

The FCC's Assault on Local Government Authority & Property Rights: Small Cells Order; OTARD NPRM and In-Kind Offset FNPRM



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Presenters



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AGENDA

- Small Cells –
 - FCC Orders – Rules and Deadlines
 - Status of Appeals and Stays
 - Potential Legislative Override
 - Where things stand in the states
- Other Major Threats to Local Government from FCC
 - FCC Offset and Mix Use Rule
 - Extension of OTARD Protection to Network to Backhaul.



IMPLICATIONS OF THE FCC'S SMALL CELL 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)
- *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
- *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, FCC WT Docket No. 17-79



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(“NEPA/NHPA Order”)

- **Holding**: Deployment of small cells (28 cu. ft.) not a federal undertaking and therefore do not trigger federal obligation to examine historical/environmental impacts
- **Generally**: Small cell deployments will not impact historical sites
- **Insight**: State and local governments can protect historical and environmental interests
- **Status**: Order was appealed and in briefing today.



Feds Move Out of Historic Preservation Business for Small Cells

- 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 was appealed and has been argued before D.C. Circuit.



Moratoria Ban

- **August 3 Holding:** 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
- **Examples:** freeze and frost laws, South Carolina hurricane path
- **Insight:** effective immediately



What is a Moratorium?

- Order captures express and *de facto* moratoria.
- Express moratoria are “...state or local statutes, regulations, or other written legal requirements that expressly, by their very terms, prevent or suspend the acceptance, processing, or approval of applications or permits necessary for deploying telecommunications services and/or facilities.” (¶135)
- *De Facto* moratoria are “...state or local actions that are not express moratoria, but that effectively halt or suspend the acceptance, processing, or approval of applications or permits for telecommunications services or facilities in a manner akin to an express moratorium.” (¶139)
- NOTE – “... not all street cut regulations are illegal moratoria.”
 - Street cut requirements which are designed to promote “dig-once” policies “would not qualify as unlawful moratoria if the state or locality imposing such street-cut requirements does not bar alternative means of deployment such as aerial lines or sublicensing existing underground conduits” (¶142)



Suggested Responses

- Moratoria Order was effective upon publication (Aug. 8)
- Continue to pursue programs that protect the health and safety of your constituents.
- Prudent to look at the examples listed in order to see if you might have a rule or ordinance that could be described as an express or *de facto* moratoria.
- If your community has an express moratorium, it might make sense to reevaluate it or make clear that it will not be enforced beyond the permissible exceptions.
- Talk to engineering/public works about formalized restoration standards for street cuts (most policies are currently informal).
- The FCC ruling is not clear as to what constitutes a *de facto* moratoria, but if a provider claims your rules constitute such a moratoria, contact your counsel to learn how best to respond.



5 Major Elements Small Cell Order

- 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”.



5 Major Elements Small Cell Order

- Finds Congress did not include a blanket proprietary exception to Section 253 (a) and therefore traditionally non-governmental conduct such as leasing may be preempted.
- “Enhanced” remedy, Not Deemed Granted, for failing to meet shot clocks
- Redefines “Collocation”



What Is a Small Cell?

(1) The facilities—

(i) are mounted on structures 50 feet or less in height including their antennas ..., **or**

(ii) are mounted on structures no more than 10 percent taller than other adjacent structures, **or**

(iii) do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater;

(2) Each antenna associated with the deployment, excluding associated antenna equipment ... is no more than three cubic feet in volume; **(Note: no limit)**

(3) 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...**

(4)... (5) ... and

(6) The facilities do not result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified in section 1.1307(b).



Legend:	Less Than Public	Exceeds Public	Exceeds Occupational	Exceeds 10x Occupational
Shaded color	blank	Blue	Yellow	Orange
Boundary marking	N/A	Blue line	Yellow line	Orange line
Sign type	I - Green INFORMATION	B - Blue NOTICE	Y - Yellow CAUTION	O - Orange WARNING

Recommended Mitigation Measures

- Lock roof access door
- Mark boundaries as shown
- Post explanatory signs
- Provide training



Notes: See text.
 Base drawing from Cellsius Engineering Group, dated July 10, 2018.
 Calculations performed according to OET Bulletin 65, August 1997.



