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## FCC Cell Tower Zoning Preemption Proceeding

by

John W. Pestle\*

prepared for

IMLA

September 2008

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\* John W. Pestle represents municipalities across the country on cable, telecommunications and utility-related matters, from large cities such as Detroit to small communities. He is a past Chair of both the Municipal Lawyers Section of the State Bar of Michigan and Legal Section of the American Public Power Association. He received a special award of merit from the Michigan Municipal League in 2006 for his work for municipalities on cable and right of way matters and received the "Member of the Year" award from the National Association of Telecommunications Officers and Advisors in 1996 for his representation of municipalities on the Federal Telecommunications Act of 1996. Mr. Pestle is a graduate of Harvard College, Yale Graduate School, and the University of Michigan Law School.

# Introduction

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- Cell phone companies have petitioned FCC for ruling to effectively preempt much local zoning of cell towers
  - Apparently on fast track for completion before January 20, commissioners change
  - Could set precedent for preemption of zoning, code enforcement, for radio station, TV towers
- Prior FCC attempts at zoning preemption rejected by Congress, FCC
  - Broadcast (radio, TV) towers
  - Cell towers
- Congress in 1996 preserved local zoning of cell towers, rejected pending FCC zoning preemption proceeding
  - 47 U.S.C. § 332(c)(7), titled "Preservation of Local Zoning Authority"

# Timing

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- Current proceeding prompted by June *Alliance for Community Media* decision on cable franchising
  - Upholding FCC authority to issue time frames for municipal action on cable franchise applications
- Petition is an attempt to obtain a similar ruling on cell tower zoning before FCC Commissioners change with change in administrations
- Short times to respond
  - Comments due Sept 29, Replies Oct 14
  - This is two week extension from original due dates

# Cellular Industry Petition

## - 4 Requests

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- 75 day "shot clock" for "final action" by municipalities on zoning applications for new cellular towers, antennas
  - If deadline not met, approval automatically deemed granted
- 45 day "shot clock" for final action on applications to collocate antennas on existing towers, structures
  - If deadline not met, approval automatically deemed granted
- Preempt zoning ordinances where variances are required for cell towers
  - If variance required for a cell tower, cell companies will likely argue local approval is preempted, not needed

# Cellular Industry Petition

## - 4 Requests (cont.)

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- Prevent municipalities from considering whether other cell companies provide service in the area in question in determining whether there is a "gap" in coverage warranting a new tower
  - Effectively reverse Third Circuit and similar decisions on this point

# Analysis - Concerns

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- Congress in 1996 refused to preempt local zoning of cell towers, instead preserved it, with mainly procedural additions. 47 U.S.C. § 332(c)(7).
  - Ever since, cellular industry has tried to overcome this refusal
  - Initially by industry attempting restrictive interpretations (rejected by courts) of Section 332(c)(7)
  - Recently by claiming zoning is preempted by the "no barrier to entry" provisions of 47 U.S.C. § 253
    - Some success in Ninth Circuit, in case currently in en banc rehearing
  - Current petition is the latest attempt
- Zoning, and balancing of competing concerns, is inherently local
  - Each application is unique, has its own issues, timing
  - FCC cannot be "national zoning board" for cell towers
  - Or impose "one size fits all" deadlines, rules

# Analysis – Concerns (cont.)

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- No "crisis" or barriers in cell tower zoning warranting action
  - As shown by the over 214,000 cell towers in place
- Proposed deadlines ignore Federal, state and local zoning procedures, realities
  - State notice, hearing requirements
  - Appeals as of right from planning/zoning commission to Board of Zoning Appeals
  - Federal cases requiring written decision, separate from the record, with adequate explanation of reasoning
  - Incomplete applications, slow responses by cell companies to questions
  - Are particularly troublesome for contentious cases (such as cell towers in residential areas) which require the most time to resolve

# Analysis – Concerns (cont.)

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- Proposals encourage providers to “run out the clock” with bad applications, delays
  - Deficient, incomplete applications
  - Slow responses to requests for information
  - Appeals by provider to Board of Zoning Appeals
- Proposals encourage non-conforming towers
  - Application for 101' tower (where only 100' towers allowed)
  - So provider can claim "variance" and thus preemption of need for any local zoning approval



# Legal Objections

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- Violates Constitutional cases on Federalism
  - "Blurs lines of political accountability"
- Violates "preservation of local zoning authority" provisions of 1996 Act and Committee Report
  - Which state "no preferential treatment" for cell tower zoning
  - Time to act is "reasonable time", "usual period of time" for zoning decisions
- Violates 1996 Congressional directive for FCC to terminate zoning preemption rulemaking
- Unduly tries to expand Section 253
- Violates normal procedures for resolving conflicts between Circuits

# What Municipalities Should Do

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- File comments at FCC
- Write U.S. Representatives, Senators, asking them to oppose cellular industry Petition
- See [www.varnumlaw.com/serviceGroups/cableTV/cellularwireless](http://www.varnumlaw.com/serviceGroups/cableTV/cellularwireless) for
  - Sample letters
  - Information on filing comments

**\*\*For Use by Municipalities in States other than Michigan\*\***

[for Michigan version, see our web page at  
<http://www.varnumlaw.com/serviceGroups/cableTV/cellularwireless/> ]

**\*\*Send this letter to your US Senators and Representative\*\***

**\*\*Fax or email copies—Security screening delays mailed letters\*\***

**\*\*Send copies to municipal groups as indicated so they can follow up\*\***

**\*\*And send copies to any of your states Senators or Reps  
who are on the House or Senate Commerce Committees - - see  
<http://energycommerce.house.gov/membios/110fullmship.shtml> and  
<http://commerce.senate.gov/public/index.cfm?FuseAction=About.Members> \*\***

The Honorable \_\_\_\_\_ [your senior US Senator]  
Senate Office Building  
Washington, DC 20510

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The Honorable \_\_\_\_\_ [your junior US Senator]  
Senate Office Building  
Washington, DC 20510

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The Honorable \_\_\_\_\_ [your U.S. Representative]  
House Office Building  
Washington, DC 20515

fax 202-\_\_\_\_ - \_\_\_\_\_

*via mail and facsimile*

Dear Senator \_\_\_\_\_, Senator \_\_\_\_\_, and Representative \_\_\_\_\_:

Please help stop the current Federal Communications Commission proceeding to effectively preempt local zoning of cellular towers. There is no need for Federal intervention here. The FCC's proposed action directly violates the Telecommunications Act Congress passed in 1996 which preserves local zoning of cell towers (and directed the FCC to dismiss proceedings that would have restricted local zoning of cell towers). Please stop this proceeding in the current budget process by telling the FCC that no funds can be spent on it. And contact the FCC to register your strong opposition to this proceeding, telling them to take no action regarding it.

Please do these things quickly, as the FCC has asked for comments in September, and appears to be trying to act on this before the change in administrations.

There is no "crisis" or problem with cell tower zoning. The several hundred thousand



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