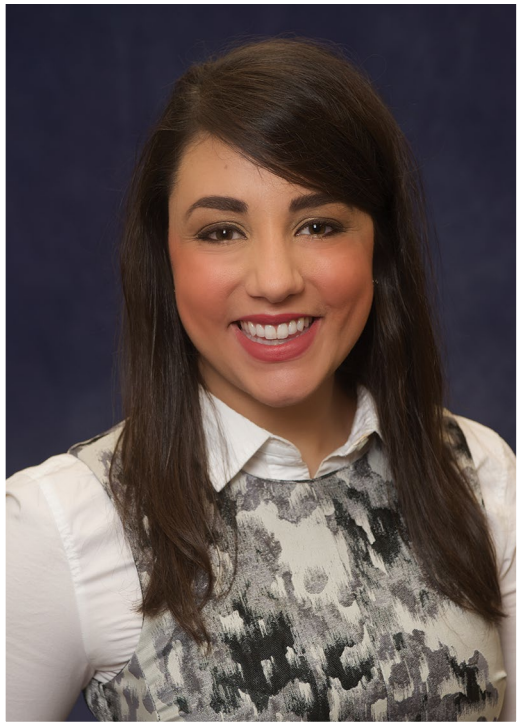
FRAME of REFERENCE

Rebecca Ruscito, NYCOM Counsel



Small Cells. Big Problems.
An Update on New Regulations Affecting Small Wireless Facility Siting

Internet connectivity has become an indispensable and integral part of a productive society. Essential to community development and public safety, meaningful internet access impacts individuals' everyday lives, including their ability to complete homework assignments, compete for jobs, manage loans, communicate with doctors, and get directions. Constant connectivity has also supported the rise of the Internet of Things, and has proliferated an ever-increasing demand for data capacity. Helping advance the volume and connectivity of smart devices is the next generation of wireless internet service, or 5G. However, the new networks will require a marked increase in the deployment of small wireless facility infrastructure.

In early 2017 this column discussed the explosion of the small antenna systems that are being used to develop 5G wireless service. At that time, the regulatory landscape had not yet caught up to the idiosyncrasies associated with the siting of small wireless facilities. However, on October 15, 2018, the Federal Communications Commission (FCC) adopted a rulemaking that specifically addresses the installation of small wireless facilities and significantly impacts how local governments may examine the applications of wireless providers to install such equipment in the municipal right-of-way (ROW). This article will summarize the new regulatory requirements set to become effective on January 14, 2019 and provide recommendations to assist cities and village in preserving as much authority and autonomy as possible under the FCC's new rules.

What is 5G Anyway?

Or, a Brief Primer on Wireless Technology and the Regulation of Wireless Service

Fifth generation wireless service, commonly referred to as 5G, is simply the latest version of wireless technology. The "race to 5G" refers to the competition between the United States and China to be the first country to deploy an operational nation-wide

> **"To ensure that local authorities preserve and retain control over considerations such as aesthetics and safety, municipal officials must clearly establish the standards for which [siting] applications will be reviewed."**

network using the technology. Due to its dramatically faster speeds, increased responsiveness, and capacity to communicate with more devices at once than previous generations of wireless technology, 5G promises to help self-driving cars, tele-health services, and virtual reality experiences reach their true potentials.[1] 5G will also improve individual users' experiences by making the smart technologies and devices that comprise the Internet of Things even more connected and integrated into everyday life.

The economic, public safety, and welfare advantages of 5G and universal high-speed broadband cannot be ignored. But despite its tremendous benefits, 5G possesses neither the signal strength nor the transmission distances of previous generations of wireless service. 4G and other previous generations of wireless technology have relied predominantly on macro towers provide service to a broad territory and more recently began using antenna systems to strengthen service in densely populated areas. However, 5G depends on small antenna systems to propagate its service. Therefore, in addition to the small wireless facilities that have already been installed to densify 4G networks, 5G will require the installation of much more equipment to cover the same area served by the current technology.

The Telecommunications Act of 1996 (TCA) is the legal mechanism restricting the powers of local governments to regulate the siting of wireless facilities in the ROW.[2] The statute prohibits municipalities from giving preferential treatment to any telecommunication service provider or from treating telecommunication service providers on a discriminatory basis. While 47 U.S.C.A. § 253(c) acknowledges the right of state and local governments to manage public rights-of-way and to receive fair and reasonable compensation from telecommunication providers' use of the ROW, federal law prohibits state and local governments from enacting requirements and ROW policies that have the effect of "prohibiting personal wireless service."[3]

As the regulatory authority charged with enforcing the provisions of the TCA, the FCC periodically produces declaratory rulings interpreting congressional intent and establishing additional regulations that effect wireless siting decisions. Prior rulemakings include the adoption of the "shot clock" which established a presumptively reasonable period of time in which local siting authorities may review a siting application for the construction or installation of telecommunications equipment. The recent regulations regarding the deployment of small wireless facilities in the ROW is another iteration of the FCC's regulatory activity.

