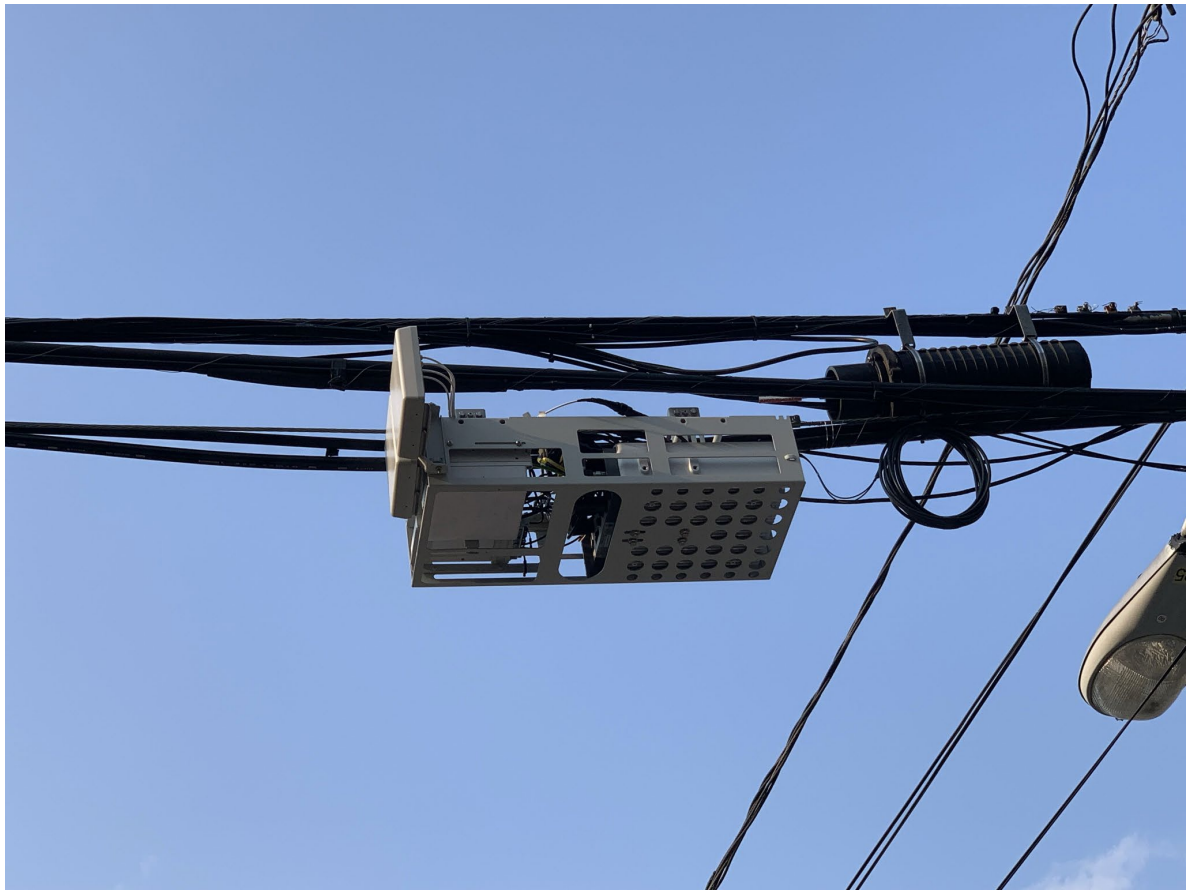
Strand Mounted Antenna



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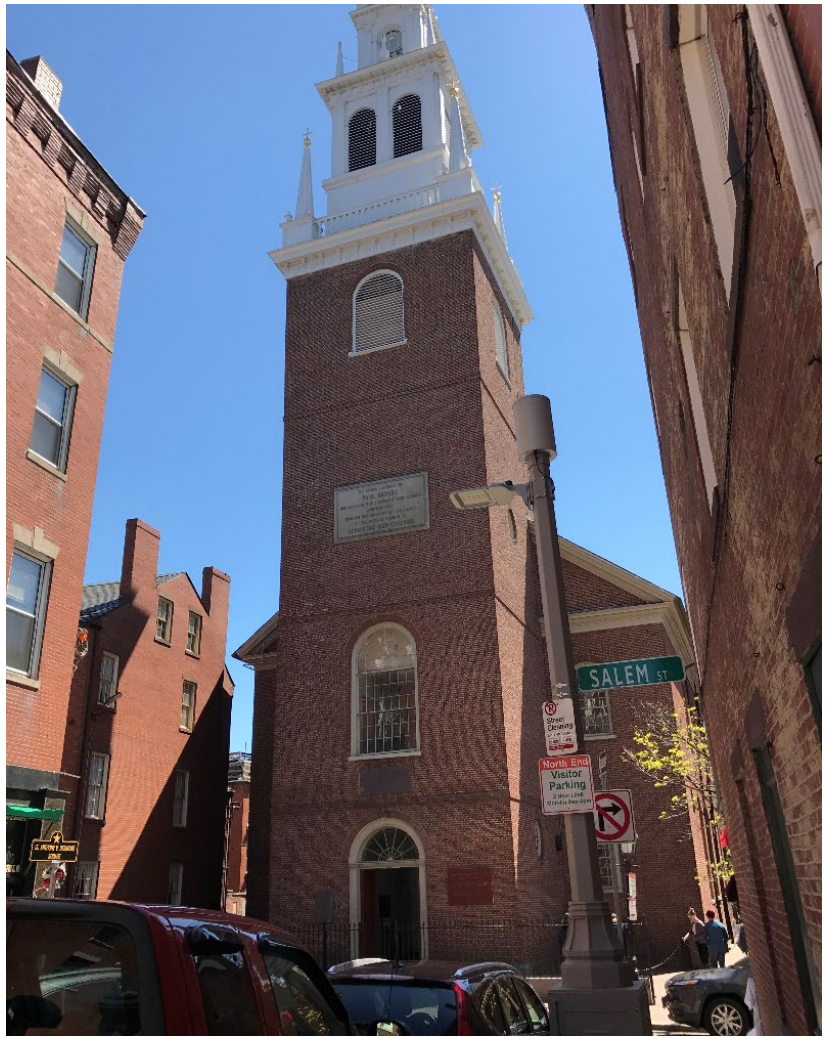
