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FCC Adopts 5G Small Cell Deployment Order

The Federal Communications Commission (FCC) adopted the Wireless Infrastructure Order at its September 26th Open Meeting. The Third Report and Order and Declaratory Ruling establishes shot clocks for state and local approvals for the deployment of small wireless facilities, and imposes new state and local streamlining requirements on wireless infrastructure deployment. The Commission unanimously adopted the Order, but Commissioner Rosenworcel dissented in part on the Declaratory Ruling.

General Overview

In the spring of 2017, the FCC opened two rulemaking proceedings to identify potential barriers to the timely deployment of wireless and wireline infrastructure.¹ In the ensuing months, the Commission used those two dockets to inform its opinions and guide additional rulemakings on a variety of issues ranging from the differences between large and small wireless facilities, the exclusion of small wireless facilities from National Historic Preservation Act (NHPA) and National Environmental Policy Act (NEPA) review, revisions to pole attachment rules, and the siting of wireless facilities on federal lands or buildings.

On September 26th the Commission adopted rules aimed at speeding up the deployment of Small Wireless Facilities (“small cells”) in the public rights-of-way (ROW).² The Commission’s rulemaking extends to state and local governments’ terms for access to the ROW that they own or control, including areas on, below, or above public roadways, highways, streets, sidewalks, or similar property. It also addresses terms for use of or attachment to government-owned property within the ROWs, such as new, existing, and replacement light poles, traffic lights, utility poles, and similar property suitable for hosting Small Wireless Facilities.

The Declaratory Ruling focuses primarily on local fees for the authorization necessary to deploy small cells. The Commission found that issuing a Declaratory Ruling was necessary to remove what the record reveals is substantial uncertainty, and to reduce the number and complexity of legal controversies regarding certain fee and non-fee and local legal requirements in connection with Small Wireless Facility infrastructure.

The Third Report and Order established two new shot clocks for small cells and codifies other existing shot clocks, and adopts a new remedy for missed shot clocks, amongst other items. Acknowledging the potential for litigation from state and local governments, the Commission specifically detailed throughout the Order its legal authority to set reasonable rates and fees and timelines for small cells.

¹ See *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, [WC Docket No. 17-84](#); *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, [WT Docket No. 17-79](#).

² See [FCC Facilitates Wireless Infrastructure Deployment for 5G](#).

Some local government groups had expressed concern that the FCC would eliminate the municipal exemption for pole attachments that had excused municipally-owned poles from FCC pole attachment rules. The Order does not address that issue, so it does not appear that these new rules would apply to utility poles owned by a municipal entity.

State and Local Fees

The Commission recognized that state and local governments incur a variety of direct and actual costs in connection with small cells, such as the cost for staff to review the provider's siting application, costs associated with a provider's use of the ROW, and costs associated with maintaining the ROW itself or structures within the ROW to which small cells are attached. It also recognized that direct and actual costs may vary by location, scope, and extent of providers' planned deployments, such that different localities will have different fees under the interpretation set forth in this Declaratory Ruling.

The Commission interpreted Sec. 253(c)'s "fair and reasonable compensation" provision to allow state or local governments to charge fees that recover a reasonable approximation of the state or local governments' actual costs. It concluded that "although there is precedent that 'fair and reasonable' compensation could mean not only cost-based charges but also market-based charges in certain instances, the statutory context persuades us to adopt a cost-based interpretation here." The Commission said its approach to compensation "ensures that cities are not going into the red to support or subsidize the deployment of wireless infrastructure."

The FCC said it doesn't suggest that localities must use any specific accounting method to document the costs that may incur when determining the fees they charge within the ROW. The Commission did note that excessive and arbitrary consulting fees or other costs should not be recoverable as "fair and reasonable compensation" because they are not a function of the provider's use of the public ROW.

Based on the Commission's review of its pole attachment rate formula, as well as small cell legislation in 20 states, local legislation from certain municipalities in states that have not passed small cell legislation, and comments in the record, the Commission presumed that the following fees would be allowed by Section 253 or Section 332(c)7:

- \$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; and
- \$270 per Small Wireless Facility per year for all recurring fees including any possible ROW access fee or fee attachment to municipally-owned structures in the ROW.

The Commission said a locality could prevail in charging fees that are above this level by showing that such fees nonetheless comply with the limits imposed by Section 253 – that is, that they are (1) a reasonable approximation of costs; (2) those costs themselves are reasonable; and (3) are non-discriminatory. The FCC acknowledged that allowing localities to charge fees above these levels recognizes local variances in costs.

Aesthetics and Other Requirements

Aesthetics

State and local governments have commented that their zoning requirements and their review and enforcement procedures are properly designed to, among other things, (1) ensure that the design,

appearance, and other features of buildings and structures are compatible with nearby land uses; (2) manage ROW so as to ensure traffic safety and coordinate various uses; and (3) protect the integrity of their historical, cultural and scenic resources and their citizens' quality of life.

The Commission provided guidance on aesthetic requirements, concluding that they are not 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. Aesthetic requirements that are reasonable in that they are technically feasible and reasonably directed to avoiding or remedying the intangible public harm of unsightly or out-of-character deployments are also permissible.

The Commission is providing localities time to establish and publish aesthetic standards that are consistent with the Declaratory Ruling. It said such publication should take no longer than 180 days after publication of this decision in the Federal Register.

