



FRAME of REFERENCE

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Are We There Yet? An Update on 5G and the Regulation of Small Wireless Facilities

Internet access has been an increasingly indispensable and integral part of a productive society, and the COVID-19 pandemic has only amplified the digital divide and accentuated the need for superior network connection and speed. Achieving high-speed broadband connectivity throughout New York State will require a marked increase of wireless installations in cities, villages, and public rights-of-way (ROWs). Therefore, as telecommunications carriers continue their pursuit of 5G ubiquity, balancing the need for universal high-speed internet with local control over siting decisions is paramount.

In 2017 and again in 2019, this column addressed the 5G network and the regulatory framework in which cities and villages must operate when managing the installation of small wireless facilities in the ROW. Then in 2020, the 9th Circuit Court of Appeals examined whether the regulations implemented by the Federal Communications Commission (FCC) exceed the scope of the Agency's authority. While the court upheld nearly every component of the FCC's new regulations, the judges found that the Commission's attempt to limit the ability of local governments to incorporate aesthetic considerations in wireless siting decisions was arbitrary and capricious.

This article will discuss the proliferation of 5G and its associated technologies, how the regulations impacting small wireless facilities has shifted, albeit marginally, and the ways in which cities and villages may reassert local considerations within the scope of their siting authority.

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What's 5G, Again?

Fifth generation wireless service, commonly referred to as 5G, is simply the latest version of broadband cellular technology. All wireless technologies, such as cellular connections, radios, and broadcast television, as well as many other household items, such as Bluetooth devices, Wi-Fi routers, garage door openers, and baby monitors, utilize radio frequencies (RF) to transmit data. 4G and other previous generations of wireless networks operating on the RF spectrum have relied predominantly on macro towers to provide service to a broad territory. These RF energies operate low on the electromagnetic spectrum (far lower than x-rays or other high-frequency energies that pose health risks).¹

5G utilizes millimeter wave technology, which, while higher on the RF spectrum than previous generations of cellular service, still operates far below the dangerous frequencies.² Transmitting data over the millimeter spectrum is often analogized to a superhighway in which vehicles are able to travel not only next to each other, but above and below each other at unrestricted speeds. Using the millimeter spectrum provides 5G with dramatically faster connections, increased responsiveness, and the capacity to link more devices at once than previous generations of wireless technology. As a result, 5G promises to help self-driving cars, remote surgeries, and virtual reality experiences reach their true potentials. 5G should also help improve individual users' experiences by making smart technologies even more integrated into everyday life.³

Despite 5G's tremendous benefits, millimeter wave technology possesses neither the signal strength nor the transmission distances of previous generations of wireless service. Consequently, 5G requires the installation of much more wireless equipment to service the same area covered by the older technology.

Remind Me How Small Wireless Facilities are Regulated?

In 1996, Congress adopted the Telecommunications Act (TCA) through which the federal government sought to facilitate the expansion of telecommunication services by preempting certain wireless siting decisions. Congress' intent was to "remove barriers to entry" in part by preventing state and local governments from impeding the industry's development of wireless networks while balancing the role of local agencies in regulating the service and managing public rights-of-way.⁴ To that end, the TCA: (1) preempts policies that prohibit or effectively prohibit wireless service; (2) requires timely review of siting applications; (3) permits fair and reasonable compensation for the use of public rights-of-way; and (4) preserves the right of local governments to manage access to the municipal ROW.

In 2018, the FCC adopted the Declaratory Ruling and Third Report and Order Accelerating Wireless and Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, also known as the "Small Cell Order," to reinterpret and

reapply the tenants of the TCA to the newest iteration of wireless technologies.⁵ Utilizing the four main objectives of the TCA, the Small Cell Order imposes specific standards for siting small wireless facilities by: defining what constitutes a prohibition of personal wireless service; establishing presumptively reasonable fees; creating deadlines for application review; and determining the standards that local governments may consider when reviewing siting applications.⁶

So, What Happened Next?

Following the adoption of the Small Cell Order, municipalities across the United States challenged the authority of the FCC to implement regulations that so severely limited the ability of local governments to regulate telecommunications providers, especially when the proposed installations attempted to utilize municipal infrastructure and public rights-of-way.⁷ Industry actors then counterclaimed, declaring that the FCC's regulations did not adequately interpret the TCA, which demanded narrower restrictions to implement Congress' intent. The litigation was consolidated in the Ninth Circuit where the Court of Appeals examined the Small Cell Order to determine whether the FCC's regulatory actions exceeded the authority possessed by the Commission.

When evaluating actions taken by a federal agency, courts must examine whether the agency is acting within the scope of its authority as directed by Congress. Here, the FCC's authority to regulate local siting decisions is granted by Sections 253(a) and 332(c) (7) of the TCA which empowers the FCC to preempt state and local requirements that "prohibit or have the effect of prohibiting" an entity from providing telecommunications services.⁸ If the FCC is acting within the scope of this statutory directive and the provisions of the Small Cell Order are logical and rationally related to the TCA, the Court must uphold the Order.⁹

The Ninth Circuit examined each of the four elements of the TCA that the FCC applied to small wireless facility siting in the Small Cell Order, and concluded, “[G]iven the deference owed to the agency in interpreting and enforcing this important legislation, the Small Cell [Order is], with the exception of one provision, in accord with the congressional directive in the Act, and not otherwise arbitrary, capricious, or contrary to law.”¹⁰

1. Material Limits on Competition Prohibit Wireless Service

The FCC applies the “material inhibition” standard in the Small Cell Order to determine when wireless service is actually or effectively prohibited. This standard prevents local governments from adopting regulations that materially limit or inhibit the ability of competitors and potential competitors to compete in a fair and balanced regulatory environment.¹¹ Therefore, an effective or material prohibition of wireless service exists when a wireless provider cannot engage in activities related to providing telecommunications service. This includes activities such as filling coverage gaps, densifying networks, and introducing new services.¹²

Admitting that the FCC was applying “a twentieth century statute to twenty-first century technology,” the Ninth Circuit upheld the material inhibition standard stating that the regulation reflects Congress’ intent to encourage the expansion of telecommunication service.¹³ Because 5G requires the deployment of more wireless equipment, local regulations are more likely to have a prohibitory effect on the new network than the older technologies, thus, the FCC is justified in adopting the material inhibition standard.