Pole Mounted Antenna



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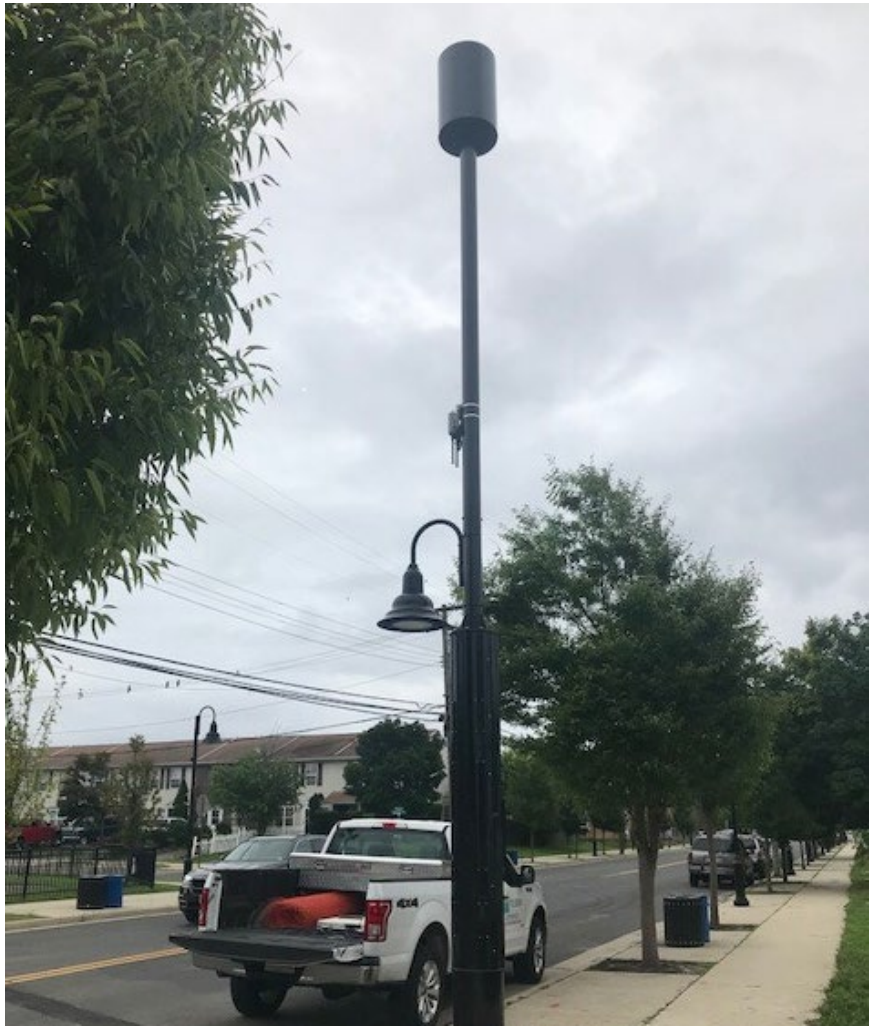

