What is in the FCC's 5G Order? What are the pending legal challenges to the Order?

Xiaosong "Larry" Li, Shain Schaffer PC lli@shainlaw.com

Quick Summary of the Order
Three Sets of Requirements

- The FCC Order, among others, limits **fees** local governments may assess on telecommunications carriers for the placement, construction or co-location of new wireless service facilities.
- It also preempts state and local **non-fee** requirements related to the deployment of 5G wireless infrastructure.
- It also sets time frames (or "**shot clocks**") for municipalities to review 5G infrastructure applications.

Preemption
Material Inhibition v. Effective Prohibition

- According to the FCC, the Telecommunication Act's two relevant preemption provisions: Sections 253 and 332(c)(7), preempt state and local requirements that "prohibit or have the effect of prohibiting the ability of any entity" to provide "telecommunications" or "personal wireless services."

- The Order interprets these provisions as imposing a "material inhibition" standard, concluding that a law "ha[s] the effect of prohibiting" a telecommunications entity from providing service if it "**materially limits or inhibits** the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."

Preemption (continued)

- The Order notes that this "material inhibition" standard was first adopted in the FCC's 1997 California Payphone decision and is consistent with decisions of the First, Second, and Tenth Circuit Courts of Appeals.

- The Order acknowledges that some courts have read the preemption provisions as requiring evidence of **a "coverage gap" or "an existing or complete inability** to offer a telecommunications service." However, the Order rejects these alternative interpretations, reasoning that the "'effectively prohibit' language must have some meaning independent of the 'prohibit' language."
- Issues related to the FCC's authority to be resolved by pending litigation.

Fee Requirements

- Right-of-way (“ROW”)access fees, and fees for the use of government property in the ROW, such as light poles, traffic lights, utility poles, and other similar property suitable for hosting Small Wireless Facilities, as well as application or review fees and similar fees imposed by a state or local government as part of their regulation of the deployment of Small Wireless Facilities inside and outside the ROW, violate Sections 253 or 332(c)(7) unless the three-part test is satisfied.

Three-part test for fees

- State or local fees charged to mobile service providers for deploying small cell sites violate Sections 253 and 332(c)(7) unless they:

(1) are a reasonable approximation of the state or local government's costs,

(2) only factor in costs that are "objectively reasonable," and

(3) are no higher than fees charged to similarly situated competitors.

Safe harbor and presumptively-permitted fees

The Order identifies specific fee limits that are presumptively allowed under Sections 253 and 332(c)(7).

- For non-recurring fees, such as up-front applications for small cell site installations, municipalities may charge up to $500, subject to certain exceptions.

- For recurring fees, such as access fees, municipalities may charge up to $270 per year. Fees within these limits presumptively comply with Sections 253 and 332.

Fees-Exception

- Municipalities may charge fees above these amounts by showing that they nonetheless comply with the three-part test due to local cost variances.

- If a city is providing not just the right to place antennas on city-owned poles, but ancillary facilities or services (such as access to electricity, existing underground ducts and underground casements at each pole), the FCC fee "guidelines" do not apply.

Three types of non-fee requirements

- In addition to fees, the Order applies the “materially inhibits” standard to three types of non-fee requirements.

- Specifically, it addresses state and local laws imposing
- **aesthetic requirements,**
- **undergrounding requirements** (i.e., laws mandating that wireless infrastructure be deployed underground),
- **minimum spacing requirements** (i.e., laws requiring wireless facilities be a certain minimum distance apart from each other).

A three-part test for non-fee requirements

- The Order articulates a three-part test for evaluating these restrictions.
- According to the Order, such non-fee requirements 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

In order to establish that they are reasonable and reasonably directed to avoiding aesthetic harms, aesthetic requirements must be

1) **objective**—i.e., they must incorporate clearly-defined and ascertainable standards, applied in a principled manner—and
2) **must be published in advance.**

Undergrounding requirements

- The three-part test for non-fee requirements applies.

- However, laws requiring **all wireless facilities** be deployed underground would amount to an “effective prohibition,” given the “propagation characteristics of wireless signals.” Such local laws are all preempted.

Minimum Spacing Requirements

- Municipal requirements regarding the spacing of wireless installations—i.e., mandating that facilities be sited at least 100, 500, 1,000 feet, or some other minimum distance, away from other facilities to avoid excessive overhead "clutter" that would be visible from public areas.
- While some such requirements may violate 253(a), others may be reasonable aesthetic requirements.
- A municipality could NOT reasonably promulgate a new minimum spacing requirement that, in effect, prevents a provider from replacing its preexisting facilities or collocating new equipment on a structure already in use.

Shot Clocks

- The other main component of the Order sets time frames governing how quickly municipalities must review applications for installing small cell sites.
- Under these shot clocks, state and local governments must approve or deny applications within 60 or 90 days, depending on whether the installation will be on an existing structure or new structure.

Batched Applications

- Due to the nature of 5G deployment- large numbers of SCFs covering a particular area – the FCC 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.
- The shot clock that applies to the batch is the same as one that would apply had the applicant submitted individual applications.
- 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.

No “deemed granted” remedy

- The FCC declined, however, to adopt a “deemed granted” remedy, which would automatically deem an application granted whenever the locality fails to rule on it within the shot clock periods.
- The Order explains that in situations where a jurisdiction misses the shot clock deadline, the applicant should, in most cases, be able to obtain expedited relief in court under Section 332(c)(7), which directs courts to decide suits brought by any adversely affected person on an “expedited basis.”

No “deemed granted” remedy (2)

- Some carriers sued to challenge the FCC’s approach.
- However, the FCC’s real concern, as admitted, is that local governments might reject the applications to avoid the shot clock deadline.