Redefinition of Effective Prohibition (Para 34-43)

- “[P]rior approaches erred by requiring coverage gaps...”
 - “Significant gap” (9th Cir.) and “least intrusive alternative” (2nd, 3rd and 9th Cir.) appear abandoned – *See n. 94*
- A state or local legal requirement constitutes an effective prohibition if it “materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.” (Para. 35 quoting *California Payphone*.)
- “We clarify that an effective prohibition occurs where a state or local legal requirement materially inhibits a provider’s ability to engage in any of a variety of activities related to its provision of a covered service. This test is met not only when filling a coverage gap but also when densifying a wireless network, introducing new services or otherwise improving service capabilities...also by materially inhibiting the introduction of new services or the improvement of existing services.” (Paragraph 37)



According to FCC A Fee Is Permitted If...

- (1) The fees are a reasonable approximation of the state or local government's costs,
- (2) Only objectively reasonable costs are factored into those fees, and
- (3) Fees are no higher than the fees charged to similarly-situated competitors in similar situations.

Fees Include . . .

- One-time and recurring charges made by State or local government in either a regulatory or proprietary capacity
- Application review fees, hearing fees, appeal fees, permit issuance fees, plan check fees, inspection fees, etc.
- Lease rent, franchise fees, pecuniary value of in-kind consideration, signing bonuses, etc.

Presumptively Reasonable Fees (caveat: check your state laws):

- Non-recurring fees =
 - \$500 for first 5 nodes/\$100 for each additional
 - \$1,000 for new pole
- Recurring fees = \$270.00 per facility including RoW fee and fee for attachment to municipal infrastructure
- Specifically rejects claim that localities are exempt from 253(c)'s fair and reasonable standard in setting rates for ROW infrastructure (See paras. 92-97.)



Existing Agreements (Para 66)

- “... [T]his Declaratory Ruling’s effect on any particular existing agreement will depend upon all the facts and circumstances of that specific case. Without examining the particular features of an agreement, including any exchanges of value that might not be reflected by looking at fee provisions alone, we cannot state that today’s decision does or does not impact any particular agreement entered into before this decision....”



Aesthetics (para 84-89)

- Aesthetics requirements not preempted if:
 - (1) reasonable,
 - (2) no more burdensome than those applied to other types of infrastructure deployments, and
 - (3) objective and *published in advance*.
- “...aesthetic requirements that are reasonable in that they are technically feasible and reasonably directed to avoiding or remedying the intangible public harm of unsightly or out-of-character deployments are also permissible.”
- Focuses on cost of aesthetics?



Undergrounding (para 90)

- “...[You don’t have to]...go so far as requiring that all wireless facilities be deployed underground, [to] ...be considered an effective prohibition of service.”
- Test: “same criteria of aesthetics generally...”
 - (1) reasonable,
 - (2) no more burdensome than those applied to other types of infrastructure deployments, and
 - (3) objective and *published in advance*.



Spacing Requirements (Par. 91)

- “...a minimum spacing requirement that has the effect of materially inhibiting wireless service would be considered an effective prohibition of service.” Para 87
- “Some parties complain of municipal requirements regarding the spacing of wireless installations... ostensibly to avoid excessive overhead “clutter” that would be visible from public areas. We acknowledge that while some such requirements may violate 253(a), others may be reasonable aesthetic requirements.” Para. 91
- “For example, under the principle that any such requirements be reasonable and publicly available in advance, it is difficult to envision any circumstances in which a municipality could reasonably promulgate a new minimum spacing requirement that, in effect, prevents a provider from replacing its preexisting facilities or collocating new equipment on a structure already in use.” Para. 91