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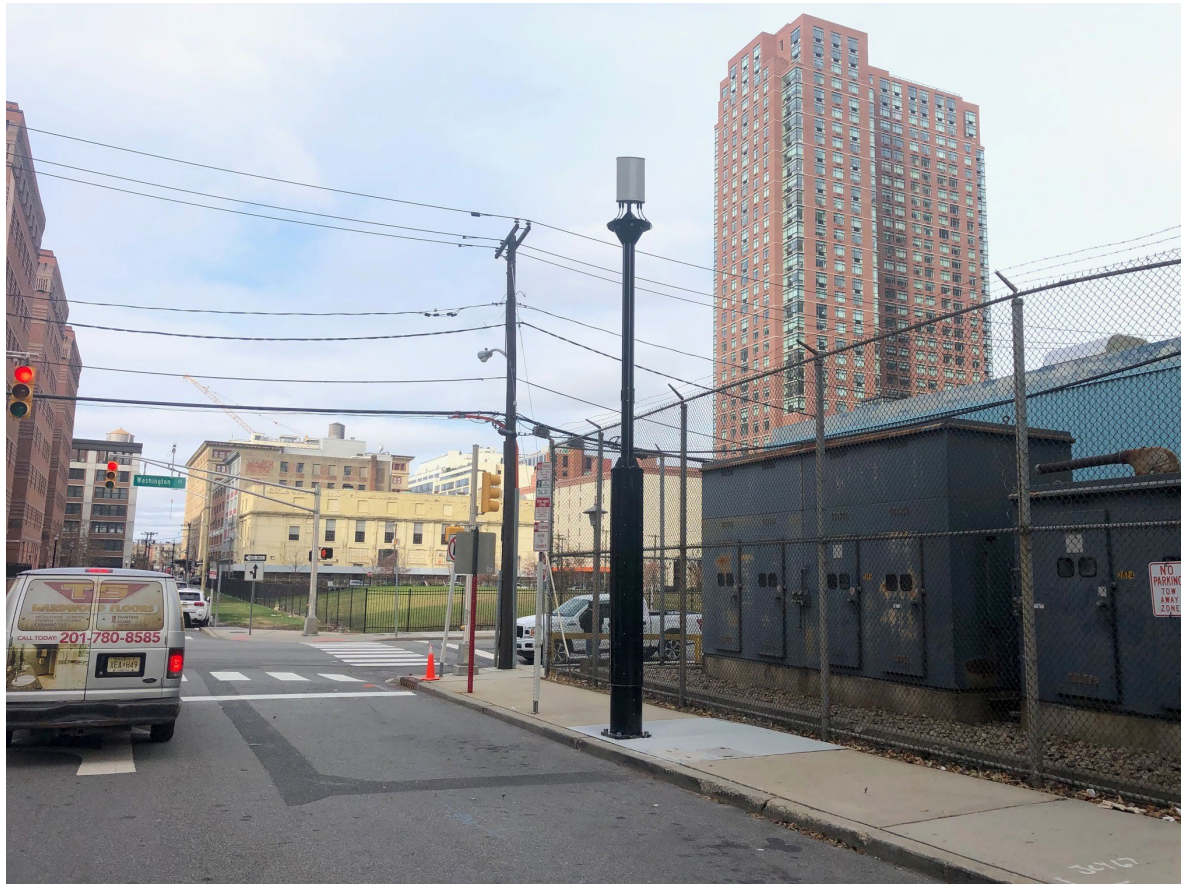

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What the Order Does

- Preempts inconsistent state and local rule.
- Adopts a broad regulatory interpretation of the scope and meaning of the effective prohibition standard set forth in Sections 253 and 332(c)(7) of the TCA and adopts the "materially inhibit" standard to determine a prohibition of service.
- Concludes that an effective prohibition may result from more than just a denial of permits and approvals and may result from exorbitant fees and other requirements, such as aesthetic, spacing and undergrounding requirements that materially inhibit the improvement in existing service or the provision of new service.

