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MEMORANDUM

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

From: **Jim Baller, Sean Stokes, Casey Lide, and McKenzie Schnell**

Date: **October 8, 2018**

Re: **Important FCC Order Concerning Small Cells**

On September 27, the Federal Communications Commission released a *Declaratory Ruling and Third Report and Order* (respectively, "*Ruling*" and "*R&O*")[1] that significantly limits the rights of state and local governmental entities, including public power utilities, in matters pertaining to the deployment of "Small Wireless Facilities" in the public rights-of-way ("ROW") and on publicly-owned infrastructure, such as streetlight poles, utility poles, and traffic signals. As discussed below, the *Ruling* and *R&O* limit fee amounts, the ability to impose aesthetic requirements, minimum spacing requirements, timelines for review, and pose other important issues related to the control and management of the public ROW and the use of publicly-owned facilities.

"Small Wireless Facilities" defined.

The *Ruling* applies to "Small Wireless Facilities" ("SWF") that meet the following conditions:

(1) The structure on which antenna facilities are mounted
  (i) is 50 feet or less in height including antennae, 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, whichever is greater; 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) is 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).

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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-18-133, released September 27, 2018.

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

Section 253(a) of the federal Communications Act specifies that "[n]o State or local statute or regulation, or other State or local legal requirement, *may prohibit or have the effect of prohibiting the ability of any entity to provide* any interstate or intrastate telecommunications service."[2] Similarly, Section 332(c)(7) states that "[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—(I) shall not unreasonably discriminate among providers of functionally equivalent services; and (II) *shall not prohibit or have the effect of prohibiting the provision* of personal wireless services."[3]

The *Ruling* adopts a broad interpretation of the "effective prohibition" provisions of Section 253 and 332(c)(7), finding that a state or local government need only "materially inhibit" a SWF deployment to violate the provisions.[4] This determination provides the underpinning for the Commission's subsequent determinations in the *Ruling* concerning fees and consideration of aesthetic concerns.

Regulatory / proprietary distinction rejected.

The *Ruling* specifically declines to adopt, for preemption purposes, any distinction between government entities acting in a "regulatory" capacity as opposed to a "proprietary" capacity, when providing access to public ROW or authorizing attachments to government-owned property for SWFs. The Commission found that neither Section 253 nor Section 332 make any distinction between regulatory and proprietary activities that constitute a barrier to entry, and the Commission concluded that such activities are inherently regulatory in nature.

In adopting this position, the Commission did not meaningfully address the argument raised by the American Public Power Association and others, that the Commission's position does not account for the fact that Section 224 of the Communications Act expressly exempts government-owned poles, ducts, conduits, and utility ROW from federal pole attachment regulation. Instead, the Commission brushed aside the argument in a footnote with little to no substantive analysis:

> … Some have argued that Section 224 of the Communications Act's exception of state-owned and cooperative-owned utilities from the definition of "utility," "[a]s used in this section," suggests that Congress did not intend for any other portion of the Act to apply to poles or other facilities owned by such entities. … We see no basis for such a reading. Nothing in Section 253 suggests such a limited reading, nor does Section 224 indicate that other provisions of the Act do not apply. We conclude that our interpretation of effective prohibition extends to fees for all government-owned property in the ROW, including utility poles. Compare 47 U.S.C. § 224 with 47 U.S.C. § 253. We are not addressing here how our interpretations apply to access or attachments to government-owned property located outside the public ROW.[5]

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2 47 U.S.C. § 253(a) (*emphasis* added).

3 47 U.S.C. § 332(c)(7) (*emphasis* added).

4 *Declaratory Ruling and Third R&O*, at ¶ 16, adopting the so-called "California Payphone Standard," which the FCC first articulated in *California Payphone Ass'n*, 12 FCC Rcd 14191, 14206, ¶ 31 (1997).

5 *See Declaratory Ruling and Third R&O*, at n. 253 (citations omitted).

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

The *Ruling* establishes that fees and charges assessed by a government entity for SWFs, including annual pole attachment fees, are only permitted to the extent that they are nondiscriminatory and represent a "reasonable approximation" of the government entity's "objectively reasonable costs" specifically related to and caused by the deployment.

> 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 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 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.[6]

- 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 SWF'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. 71).

- The *Ruling* sets forth fee amounts that are presumptively acceptable under Sections 253 and 332:

  - **$500** for a single up-front application that includes up to five SWFs, with an additional $100 for each Small Wireless Facility beyond five, or $1,000 for a new pole to support a SWF.
  - **$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").

- State and local government entities can charge higher fees than those set forth above if they can show:

  (1) The fees are a reasonable approximation of costs;
  (2) Those costs themselves are reasonable; and
  (3) The fees are being assessed in a non-discriminatory manner.

- 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

6 *Declaratory Ruling and R&O*, at ¶ 50.

types of fees. It is sufficient under the statute that the total of the two recurring fees reflects the total costs involved.[7]

"In-kind" arrangements limited.

