

FCC Attempts To Impose New Restrictions And Penalties On Local Decisions On Cell Tower And Antenna Requests

On November 18, 2009, the Federal Communications Commission ("FCC") issued a Declaratory Ruling imposing new restrictions on municipalities by way of its new interpretation of the Federal Telecommunications Act of 1996 ("TCA"). The TCA states that local governments must act on requests to place wireless facilities "within a reasonable period of time" and grants wireless service providers an expedited process to file a lawsuit for violations in federal court. 47 U.S.C. § 332(c)(7)(B)(ii), (v).

For more information,
contact:

Daniel G. Vogel
dan@municipalfirm.com

Ryan A. Moehlman
ryan@municipalfirm.com

The FCC's findings in *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B)...*, FCC 09-99, Declaratory Ruling (November 18, 2009) go beyond the language of the statute and for the first time declare that:

- A "reasonable period of time" for a local government is presumptively:
 - **Ninety (90) days** to process personal wireless service facility siting applications requesting co-locations (**antennas on existing towers/structures**).
 - **One-hundred fifty (150) days** to process all other applications (**new towers/structures**).
- A failure to make a "final action" (a final *written* decision) within those timeframes constitutes a rebuttable presumption of a "failure to act" authorizing a challenge in federal court. However, failure to act on an application within the timeframes "would not, in and of itself, entitle the siting applicant to an injunction granting the application."
- Applicants and the State or local authority **can agree to extend** the above timeframes.
- The 90 day or 150-day time limits **do not start to run until the applicant files a complete application**.
 - State and local governments **must inform an applicant that their application is incomplete within thirty (30) days** of receiving an incomplete application.
- Time limits apply to **currently-pending** wireless facility siting applications.
 - All pending applications as of November 18, 2009 must have "final action" by **February 16, 2010** (for co-locations) or by **April 17, 2010** (for new structures), except that any pending application that has already exceeded the 90/150 day time frame (as of November 18, 2009) must be decided by **January 17, 2010**.
- New restriction on permissible reasons for denials:
 - "A State or local government that denies an application for personal wireless service facilities siting **solely** because 'one or more carriers serve a given geographic market' has engaged in unlawful regulation that 'prohibits or ha[s] the effect of prohibiting the provision of personal wireless services....'" (emphasis added).

ACTION REQUIRED:

The FCC's interpretation challenges the longstanding view of municipal groups that the FCC has no authority to regulate local zoning decisions on applications to place wireless facilities. Therefore, it is unclear if the Ruling is a lawful application of the TCA. Nevertheless, there is no doubt that the FCC's Ruling will be cited by wireless service providers and used as a basis for legal action against cities until applicable courts clarify whether these new restrictions are in fact enforceable against local governments. Therefore, each local government should review its wireless facility siting ordinance and current practices to ensure that it is adequately protected against new challenges based on this FCC Ruling.

In particular, the following actions should be considered:

1. **Incorporate new time limits** into existing codes and practices if these time frames are appropriate and achievable in your community. Be careful not to accept the FCC Ruling as valid and enforceable until or unless it has been upheld.
2. **Notify and educate** officials and staff who are responsible for processing and/or making decisions on wireless facility applications of the TCA obligations, this FCC Ruling, and court interpretations of the procedural requirements of the TCA.
3. **Implement procedures** regarding what constitutes a "complete application," the timing of review, procedures for extensions, and clear standards for decisions that reduce the risk of legal action and increase the likelihood that local decisions regarding your community will be upheld.

This summary is not exhaustive and is intended only as an outline of the significant provisions of the FCC Ruling. Please contact your City Attorney or other legal counsel to ensure the requirements are met for your specific circumstances.

To access previous reports on our website: [CLICK HERE](#).

Further questions may be directed to:

Daniel G. Vogel or Ryan A. Moehlman
Cunningham, Vogel & Rost, P.C.
legal counselors to local government

Suite One, 75 W. Lockwood

St. Louis, MO 63119

314.446.0800

314.446.0801 (fax)

dan@municipalfirm.com or ryan@municipalfirm.com

www.municipalfirm.com

This is a Municipal Issue Report from Cunningham, Vogel & Rost, P.C. relating to legal issues affecting municipalities. This Report does not constitute, and should not be treated as, legal advice, nor should it be understood to create an attorney-client relationship. These reports are prepared as an educational courtesy to municipalities and organizations that represent the interests of local governments to promote the public sector interests and municipal services on which our law firm was founded. If you do not wish to receive these Reports, or would like them directed to other or additional persons within your municipality or organization, please respond to this email with appropriate instructions. If you have suggestions for improving this service, please share those comments as well.