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What the Order Does, Cont'd

- Requires fees charged by state and local governments to be nondiscriminatory and no greater than a reasonable approximation of the costs for processing applications and for managing deployments in the rights-of-way
- Requires that the actual costs from municipal consultants must themselves be reasonable.
- Establishes time limits (shot clocks) for the review of siting applications involving Small Wireless Facilities
  - 60 days for collocation on preexisting structures
  - 90 days for new builds
- All state and local government authorizations, including building permits, are subject to those shot clocks.
- Concludes that a failure to act within the new Small Wireless Facility shot clocks constitutes a presumptive prohibition on the provision of services.

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An Effective Prohibition May Result From Other State and Local Requirements

The "material inhibition" standard applies to other legal requirements imposed by state and local governments including:

- Fees
- Right-of-way access
- Other regulations
- ~~Aesthetics~~ *See* City of Portland v. FCC, 969 F.3d 1020 (9th Cir. 2020), cert. denied, 141 S. Ct.2855 (2021). *See also* ExteNet Systems v. Twp of North Bergen, Docket No. 20-15098 (MCA-JRA) (D.N.J. May 19, 2022) (But must meet substantial evidence standard and may not materially prohibit the provision of wireless service)

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Presumptively Reasonable Fees

The FCC stated that the following fees would presumptively not be prohibited by Section 253 or Section 332(c)(7):

- $500 for a single up-front application that includes up to five Small Wireless Facilities, with an additional $100 for each Small Wireless Facility beyond five, or
- $1,000 for non-recurring fees for a new pole (i.e., not a collocation) intended to support one or more Small Wireless Facilities; and
- $270 per Small Wireless Facility per year for all recurring fees, including any possible ROW access fee or fee for attachment to municipally-owned structures in the ROW.

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Right-of-Way Access & Use of Government Property

"We confirm that our interpretations today extend to state and local governments' terms for access to public ROW that they own or control, including areas on, below, or above public roadways, highways, streets, sidewalks, or similar property, as well as their terms for use of or attachment to government-owned property within such ROW, such as new, existing and replacement light poles, traffic lights, utility poles, and similar property suitable for hosting Small Wireless Facilities."

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What is a reasonable time to act? Small Cell Shot Clocks

The Order adopts two new § 332 shot clocks for Small Wireless Facilities:

- **60 days for collocation on preexisting structures; and**
- **90 days for review of an application for attachment using a new structure.**

"These new Section 332 shot clocks carefully balance the well-established authority that states and local authorities have over review of wireless siting applications with the requirements of Section 332(c)(7)(ii) to exercise that authority 'within a reasonable period of time… taking into account the nature and scope of the request.'"

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Batched Applications For Small Wireless Facilities

Should an applicant file a single application for a batch that includes both collocated and new construction of Small Wireless Facilities, the longer 90-day shot clock will apply, to ensure that the siting authority has adequate time to review the new construction sites.

“In 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.”

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New Remedy for Violations of the Small Wireless Facilities Shot Clocks

A failure to make a decision by the end of the shot clock will function as a failure to act and a presumptive prohibition of services

When a siting authority misses the applicable shot clock deadline, the applicant may commence suit alleging a violation of Section 332(c)(7)(B)(i)(II), in addition to a violation of Section 332(c)(7)(B)(ii). The siting authority then will have an opportunity to rebut the presumption of effective prohibition by demonstrating that the failure to act was reasonable under the circumstances and, therefore, did not materially limit or inhibit the applicant from introducing new services or improving existing services."