Shot Clocks

- Apply to all permits required for deployment, not just wireless permits
- Mandatory Pre-Application Meetings
 - “We conclude that if an applicant proffers an application, but a...locality refuses to accept it until a pre-application review has been completed, the shot clock begins to run when the application is proffered...” Para 145
- Failure to meet shot clocks deemed an “effective prohibition”
- **NO DEEMED GRANTED.**



Batched Applications

- Locality must accept “batched” applications.
 - Time frame is same for one as it is for hundreds (Paras. 114, 115)
 - “...[I]n 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.” Para. 115



Small Cell Shot Clock *Reset*

- Siting authority must:
 - Notify the applicant on or before the 10th day after submission that the application is *materially* incomplete.
 - Clearly and specifically identify the missing documents or information and the specific rule or regulation creating the obligation to submit such documents or information,
- Shot clock date calculation “shall restart at zero on the date on which the applicant submits all the documents and information required...”
- But...operators will argue shot clock starts on resubmission. Additional incompleteness notice is required if resubmission is inadequate



Collocation

- Two meanings:
 - Non 6409 context – there is a structure present, but not a wireless device. This provides 60 day shot clock for small cell and 90 day shot clock for all others
 - 6409 Context – there is a structure and the structure has a permitted wireless device.



ACCESS TO LOCAL PROPERTY

- FCC SAYS IT IS NOT REQUIRING ACCESS TO PUBLIC PROPERTY – JUST NOTING THAT THERE IS NO BLANKET EXEMPTION TO SECTION 253(C)'S JUST AND REASONABLE STANDARD FOR MUNICIPAL PROPERTY(¶94)
- BUT, what does it mean to suggest that we must act on a demand for access within 60 days, or have presumptively prohibited entry?



Putting Time Frames Together...

New Concept of Collocation

← 10 Day Review of Amended Applications →

10 Days

30 Days

60 Days

90 Days

150 Days

Incomplete
Small Cell
with Reset

Incomplete
Non-Small
Cell,
but
No Reset*

Small Cell
On Existing
Structure

6409 Co-
location

Small Cell
On New
Structure //
Any Cell on
Existing
Structure

New Cell on
New Structure



Status of Appeals and Stay Requests and the role Petitions for Recon might play

Time Periods – What's Next?



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Status of Appeals and Stay Request

Effective Date(s)

- **January 14, 2019**
 - *Consolidated forms.*
- **April 15, 2019**
 - *Defend Aesthetics and Design Standards under new FCC test*



Status of Appeals and Stay Request

APPEALS OF FCC ORDERS – IN 9TH CIRCUIT PRESENTLY

Moratorium/One Touch August Order

- Portland filed appeal of August Moratorium Order in 9th Cir.
- American Public Power filed appeal of “One Touch” section of August Order in 11th Circuit
 - 11th Circuit granted FCC request to remove matter to 9th

September Small Cell Order

- 3 Local gov’t groups filed in 9th Cir. (after lottery locals filed in DC, 4th and 6th Circuits)
- Industry in 10th, 1st, 2nd and DC Cir.
- 10th Cir Awarded lottery but granted local governments’ request to remove to 9th.



Status of Appeals and Stay Request

Stay of Order – not granted, but possible petition in future

- Not automatically stayed on appeal.
- We asked FCC – they denied but did clarify effective date for defending standards for design and aesthetics under new test.
- 10th Circuit denied – said we failed to demonstrate irreparable harm on a *prima facie* basis as denial was before effective date.
- 9th Circuit – opportunity to bring and use as applied standards.
 - Yesterday 9th held case management conference.
 - Briefs will be do in about 30 days.



