



TALK OF THE Towns & Topics

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FCC Limits Local Control for Deployment of 5G Network

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BACKGROUND

On September 26, 2018, the Federal Communications Commission issued a [Declaratory Ruling and Third Report and Order](#) (the order) that pre-empts certain state and local regulatory authority claiming that existing local regulations hinder the deployment of 5G infrastructure. The order was published in the *Federal Register* on

October 15, 2018 and becomes effective on January 14, 2019. Local rules concerning aesthetic concerns must be publicly available 90 days later. According to reports, several localities on the west coast have already commenced appeals to challenge the FCC's

[See: FCC Order on Page 15](#)

Court of Appeals Upholds Localities' Ability to Tax Certain Telecom Equipment

In a recently issued Court of Appeals decision, *T-Mobile Northeast, LLC v DeBellis*, 2018 NY Slip Op 08539 (Ct App Dec. 13, 2018), the court upheld local governments' authority to tax certain telecommunications equipment mounted to the exterior of buildings, such as cabinets that house wiring and provide battery power and antennas that transmit and receive signals, as real property.

Real Property Tax Law (RPTL) defines what constitutes real property for taxing purposes. In the 1980s, some legislative amendments were made to help clarify what telecommunications property could be taxed as real property. Local governments

proceeded to tax this equipment as real property until 2012 when the First Department Appellate Division issued an opinion finding that this type of equipment did not fall within the definition of real property found in the RPTL.

However, in 2016, the Second Department examined the language of the statute and found that the equipment did fall within the definition. The recent Court of Appeals case resolved the different interpretations of the appellate divisions by stating that the plain language of the RPTL encompasses this type of telecommunications property.

Look for an in depth analysis of the case [in the next issue of *Talk of the Towns & Topics*](#). □

From Page 14: FCC Order for 5G Small Cell Deployment Jeopardizes Local Authority over Rights-of-Way, Standards and Fees

action claiming, among other things, that order amounts to a federal overreach. The FCC's goal to streamline a fast rollout of 5G technology appears directly at odds with municipalities' claims that they should retain authority to set standards and fees for such equipment being placed in public rights-of-way.

IMPACTING MUNICIPAL AUTHORITY

The order focuses on facilitating the installation of "Small Wireless Facilities" necessary to densify wireless networks for 5G services. As noted by the challenges already commenced against the order, local governments are concerned that the order will compromise their ability to maintain and ensure the safety of the public rights-of-way.

The order provides that municipalities retain some limited, yet significant, power to enact regulations. This may help localities maintain leverage with service providers and address important community issues, such as design of antennae attachments, location and even spacing.

FEE LIMITATIONS

The order establishes guidelines for various local fees that municipalities typically charge that presumptively comply with Sections 253 and 332. Municipalities object, it has been reported, that these nationally uniform fees are not realistic and do not take into account the varying municipal costs across the country. Municipal costs typically include staff time to review the application(s), use

of the right-of-way and costs associated with maintaining the right-of-way and structures within the right-of-way where such Small Wireless Facilities will be attached. The order establishes a presumptively valid fee schedule for these costs.

Can a municipality charge a higher fee?

See: FCC Order on Page 16

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From Page 15: FCC Order for 5G Small Cell Deployment Jeopardizes Local Authority over Rights-of-Way, Standards and Fees

Perhaps, in limited circumstances, a locality may charge fees that are above the federal-authorized fee levels by establishing that such fees comply with the limits imposed by Section 253 — specifically, that they are (1) a reasonable approximation of the municipality's costs and competitively neutral, (2) those costs themselves are reasonable, and (3) are non-discriminatory, i.e. fees can be no higher than the fees charged to similarly situated competitors in similar situations. However, such fees charged above the FCC's presumptively valid fees must be very carefully considered, or a service provider could commence an action challenging them. The presumptively reasonable fees under Section 253 or Section 332(c)(7) include:

1. \$500 for a single up-front application that includes up to five Small Wireless Facilities, with an additional \$100 for each

Small Wireless Facility beyond five,

2. \$1,000 fee for a new pole (i.e., not a collocation) intended to support one or more Small Wireless Facilities, and
3. \$270 per Small Wireless Facility per year for all recurring fees, including any possible right-of-way access fee or fee for attachment to municipally owned structures in the right-of-way.

AESTHETICS

Cities, towns and villages are concerned with the aesthetics of their municipality. Given the anticipated huge number of 5G facilities to be deployed in local communities in the

See: FCC Order on Page 19



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From Page 16: FCC Order for 5G Small Cell Deployment Jeopardizes Local Authority over Rights-of-Way, Standards and Fees

near future, it appears incumbent on municipalities to act quickly to protect residents and streetscapes, balanced against the provision of telecom services for residents.