- In a footnote discussing 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.[8]

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.

Aesthetic determinations must be reasonable, nondiscriminatory, and published in advance.

- Aesthetic requirements for SWF are subject to possible preemption unless they are (1) reasonable; (2) no more burdensome than those applied to other types of infrastructure deployments; (3) objective; and (4) published in advance.

- The *Ruling* discusses minimum-spacing requirements, and suggests that such requirements may or may not meet this standard, depending on the particular facts.

Section 332 applicable to SWF; 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."[9][10] The Commission adopted "a 90-day clock for reviewing collocation applications and a 150-day clock for reviewing siting applications other than collocations."

The *R&O* adopts new, shortened shot clocks specifically applicable to Small Wireless Facilities:

- Requests to site SWFs on preexisting structures (collocation)[11]: **60 days**
- SWF siting requests that involve construction of new qualifying structures: **90 days**

The *R&O* does not adopt a "deemed granted" remedy in the case of a failure by a state or local governmental entity to act within the above timeframes. However, state or local inaction by the end of the SWF shot

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7 *Id.*, ¶ 76.

8 *Id.*, n. 252.

9 *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).

10 *Declaratory Ruling and R&O*, at ¶ 100.

11 The *R&O* revises the term "collocation" to mean an attachment to a preexisting structure, and does *not* require that the structure already have wireless facility attached to it.

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).

The *R&O* 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 *R&O* interprets the word "any" broadly, concluding that the shot clocks would apply to "more than just zoning permits."[12] "[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 he shot clocks we adopt or codify here."[13]

The Commission also revised the process for calculating time under the shot clocks for SWFs when an application is incomplete. SWF shot clocks are reset, not just tolled, if the government entity notifies the SWF applicant within 10 days after submission that the application is incomplete. For subsequent determinations of incompleteness, the shot clock would toll—not reset—if the government entity provides written notice within 10 days that the supplemental submission did not provide the requested information.

For non-SWF, the process remains the same—i.e., shot clocks begin to run when an application is first submitted, and can be paused—not reset—if the government entity notifies the applicant within 30 days that the application is incomplete.

Notably, the *R&O* 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 *R&O* is silent on that point, the Commission and courts may determine that the shot clocks do apply in such circumstances and that any recourse for accommodating more lengthy attachment negotiations may depend on overcoming the presumption of a "reasonable" period of time under Section 332(c)(7)(B).

Effect on preexisting state-level small cell laws

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."[14] But it does not specifically preserve state-level determinations; conflicting state provisions apparently would be preempted unless they can be found not to violate the Commission's *"materially inhibit*" standard.

Effect on preexisting contracts

The Commission stated that the effect of its *Ruling* is not limited to new agreements, and could preempt portions of existing agreements that are found to contain terms or conditions that are contrary to the findings of the *Ruling*:

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12 *Id*., at ¶ 133.

13 *Id*., at ¶ 144.

14 *Declaratory Ruling and R&O*, at ¶ 6.

> Some have argued that our decision today regarding Sections 253 and 332 should not be applied to preempt agreements (or provisions within agreements) entered into prior to this Declaratory Ruling. We note that courts have upheld the Commission's preemption of the enforcement of provisions in private agreements that conflict with our decisions. We therefore do not exempt existing agreements (or particular provisions contained therein) from the statutory requirements that we interpret here. That said, however, this Declaratory Ruling's effect on any particular existing agreement will depend upon all the facts and circumstances of that specific case. Without examining the particular features of an agreement, including any exchanges of value that might not be reflected by looking at fee provisions alone, we cannot state that today's decision does or does not impact any particular agreement entered into before this decision.[15]

Effective Date and Potential Legal Challenges

The *Ruling* and *R&O* become effective 90 days after publication in the Federal Register.

The Commission's *Ruling* regarding the scope of Sections 253 and 332 and the "materially inhibit" standard for determining whether a particular state or local action constitutes a barrier to entry that prohibits or has the effect of prohibiting service in violation of the Communications Act are not self-effectuating. Instead, a provider or other entity would have to prevail on a complaint before the Commission or a federal court. That said, the time period to challenge the Commission's conclusions is now and not at the time of such a complaint. This is because only a federal court of appeals can overturn a Commission determination.

Parties have thirty days from the publication in the Federal Register to file a petition for reconsideration of the *Declaratory Ruling* and *R&O* with the Commission, and sixty days from publication in the Federal Register to file an appeal in a federal court of appeals.

A number of organizations representing local governmental entities intend to file appeals. While petitions for reconsideration are also an option, in this instance such petitions would be unlikely to cause the Commission to significantly revise its position on key issues, and as a consequence would likely result in a significant expense in time and money without much benefit. Moreover, it is unlikely that the Commission would grant a stay of the effect of its *Declaratory Ruling* and *R&O* pending the resolution of a petition for reconsideration.

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15 *Id.*, at ¶ 66.