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To: **BSL Clients and Other Interested Parties**

From: **Jim Baller, Sean Stokes & Casey Lide**

Date: **September 11, 2018**

Re: **Important FCC Draft Order Concerning Small Wireless Facilities**

On September 5, the Federal Communications Commission released a draft Declaratory Ruling and Third Report and Order (respectively, "Ruling" and "Order")[1] that, if adopted, would significantly affect local government discretion in matters pertaining to the deployment of "small wireless facilities" in the public right-of-way. Fee amounts, the ability to impose aesthetic requirements, minimum spacing requirements, timelines for review, and other important issues are directly addressed in the Ruling and Order. Ultimately, the Ruling and Order could result in preemption of the terms of small cell ordinances and attachment agreements already enacted by local governments and government-owned utilities.

This memorandum summarizes the main points of the Draft, which is scheduled for a vote by the Commission on September 26, 2018.[2] The Commission will permit *ex parte* comments and presentations until the commencement of the Sunshine Period prior to the September 26 open meeting (typically one week in advance of the meeting).

If you have any questions concerning the draft Ruling and Order, or would like to discuss potential strategies and options concerning the important changes likely to occur in the near future, please do not hesitate to contact us.

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1 *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, WT Docket No. 17-79, WC Docket No. 17-84, FCC-CIRC1809-02.

2 The Third Report and Order is to become effective 30 days after its publication in the Federal Register, which generally occurs roughly two months following agency approval. The Declaratory Ruling is set to become effective on the same day that the Third Report and Order is effective. (¶ 148). They will likely face legal challenges.

*Please note that the following summary relates to a **draft** Ruling and Order, and that any Ruling and Order ultimately adopted may or may not diverge substantially on any of the following points.*

"Small Wireless Facilities" defined.

The Ruling would define the term "Small Wireless Facility" (SWF) to mean a facility that meets the following conditions:

(1) The structure on which antenna facilities are mounted
  (i) is 50 feet or less in height, or
  (ii) is no more than 10 percent taller than other adjacent structures, or
  (iii) is not extended to a height of more than 50 feet or by more than 10 percent above its preexisting height as a result of the collocation of new antenna facilities; and
(2) Each antenna associated with the deployment (excluding the associated equipment) is no more than three cubic feet in volume; and
(3) All antenna equipment associated with the facility (excluding antennas) are cumulatively no more than 28 cubic feet in volume; and
(4) The facility does not require antenna registration under part 17 of this chapter; and
(5) The facility is not located on Tribal lands, as defined under 36 CFR 800.16(x); and
(6) The facility does not result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified in Rule 1.1307(b).

(¶ 4).

Broad interpretation of "effective prohibition" provisions of Section 253 and 332(c)(7).

The Ruling would adopt a broad interpretation of the "effective prohibition" provisions of Section 253 and 332(c)(7) of the Communications Act, finding that a state or local government need only "materially inhibit" a SWF deployment to violate the provisions.[3] This determination provides the underpinning for the Commission's subsequent determinations in the Declaratory Ruling concerning fees and consideration of aesthetic concerns.

Fees and charges limited to cost (including ROW access fees and attachment fees).

- The Ruling would establish that fees and charges assessed by a government entity are "only permitted to the extent that they are nondiscriminatory and represent a reasonable approximation of the locality's reasonable costs" "specifically related to and caused by the deployment." (¶ 11, Fn. 16).[4] "We also interpret Section 253(c)'s 'fair and reasonable compensation' to refer to fees

[3] 47 U.S.C. § 253(a) and 47 U.S.C. § 332(c)(7) respectively.

[4] A more complete formulation may be found at paragraph 48:

> We conclude that 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

that represent a reasonable approximation of actual and direct costs . . . ." (¶ 53). The Ruling explicitly rejects an interpretation of Section 253(c) that would permit market-based charges (¶¶ 53, 70). It notes that "[r]easonable state and local regulation of facilities deployment is an important predicate for a viable marketplace for communications services by protecting property rights and guarding against conflicting deployments that could harm or otherwise interfere with others' use of property." (¶ 54)

- Fees and charges subject to this limitation include:
  (1) "Event" or "one-time" fees, including application and construction permits, permitting fees, etc., whether or not the deployment is in the ROW;
  (2) Recurring attachment fees ("Recurring charges for a Small Wireless Facility's use of or attachment to property inside the ROW owned or controlled by a state or local government") and
  (3) Recurring ROW access fees. (Fn. 62).