Wild Card(s): Petitions for Reconsideration

- FCC will ask 9th Circuit to suspend consideration of appeals until they finish work on Petitions for Reconsideration.
 - Moratorium – record completed 11/19/18
 - Small Cell – record completed 3/4/19



116TH CONGRESS
1ST SESSION

H. R. 530

To provide that certain actions by the Federal Communications Commission shall have no force or effect.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 14, 2019

Ms. ESHOO (for herself and Ms. SPEIER) introduced the following bill; which was referred to the Committee on Energy and Commerce

A BILL

To provide that certain actions by the Federal Communications Commission shall have no force or effect.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

- 41 Sponsors as of today.
- Sens Feinstein, Blumenthal and others pledged to introduce Senate Companion.

APA

BBK

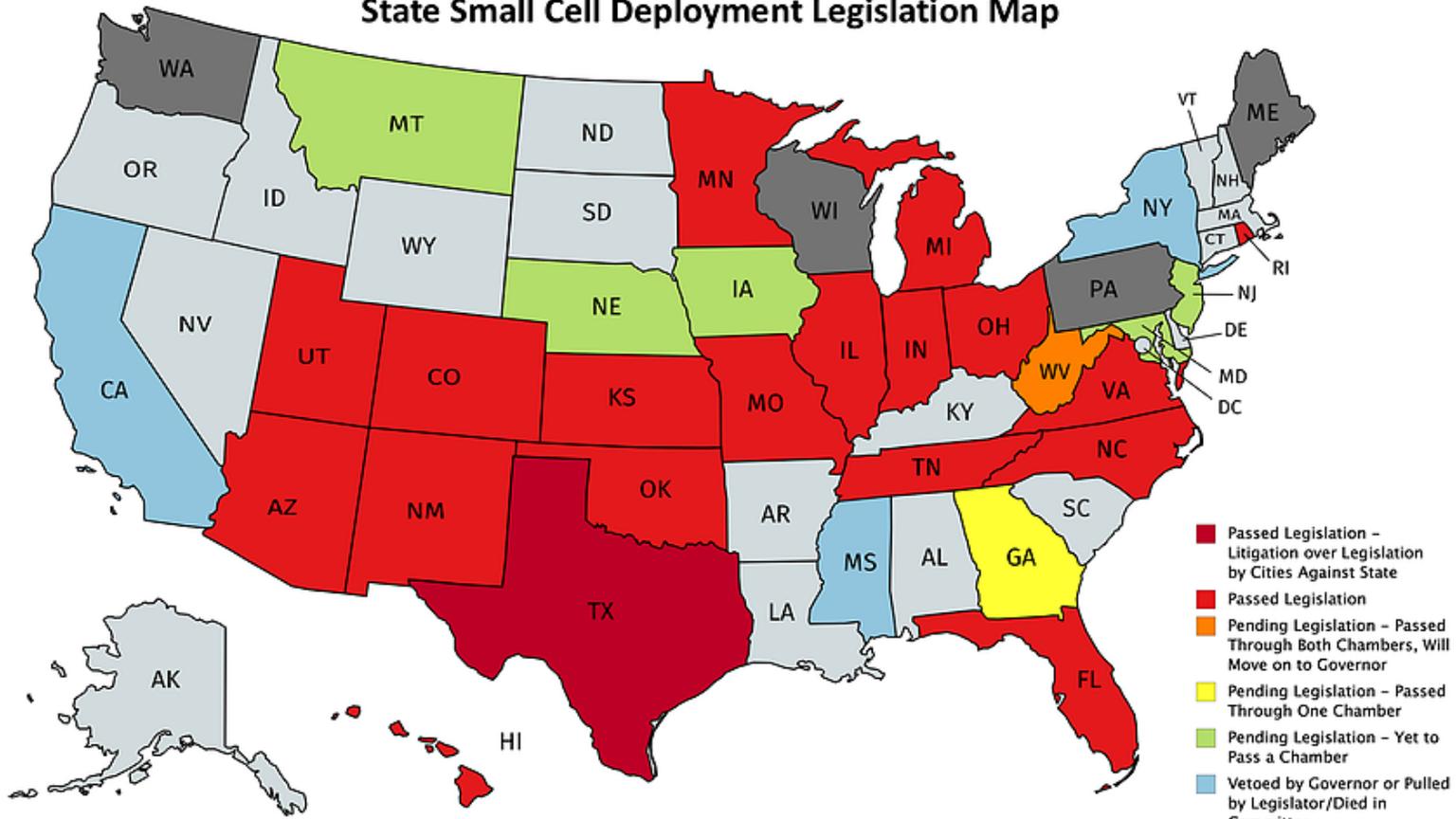
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State Small Cell in ROW Laws (As of 3/1/2019)

Active States
GA. W.V.
MD. NE. SC.

