BOROUGH OF BEACH HAVEN
CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS
APPLICATION FOR THE INSTALLATION OF SMALL WIRELESS FACILITIES
JS BEACH HAVEN 14 SC
Located in the Borough Right-of-Way Nearest to
325 Taylor Avenue

Introduction

Cellco Partnership, d/b/a Verizon Wireless ("Verizon Wireless" or the "Applicant") is licensed by the Federal Communications Commission ("FCC") to provide wireless communications services. In this application, Applicant seeks consent to install one (1) Small Wireless Facilities ("SWF")[1] within the public rights-of-way in the Borough of Beach Haven (the "Borough") in a location nearest to 325 Taylor Avenue. This SWF will provide necessary additional wireless capacity to residents and visitors in the Borough.

This application is being filed pursuant to the Telecommunications Act of 1996,[2] and Section 212-28.1 *et seq.* of the Revised General Ordinances of the Borough of Beach Haven (the "Small Cell Code"). As will be discussed below, there are portions of the Small Cell Code which, as applied to this application, are superseded and preempted by federal law.

This addendum has three parts. Section (A) will set forth the federal regulatory framework that governs how the Borough must process this application. Section (B) will provide an overview of the proposed SWF location and its compliance with the Small Cell Code. Lastly, Section (C) will raise certain objections to the Small Cell Code and also set forth certain requested waivers from same.

A. Regulatory Framework and Application to the Small Cell Code.

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[1] The proposed SWFs meet the definition of a "Small Wireless Facility" as set forth in the applicable Federal Communications Commission Regulation at 47 CFR § 1.6002(l).

[2] Telecommunications Act of 1996, No. 104-104, 110 Stat. 56 (1996), which amended the Communications Act of 1934, codified in 47 U.S.C. §151 et seq. (hereinafter, the "Act" or the "TCA").

In 1996, Congress enacted the Telecommunications Act ("TCA" or "Act") as a "pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans . . . ".[3]

Congress has declared that there is a need for wireless communication services, including "personal wireless services,"[4] as set forth in the Act, and the rules, regulations and orders of the FCC promulgated pursuant thereto. To foster its pro-competitive, deregulatory national policy, Congress included provisions in the Act that encourage competition by restricting the regulation of the placement of personal wireless service facilities by State and local governments and instrumentalities thereof.

Section 332(c)(7) of the Act imposes substantive and procedural limitations to ensure that the Act's pro-competitive goals are not frustrated, and it expressly preempts any action or inaction by State or local governments or their agents that effectively prohibits the provision of wireless services. Section 253 of the Act prohibits State or local authorities from erecting barriers that may prohibit, or may have the effect of prohibiting, the ability of any entity to provide telecommunications services, including taking action or inaction that results in an unreasonable delay in the deployment of the provider's facilities and provision of telecommunications services.[5]

Section 253(a) of the Act further provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." In September 2018, the FCC interpreted Section 253(a) in its Declaratory Ruling and Third Report and Order entitled:

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[3] The Act, S. Rep. 104-230, at 1 (Feb. 1, 1996) (Conf. Report).
[4] Personal wireless service facilities include "Small Wireless Facilities," as defined by the Federal Communications Commission ("FCC") in 47 C.F.R. § 1.6002(l).
[5] 47 U.S.C. § 253(a).

"Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment" (the "Third Report and Order").[6] This order confirmed that the "materially inhibit" standard is the proper standard to be used to determine whether a state or local law operates as a prohibition or effective prohibition within the meaning of Sections 253 and 332 of the TCA.[7] As further explained by the FCC:

> a state or local government legal requirement will have the effect of prohibiting wireless telecommunications service if it materially inhibits the provision of such services. 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 a new service or otherwise improving service capabilities. [8]

Significantly, in its Third Report and Order, the FCC also

> confirm[ed] that our interpretations today extend to state and local governments' terms for access to public ROW that they own or control, including areas on, below, or above public roadways, highways, streets, sidewalks, or similar property, as well as their terms for use of or attachment to government-owned property within such ROW, such as new, existing and replacement light poles, traffic lights, utility poles, and similar property suitable for hosting Small Wireless Facilities.[9]

The FCC's "materially inhibit" standard was recently adopted by the United States Court of Appeals for the Third Circuit in Cellco Partnership v. White Deer Township Zoning Hearing Board.[10] Consequently, same is the law in New Jersey.