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Tolling for Small Wireless Facilities

"For Small Wireless Facilities applications, the siting authority has 10 days from the submission of the application to determine whether the application is incomplete. The shot clock then resets once the applicant submits the supplemental information requested by the siting authority. Thus, for example, for an application to collocate Small Wireless Facilities, once the applicant submits the supplemental information in response to a siting authority's timely request, the shot clock resets, effectively giving the siting authority an additional 60 days to act on the Small Wireless Facilities collocation application. For subsequent determinations of incompleteness, the tolling rules that apply to non-Small Wireless Facilities would apply—that is, the shot clock would toll if the siting authority provides written notice within 10 days that the supplemental submission did not provide the information identified in the original notice delineating missing information."

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Two Recent Federal Court Decision in the District of New Jersey

ExteNet Systems, Inc. v. The City of East Orange,

Docket No. 19- 21291, 2020 WL 7238154 (D.N.J. Dec. 9, 2020).

ExteNet Systems, Inc. v. Township of North Bergen,

Docket No. No. 20-15098 (MCA-JRA) (D.N.J. May 19, 2022)

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ExteNet Systems, Inc. v. The City of East Orange, Docket No. 19- 21291, 2020 WL 7238154 (D.N.J. Dec. 9, 2020)

Reviewed the TCA requirements that:

State and local governments must "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 duly filed," and that any "denial must be in writing and supported by substantial evidence contained in a written record."

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ExteNet Systems, Inc. v. The City of East Orange, Docket No. 19- 21291, 2020 WL 7238154 (D.N.J. Dec. 9, 2020)

- Two sets of applications filed
- The City Council voted to deny the applications, but did not issue a written denial.
- Court held that "a denial must be in writing to be a final action, the issuance of [which] is the government 'act 'ruled by the shot clock."
- The vote to deny was not official action because no written reasons were adopted.
- The first set of applications were ripe for review because the City had missed the 60-day shot clock and that resulted in a "failure to act within a reasonable timeframe" as required by 47 *U.S.C.* § 332(c)(7)(B)(v).
- The second set of applications were not ripe for challenge as of the date of the filing of the Complaint because the City had some additional time to "act."

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ExteNet Systems, Inc. v. The City of East Orange, Docket No. 19- 21291, 2020 WL 7238154 (D.N.J. Dec. 9, 2020)

The City's failure to act on the first set of applications was found to be a "presumptive prohibition of service" pursuant to 47 *U.S.C.* § 332(c)(7)(3)(ii).

The Court held that "[t]he FCC has declared that a state or local government's failure to act within "the Small Wireless Facility shot clock. . . function[s] not only as a Section 332(c)(7)(B)(v) failure to act but also amount[s] to a presumptive prohibition on the provision of personal wireless services within the meaning of Section 332(c)(7)(B)(i)(II)."

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ExteNet Systems, Inc. v. Township of North Bergen, Docket No. No. 20-15098 (MCA-JRA) (D.N.J. May 19, 2022)

Application to install 40 SWFs that were mostly “strand mounted” i.e. the antennas mounted on a line extending between existing poles.

ExteNet submitted a report that demonstrated that RF exposure would be well below the FCC limits at ground level but that some areas very near the antennas would experience RF omissions exceeding FCC “general population” and “occupational” limits.

The FCC’s radio frequency (“RF”) exposure guidelines require the posting of signs to alert utility workers where applicable RF exposure levels may be exceeded near antennas. *Office of Engineering and Technology Bulletin 65*, at 52-55

With the appropriate signage in place, the report concluded that the facilities would be in compliance with federal standards.

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ExteNet Systems, Inc. v. Township of North Bergen, Docket No. No. 20-15098 (MCA-JRA) (D.N.J. May 19, 2022)

Township denied the application:

(1) “the antennas pose a danger to the public, regardless of whether the radio frequency emitted from the antennas is within that required by FCC”;

(2) the Warning Signs “will, at minimum, cause public alarm and will negatively impact property values;”

(3) Plaintiff did not submit copies of its agreements with the owners of the relevant utility poles permitting the installations; and

(4) the appearance of certain equipment to be utilized “d[id] not match or conform to existing’ equipment.”

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Seven (7) months later, Township issues a supplemental denial:

(1) Plaintiff did not provide a "propagation plot;"

(2) the Application failed to demonstrate that the RF emissions from the proposed antennas would comply with FCC regulations; and

(3) no Right of Way Occupancy Agreement had been executed.

