

5G, THE FCC, & LOCAL GOVERNMENTS

Interpreting the September 27, 2018

FCC Ruling and Order

What is 5G?

- A term used to describe the "next generation" of wireless communication networks that have yet to be standardized
- The fifth generation of mobile networks that is evolving from the uses of today's 4G LTE networks to meet the very large growth in data and connectivity of today's modern society, the internet of things with billions of connected devices, and tomorrow's innovations.
- It is significantly different from 4G, so the infrastructure will be completely new.
- Given the technology's use of shorter wavelengths, that infrastructure will rely on small cell technology that is dense and numerous.

Basics of FCC's Order

- FCC released the Ruling and Order (R&O) on September 27, 2018
- Chairman Ajit Pai and Commissioners Michael O'Rielly and Brendan Carr issued separate statements
- Commissioner Jessica Rosenworcel approved in part, dissented in part and issuing a statement.
- 116 page R&O can be found here:
<https://docs.fcc.gov/public/attachments/FCC-18-133A1.pdf>
- Almost all agree the R&O was a big win for the wireless industry regarding deployment of 5G infrastructure

Effective Date Issues

- By its own terms, the R&O was to become effective 90 days from publication in Federal Register, which made the effective date January 14, 2019.
- A Motion to Stay was denied by the FCC as well as in the consolidated appeal currently pending in the 9th Circuit Court of Appeals.
- Therefore, the requirements of the R&O are currently in full force and effect.
- Multiple challenges to the R&O are underway, including a new bill introduced in the U.S. House.

Small Cell Defined

- Mounted on structures 50 feet or less in height including their antennas
- Mounted on structures no more than 10 percent taller than other adjacent structures
- Do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater
- Each antenna associated with the deployment, excluding associated antenna equipment is no more than three cubic feet in volume;
- All other wireless equipment associated with the structure, including the wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than 28 cubic feet in volume
- The facilities do not require antenna structure registration under FCC regulations
- The facilities are not located on Tribal lands (as that is defined under federal regulations)
- The facilities do not result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified in the FCC regulations

General Observations

- The R&O changes the legal standard for a challenge under the Telecommunications Act (TCA) that might be brought by a provider whose application for any facility or facility modification has been denied by a local government.
- The R&O changes how a local government may rent its property to wireless providers.
- The R&O changes how a local government must process an application for any facility permit.
- The R&O changes the concept of collocation with reference to shot clocks.
- The R&O seems to be a response to the misconception that all local governments are opposed to 5G infrastructure.

Legal Standard Redefined

- Under the TCA, a local government maintains its authority over decisions regarding the placement, construction, and modification of wireless facilities, so long as such decisions do not “prohibit or have the effect of prohibiting” the provision of wireless services.
- Prior to the R&O, the “significant gap” test was in place. Under that standard, a provider had to show that the proposed facility was the “least intrusive means” of closing that gap (which required consideration of alternative sites which could fill the gap).
- The R&O redefines this standard to a “materially inhibit” standard that applies to ANY facility, not just small cells.
- The “materially inhibit” standard is broader so that it is easier for a provider to show a prohibition of services and a violation of the TCA.

Fees

- So that fees do not “materially inhibit” a provider, the following must be considered:
 1. Fees are a reasonable approximation of the local government’s costs directly related to maintaining R/W
 2. Only objectively reasonable costs are to be used
 3. Fees may be no higher than those charged to similarly-situated competitors in similar circumstances
- Presumptively safe:
 1. \$500 for first 5, \$100 for each additional
 2. \$1,000 for new pole
 3. Recurring: \$270 per facility (R/W and government property)

Specifically applies to Small Cells Only

Aesthetics

- So that aesthetics do not “materially inhibit” a provider, the following must be considered:
 1. Reasonable: “technically feasible and reasonably directed to avoiding or remedying the intangible public harm of unsightly or out-of-character deployments”
 2. No more burdensome than those applied to other types of infrastructure deployments
 3. Objective and **published in advance of the effective date of the R&O**

****Specifically applies to Small Cells Only****

Undergrounding & Spacing

- The same considerations apply to Undergrounding and spacing requirements
- The “materially inhibit” standard does not require that the local government goes so far as requiring all facilities to be underground. If the previous factors are not met, then the local government’s decision would materially inhibit the provider and would violate the TCA
- A local government cannot pass new spacing requirements that would prevent a provider from replacing its preexisting facilities or collocating new equipment on a structure already in use

****Specifically applies to Small Cells Only****

Shot Clocks -- Observations

- Applies to the entire permit process for deployment, no matter how many permits may be needed
- Pre-Application meeting requirement does not stall the shot clock
- Batched applications are not treated differently – time frame is same for one as for multiple applications. However, a local government may be able to show the shot clock is unreasonable in this circumstance if a batch “causes legitimate overload” of resources
- If the shot clock deadlines are missed, there is an effective prohibition under the TCA (application is not deemed granted).
- Reset of clock for small cell application that is incomplete – 10 days to notify provider with specific missing information and the specific rule that requires that information

Shot Clock Terms

- Small Cell facilities:

- 60 days on existing structure
- 90 days on new structure

- Non-Small Cell facilities:

- 90 days on existing structure
- 150 days on new structure

Considerations

- Much of the R&O specifically applies only to small cells, leaving open tests for non-small cell facilities.
- Now is the time to take a hard look at policies and procedures regarding all wireless facilities.
- Unclear of impact on existing agreements, but unlikely that agreements would be voided.
- The R&O may make negotiating more difficult, but not impossible, especially if provider has certainty and predictability when reviewing process.
- 5G is a good thing – how can we implement it without running roughshod over local governments? We anticipate Georgia legislation to be introduced during the current legislative session.

Questions?



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