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[6] *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT 17-29, WC 17-84, FCC 18-133, 33 FCC Rcd. 9,088, Sept. 26, 2018. The Order became effective as of January 14, 2019. 83 Fed. Reg. 51,867 (2018) and was affirmed, in part, in *City of Portland v. United States,* 969 F.3d 1020 (9th Cir. 2020), cert denied 141 S.Ct. 2855 (2021).

[7] Third Report and Order at p. 4, ¶ 10.
[8] Third Report and Order at p. 17, ¶ 37.
[9] Third Report and Order at p. 9.134, ¶ 92.
[10] 74 F.4th 96 (2023).

In 2018, the FCC also adopted the Moratorium Order which prohibits both express and *de facto* moratoriums.[11] The Moratorium Order defines a *de facto* moratorium as "state or local actions that are not express moratoria, but that effectively halt or suspend the acceptance, processing, approval of applications or permits for telecommunications services or facilities in a manner akin to an express moratorium."[12] According to the FCC, "like express moratoria, de facto moratoria, prohibit or have the effect of prohibiting the provision of service and are thus prohibited by [47 U.S. Code § 253]." Consequently, any local provision that has the legal effect of suspending the acceptance or processing of an application is unlawful under the Moratorium Order.

The Act and the Third Report and Order also require that this Application be processed within a reasonable period of time which is, presumptively, within ninety (90) days.[13] This time period is commonly referred to as a "shot clock." The Borough has ten (10) days to deem this Application incomplete or else it will be unable to toll the ninety (90) day shot clock. 47 CFR §1.6003(d).

The FCC has also ruled that "mandatory pre-application . . . requirements do not toll . . . shot clocks."[14] With respect to this issue, the FCC has held:

> We also find that mandatory pre-application procedures and requirements do not toll the shot clocks. Industry commenters claim that some localities impose burdensome pre-application requirements before they will start the shot clock. Localities counter that in many instances, applicants submit applications that are incomplete in material respects, that pre-application interactions smooth the application process, and that many of their pre-application requirements go to important health and safety matters. We conclude that the ability to toll a shot clock when an application is found incomplete or by mutual agreement by the applicant and the siting authority should be adequate to address these concerns. Much like a requirement to file applications one after another, requiring

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[11] In 2018, the FCC adopted an order (the "Moratorium Order") clarifying how local moratoria, both *de facto* and express, violate 47 U.S. Code § 253(a). In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Deployment, WC Docket 17-84 (August 3, 2018).

[12] Moratorium Order at p. 76, ¶ 149

[13] Third Report and Order at p.55, ₱105.

[14] Third Report and Order at pp 75-76, ₱145.

pre-application review would allow for a complete circumvention of the shot clocks by significantly delaying their start date. An application is not ruled on within "a reasonable period of time after the request is duly filed" if the state or locality takes the full ordinary review period after having delayed the filing in the first instance due to required pre-application review. Indeed, requiring a pre-application review before an application may be filed is similar to imposing a moratorium, which the Commission has made clear does not stop the shot clocks from running. Therefore, we conclude that if an applicant proffers an application, but a state or locality refuses to accept it until a pre-application review has been completed, the shot clock begins to run when the application is proffered. In other words, the request is "duly filed" at that time, notwithstanding the locality's refusal to accept it. Id. at ¶ 145.

Consequently, pre-application review requirements are not permitted under applicable Federal law, are superseded and of no effect.

