Updates
August 20, 2020
Ninth Circuit Largely Upholds FCC Orders Designed to Promote 5G Network Deployment

In a recent decision, a panel of the U.S. Court of Appeals for the Ninth Circuit largely upheld three Federal Communications Commission (FCC) orders intended to facilitate the rapid deployment of 5G wireless facilities nationwide. The court's decision will help promote the rapid deployment of small cell network infrastructure and thereby increase the speed by which 5G services reach most Americans. But these benefits come at the cost of diminishing the role state and local governments and utility companies play in infrastructure deployment.

Background on FCC Orders

With greater capacity, faster speeds, reduced latency, and better security than earlier generations of wireless technology, 5G has the potential to transform the ways in which Americans live, work, and play in the digital age. The growth in Internet of Things devices, connected wearables, autonomous vehicles, and telemedicine solutions—coupled with consumers' and businesses' increased dependency on wireless communications during the coronavirus pandemic—makes the demand for 5G particularly palpable. "Small cell" facilities, which can be mounted to outdoor structures and transmit powerful wireless signals, serve as the backbone of 5G network architecture. Over the past several years, however, wireless service providers and related 5G ecosystem manufacturers have increasingly raised complaints about the regulatory barriers that affect the speed and cost of small cell deployment.

In response to these complaints, the FCC issued three orders in 2018 to make it easier to facilitate the deployment of 5G facilities. Two of the orders—the Small Cell Order and the Moratoria Order—addressed the limits of state and local governments' authority to regulate telecommunications providers. The Communications Act of 1934, as amended, vests these government bodies with the authority to manage public rights-of-way, require fair and reasonable compensation from telecommunications providers, and determine the placement, construction, and modification of wireless facilities (including small cells). However, this authority is limited by Sections 253(a) and 332(c)(7) of the Communications Act, which disallow state or local requirements that "prohibit or have the effect of prohibiting" the provision of telecommunications service. Section 332(c)(7) also bars state and local requirements that "unreasonably discriminate among providers of functionally equivalent" wireless services. In interpreting these provisions, the Small Cell and Moratoria Orders adopted the following new rules:

- **Fees:** Fees charged by state and local governments for wireless facility applications that are in excess of an FCC-defined safe harbor amount are permissible only if they reflect a reasonable approximation of the government's costs of processing applications and managing rights-of-way.
- **Aesthetics Restrictions:** Local restrictions imposed on the basis of aesthetics will be preempted by the federal rules unless they are (1) reasonable, (2) no more burdensome than requirements placed on other facilities, and (3) objective and published in advance.
- **"Shot-Clock" Deadlines:** The FCC's "shot clocks" rules—which set deadlines by which state and local governments must approve or deny wireless siting applications—apply to all telecommunications permits (not just zoning permits, as was the case prior to the orders), and the relevant deadlines are shortened.
- **Moratoria:** Subject to certain limited exceptions, municipal actions that expressly halt or have the effective of halting 5G deployment violate Section 253(a).

The third order—called the One-Touch Make-Ready Order—established new rules meant to give broadband service providers easier access to utility poles for 5G use. Section 224 of the Communications Act gives the FCC

the authority to regulate pole attachments. To facilitate greater 5G deployment, the FCC established a new process called "one-touch make-ready" to make it cheaper and faster for pole attachers to attach new network equipment to utility poles. In setting out the framework for this process, the One-Touch Make-Ready Order adopted the following rules, among others:

- **Overlashing:** Utilities may not require attachers wishing to overlash (i.e., tie additional wires or cables to those that are already attached to a utility pole) to conduct pre-overlashing engineering studies or to pay the utility's cost of conducting such studies.
- **Preexisting Pole Violations:** Utilities cannot deny access to a new attacher solely because of a preexisting safety violation on the pole that the attacher did not cause.
- **Self-Help:** Utility-approved contractors may prepare the entire pole for attachment, rather than just the lower portion of the pole (as was the case before the One-Touch Make-Ready Order).
- **Rate Reform:** Both competitive local exchange carriers (CLECs) and incumbent local exchange carriers (ILECs) are presumed to be similarly situated and thus entitled to the same rates, but this presumption can be rebutted by showing that an ILEC retains "net benefits" that other telecom providers do not enjoy.

Ninth Circuit Decision

Following the publication of these FCC orders, a group composed of local governments, public and private power utilities, and wireless service providers filed an appeal with the Ninth Circuit, arguing that the orders should be overturned on statutory and constitutional grounds. In an opinion authored by Judge Mary Schroeder and joined by Judges Jay Bybee and Daniel Bress, the court largely rejected the petitioners' arguments.

On the Small Cell and Moratoria Orders, the court held that, for the most part, the FCC's orders were consistent with Sections 253 and 332 and with relevant court precedents. However, the court concluded that the FCC's requirement that aesthetic regulations be "no more burdensome" than requirements applicable to other infrastructure deployment did not square with Section 332(c)(7)'s language allowing different regulatory treatment among types of providers so long as such treatment did not "unreasonably discriminate" among providers of functionally equivalent services. The court also held that the FCC's requirement that all aesthetic criteria be "objective" lacked a reasoned explanation. As a result, the court vacated the FCC's aesthetic requirements and remanded them for further consideration, but otherwise upheld the remainder of the orders.

With respect to the One-Touch Make-Ready Order, the court concluded that the FCC had reasonably interpreted Section 224 as a matter of law and that the FCC's rules concerning overlashing, preexisting pole violations, self-help, and rate reform were an appropriate exercise of the FCC's regulatory authority.

Judge Bress partly dissented from the majority's decision to uphold the FCC's ruling regarding wireless facility application fees. Specifically, Judge Bress believed that the FCC failed to adequately explain how the charging of above-cost fees amounted to an "effective prohibition" on telecommunications service under Sections 253(a) and 332(c)(7), and would have instead vacated the FCC's decision on this issue and remanded.

Significance

The rapid deployment of 5G network technology nationwide is key to the advancement of new and innovative technologies and to maintaining the American economy's competitiveness in the global market. The Ninth Circuit's decision will help further these objectives by removing a number of barriers that would otherwise slow the speed of wide-scale small cell deployment. The decision also represents a partial but important victory for FCC Chairman Ajit Pai, who has made infrastructural reform a core tenet of his 5G FAST Plan to secure

America's position as a leader in 5G.

On the other hand, state and local authorities will be limited in their ability to collect above-cost fees for wireless applications and will have to respond more quickly to such applications, all during a time where the coronavirus pandemic and a slowing economy have put a meaningful strain on municipal resources. Utilities, too, will face greater challenges recovering costs, and will have less control over the pole attachment process more generally. In addition, the Ninth Circuit's decision to vacate and remand the determinations made by the FCC with respect to local aesthetic requirements will create uncertainty and potential delays until there is further resolution by the FCC. Finally, because state and local authorities are generally barred from adopting moratoria that impede 5G deployment, these authorities will have less leeway to pursue certain governmental priorities that, while otherwise desirable, may have the effect of limiting small cell buildouts.

In the end, a streamlined 5G infrastructural regime promises to yield great benefits for the future of the digital economy, but state and local authorities and utilities will have less power to shape what that future ultimately looks like.

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