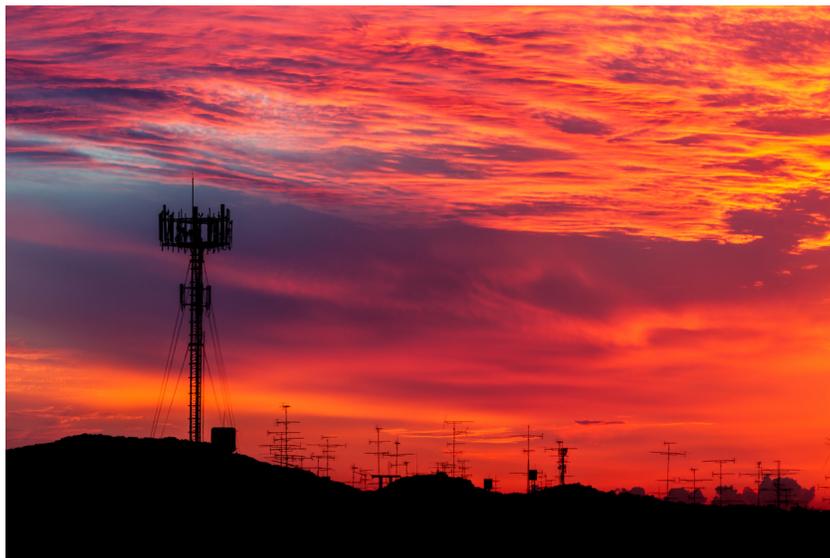
The FCC Order provides guidance to municipalities concerning aesthetic requirements that will not be pre-empted, provided they are (1) reasonable, (2) non-discriminatory, no more burdensome than those applied to other types of infrastructure deployments and (3) published in advance.

It may behoove municipalities to develop standardized aesthetic requirements, such as pre-approved antennae, equipment cabinets, spacing requirements and street furniture designs (colors, locations), where appropriate and include them in rights-of-way use and access agreements with providers. This action would assist in avoiding unsightly or out-of-character future deployments. It would also appear to help make processing such applications easier for localities in a reasonably expeditious manner and help defend challenges to their siting decisions for failure to meet shot clock deadlines, as discussed below.

NEW SHOT CLOCKS

The FCC established new shot clocks that apply to “all authorizations necessary for the deployment of personal wireless services infrastructure, including building permits and road opening permits” by local governments on an application to deploy a small cell:

1. 60 days for review of an application for collocation of a small cell on a preexisting structure, and
2. 90 days for review of an application for attachment of a small cell using a new



structure.

In an apparent nod to municipal objections, the FCC Order, as published in the Federal Register, changed the language from the original order to provide for a new “modified tolling system,” which will “restart” the shot clock in certain circumstances. The modified tolling system is intended to ensure that the service providers submit complete applications at the beginning of the review process. For Small Wireless Facilities applications, the municipality 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. Effectively, the municipality would have 60 additional days for review.

Under the FCC Order, failure to meet these deadlines results in a presumption that a municipality has not acted in a reasonable period of time, and will be deemed a presumptive prohibition on the provision of personal wireless services, per Section 332, and subjects the municipality to potential

See: FCC Order on Page 20

From Page 19: FCC Order for 5G Small Cell Deployment Jeopardizes Local Authority over Rights-of-Way, Standards and Fees

litigation with the service provider. The FCC stated it would expect that, upon notifying the local authorities of the expiration of the shot clock, the service provider would be issued the necessary permits “absent extraordinary circumstances.” If the necessary permits are not issued, according to the FCC, the service provider would have a “straightforward case” for obtaining expedited judicial relief.

WHAT SHOULD A MUNICIPALITY DO?

Municipalities are in the frontline of the battleground under the FCC Order and should prepare for a possible onslaught of applications from service providers seeking to deploy 5G technology within localities, primarily within municipal rights-of-way. Indeed, the battle has already begun. Reasonable steps might include:

1. Take immediate steps to enact reasonable

zoning and other regulations to address important community issues.

2. Such regulations might include antennae design, location spacing, additional pole and equipment aesthetic requirements.
3. This will help the locality to maintain some leverage in possible negotiations with service providers.

Please do not hesitate to contact Thomas A. Shepardson, Esq. for additional information at 518-487-7663 or tshepardson@woh.com. □

Disclaimer: This update is intended to be a general summary of the law and does not constitute legal advice. If you have concerns about the impact and effect on your municipality, you should consult with counsel to determine applicable legal requirements for a specific factual situation.

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