B. Site Location.

1. JS Beach Haven 14 SC

Proposed Pole that includes a SWF.
Nearest to 325 Taylor Avenue
ROW: Municipal

Small Cell Code Requirement	Compliance
a. Each antenna is located in an enclosure of no more than three cubic feet in volume or, in the case of an antenna that has exposed elements, the antenna and all of its exposed elements would fit within an imaginary enclosure of no more than three cubic feet.	Yes.
b. Primary equipment enclosures are not larger than 17 cubic feet in volume. The following associated equipment may be located outside the primary equipment enclosure and if so located, is not included in the calculation of equipment volume: electric meter, concealment, telecommunications demarcation box, ground-based enclosures, backup power systems, grounding equipment, power transfer switch and cutoff switch.	Yes.
c. Located in the BD Zone.	Yes.
d. Complies with the International	Yes.

Building Code and National Electrical Code, as applicable.	

The Small Cell Code also requires that certain other information be provided. Below, please see Applicant's response to these requirements, as set forth at Section 212-28.1(E)(5):

> (5) Preliminary engineering plans, a survey, specifications, and a network map of the telecommunications facility to be located within the Borough, all in sufficient detail to identify:
> (a) The location and route requested for the applicant's proposed telecommunications facility. **Yes.**
> (b) The location of all antennas, cells and nodes for the applicant's proposed
> telecommunications facility. **Yes.**
> (c) The location of all overhead and underground public utility, telecommunications, cable,
> water, sewer drainage and other facilities in the public way along the proposed route. **Yes.**
> (d) The specific trees, structures, improvements, facilities and obstructions, if any, that the
> applicant proposes to temporarily or permanently remove, relocate or alter. **Yes.**
> . . .
> (g) Financial statements prepared in accordance with generally accepted accounting principles
> demonstrating the applicant's financial ability to construct, operate, maintain, relocate and
> remove the telecommunications facilities. **Verizon Wireless is a publicly traded company, licensed by the FCC with decades of experience and expertise in operating telecommunications facilities.**
> (h) Information to establish the applicant's technical qualifications, experience and expertise
> regarding the telecommunications facilities and telecommunications services described in
> the application. **Verizon Wireless is a publicly traded company, licensed by the FCC with decades of experience and expertise in operating telecommunications facilities.**
> (i) Information to establish that the applicant has obtained all other governmental approvals
> and permits to construct and operate the telecommunications facilities and to offer or
> provide the telecommunications services. **As will be discussed below, requiring all other governmental approvals before the issuance of a license is a *de facto* moratorium and unlawful under applicable FCC orders.**

(j) Information to establish that the telecommunications facility meets the current standards
and regulations of any agency of the federal government with the authority to regulate
telecommunications facilities. **Yes, an EME compliance report has been provided.**
(k) Information to establish that the proposed telecommunications facility conforms to the
requirements of the International Building Code and National Electrical Code, as
applicable. **Yes.**
(l) Proof of notice pursuant to the requirements set forth below in Subsection K below, Notification for telecommunication facilities. **This type of pre-application requirement has been superseded by federal law and a waiver is requested such that Verizon Wireless will provide this at the same time that the Borough is reviewing this application.**
(m) A copy of Land Use Board approval. **This type of pre-application requirement has been superseded by federal law and a waiver is requested such that the Borough will approve this application conditionally on the issuance of land use board approval. Verizon Wireless notes that the land use board application has been filed concurrently with this application.**

In sum, Applicant has provided all required information not otherwise superseded by federal law.

C. Objections and Requested Waivers.

First, Applicant objects to the provision of the Small Cell Code that requires that it provide "information to establish that applicant has obtained all other governmental approvals and permits to construct and operate the telecommunications facilities and to offer and provide the telecommunications services" because such a requirement violates the Moratorium Order. §212-281.1(E)(5)(i) of the Small Cell Code. As set forth above, the Moratorium Order defines a *de facto* moratorium as a "state or local actions that are not express moratoria, but that effectively halt or suspend the acceptance, processing, approval of applications or permits for telecommunications services or facilities in a manner akin to an express moratorium."[15] According to the FCC, "like

[15] Moratorium Order at p. 76, ¶ 149

express moratoria, de facto moratoria, prohibit or have the effect of prohibiting the provision of service and are thus prohibited by [47 U.S. Code § 253]."

