


Local Government Authority Over Wireless Facilities: Reconciling (or not) State and Federal Law

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... to colleagues Joe Van Eaton and Gerry Lederer of Best, Best & Krieger, LLP, for permitting the use of some of the material in these slides


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What We're Going to Cover


- Colorado's Statute on Small Cells
- The FCC's Recent Orders on Small Cells
- Conflicts Between State Law and the FCC Rules
- Status of the Court Challenge to the FCC Rules



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Colorado's Small Cell Law HB 17-1193


- Codified at CRS 29-27-401, et seq. and 38-5-5-102, et seq.
- 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



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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 47 U.S.C. sec. 224



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The FCC's Orders

- In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79, Second Report and Order (Mar. 30, 2018) (NEPA and NHPA)
- In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, FCC 18-111, Third Report and Order and Declaratory Ruling, WT Docket No. 17-79 (Moratoria)
- Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Declaratory Ruling and Third Report and Order, FCC WT Docket No. 17-79 (Small Cell Order – September 2018)



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FCC Order – NEPA and NHPA

- In March, 2018, the FCC amended its rules to clarify that “deployment of small wireless facilities by private parties does not constitute either a “federal undertaking” within the meaning of NHPA or a “major federal action” under NEPA....”
- Neither statute’s review process would be mandated for such deployments
- Small wireless facilities deployments continue to be subject to applicable state and local government approvals
- Order has been appealed and briefed, argued on March 15th



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FCC Order – Moratoria

- In August, 2018 FCC determined that express moratoria and de facto moratoria on deployment generally “prohibit or effectively prohibit” provision of telecom services in violation of federal law, and are not saved from preemption as a form of ROW management
- De facto moratoria examples: freeze and frost laws, restrictions on ROW work at certain times of year on hurricane path evacuation roads
- On appeal – not yet briefed



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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”



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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



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Conflicts between Colorado Statute and FCC Small Cell Order

- State shot clock: 90 days for location or collocation of small cell network facilities
 - shot clock stops if you notify applicant of incomplete application within 30 days
- FCC Rules: collocating small cells – 60 days; new small cell facility – 90 days;
 - if notified of a “materially incomplete” application with details of what must be provided w/in 10 days, shot clock stops and starts over with revised application
 - if notice of incompleteness w/in 30 days, shot clock stops and restarts when new information filed
- FCC Rules: requirement for a pre-application conference could have the effect of starting the shot clock – even though the application has not yet been filed!



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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
 - CRS 38-5.5-107
 - *Bloom v. City of Fort Collins*, 784 P.2d 304 (Colo. 1989)
- Pole Attachment fees under state law: cannot charge in excess of the amount that would be authorized if the local government were regulated pursuant to 47 U.S.C. sec. 224, as amended



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Conflicts between Colorado Statute and FCC Small Cell Order

- 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



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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

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Conflicts between Colorado Statute and FCC Small Cell Order




- 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

Photos courtesy of Dr. Jonathan L. Kramer, Esq. www.collegal.com

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Conflicts between Colorado Statute and FCC Small Cell Order – specific issues related to aesthetics and public safety

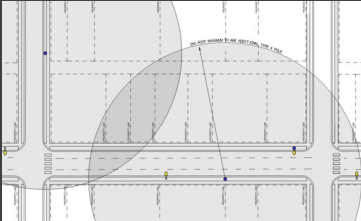
- Undergrounding of facilities: state law would allow, both for aesthetic reasons and public safety (such as a narrow ROW where above ground equipment cabinet would limit access for pedestrians)
- Undergrounding of facilities: FCC rules hold a requirement to underground all utilities is preempted and even a requirement to underground limited facilities could be preempted if it “materially inhibited” provision of wireless service

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Conflicts between Colorado Statute and FCC Small Cell Order – specific issues related to aesthetics and public safety

- 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”



Graphic courtesy of City & County of Denver Small Cell Design Guidelines

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Appeal of the FCC Rules

- Many local governments (including the Colorado Communications and Utility Alliance) and some industry entities challenged the rules in federal court
- Local Government Issues:
 - Faulty interpretation of statutory language of “effective prohibition of service”
 - Not based upon evidence in the record
 - 10th and 5th Amendment violations
- Industry Issues: FCC should’ve adopted a “deemed granted” remedy for violations

