

## Wireless/Cellular Tower Siting:

### **\*\*What is the law?\*\***

### **\*\*What are the federal, state and local responsibilities?\*\***

#### **Summary:**

- Under both Federal law and California law, local governments have primary authority to approve tower sites. The CPUC has delegated this primary authority to local jurisdictions.
- The CPUC handles disputes between local government agencies and wireless service providers, but does not handle tower siting complaints of private citizens.
- Private citizens wishing to contest a tower siting should appeal to their local government agencies, which have processes in place to handle such inquiries either within their planning or building code departments, or some other department. ***Federal statute also provides that any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with the federal law may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court is required to hear and decide such action on an expedited basis.***
- Federal judicial decisions uphold local jurisdiction in tower siting decisions.

#### **Federal Law:**

- Section 332(c)(7) of the federal Communications Act of 1934, as amended, [47 USC 332(c)(7)] preserves state and local authority over zoning and land use decisions for personal wireless service facilities.
- The statute provides that a state or local government may not unreasonably discriminate among providers of functionally equivalent services, and may not regulate in a manner that has the effect of prohibiting the provision of personal wireless services. ***The Federal Communications Commission (FCC) has also found that it is a violation of the Communications Act to deny a siting request based on availability of service from another provider.***
- Federal statute also provides that state/local government must act on applications within a reasonable period of time (*see November 2009 FCC decision below*) and must make any denial of an application in writing supported by substantial evidence in a written record.
- The statute preempts local decisions premised directly or indirectly on the environmental effects of radio frequency (RF) emissions, assuming that the provider is in compliance with the FCC's RF rules. Any person adversely affected by an act or failure to act by a State or local government that is inconsistent with this federal preemption clause may petition the FCC for relief.
- ***In November 2009, the FCC established timeframes for state and local zoning boards to rule on applications for cell-tower sites. The FCC order allows 90 days for ruling on collocations and 150 days for ruling on applications other than collocations. If the state or local government has not acted within these***

*timeframes the applicant may seek redress in a court of competent jurisdiction within 30 days of the failure to act.<sup>1</sup>*

***Transition Period for Pending Applications: For applications pending as of November 18, 2009, a “failure to act” will occur 90 days (for collocations) or 150 days (for other applications) after November 18, 2009. However, a party whose application has been pending for the applicable timeframe established by the FCC in this November 2009 ruling may, after providing notice to the relevant State or local government, file suit under Section 332(c)(7)(B)(v) of the Communications Act if the State or local government fails to act within 60 days from the date of such notice. This option does not apply to applications that have been pending for less than 90 or 150 days as of November 18, 2009 -- in these instances the State or local government will have 90 or 150 days from November 18, 2009 before it will be considered to have failed to act.***

***Incomplete Applications: Reviewing authorities must notify applicants within a reasonable period of time that their applications are incomplete. The FCC found that a review period of 30 days gives State and local governments sufficient time for reviewing applications for completeness, while protecting applicants from a last minute decision that applications should be denied as incomplete. Accordingly, the time it takes for an applicant to respond to a request for additional information will not count toward the 90 or 150 days only if that State or local government notifies the applicant within the first 30 days that its application is incomplete.***

- In the matter of locally enacted moratoria on new towers, *in 1998, the Commission's Local and State Government Advisory Committee, the Cellular Telecommunications Industry Association (CTIA), the Personal Communications Industry Association, and the American Mobile Telecommunications Association entered into an agreement addressing issues relating to moratoria on the siting of wireless telecommunications facilities. This agreement sets out recommended guidelines for local governments and carriers to follow in connection with moratoria, and it establishes a non-binding alternative dispute resolution procedure that either carriers or local governments may invoke.* The agreements can be found at <http://www.fcc.gov/statelocal/agreement.html> , and are explained in two Statements released August 5, 1998: the Kennard Statement and the Fellman Statement. Among other things, the agreement provides:  
“If a moratorium is adopted, local governments and affected wireless service providers shall work together to expeditiously and effectively address issues leading to the lifting of the moratorium. Moratoria should be for a fixed (as opposed to open ended) period of time, with a specified termination date. The length of the moratorium should be that which is reasonably necessary for the local government to adequately

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<sup>1</sup> If a local entity has a shorter timeframe within which the local authority must act on an application, that timeframe is still valid.

address the issues described in Guideline A. In many cases, the issues that need to be addressed during a moratorium can be resolved within 180 days. All parties understand that cases may arise where the length of a moratorium may need to be longer than 180 days. Moratoria should not be used to stall or discourage the placement of wireless telecommunications facilities within a community, but should be used in a judicious and constructive manner.”