As you may be aware, the Uniform Construction Code ("UCC") requires that all "prior approvals" be obtained before a construction permit can be issued. N.J.A.C. 5:23-2.16 (j)(2). Consequently, the Small Cell Code creates a "catch-22" where it would refuse the issuance of a SWF license based on the failure to provide construction permits which Applicant would be unable to obtain, until it received its SWF license.

Furthermore, such a requirement also unreasonably increases costs and is so burdensome that same also violates the TCA. In its Third Report and Order, the FCC stated that:

> [W]e first reaffirm, as our definitive interpretation of the effective prohibition standard, the test we set forth in *California Payphone*, namely, that 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."[16]

Requiring that Verizon Wireless obtain and provide all other approvals prior to the issuance of a SWF license, a requirement not required by other telecommunications uses in the Borough ROW, inhibits Verizon's ability to compete in a "fair and balanced legal and regulatory environment" and is superseded by the Third Report and Order and must be waived. Consequently, Verizon Wireless requests a waiver with respect to this requirement with the understanding that all necessary approvals will be obtained prior to obtaining construction permits from the Borough.

Second, Applicant objects to the requirement that it obtain land use board approval, in addition to, consent from the Borough to use its ROWs. Section 212-28.1(E)(5)(M) of the Small Cell Code requires that Verizon obtain "land use board approval" as a condition of ROW permit

[16] Third Report and Order at ¶ 35.

approval. Under New Jersey law, public rights-of-way are governed by Title 48, the public utility provisions of the revised statutes, and not the Municipal Land Use Law ("MLUL"). Therefore, zoning approval is not required for the use of the public rights-of-way. The applicable provisions from Title 48 provide that "[a]ny person municipal or otherwise, may enter into a written agreement with any other such person owning or using any poles erected under municipal consent in any street, highway or other public place for the use by the former person of the poles upon such terms and conditions as may be agreed upon by the persons." N.J.S.A. 48:3-18. In addition, "[t]he consent of the municipality shall be obtained for the use by a person of the poles of another person unless each person has a lawful right to maintain poles in such street, highway or other public place." N.J.S.A. 48:3-19. Finally, "no pole, conduit, wire or other fixture. . . . shall be constructed or erected in, upon, along, over or under any public road, street or highway of any municipality without first obtaining permission by ordinance or resolution from the governing body of the municipality." N.J.S.A. 48:17-10.

It is significant that these statutes require municipal and county "consent" or "permission," not zoning approval. The MLUL does not set forth a procedure for one seeking consent to attach an antenna or place equipment within the right-of-way. Moreover, the MLUL has very specific definitions that cannot be reasonably construed so as to require zoning of installations in the right-of-way. The term "development" is defined and limited to "the division of a parcel of land into two or more parcels, the construction, reconstruction, conversion, structural alteration, relocation or enlargement of any building or other structure, or of any mining excavation or landfill, and any use or change in the use of any building or other structure, or land or extension of use of land, for which permission may be required pursuant to P.L.1975, c.291 (C.40:55D-1 et seq.)." N.J.S.A. 40:55D-4 (emphasis added). As noted above, one seeking permission to attach an antenna to a

utility pole is not seeking permission pursuant to the provisions of N.J.S.A. 40:55D-1, et seq. (i.e., the MLUL), but rather the public utility provisions of N.J.S.A. 48:3-19. Since permission is not required under the MLUL, the attachment of antennas and equipment is not a MLUL "development."

The United States Congress has recognized the unique nature of the public rights-of-way and has explicitly preserved a municipality's right to manage its public rights-of-way, but has sharply circumscribed its regulation of a telecommunications provider's use of the public rights-of-way. Section 253(a) of the Act provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). Whereas, subparagraph (c) of Section 253 allows for municipal right-of-way management, as follows:

> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government. 47 U.S.C. § 253(c).

In other words, Section 253(c) limits the power of State and local government authorities to "manage the public rights-of-way" on a "competitively neutral and nondiscriminatory basis."