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Appeal of the FCC Rules

- Case originally assigned to 10th Circuit, but is now is pending in the 9th Circuit (that's good for us)
- FCC and 10th Circuit denied motion for stay
- FCC has filed motion to hold case in abeyance, until it rules on a motion for reconsideration on a minor issue in the case
- Case Management Conference scheduled for 4/18 where abeyance issue will be resolved as well as briefing scheduled determined
- Hope to have briefing finished and expedited oral argument by fall



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LOCAL GOVERNMENT PERSPECTIVE

GERALD DAHL
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INDUSTRY & LOCAL GOVERNMENT SHARE MANY OF THE SAME CHALLENGES

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

Local governments have unique problems, though:

- 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

Local Regulatory Response

- Zone district restrictions
- Design standards (screening, setback, height)
- Collocation requirements
- Insurance
- Bond for removal at abandonment

Review Process & Procedure

- Building and roof mounts that are not a substantial change
 - Opportunity for administrative review
- Substantial changes and new freestanding facilities
 - Conditional/special use permit?
 - Collocation potential
 - Roof or stealth potential
 - Photo simulations
 - Review deadlines
 - Requirement for a complete application

Small Cells: Opportunities & Challenges

- Use of public rights-of-way
 - Required by state legislation
 - Should be prioritized:
 1. On a new municipally-owned pole, designed to contain all antennae and equipment
 2. On an existing municipally-owned pole
 3. On a third-party pole
 4. On a traffic signal or pole with CDOT/City approval
 5. On a new pole

Small Cells: Opportunities & Challenges, *cont'd.*

- Avoid mid-block and sidewalk locations
- Key considerations:
 - Height
 - Safety & design
 - Spacing
 - Indemnification (when in right-of-way)
 - Bonding
 - Permitting Process
 - ❖ Revocable permit
 - ❖ Network permits

Challenge to Industry

- Become informed about and participate in local government comprehensive planning process
- Constructively participate in development and adoption of regulations
- Refrain from over-representing the extent of federal or state preemption
- Aggressively collocate
- Commit to removal upon abandonment

SMALL CELL – How Aurora is talking

Leslie N. Gaylord | Real Property Specialist
Real Property Services | City of Aurora

This is about YOUR City too and it's okay to remind them of that!

- 1) Know the FCC rules
- 2) Know your City
- 3) Be Transparent
- 4) Establish your City's Small Cell Procedures

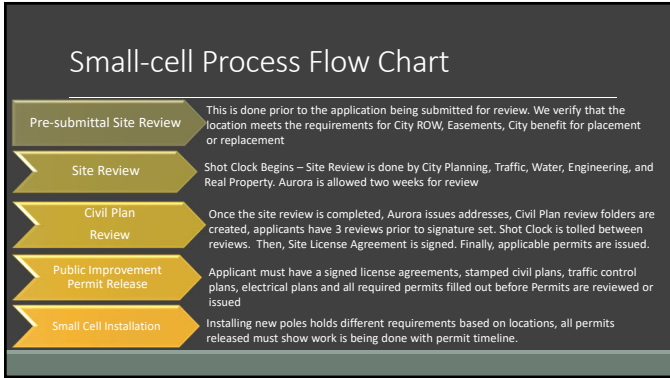
Aurora has one voice – Collaboration!

Who's Working With You and For You

<p>INTERNAL COMMUNICATION</p> <ul style="list-style-type: none"> • Current workload • Who knows what? • Assess staffing levels • Who's informing the community 	<p>EXTERNAL COMMUNICATION</p> <ul style="list-style-type: none"> • One voice • Establish carrier goals & priorities • Understand carrier experience level • Process improvement
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Falling Flat - Shot Clock is Pulled

- FCC vs State vs Local laws – FCC states, for new stand-alone poles, Small Cell must be installed with 90 days unless...
 - The local government can rebut the presumption of reasonableness of the shot clock period where the application causes legitimate overload on the siting authority's resources, or other exceptional circumstances
 - For example, third party permissions from other entities not timely given; issues unique to historic districts; unique public safety issues; staff shortages, etc.



Questions?

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