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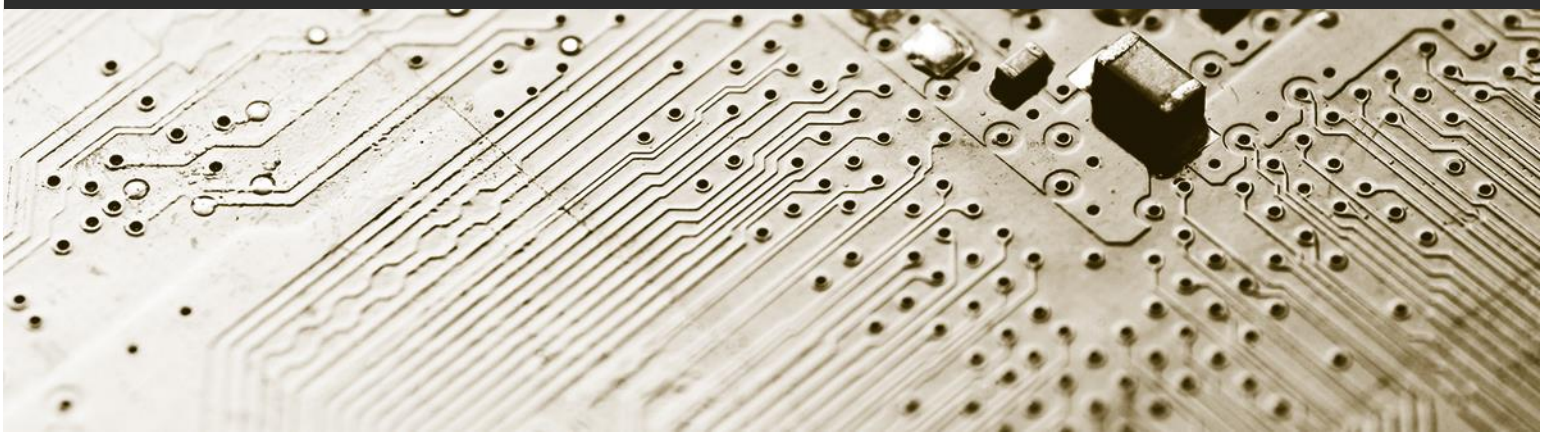

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FCC Removes Regulatory Barriers to Deployment of Infrastructure Used for 5G Wireless Services

The Federal Communications Commission (FCC) has issued a Declaratory Ruling and Order (Order) that removes regulatory obstacles to wireless infrastructure deployment as a means to support the next generation of wireless services, known as 5G. The FCC Order limits the ability of state and local governments to regulate small cell deployments[1] by setting standards for fees that can be charged to obtain required authorizations, providing guidance regarding prohibited non-fee requirements, and establishing shot clocks governing the processing of applications to deploy small cell facilities.

5G networks are characterized by faster speeds, lower latency, and the capability to connect multiple devices. 5G networks rely on numerous small cell facilities that can be attached to utility poles and other existing structures, as opposed to the large cell towers that support 4G and earlier generations of communications networks. Commercial applications of 5G, such as self-driving cars, remote medical treatment and virtual reality, are expected to have a substantial positive effect on the United States economy.

Statutory Authority

The FCC relies on two sections of the Communications Act of 1934, as amended (the Act) as the legal authority for its Order. Section 253(a) of the Act (47 U.S.C. § 253(a)) provides that "[n]o State or local

[1] The FCC Order defines "Small Wireless Facilities" as facilities mounted on structures 50 feet or less in height or on structures no more than 10 percent taller than adjacent structures with an antenna no more than three cubic feet and total wireless equipment no more than 28 cubic feet.

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." Section 332(c)(7) of the Act (47 U.S.C. § 332(c)(7)) provides that "[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government … (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." Section 332(c)(7)(B)(ii) further directs state and local governments to act on requests for authorizations regarding personal wireless facilities within a reasonable time. The FCC Order is a response to complaints by wireless service providers that state and local governments are impeding the deployment of 5G infrastructure and associated services by charging excessive and unreasonable fees to access rights-of-way, imposing various discriminatory non-fee requirements, and subjecting applicants to lengthy delays when they seek to construct small cell facilities.

FCC Standards for Fees Charged by State and Local Governments

In the declaratory ruling portion of the Order the FCC clarified that a state or local law constitutes a prohibition or effective prohibition on the provision of wireless telecommunications service in violation of Sections 253 and 332 of the Act if the law "materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." The FCC explained that a law does not need to be an insurmountable barrier to materially inhibit a service provider.