- The Ruling identifies fee amounts that are presumptively acceptable under Sections 253 and 332:
  - **$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"
  - **$270** per SWF, per year for all recurring fees (including "any possible ROW access fee or fee for attachment to municipally-owned structures in the ROW").
  - "Any party may still charge fees above the levels we identify by demonstrating that the fee is a reasonable approximation of cost that itself is objectively reasonable." (Fn. 214)

  - The ruling does not prescribe any specific accounting or cost-allocation methodologies:

    "[W]e do not suggest that localities must use any specific accounting method to document the costs they may incur when determining the fees they charge for Small Wireless Facilities within the ROW. Moreover, in order to simplify compliance, when a locality charges both types of recurring fees identified above (i.e., for access to the ROW and for use of or attachment to property in the ROW), we see no reason for concern with how it has allocated costs between those two types of fees. It is sufficient under the statute that the total of the two recurring fees reflects the total costs involved." ¶ 73

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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 Section 253 or 332(c)(7) unless these conditions are met: (1) the fees are a reasonable approximation of the state or local government's costs, (2) only objectively reasonable costs are factored into those fees, and (3) the fees are no higher than the fees charged to similarly-situated competitors in similar situations.

¶ 48; *see* ¶ 66 ("fees for the attachment to or use of property within the ROW owned or controlled by the government (*e.g.*, street lights, traffic lights, utility poles . . .)").

- **"In-kind" arrangements limited**: In a footnote during discussion of minimum spacing requirements, the Ruling suggests that in-kind arrangements that do not "meaningfully advance any recognized public-interest objective," and those that "are not cost-based" would not be permitted. (Fn. 228).

- **Revenue-based fees restricted:** Gross revenue-based fees, and other fees "not reasonably tethered to costs appear to violate Sections 253(a) or 332(c)(7)…." (¶ 67)

- **Reasonable fees to consultants and contractors allowed:** Fees paid to consultants and third-party contractors may be permissibly passed through, if those costs are reasonable. (¶ 67)

Aesthetic determinations must be "reasonable," "no more burdensome," and *published in advance.*

- Because compliance with aesthetic requirements imposes costs of providers, "the impact on their ability to provide service is just the same as the impact of fees. We therefore draw on our analysis of fees to address aesthetic requirements." (¶ 84).

- "Reasonable" and "no more burdensome":

> [A]esthetic requirements that are reasonable in that they are reasonably directed to avoiding or remedying the intangible public harm of unsightly or out-of-character deployments are also permissible. In assessing whether this standard has been met, aesthetic requirements that are more burdensome than those the state or locality applies to similar infrastructure deployments are not permissible, because such discriminatory application evidences that the requirements are not, in fact, reasonable and directed at remedying the impact of the wireless infrastructure deployment. (¶ 84).

- "Aesthetic requirements must be published in advance":

> [I]n order to establish that they are reasonable and reasonably directed to avoiding aesthetic harms, aesthetic requirements must be published in advance. "Secret" rules that require applicants to guess at what types of deployments will pass aesthetic muster substantially increase providers' costs without providing any public benefit or addressing any public harm. Providers cannot design or implement rational plans for deploying Small Wireless Facilities if they cannot predict in advance what aesthetic requirements they will be obligated to satisfy to obtain permission to deploy a facility at any given site. (¶ 85).

Undergrounding requirement "can amount to effective prohibitions by materially inhibiting the deployment of wireless service."

Without significant elaboration, the Ruling addresses local provisions that require infrastructure to be placed underground by stating that such provisions can amount to effective prohibitions that "materially inhibit" deployment under Section 253. The Ruling states that, even if such undergrounding provisions are permissible under state law, "any local authority to impose undergrounding requirements under state law does not remove the imposition of such undergrounding requirements from the provisions of Section 253." ¶ 86.

Minimum spacing requirements: some may be "reasonable aesthetic requirements."

"Some parties complain of municipal requirements regarding the spacing of wireless installations—i.e., mandating that facilities be sited at least 100, 500, or 1,000 feet, or some other minimum distance, away from other facilities, ostensibly to avoid excessive overhead 'clutter' that would be visible from public areas. We acknowledge that while some such requirements may violate 253(a), others may be reasonable aesthetic requirements. Therefore, such requirements should be evaluated under the same standards as other aesthetic requirements." (¶ 87).

Regulatory / proprietary distinction rejected.