2. Shot Clocks Ensure the Timely Review of Siting Applications

The Small Cell Order grants local siting authorities 90 days to review applications to install small wireless facilities on new structures and 60 days to review applications to install facilities on existing infrastructure. Parties may mutually agree to extend the clock, but if local governments fail to act within the shot clock, applicants may request a court order authorizing the installations. The FCC rejected the industry’s request for a “deemed granted” remedy, which would invert the standard and require a local government to seek an injunction to prevent an applicant from installing a wireless facility in the event that a shot clock is missed.

The Ninth Circuit upheld the shot clocks stating that the clocks create a presumption that may be overcome based on certain circumstances and consequently result in an inherently reasonable regulation.¹⁴ The Court also upheld the FCC’s rejection of the deemed granted remedy stating that nothing in the record supports the claim that short clocks are ineffective.¹⁵ Moreover, unlike the other Congressional grants of authority, like the Spectrum Act, which requires local governments to approve modifications for certain eligible wireless facilities, the TCA does not grant the FCC the authority to utilize deemed granted remedies in this context.¹⁶

3. Fair and Reasonable Compensation Does Not Mean Profit-Generating

While Section 253(c) of the TCA permits local governments to receive “fair and reasonable compensation from telecommunications providers” for the use of the public ROW, the FCC rejected the interpretation that “fair and reasonable compensation” should reflect market-based payments. Instead, the Small Cell Order requires that fees associated with the siting and installation of small wireless facilities be limited to reasonable approximations of the local government’s directly incurred costs and be imposed in a nondiscriminatory manner.¹⁷ Having limited fair and reasonable compensation to a municipality’s direct and actual costs, the Small Cell Order establishes a series of presumptively reasonable application and ROW occupancy fees.

In part, the FCC adopted the fee presumption to ensure the availability of 5G service throughout the United States, claiming that excessive fees delay the deployment of the technology and inhibit ubiquitous network development.¹⁸ The Court supported this rationale stating that it is reasonable to infer that high fees in one part of the country will impact 5G deployment in other parts of the country and upheld the preemption as logical and rationally related to the enacting legislation. Additionally, presumptively reasonable fees do not set the rates in an arbitrary and capricious manner because they may be exceeded and are designed to avoid litigation. Lastly, the Court agreed with the FCC’s analysis that “fair and reasonable compensation” does not constitute profit-generating under the TCA.¹⁹

4. Aesthetics Cannot be Standardized

Local regulations that impose aesthetic requirements, including camouflaging and minimum spacing prescriptions, and safety considerations are explicitly preserved by the Small Cell Order. However, in order for a local government to enforce such local standards, the regulations must be “(1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments, and (3) published in advance.”²⁰

Here, the Court found that the FCC exceeded the scope of its authority. The Ninth Circuit stated, “Local governments have always been concerned about where utilities’ infrastructure is placed and what it looks like.”²¹ By demanding identical requirements for all entities occupying the ROW the FCC failed to account for the differences among various technologies. Furthermore, the Court found that the TCA “expressly permits some difference in the treatment of different providers, so long as the treatment is reasonable.”²²

Concluding that federal agencies may not “rewrite clear statutory terms,” the

Court held that the regulations exceed what Congress authorized in the TCA by requiring local governments to apply the same aesthetic considerations to 5G installations as they would all infrastructure rather than applying the same aesthetic considerations to functionally equivalent infrastructure.²³ The Court noted that Congress authorized local governments to “differentiate in the regulation of functionally equivalent providers with very different physical infrastructure” and, as a result, vacated the “no more burdensome” requirement of the Small Cell Order.²⁴

Addressing the Small Cell Order’s requirement that local regulations be “objective and published in advance,” the Court found that the “FCC’s position that all subjective aesthetic regulations constitute a per se material inhibition [of wireless service] must be viewed with considerable skepticism.”²⁵ While advance publication is generally necessary to uphold a local regulation, the Court ruled that the requirement that all aesthetic regulations be objective is arbitrary and capricious because the FCC was unable to articulate “the harm that it is addressing” and the extent to which the preemption is designed to mitigate that harm, especially when balanced against the justifiable and traditional authority of local governments to regulate the character of their neighborhoods.²⁶

The only component of the Small Cell Order’s aesthetic limitations upheld by the Ninth Circuit was the requirement that local regulations be reasonable. The Court explained that reasonableness is a consistent trope in the jurisprudence and not so undescriptive to render the requirement “unduly vague or overbroad.”²⁷

Next Steps and Conclusion

Many cities and villages in New York State have adopted telecommunications policies that adhere to the FCC’s Small Cell Order while incorporating objective aesthetic standards. Now that the Court has struck down the restrictions imposed by the FCC on local governments’ regulation of aesthetics, local legislative bodies are encouraged to revisit their local codes to determine whether the policy appropriately reflects the aesthetic preferences of the community. However, because all aesthetic considerations are inherently subjective, changes to a local telecommunications policy may not be necessary. Regardless, cities and villages should feel more confident that these considerations are legitimate and not as vulnerable to legal challenge.



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