State Small Cell Deployment Legislation Map



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Part VI: Practical Considerations for Local Regulation

APA



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Changes Required in Your Local Laws and Practices, Forms

- **Legal Considerations**

- No explicit requirement in new regulations that jurisdictions create or publish new standards and rules in an ordinance.
- But it is important to review existing ordinances/practices to consider
 - Do your local laws permit locality to comply with federal/state laws
 - Are there revisions to provide protections to community
- Particularly important:
 - You may want applications to have different standards depending on where deployment takes place (Inside or outside of RoW;) Size (Is it a small cell or Eligible Facilities Request or not); Type of zone – residential, commercial, industrial, historic, environmentally sensitive? Is the neighborhood a undergrounded community??



Changes Required in Your Local Laws and Practices, Forms

- **Practical Considerations**

- 10 day incompleteness standard with Reset
- 60-day timeframe for Eligible Facilities requests and small cells on existing structures
- 90-day timeframe for Small Cells on new structures
- Mandatory approvals
- Limited criteria for review
- Extremely new FCC and state statutory rules where many issues are unclear



Land Use Code Revision DO's

- Don't Forget to Check your State's Laws.
- Express Your Local Land-Use Values!
- Incentivize Preferred, Dis-Incentivize Discouraged Deployments (Cautiously)
- Consider Requiring More Stealth/Concealment Elements
- Consider Empowering Local Professional Staff to Approve Applications that comply with published design standards.
- Provide Mechanism and Authority For Creation Of Application Forms – Ordinance Need Not Specify Requirements (But May Set Minimums – check state law.)



Land Use Code Revision DON'Ts

- Adopt a Moratorium
- Re-codify State/Federal Process/Remedies (But Be Sure You Can Comply)
- Adopt Different Standards for Similar Impacts
- Assume Federal Law Always Controls
- Attempt to Regulate Technological Choices



Permit Applications Do's

Do

- Create Applications that clearly reflect the time frame in which they must be acted upon.
- Develop comprehensive application forms, with applicant making clear whether the application is for:
 - Small Cell, 6409 co-location or other;
 - On a new or existing Facility
 - Inside or outside the RoW,
 - On government property or not
- Develop policies for handling requests that may require zoning approvals; lease/license to use City property; franchise issuance, and make those policies clear for potential applicants
- Consider pre-submittal conferences, but be careful that meeting is not deemed the start of the shotclock.
- Consider Implementing formal submittal procedures, and internal handling procedures



Permit Applications Don'ts

Don't

- Allow the counter clerk to decide whether to reject/return applications – unless you have provided clear guidance to avoid incompleteness/final decision errors.
 - You only have one chance to provide the basis for incompleteness.
- Fail to send incomplete notices on time



State Laws Impacting Local Authority Over Telecommunications and Wireless

- **State laws may limit your right to:**
 - Require wireless provider to obtain a franchise,
 - Time in which you have to act, and
 - Price you may charge for application or rent.
- FCC small cell order does not preserve any state law that is better for local government. If you are in a state with a small cell agreement, default to the least generous term or length of time in which to act.