The FCC examined fees charged by state and local governments for access to rights-of-way and other government property (such as utility and light poles), application fees and other fees related to deployment of small cell facilities, as well as fees related to maintenance, repair, modification and removal of small cell facilities (including fees for zoning applications, building permits, and excavation permits). The FCC concluded that all such fees must meet the following three conditions: (1) the fees must represent a reasonable approximation of the state or local government's costs; (2) only objectively reasonable costs may be factored into the fees; and (3) the fees may be no higher than the fees charged to similarly-situated competitors in similar situations.

The FCC also established certain fee levels that are presumed to comply with the foregoing conditions. For non-recurring fees, the following fees will be permitted: $500 for an application that includes up to five Small Wireless Facilities, plus $100 for each facility beyond five, or $1,000 for one pole intended to support one or more Small Wireless Facilities. For recurring fees, a total of $270 per Small Wireless Facility per year (including all right-of-way access fees and fees for attachments to structures in the right-of-way) is presumptively lawful.

The FCC acknowledged that some state and local governments have entered into agreements with wireless service providers that govern the deployment of small cell facilities and that include provisions regarding fees. The FCC stated that existing agreements are not exempted from the statutory requirements as interpreted by the FCC in the Order. However, whether and how the Order impacts any particular agreement depends on the terms of the agreement.

FCC Guidance on Non-Fee State and Local Requirements

The FCC also addressed non-fee state and local requirements governing small cell deployments that may prohibit or have the effect of prohibiting service in violation of Sections 253 and 332 of the Act. Such requirements include aesthetic restrictions (such as requiring equipment to be camouflaged, painted a certain color, or limited in size), undergrounding of infrastructure, and minimum spacing between

wireless facilities. The FCC concluded that non-fee restrictions on small cells will not be preempted if they are "(1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments, and (3) objective and published in advance." While the FCC stated that a law requiring all wireless facilities be placed underground would effectively prohibit wireless service, it did not provide any other specific guidance as to the types of non-fee restrictions that would violate Sections 253 and 332.

Shot Clocks Applicable to Wireless Facilities

The final section of the FCC Order focuses on permissible time limits or "shot clocks" for state and local governments to act on applications related to Small Wireless Facilities. Specifically, authorities have 60 days to review collocation applications for placement of Small Wireless Facilities on a preexisting structure and 90 days to review a siting application for attachment of Small Wireless Facilities on a new structure. The FCC Order also provides that failure to meet the foregoing time limits constitutes a presumptive prohibition on the provision of wireless services that would support an applicant's receipt of expedited relief from a court. The FCC also codified existing shot clocks applicable to wireless facilities that do not meet the definition of Small Wireless Facilities. Those shot clocks require state and local authorities to review collocation applications within 90 days and new siting applications within 150 days. Unlike the shot clocks applicable to Small Wireless Facilities, failure to meet shot clocks for other wireless facilities does not qualify as a presumptive prohibition on the provision of wireless services.[2]

State and Local Government's Concerns about the FCC Order

The FCC Order decreases regulatory obstacles to the efficient deployment of infrastructure necessary to support 5G services. As such, entities seeking to construct or expand their communications networks or to offer 5G services perceive the FCC Order as a positive development. In contrast, state and local governments object to the FCC impeding their ability to regulate their rights-of-way and to make their own decisions about whether proposed projects serve the public interest. State and local governments also have concerns about covering costs with the presumptively lawful fees and about having sufficient time to fully consider applications within the shot clock time limits. Therefore, it is expected that state and local governments and other public interest organizations will challenge the Order by seeking reconsideration at the FCC or by filing an appeal in federal court.

If you have questions about the FCC Order or any other questions regarding the FCC's rules governing deployment of communications infrastructure, please contact us at your convenience.

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[2] Under 47 U.S.C. § 332(c)(7)(B)(v), a wireless carrier affected by a state or local government's failure to act (whether or not Small Wireless Facilities are at issue) may commence an action in any court of competent jurisdiction and have the case decided on an expedited basis or petition the FCC for relief. Given that a failure to meet the shot clock applicable to Small Wireless Facilities is a presumptive prohibition on providing service, the FCC expects that the appropriate legal remedy will be a court order to issue all authorizations needed to deploy small cell infrastructure.

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