Undergrounding

The Commission concluded that local jurisdictions that have "undergrounding provisions" that require wireless facilities to be deployed underground for aesthetic concerns "would amount to an effective prohibition given the propagation characteristics of wireless signals."

Minimum Space Requirements

Some parties have complained about municipal requirements regarding the spacing of wireless installations – i.e., mandating that facilities be sited at least 100, 500, or 1,000 feet, or some distance, away from other facilities, to avoid excessive overhead "clutter" that would be visible from public areas. The Commission acknowledged that some such requirements may violate 253(a), while others may be reasonable aesthetic requirements. It said such requirements should be evaluated under the same standards for aesthetic requirements as mentioned above.

Shot Clocks and Related Recommendations

The Third Report and Order creates two new categories of shot clocks for small cell review. The Commission said it updated its policies because the record demonstrated "the need for, and reasonableness of, expediting the siting review of these collocations."

Small Wireless Facilities

Using authority confirmed in *City of Arlington*, the Commission adopted two new Section 332 shot clocks for Small Wireless Facilities³:

- 60 days for review of an application for collocation of Small Wireless Facilities using a preexisting structure; and
- 90 days for review of an application for attachment of Small Wireless Facilities using a new structure.

The Commission said the 60-day shot clock for processing collocation applications was reasonable because these applications are "generally easier to process than new construction because the community impact is likely to be smaller. "

³ See [City of Arlington v. FCC](#).

These shot clocks are similar to the recommendations in the FCC's Broadband Deployment Advisory Council's Model Code for Municipalities' recommended timeframes, which utilize this same 60-day and 90-day framework for collocation of Small Wireless Facilities and new structures, and are similar to shot clocks enacted in state-level small cell bills, and instituted by several municipal governments.

The Commission also noted that the 60- and 90-day shot clock approach is similar to provisions in the STREAMLINE Small Cell Deployment Act ([S. 3157](#)), which would apply a 60-day shot clock to collocation of small personal wireless service facilities and a 90-day shot clock to any other action relating to small personal wireless service facilities.

Non-Small Wireless Facilities

The Commission retained the existing 90-day shot clock for collocations not involving Small Wireless Facilities. Collocations that do not involve these facilities include deployments of larger antennas and other equipment that may require additional time for localities to review and process. The Commission also retained the existing 150-day shot clock for new construction applications that are not Small Wireless Facilities.

Batch Applications

The Commission said it anticipates that some applicants will submit "batched" applications – multiple, separate applications filed at the same time, each for one or more sites or a single application covering multiple sites. However, it said there is no reason for longer shot clocks for "batched" applications, arguing that such applications have "advantages in terms of administrative efficiency that could make review easier."

Under the Commission's current policy, if an applicant files multiple siting applications on the same day for the same type of facilities, each application is subject to the same number of review days by the siting application. These multiple siting applications are equivalent to a batched application and therefore the shot clocks for batching should follow the same rules as if the applications were filed separately.

Should an applicant file a single application for a batch that includes both collocated and new construction of Small Wireless Facilities, the longer 90-day shot clock will apply, to ensure that the siting authority has adequate time to review the new construction sites.

Collocations on Structures Not Previously Zoned for Wireless

The Commission clarified that for the purpose of Section 332 Shot Clocks, attachment of facilities to existing structures constitutes collocation, regardless whether the structure or the location has previously been zoned for wireless facilities

When Shot Clocks Start and Incomplete Applications

In the 2014 Wireless Infrastructure Order, the Commission clarified, among other things, that a shot clock begins to run when an application is first submitted, not when the application is deemed complete. The clock can be paused, however, if the locality notifies the applicant within 30 days that the application is incomplete. The locality may pause the clock again if it provides written notice within 10 days that the supplemental submission did not provide the information identified in the original notice delineating missing information.

The Commission found no reason to alter those previous determinations and codified those rules in the Third Report and Order adopted on September 26th. However, for applications to deploy Small Wireless Facilities,

the Commission implemented a tolling system “designed to help ensure that providers are submitting complete application on day one.”

- For Small Wireless Facilities: the Commission determined that the siting authority has 10 days from the submission of the application to determine whether the application is incomplete. The shot clock then resets once the applicant submits the supplemental information requested by the siting authority.

Timing and Next Steps

Barring an administrative or judicial stay, the Declaratory Ruling and Third Report and Order will be effective 90 days after publication in the *Federal Register*, during which time the ruling will be reviewed to meet regulatory requirements determined by the *Regulatory Flexibility Act*, the *Paperwork Reduction Act* and the *Congressional Review Act*. Assuming publication occurs within the next two weeks – and no other regulatory review issues emerge – the rules will be effective sometime in early or mid-January. NATaT anticipates that state and local groups (*e.g.*, NATOA, NLC, *et al.*) will appeal the ruling. An appeal window opens on the day the ruling is published in the *Federal Register* and remains open 60 days after publication. Once again, assuming publication in the next two weeks, the deadline to file a petition of review will be in mid-December. A stay must be filed with the FCC to request a stay from a court. While NATaT anticipates an adverse decision from the FCC on a motion to stay, an adverse decision from the court might prejudice the principle arguments in the petition for review since the court must evaluate the likelihood that state and local groups would be successful on the merits. So there is substantial risk to filing a motion to stay. Separately, there is consensus that a petition for reconsideration at the FCC would be harmful to the collective best interests of state and local groups.

FCC Links

[Declaratory Ruling and Third Report and Order](#)

[News Release](#)

[Commissioner Statements](#)