Codification of Section 332 Shot Clocks

- The FCC retains the existing 90-day shot clock for collocations not involving Small Wireless Facilities.
- The Order also codifies the existing 150-day shot clock for new construction applications that are not for Small Wireless Facilities.

Collocations on Structures Not Previously Zoned for Wireless Use

- The Order clarifies that for purposes of the Section 332 shot clocks, attachment of facilities to existing structures constitutes collocation, regardless of whether the structure or the location has previously been zoned for wireless facilities.
- A reduced shot clock thus applies to sites that have never been approved by the local government as suitable for wireless facility deployment.

When Shot Clocks Start and Incomplete Applications

- For Small Wireless Facilities applications, 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.

All relevant permits subject to the shot clock

- Multiple authorizations may be required before a deployment is allowed to move forward.
- For instance, a municipality may require a zoning permit, a building permit, an electrical permit, a road closure permit, and an architectural or engineering permit for an applicant to place, construct, or modify its proposed personal wireless service facilities.
- All of these permits are subject to Section 332's requirement to act within a reasonable period of time, and thus all are subject to the shot clocks the FCC adopts or codifies in the Order.

Mandatory pre-application procedures and requirements (pre-approval review) do not toll the shot clocks.

- If an applicant proffers an application, but a state or municipality refuses to accept it until a pre-application review has been completed, the shot clock begins to run when the application is proffered.
- In other words, the request is “duly filed” at that time, notwithstanding the municipality’s refusal to accept it.

Legal Challenges to the validity of the Order

- On October 24, 2018, about a month after the FCC approved the Order, a number of municipalities filed petitions for review in the Ninth Circuit. These petitions generally allege that the Order exceeds the FCC's statutory authority, is arbitrary and capricious and an abuse of discretion, and is otherwise contrary to law.
- Shortly thereafter, several mobile service providers (including AT&T, Verizon, and Sprint) also filed petitions for review in various federal appellate courts, alleging that the FCC's failure to adopt a "deemed granted" remedy was "arbitrary and capricious."

Legal challenges (2)

- While most of these petitions were initially consolidated in the Tenth Circuit, they have now all been transferred to the Ninth Circuit.
- Before transferring the petitions to the Ninth Circuit, however, **the Tenth Circuit denied petitioners' motion to stay the Order's effect pending the outcome of the litigation.**
- Consequently, while the Ninth Circuit is still scheduled to consider petitioners' challenges to the validity of the Order, **the Order has been effective since January 14, 2019.**

Notable decision-Historic and environmental review

- The FCC cannot exempt from historic preservation review under the National Historic Preservation Act (NHPA), and environmental review under the National Environmental Policy Act (NEPA), construction of densely spaced small wireless facilities or small cell radio towers transmitting cellular signal and reducing a tribes' role in reviewing proposed construction of macrocell towers and other wireless facilities that remained subject to cultural and environmental review, as part of the FCC's effort to expedite rollout of next generation of wireless service known as 5G. FCC United Keetoowah Band of Cherokee Indians in Oklahoma v. Fed. Commc'ns Comm'n, 933 F.3d 728 (D.C. Cir. 2019)

Pending Ninth Circuit cases:

- Oral argument held 2/10/2020.

- Sprint Corporation v. FCC - Phone companies, various cities and counties, and public power groups and utilities petition for review of two orders of the Federal Communications Commission that will accelerate the installation of mobile broadband 5G technology in public rights-of-way across the United States. [FCC 18-133].
- City of Portland v. USA - The City of Portland and various power companies petition for review of two orders of the FCC – the declaratory portion of the Moratorium Order and the Small Cell Order – that expressly preempt state or local measures that prohibit interstate communications services. [18-111]

Legal challenges- possible prohibition v. actual prohibition

- One source of contention is the validity of the FCC's "material inhibition" standard.
- In particular, the FCC will likely need to grapple with the Ninth Circuit case Sprint Telephony PCS, L.P. v. County of San Diego. In County of San Diego, the Ninth Circuit overturned its prior decision in City of Auburn v. Qwest Corp., which held that Section 253 preempts state and local regulations whenever they "create a substantial . . . barrier" to the provision of services. The court reasoned that the City of Auburn mistakenly read Section 253 to preempt laws that "may" have the "effect of prohibiting" service, rather than only preempting laws that actually have the "effect of prohibiting service."

- Consequently, it adopted a narrower standard, holding that plaintiffs "must show actual or effective prohibition, rather than the mere possibility of prohibition."
- In light of this holding, a key issue will likely be whether County of San Diego forecloses the FCC's interpretation.

Legal challenges- “deemed granted” remedy

- In addition to the preemption standard, another issue will likely be whether the FCC’s decision not to include a “deemed granted” remedy for shot clock violations was arbitrary and capricious under Section 706 of the Administrative Procedure Act
- To prevail under this standard, the mobile service providers will likely need to make fact-specific arguments showing that, for example, the FCC failed to grapple adequately with evidence in the record or failed to address an important argument related to the “deemed granted” remedy.
- Ultimately, however, arbitrary and capricious review generally favors the FCC as the Ninth Circuit has described it as “highly deferential.”
- Uphill battle for the carriers.

Possible Congressional Action

- Due to the litigation surrounding the Order, Congress may be interested in addressing the extent to which the Telecommunications Act limits state and local action affecting 5G infrastructure deployment.

- At least one bill introduced in the 116th Congress would declare the Order to have “no force or effect.” There are other pending legislations codifying some of the Order’s approaches.

- However, no legislation has been introduced in the 116th Congress that would amend the Telecommunications Act’s preemption provisions.