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ExteNet Systems, Inc. v. Township of North Bergen, Docket No. No. 20-15098 (MCA-JRA) (D.N.J. May 19, 2022)

Judge Arleo held that under the TCA, a municipality's denial of an application must be "supported by substantial evidence contained in a written record," 47 *U.S.C.* § 332(c)(7)(B)(iii), and its "statement of reasoning must be provided 'essentially contemporaneously' with a written notice of denial," *citing T-Mobile S., LLC v. City of Roswell*, 574 *U.S.* 293, 307-08 (2015).

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ExteNet Systems, Inc. v. Township of North Bergen, Docket No. No. 20-15098 (MCA-JRA) (D.N.J. May 19, 2022)

Judge Arleo held that "[a]mong other substantive restrictions in the TCA, '[n]o . . . local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of [RF] emissions to the extent that such facilities comply with [FCC] regulations concerning such emissions."

"Environmental effects" include the effect of RF emissions on human health. [citations omitted] . . . Thus, so long as a proposed facility would comply with FCC regulations, a town may not deny an application based on a perceived threat to human safety arising from RF emissions."

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ExteNet Systems, Inc. v. Township of North Bergen, Docket No. No. 20-15098 (MCA-JRA) (D.N.J. May 19, 2022)

Township improperly based its denial on unsubstantiated environmental concerns because the Township did not raise any issue with respect to FCC compliance, but rather stated that its concerns existed "regardless of whether the [RF] emitted from the antennas is within that required by the FCC."

This statutory violation was enough for Plaintiff to prevail, even if there were other legitimate reasons for the denial

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"Courts have held, however, that 'the fact that [a locality] relied on valid reasons to support its decision does not immunize its violation of a statutory limitation" and that "the fact that [a locality] gave valid reasons for its decision, which by themselves would be sufficient' is irrelevant." *Loudoun Cnty. Bd. of Supervisors*, 748 F.3d at 195; see also *Town of Ramapo*, 701 F. Supp. 2d at 460 ("[A]ny decision actually based on environmental effects is a violation, whether other legitimate reasons factored into the decision or not.")

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ExteNet Systems, Inc. v. Township of North Bergen, Docket No. No. 20-15098 (MCA-JRA) (D.N.J. May 19, 2022)

The Township's aesthetics rationale was impermissible because it could not meet the TCA's "substantial evidence" requirement. 47 *U.S.C.* § 332(c)(7)(B)(iii).

With respect to aesthetics, "[a] few generalized expressions of concern with 'aesthetics' cannot serve as substantial evidence."

Defendants' denial did not detail how the proposed equipment "failed to conform with existing equipment or otherwise violated the Township's standing Regulations." "Even if the Township had not cited safety concerns as a basis for denial, its bare assertion of nonconformance with existing equipment, without more, fails to clear this modest hurdle."

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ExteNet Systems, Inc. v. Township of North Bergen, Docket No. No. 20-15098 (MCA-JRA) (D.N.J. May 19, 2022)

And what about the supplemental reasons for denial?

The additional bases for denial, provided 7 months after the initial denial, were not considered by the Court because they were not provided "essentially contemporaneously" with the Township's written denial.

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What's the remedy?

The TCA does not contain an express remedy for violations of Section 332(c)(7), but citing to Judge Martini's decision in *East Orange,* Judge Arleo held that "courts have concluded that the most appropriate remedy is typically 'the award of injunctive relief in the form of an order to issue all necessary authorizations.'

This was found to be the appropriate remedy here because "the clear evidence that unlawful considerations regarding the safety of RF emissions infected the Township's decision-making process."

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Summary of Decisions

1. Applications must be acted upon within a reasonable period of time, consistent with the FCC's shot clocks.
2. Decision must be in writing and issued contemporaneously with the action.
3. Concerns regarding environmental effects, including health effects, even if "packaged" as apprehension regarding FCC required signage, cannot be a basis for a denial. Moreover, even raising environmental effects as a reason for denial will taint any other valid basis for same.
4. Blanket statements regarding aesthetics do not meet the "substantial evidence" standard for denial. Modern utility poles are covered with various equipment cabinets and boxes, so any denial based on aesthetics would be rare given the small size of SWFs. Merely citing "aesthetics" without explaining how a SWF is different and more impactful than other existing infrastructure, won't be sufficient.

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