The Ruling specifically declines to adopt, for preemption purposes, any distinction between government entities' "regulatory" and "proprietary" capacities (¶ 89). "[W]e conclude here that, as a general matter, 'management,' of the ROW [for purposes of Section 253(c)] includes any conduct that bears on access to and use of those ROW, notwithstanding any attempts to characterize such conduct as proprietary. This reading … suggests that Congress's omission of a blanket proprietary exception to preemption was intentional and thus that such conduct can be preempted under Section 253(a)."[5] (¶ 90). As for Section 332, the Ruling interprets the term "any request" in Section 332(c)(7)(B)(ii) broadly, to "encompass[] anything required to secure all authorizations necessary for the deployment" of personal wireless facilities, including authorizations "relating to access to a ROW, including but not limited to the 'place[ment], construct[ion], or modif[ication]' of facilities on government-owned property." (¶ 91).

Section 332 applicable to Small Wireless Facilities shot clocks shortened; no "deemed granted" remedy.

In 2009, the Commission opted to employ "shot clocks" "to define a presumptive 'reasonable period of time' beyond which state or local inaction on wireless infrastructure siting applications would constitute a 'failure to act' within the meaning of Section 332."[6] (¶ 100). The Commission adopted "a 90-day clock for reviewing collocation applications and a 150-day clock for reviewing siting applications other than collocations." (¶ 100).

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5 The Commission does not address Section 224 of the Communications Act, which expressly exempts government-owned poles, ducts, conduits, and utility ROW from federal pole attachment regulation.

6 *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994 (2009), *aff'd, City of Arlington v. FCC*, 668 F.3d 229, (5th Cir. 2012), *aff'd,* 133 S. Ct. 1863, 569 U.S. 290 (2013).

The Order would adopt new, shortened shot clocks specifically applicable to Small Wireless Facilities:

- Requests to site SWFs on preexisting structures (collocation)[7]: **60 days**
- SWF siting requests that involve construction of new qualifying structures: **90 days**

The Order does not adopt a "deemed granted" remedy in the case of a failure to act within the given timeframe. However, "[s]tate or local inaction by the end of the Small Wireless Facility shot clock will function not only as a Section 332(c)(7)(B)(v) failure to act but also amount to a presumptive prohibition on the provision of personal wireless services within the meaning of Section 332(c)(7)(B)(i)(II). Accordingly, we would expect the state or local government to issue all necessary permits without further delay. In cases where such action is not taken, we assume … that the applicant would have a straightforward case for obtaining expedited relief in court." (¶ 114).

The Order also sets forth the types of requests and authorizations that are subject to the shot clock under Section 332(c)(7), which applies to "any request for authorization to place, construct, or modify personal wireless service facilities . . . ." While Section 332(c)(7) is entitled "Preservation of Local Zoning Authority," the Order interprets the word "any" broadly to conclude that the shot clocks would apply to "more than just zoning permits." (¶ 129) "[M]ultiple authorizations may be required before a deployment is allowed to move forward. For instance, a locality 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 we adopt or codify here." (¶ 139).

Notably, the Order does not clearly state whether or how the shot clocks would apply to requests to attach to government-owned facilities in the ROW, for which a negotiated attachment agreement may be required in some circumstances. While the Order is silent on that point, this Commission and courts may well determine that the shot clocks do apply in that circumstance, and that any recourse for accommodating more lengthy attachment negotiations may lie on overcoming the presumption of a "reasonable period of time" under Section 332(c)(7)(B).

The Order makes no changes to the Commission's 2014 determination as to when the shot clock would commence.[8] "[A] shot clock begins to run when an application is first submitted, not when the application is deemed complete. The clock can be paused, however, if the locality notifies the applicant within 30 days that the application is incomplete."

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[7] Note that the Order apparently interprets the term "collocation" to mean simply an attachment to a preexisting structure, and does *not* mean only an attachment to a structure that already has wireless facilities upon it. "We take this opportunity to clarify that for purposes of the Section 332 shot clocks, attachment of facilities to existing structures constitutes collocation, regardless whether the structure or the location has previously been zoned for wireless facilities." (¶ 136).

[8] *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report & Order, 29 FCC Rcd 12865, (2014), *aff'd, Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015).

Effect on preexisting state-level small cell bills.

The Ruling asserts that "we reach a decision today that does not preempt nearly any of the provisions passed in recent state-level small cell bills." (¶ 6) But it does not specifically preserve state-level determinations; conflicting state provisions apparently would be preempted. For example, the Ruling states that, in those states that allow fees in excess of the $500 and $270 safe harbor set forth in the Ruling, localities wishing to charge the higher fees must affirmatively justify them as being reasonable approximations of the local government's cost. (¶ 77).

Effect on preexisting contracts.

The Ruling and Order would apparently preempt conflicting terms in preexisting contracts involving Small Wireless Facilities, although how and when this might occur as a practical matter is difficult to assess at this point. Nothing in the Ruling and Order suggests that preexisting contracts would be "grandfathered."