*In the Matter of Implementation of Section
621(a)(1) of the Cable Communications
Policy Act of 1984 as amended by the Cable
Television Consumer Protection and
Competition Act of 1992, MB Docket No. 05-
311*

“In-Kind Proceeding”



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OVERVIEW

- *FCC Cable Franchising Proceeding (FNPRM)*
 - In-Kind Contributions As Franchise Fees
 - Mixed-Use Networks
- *What's Next?*
- *What Can We Do?*



BACKGROUND

- ***Montgomery County v. FCC*, 863 F.3d 485 (6th Cir. 2017)**
 - Challenge to a 2007 FCC Order extending to incumbent cable operators rules established to apply to competitive entrants
 - In-kind Payments: Vacated FCC's finding that cable-related exactions are "franchise fees"
 - "Mixed Use Rule": Non-Cable Services on the Cable System
 - Vacated FCC's finding that LFAs cannot use Title VI authority to regulate non-telecommunications (i.e., internet) services provided by incumbent cable operators
 - FNPRM is the FCC's do-over after the 6th Circuit loss



PROPOSAL

Allow a cable operator to credit against franchise fees the market value of all franchise obligations required under a state or local cable franchise.

- “In-kind” includes include “any nonmonetary contributions related to the provision of cable services provided by cable operators as a condition or requirement of a local franchise agreement, including but not limited to free or discounted cable services and the use of cable facilities or equipment”
- “In-kind” does not include the cost of build-out requirements or PEG capital costs



WHAT DOES FCC CALL AN IN-KIND CONTRIBUTION?

- Institutional Networks
- Complementary Cable Service to Government Buildings
- PEG Channels –(Value of the channel)
- Electronic Programming Guide Service
- Video-On-Demand
- Customer Service Location
- Video Transmission Paths
- Discounted Enterprise Services
- ROW Requirements
 - Relocation, Restoration, Maintenance



MIXED-USE RULE

Proposal (is ambiguous):

- “..prohibit [local franchising authorities] from using their video franchising authority to regulate non-cable services offered over cable systems by incumbent cable operators”
- “...prohibits LFAs from regulating the provision of any services other than cable services offered over the cable systems of incumbent cable operators that are common carriers, or from regulating any facilities and equipment used in the provision of any services other than cable services offered over the cable systems of incumbent cable operators that are common carriers”
- Under either statement, excludes I-Nets from this restriction



IMPACT OF MIXED-USE RULE

- Would preempt regulation of any facilities and equipment used in the provision of any services other than cable services
- Would effectively adopt cable operators' argument that a cable franchise authorizes installation of any equipment in RoW, regardless of use for cable service
- Impedes local authority to ensure consistent regulations apply to providers of similar services



WHAT CAN LOCAL GOVERNMENT COUNSEL DO?

Advocate at the FCC

- Large number of local governments have filed; still time for *ex partes*

Educate Elected Officials and the Public

- Federal, state and local officials, general public, must understand the impacts of the proposed rules



OTARD

Current Rules

- Prohibit State, local, or private laws, regulations, or restrictions that impair the ability of antenna users to use over-the-air-reception devices (OTARD).
 - Rules cover antennas used for fixed wireless signals, provided that:
 - (1) the antennas are small (less than one meter in diameter or diagonal measurement);
 - (2) the property on which the antennas are located is within the exclusive use or control of the user (if the user has an ownership or leasehold interest in property); and
 - (3) the antenna transmits and receives fixed wireless signals for the use of those who control the premises on/in which the antenna is located.

The OTARD rule does not currently apply to antennas operating primarily as hub or relay antennas.



Proposed OTARD Expansion

WT Docket No. 19-71

What the Notice Would Do:

- Proposes to eliminate the restriction that currently excludes hub and relay antennas from the scope of the OTARD rule in order to help spur infrastructure deployment, especially in rural areas.
- Seek comment on certain implementation issues in order to ensure that the revised rule would apply to hub and relay antennas.
- Proposes to retain an exception to the rule for safety or historic preservation purposes.
- In other words – remove zoning consideration for wireless network components outside of the rights of way.



Time Line

WT Docket No. 19-71

- NPRM adopted on April 12, 2019
- Comments due 30 after publication in Fed Register
- Reply Comments due 45 days after publication in Fed. Register.



Questions



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