

STATE AND FEDERAL LEGAL FRAMEWORK FOR LOCAL REGULATION OF SMALL WIRELESS FACILITIES

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LOCAL GOVERNMENT AND INDUSTRY CHALLENGES

- Rapidly changing technology
- Increased customer demand (industry)
- Increased service demand (residents)
- Fair and efficient review process



ISSUES UNIQUE TO LOCAL GOVERNMENT

- Reducing visual clutter
- Preserving public safety
- Respecting the wishes of citizens
- Maintaining appropriate use of public rights-of-way
- Budgeting for staff review time expenses, particularly in small communities
- Maintaining local land use control in an environment of federal and state preemption



COLORADO'S SMALL CELL LAW HB 17-1193

- Small cells are a use by right in any zone district
- Subject to local police powers (including zoning requirements)
- Defines "small cell"
- Applies existing state shot clock for wireless facilities
- Provides for "batched" applications



COLORADO'S SMALL CELL LAW HB 17-1193

- Authorizes use of local government light poles, light standards, traffic signals, or utility poles in the rights-of-way
- Does not limit fees for attachments to government-owned poles unless fees would be limited if the local government were regulated pursuant to federal pole attachment rules



FCC SMALL CELL ORDER – SEPTEMBER 2018

- Interprets “prohibit or effectively prohibit” under Sections 253 and 332 to mean “materially inhibit”
- Creates tests to see if local government action exceeds “materially inhibit” standard:
 - Tests for when fees, aesthetics, undergrounding & spacing, “act in a timely manner,” and other requirements materially inhibit service.
 - Creates “cost caps” for regulatory fees both inside and outside of rights-of-way; caps rent within ROW
 - Creates 2 new shot clocks for “small cells”
 - Redefines “Collocation”



CONFLICTS BETWEEN COLORADO STATUTE AND FCC SMALL CELL ORDER

- State definition of collocation - mounting equipment on a tower, building, or structure with existing broadband service equipment
- FCC Rules: mounting equipment on any pre-existing structure , even those that have not been approved for wireless facilities
- State definition of small cell: each antenna to fit w/in enclosure of no more than 3 cubic feet and primary equipment enclosures of no more than 17 cubic feet , with some equipment excepted; height is subject to local zoning
- FCC Rules: each antenna no more than 3 cubic feet and equipment of no more than 28 cubic feet, PLUS, can be located on structures of up to 50 feet in height or may extend existing structure to 50 feet or 10% increase in height, whichever is greater



Photo courtesy of Dr
Jonathan L. Kramer,
Esq.
www.celltowerphotos.com



CONFLICTS BETWEEN COLORADO STATUTE AND FCC SMALL CELL ORDER

- State shot clock: 90 days for location or collocation of small cell network facilities
- FCC Rules: collocating small cells– 60 days; new small cell facility – 90 days
- If pre-application meeting required, shot clock starts if applicant tenders application at meeting



CONFLICTS BETWEEN COLORADO STATUTE AND FCC SMALL CELL ORDER

- License and Permit fees under state law: Limited to recovery of actual costs incurred by the local government in connection with the permit process
- FCC Rules: presumption that fees that exceed these amounts have the effect of prohibiting the ability to provide service in violation of federal law:
 - \$500 for non-recurring fees, including 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
 - for recurring fees like pole attachments, \$270 per small wireless facility per year for attachment to local government-owned structures in the ROW



CONFLICTS BETWEEN COLORADO STATUTE AND FCC SMALL CELL ORDER

- Use of local government structures in the ROW under state law: subject to 38-5.5-101 et seq and CRS 29-27-403 and 404, and a local government entity's police powers, a provider has right to locate small cell facilities or networks on light poles, light standards, traffic signals, or utility poles in the ROW owned by local governments
- FCC Rules: apply to all local government structures in the ROW suitable for hosting small cells – not limited to zoning or other police power restrictions



CONFLICTS BETWEEN COLORADO STATUTE AND FCC SMALL CELL ORDER



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- Aesthetics under State law: local zoning preserved, which includes authority to impose aesthetic requirements
- FCC Rules: aesthetics requirements are not preempted if they are
 - objectively reasonable,
 - no more burdensome than those applied to other types of infrastructure deployments, and
 - objective and published in advance



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CONFLICTS BETWEEN COLORADO STATUTE AND FCC SMALL CELL ORDER – SPECIFIC ISSUES RELATED TO AESTHETICS AND PUBLIC SAFETY

- Undergrounding of facilities: state law allows, both for aesthetic reasons and public safety (such as a narrow ROW where above ground equipment cabinet would limit access for pedestrians)
- Undergrounding of facilities: FCC says requirement to underground all utilities is preempted and even requirements to underground limited facilities could be preempted if it “materially inhibited” provision of wireless service
- Spacing requirements: under state law, permitted, mostly as an aesthetic/community character regulation
- Spacing requirements: under FCC rules, might be preempted if not deemed to be “objectively reasonable”



COMMON PUBLIC CONCERN: RADIO FREQUENCY EMISSIONS

- Telecom Act of 1996: any state or local laws seeking to regulate on the basis of the health effects of radio frequency emissions is preempted
- Case law has supported this preemption
- FCC has sole federal authority to set health emissions standards
- It has had standards in place for many years, and has had a docket open to update the standards for the last 6 years
- Resources: http://wireless.fcc.gov/siting/FCC_LSGAC_RF_Guide.pdf
<https://www.fcc.gov/general/fcc-policy-human-exposure>



Q & A

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