Given the dictates of the Act, a requirement that a telecommunications provider obtain site plan approval when no such requirement is placed on any other occupier of the public rights-of-

way would also violate Section 253(a). See, Ill. Bell Tel. Co. v. Vill. Of Itasca, 503 F. Supp. 2d 928 (N.D. Ill. 2007), where the court determined that a municipality's prohibition on ground mounted equipment by a telecommunications provider, but allowance of the same for other utilities, belies legitimate right-of-way management concerns and supports a claim of prohibition of service under Section 253(a).

Furthermore, there is also no history of requiring MLUL zoning in connection with the installation of facilities in the rights-of-way. Given the compact nature of the Verizon Wireless installations and the plethora of poles, boxes, solar panels and other attachments and equipment already present in the public rights-of-way, all of which exists without prior Board review, zoning is simply not applicable. As noted by the FCC, the public interest involves safety and aesthetic considerations. Verizon Wireless is deploying small antennas on replacement light poles. All equipment will be located internally. These types of deployments do not create significant aesthetic or safety concerns. Moreover, the design of the facilities is subject to both the Borough's review pursuant to N.J.S.A. 27:16-6.

While the Applicant has filed an application with the Borough's land use board under protest, it respectfully requests that the Borough approve its request for a license, pending the approval of the land use board, as required by federal law. As discussed above, the FCC has also ruled that "mandatory pre-application . . . requirements do not toll . . . shot clocks."[17] Requiring that this Application be held until the Applicant obtain land use board approval, violates this requirement. Consequently, this application should be reviewed simultaneously and approved, conditioned on obtaining such land use board approval.[18]

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[17] Third Report and Order at pp 75-76, ¶145.

[18] Applicant would be remiss to forego noting that the Borough has ninety (90) days to accomplish both land use board and administrative review of this application. Such a timeframe is much shorter than the normal timeframe required by the MLUL for the processing of applications for development (i.e. 120 days).

Additionally, I respectfully request that the Borough Manager provide this office with a 500' list, as referenced at §212-28.1(K) of the Small Cell Code and waive any requirement (to the extent same exists) that such a document be provided upon application submittal. While the Small Cell Code appears to require that this be provided upon the filing of the application, as set forth in the preceding paragraph, such a mandatory pre-application requirement cannot be used as a basis to deem this application incomplete. Consequently, I respectfully request that this requirement be waived and that you provide this list, so that the Applicant can transmit the required notice.

Notwithstanding the foregoing, Applicant agrees to provide such notice under protest. While Applicant disagrees, the Borough wishes to process this application by way of a zoning process-a process governed by the Municipal Land Use Law ("MLUL"). New Jersey courts have ruled that imposing additional notice requirements, outside of the standard notice set forth at N.J.S.A. 40:55D-12, is beyond the scope of the MLUL and is contrary to law. *See* New York SMSA Ltd. Partnership v. Township Council of Twp. of Edison, 382 N.J. Super. 541 (App. Div. 2006) (requirements to transmit 300' notice and the posting of sign is contrary to the MLUL and unlawful). Consequently, the Small Cell Code's requirement to transmit notice within 500' of the proposed SWF, because such a requirement is found within the Borough's zoning code, is also unlawful.

The Small Cell Code also imposes fees which exceed those permitted by the Third Report and Order and create an effective prohibition pursuant to 47 U.S.C § 253. The Third Report and Order provides:

> Our interpretation of Section 253(a) and "fair and reasonable compensation" under Section 253(c) provides guidance for local and state fees charged with respect to one-time fees generally, and recurring fees for deployments in the ROW. . . Based on our review of the Commission's pole attachment rate formula, which would require fees below the levels described in this paragraph, as well as

> small cell legislation in twenty states, local legislation from certain municipalities in states that have not passed small cell legislation, and comments in the record, we presume that the following fees would not be prohibited by Section 253 or Section 332(c)(7): (a) $500 for non-recurring fees, including a 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. . . ¶¶ 78 &79.

Contrary to the requirements of the Third Report and Order, the Small Cell Code requires the payment of a $1,000.00 application fee *and* a $2,500.00 escrow deposit which can be required to be replenished. Small Cell Code §212-281(G). Here, the presumptively reasonable fee amount would be simply $1,000.00. Consequently, Applicant must pay these fees under protest.