

# Special Feature



## FCC enacts new ‘shot clock’ to decide wireless cellular facilities siting applications

We all know that broadband and other wireless services are becoming increasingly in demand nationally—a movement that will only continue given the nation’s push to increase broadband coverage. Indeed, more and more people rely on their mobile phones than landline phones. And more and more people rely on mobile devices for both phone and Internet service.

To meet this increased demand, many wireless providers continue to build out their networks to provide those services. A critical prerequisite to wireless providers building out their networks is, as many township officials know, securing township approval to build a cellular tower or attach a cellular antenna onto an existing tower. For this reason, many Michigan townships are experiencing a continued flow of applications from wireless providers to locate various wireless facilities in their townships.

A township’s resolution of wireless siting applications is not always straightforward and can often be time-consuming. Indeed, applications to allow wireless facilities—commonly called “siting applications”—often involve complicated terminology, particularly to new township board members, as well as technical and engineering matters to consider. And of course townships must comply with the federal requirement that any decision to deny a request to place or modify a wireless facility must be in writing supported by evidence in a written record. (47 USC 332(c)(7)(B)(iii))

But new rules just adopted make township decision-making far more challenging.

Despite the complexity and time-consuming nature of wireless siting applications, the Federal Communications Commission

(FCC) recently issued a ruling that sets new rules as to how townships can resolve wireless siting applications. This article summarizes those new rules—which include new deadlines for townships to issue decisions.

### KEY TERMINOLOGY

Wireless facilities applications generally fall into two categories. First, an application may be a “collocation application.” This type of application seeks permission to add to an existing tower or structure a facility, such as an antenna, that does not involve a substantial increase in the size of a tower. The typical collocation application seeks to simply add one or two new antennas onto an existing tower.

All other applications fall into a second category of applications, often called “non-collocation applications.” These applications seek, for example, permission to install a new wireless cellular tower and antennae onto it, or to build a network of wireless facilities.

### LOCAL AND FEDERAL ZONING REGULATIONS

Regardless of the category, most townships have ordinances that govern the process under which they will review a wireless siting application. A wireless facility ordinance will identify where those facilities are allowed, application requirements, and what the standards are to obtain such approval. Ordinances very often also require wireless operators to obtain zoning approval—including a special use permit or variance—before being allowed to erect any wireless facility. And while some townships’ ordinances set forth self-imposed deadlines to make those decisions, many are silent on deadlines.

In addition to regulations in a township ordinance, the Federal Telecommunications Act (47 USC 201, *et seq.*) has several laws that also guide a township’s review of a wireless facility siting application.

## THE PETITION THAT STARTED IT ALL

In July 2008, a wireless association asked the FCC to change the rules under which townships review wireless siting applications. The wireless association specifically asked the FCC to impose three things: 1) set a deadline by which zoning authorities must act on siting requests for wireless communications facilities; 2) bar zoning authorities from denying a wireless facility siting application based on availability of service from another provider; and 3) strike down all ordinances that require variances for all wireless communications facilities.

## THE FCC'S DECISION AND ITS 'RATIONALE'

The FCC ruling of Nov. 18, 2009, granted some but not all of the relief requested. The FCC proclaimed that its decision promotes deployment of broadband and other wireless services, and reduces delays in constructing and improving wireless networks.

The FCC also found persuasive the wireless association's evidence on delays at the local and state level in resolving wireless siting applications: 1) there were over 3,300 pending personal wireless service facility siting applications before local jurisdictions; 2) about 760 of them had been pending for over one year; and 3) roughly 180 were pending for over three years. Although most of this evidence concerned a handful of states, the FCC deemed it proper to set new rules for the entire country.

## THE NEW DEADLINES

The FCC first granted the wireless association's request to set deadlines by which townships must act on siting requests for wireless communications facilities. The FCC's new rules include:

- A township must act on a wireless facility siting request for "personal wireless services" within 90 days for collocation applications, and within 150 days for all other wireless facility siting applications.
- If the township fails to act within the 90-day or 150-day period, then a presumptive "failure to act" has occurred and wireless providers may seek relief under the Federal Telecommunications Act (TCA) in court within 30 days of the failure to act. However, in the court action, the township will have the opportunity to rebut the presumption and show that it had good cause for not acting within the 90-day or 150-day period.
- The FCC's 90-day and 150-day time periods may be extended by mutual consent of the wireless provider and the township.
- The FCC's interpretation of the deadlines is independent of any deadlines in local ordinances. In other words, if a township ordinance sets a shorter review period than the FCC's 90-day or 150-day period, then the applicant may pursue remedies granted under the local ordinance when that local ordinance's review period has lapsed. But the applicant must wait until the 90-day or 150-day review period has expired to bring suit for a "failure to act" under the TCA. Likewise, if the local ordinance gives a longer review period than the 90-day or 150-day FCC review period, then the applicant may sue under the TCA after 90 days or

150 days, and may consider pursuing any remedies granted under a local ordinance only when that local ordinance's time period has expired.

- For all currently pending applications that have been pending for less than 90 or 150 days as of Nov. 18, 2009, the township has until April 17, 2010, (for non-collocation applications) to take action. The deadline for pending collocation applications was Feb. 16, 2010.
- An applicant whose application has been pending for at least 90 days (for collocations) or 150 days (for other applications) as of Nov. 18, 2009, may, after providing notice to the township, sue under the TCA if the township fails to act within 60 days from the date of that notice.
- If a township notifies the applicant within the first 30 days after receipt of an application that it is incomplete, the time it takes for an applicant to respond to a request for additional information will not count toward the 90 or 150 days.

## NO DENIALS BECAUSE OTHER PROVIDERS IN THE AREA

Next, the FCC ruled that a township may not deny a wireless facility siting application solely because there is service available from another provider. The FCC ruled that a denial on that basis violates the TCA since it "prohibits ... the provision of personal wireless services." As a result, a township may not base a denial of a wireless facility siting application solely on the fact that there may be other carriers who provide service to the area in question.

## ORDINANCES REQUIRING VARIANCES FOR WIRELESS FACILITIES ARE NOT INVALID—FOR NOW

Finally, the FCC refused to strike down ordinances that require a variance before an applicant can site any wireless communication facility. However, the FCC did leave open the possibility of considering whether to bar all ordinances that require a variance for any type of wireless siting application if it receives specific evidence that a blanket variance ordinance is effectively an unlawful bar on wireless service.

## LESSONS MOVING FORWARD

There is no question that the FCC ruling puts pressure on townships to resolve wireless siting applications quickly. The FCC ruling appears to be strong evidence that the FCC will pursue avenues to further promote the deployment of broadband and other wireless services. Its new timing constraints, while likely viewed with open arms by wireless providers, may be challenging for townships to meet. Nevertheless, townships should be aware of these new rules in resolving wireless siting applications given the consequences the FCC sets out of not heeding those new rules. ■

**Ronald D. Richards Jr.**, Attorney,  
Foster, Swift, Collins & Smith, P.C., Lansing

For more information, call (517) 371-8154 or  
e-mail [rrichards@fosterswift.com](mailto:rrichards@fosterswift.com).