- Additional information is available at <http://wireless.fcc.gov/siting/>

**California: CPUC General Order 159A and Decision 96-05-035:**

- The original GO 159 [D.90-03-080 dated March 28, 1990], required cellular carriers to file advice letters and copies of local government permits with the CPUC for each new cell site, and to seek Commission approval to complete its siting process.
- **In 1996, the CPUC adopted General Order 159-A in D. 96-05-035.** The Decision provided that Commission authorization prior to construction would no longer be required. GO 159-A also streamlined the procedure to be utilized by the cellular carriers to notify the Commission of new facilities or significant modifications to existing facilities.
- GO 159-A continues to recognize that primary authority regarding cell siting issues should continue to be deferred to local authorities. GO 159-A affirms that the Commission will continue to defer to local governments in its exercise of its authority to regulate the location and design of cell sites and MTSOs including (a) the issuance of land use approvals; (b) acting as Lead Agency for purpose of satisfying the California Environmental Quality Act (CEQA); (c) the satisfaction of noticing procedures, public comment requirements, if any, for both land use approvals and CEQA procedures.
- The Commission's role continues to be that of the State agency of last resort, intervening only when a utility contends that local actions impede statewide goals.
- The CPUC ruled that individual citizens should not be able to petition for the CPUC to preempt such local jurisdictions; in ceding primary facility review authority to local agencies, the Commission reasoned that only carriers, and not individuals, should be able to appeal a local agency decision to the Commission
- In GO 159-A the CPUC replaced an advice letter filing requirement process with a notification letter process. Under GO 159-A, prior to commencing construction, cellular carriers must send to the Commission's Consumer Protection and Safety Division a notification letter within 15 business days of receipt of all requisite land use approvals or a determination that no land use approval is required (see sample letter GO 159-A, p. 8). Carriers must provide a description of the facility and identify the local permit obtained or state that no land use permit is required.

The carriers no longer need to file with the Commission copies of applications and permits obtained from local authorities. However, such documents must continue to be retained by the carriers and must be available to the Commission upon request. Carriers must provide copies of the notification letter to the city planning director, the city clerk, and the city manager of the affected city, or where no city is involved, a copy of the notification letter must be provided to the county planning director, the clerk of the board of supervisors, and the county executive of the affected county.

- The revisions to GO 159 do not change any local land use or building permit procedures.
  
- As noted above, in GO 159-A, the Commission continues to delegate its authority to regulate the location and design of cellular facilities to local agencies, **except in those instances when there is a clear conflict with statewide interests.** In those instances, the Commission will review the need to preempt local jurisdiction, allowing local agencies and citizens an opportunity to present their positions. The cellular utility will have the burden of proof to demonstrate that accommodating local agency requirements for any specific site would frustrate the Commission's objectives. If the cellular utility is able to prove this point, the Commission will preempt local jurisdiction pursuant to its authority under Article XII, Section 8 of the California Constitution.
  - ▷ Because statewide telecommunications interests in some infrequent cases may be in conflict with local interests, the Commission continues to reserve jurisdiction to preempt those matters which are inconsistent with the overall statewide communications objectives. The Commission continues to have an interest in assuring that individual local government decisions do not impact uniform state interests, or create unconscionable standards.
  
- CPUC policy as stated in the decision is to enable adoption of advanced communications technologies.

**California: CPUC General Order 95:**

- GO95 governs constructions in the "right-of-way."

**Federal Court, 8th and 9th District Rulings (2008):**

- In "Level 3 Communications LLC v. City of St. Louis, Mo." (Case 08-626) and "Sprint Telephony PCS, L.P., v. San Diego County, Calif., et al." (08-759) both courts left in place rulings by two separate judicial circuits -- the Eighth and the Ninth -- that repudiate the idea that section 253 of the 1996 Act preempts state or local government requirements. The decision may make it more difficult for wireless telecommunications companies to bring facial challenges to local wireless tower moratorium ordinances absent proof of actual prohibitive effect, but leaves intact the ability for wireless telecommunications companies to challenge local zoning decisions on permit applications where the decisions violate federal restrictions.

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