

## MEMORANDUM

October 17, 2018

TO: Susannah Goodman

FROM: Mark Del Bianco

Re: Federal Law Does Not Prohibit the County from Imposing Stricter Procedural Requirements on Wireless Facilities Than on Other Pole Attachments

This memo addresses an issue raised by staff at the Council work session on ZTA 18-11 on October 9, 2018. Specifically, staff suggested that the Council might be inviting a legal change if it passed an amendment which would require all applications for wireless transmission facilities to be conditional use if the carrier wanted the facility to be placed within the 60 foot setback. County staff explained that this would subject wireless attachments to a different approval process than that imposed on attachments by other industries. The staff stated that PEPCO and wireline service providers such as Verizon, Comcast or RCN were permitted to place equipment on poles under limited use zoning rules. Therefore, staff suggested, the amended ordinance might be discriminatory in violation of federal law and/or FCC regulations and could be vulnerable to legal challenge.

However, this analysis is incomplete and therefore draws the wrong conclusion. If the County required conditional use for all wireless providers seeking to place wireless facilities within the 60 foot setback, there would be no impermissible discrimination and there would be no legal risk.

### Summary

Staff's suggestion that the differential treatment of wireless and other infrastructure might create a risk of a legal challenge is not correct. There is no question that Montgomery County has the authority to regulate both the approval procedure and the setbacks for small wireless facilities. In doing so, it may discriminate between attachments intended to provide wireless services and those used to provide other services that are not functionally equivalent to wireless services. As long as the county ordinance does not discriminate between functionally equivalent wireless services, the ordinance would only be subject to legal challenge if it "prohibit[ed] or ha[d] the effect of prohibiting the provision of wireless services" in violation of Sections 253 or 337 of the federal Communications Act.

Neither of those provisions of the Communications Act prohibits the county from imposing stricter zoning procedural requirements on wireless carriers' service facilities than on cable, telco, or other services that use the same poles or facilities.

## Analysis

Neither the provisions of the federal Communications Act, the existing FCC rules nor the order that was passed at the FCC's September meeting (the Small Cell Order) address the issues of setbacks or the specific procedures to be followed by a locality in considering an application for small cell wireless facilities.

The only two provisions of federal law that create non-discrimination requirements that might protect wireless services providers are Sections 253 and 337 of the Communications Act, 47 U.S.C. §§ 253 and 337(c)(7). (These are the two provisions whose meaning and scope the FCC interpreted in the Small Cell Order. The new small cell rules in that order implement the FCC's interpretation of Sections 253 and 337(c)(7).)

Section 332(c)(7)(B) provides

### (B) Limitations

- (i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof— (I) shall not unreasonably discriminate among providers of functionally equivalent services; and (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

\* \* \*

The language of Section 332(c)(7)(B)(i)(I) is very clear: the only prohibited discrimination is that between "providers of functionally equivalent services." "Functionally equivalent services" means wireless services that are functionally equivalent to those being provided by the "personal wireless service facilities" for which approval is sought. Obviously, neither electric utilities such as PEPCO, wireline broadband providers such as Verizon, nor cable providers such as Comcast are providing "functionally equivalent services" within the meaning of Section 332(c)(7)(B)(i)(I). Therefore, a county zoning ordinance that imposed different and stricter procedural requirements (e.g., conditional use) on wireless service facilities than on facilities used for providing fiber to the home, cable TV or other services would not be covered by, and could not be in violation of, Section 332(c)(7)(B)(i)(I). [Note: if any of these other providers started to offer functionally equivalent wireless services and applied to place wireless equipment on poles, the county would almost certainly be in violation of Section 332(c)(7)(B)(i)(I) if it allowed them to do so without requiring them to follow the stricter provisions of the new ordinance.]

Section 253 also does not prohibit the county from imposing stricter procedural requirements on wireless service facilities than on cable, telco, or other uses of facilities. Section 253 has three relevant parts. Section 253(a) creates the general rule 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." Then subsections (b) and (c) are so-called "savings clauses" that provide safe harbors or carve-outs to protect the ability of states and localities to regulate zoning and construction of wireless facilities:

(b) State regulatory authority

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and local government authority

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. . . .

**At least two courts have recognized that a locality does not violate Section 253(a) by enacting procedural requirements for wireless facilities (including small cell facilities) that are different from or stricter than those that apply to companies providing other services.**

Just last year in *Crown Castle NG E. LLC v. City of Rye*, 17 CV 3535 (S.D. N.Y. 2017), a federal district court reviewed the authority of the city of Rye to regulate both new ground-mounted small cell facilities and antennas to be attached to existing poles. Comcast challenged the application procedure imposed by the city. The Court considered "whether the review process employed by the City is itself a violation of Section 253(a)." It noted that "Plaintiff does not cite and the Court is not aware of any binding authority holding that a municipality's review process is a "legal requirement" for purposes of Section 253(a) . . ." *Id.* at 8. The court went on to hold that

Moreover, review alone cannot be a proscribed barrier to entry under Section 253(a) because Section 332(c)(7)(B)(iii) of the TCA contemplates a process through which a local government can compile "substantial evidence" sufficient to justify denial of a request to place, construct, or modify wireless facilities. It is self-evident that this requirement necessitates thorough review.

*Id.* at 9. The court rejected Comcast's argument that the procedure imposed by Rye violated Section 253. *Id.* at 7-10.

Other courts have reached a similar conclusion, confirming that a locality does not violate Section 253 by regulating the use of rights of way so long as it does not discriminate between competitive services. See, e.g., *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2002).

The only mentions of non-discrimination requirements in the FCC Small Cell Order are in connection with the charging of fees and the imposition of aesthetic requirements. Nothing in the order prevents local jurisdictions from imposing different and stricter approval process requirements for the wireless industry than for other industries that attach equipment to poles.

In short, Montgomery County has the authority to regulate both the approval procedure and the setbacks for small wireless facilities to be placed in its ROW and in residential zones. In doing so, it may discriminate between attachments intended to provide wireless services and those used to provide other services that are not functionally equivalent to wireless services. As long as the county ordinance does not discriminate between functionally equivalent wireless services (and it does not, nor do any of the amendments), the ordinance would only be subject to legal challenge if it "prohibit[ed] or ha[d] the effect of prohibiting the provision of wireless services" in violation of Section 253. Since neither the ordinance nor any of the proposed amendments would explicitly prohibit the provision of wireless services - indeed all are designed to facilitate small cell deployment by increasing the number of potential antenna sites in residential zones - the only challenge could occur down the road if it turned out that in practice the county used the conditional approval process to prevent the deployment of sufficient antennas that it effectively prohibited the provision of wireless services.