Preemption is the Worst.
Or, a Summary of the Recently Adopted Regulations Affecting Small Wireless Facility Siting

Known as the Declaratory Ruling and Third Report and Order Accelerating Wireless and Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, the rulemaking asserts the agency's authority to promulgate rules affecting local government's siting authority in the municipal ROW.[4] The primary objectives of the order are (1) defining what constitutes a material prohibition of personal wireless service, (2) establishing presumptively reasonable fees and standards that may be imposed by local governments, and (3) creating new shot clocks for applications to install small wireless facilities.[5]

1. Material Inhibition Standard
As stated above, under Sections 253(a) and 332(c)(7)(b) of the TCA, municipalities may not enforce local regulations that have the "effect of prohibiting" personal wireless services. However, when interpreting the TCA, federal courts have applied different standards of what constitutes an effective prohibition. Creating a uniform application, the recent rulemaking clarifies the definition of material prohibition and establishes the standard first articulated by the FCC's California Payphone decision as the appropriate basis for "determining whether a state or local law operates as a prohibition or effective prohibition [of service] within the meaning of Sections 253 and 332."[6] Specifically, if a local government imposes a requirement that "materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment" the regulation is prohibited.[7]

A regulation that materially inhibits the provision of services need not be an "insurmountable barrier."[8] Instead, an effective or material prohibition exists when a wireless provider cannot engage in actives related to providing telecommunications service. This includes activities such as filling coverage gaps, densifying networks, and introducing new services.[9] Put another way, service is materially inhibited when a wireless provider cannot strengthen its service or make it more reliable in a defined area, even when the territory is already covered by the provider's network.

Additionally, wireless infrastructure developers (e.g., Mobilitie, Crown Castle, ExteNet), as opposed to firms that are not only installing the infrastructure but

providing wireless service, are also covered by the order.[10] The FCC states, "The fact that facilities are sometimes deployed by third parties not themselves providing covered services also does not place such deployment beyond the purview of Section 253(a) or 332(c)(7)(B)(i), insofar as the facilities are used by wireless services providers on a wholesale basis to provide covered services." Therefore, the FCC eliminates any distinction between a wireless service provider and a wireless infrastructure developer, provided that the facility is used to transmit service. Consequently, any local regulation that inhibits or impedes the installation of wireless facilities by third parties or that provides preferential treatment to different providers would violate the TCA under the rule.

2. Fees and Installation Requirements

Fair and Reasonable Compensation

While Section 253(c) of the TCA permits local governments to receive "fair and reasonable compensation from telecommunications providers" for the use of the public ROW, the FCC concluded excessive fees materially inhibit the deployment of personal wireless service.[11] Verizon estimates that network densification and 5G deployment will require the installation of up to 100 times more antenna facilities than are currently in existence.[12] Noting that wireless providers have finite resources, the FCC found that the current per-facility fee structure imposed throughout the country is unsustainable due to number of small wireless facilities that will be required to upgrade wireless service to 5G. Moreover, the FCC stated that the imposition of fees by localities cannot be considered in isolation, as inflated fees enforced in one part of a state or the nation has the effect of constraining broadband development in other areas.[13]

Rejecting the interpretation that "fair and reasonable compensation" may be understood as market-based payments, the FCC concluded that all fees associated with the siting and installation of small wireless facilities must be limited to reasonable approximations of the local government's directly incurred costs imposed in a nondiscriminatory manner.[14] Thus, reasonable costs must be based on the actual costs incurred by the municipality, may not include exceptional third party consultant fees, and may not be used to generate revenue.[15] Additionally, the imposed charges must be applied consistently among similarly-situated applicants.

Presumptively Reasonable Fees

Having limited fair and reasonable compensation to a municipality's direct and actual costs, the FCC established a series of presumptively reasonable fees. Application fees are presumptively reasonable when limited to $500 for a single up-front application that includes up to five sites, and $100 per application for each site thereafter. Presumptively reasonable recurring charges for small wireless facilities in the ROW is $270 per site per year, which includes all related access, permitting, and rental fees.

The FCC established that the fees that may be imposed by a local government includes, "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 for 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)."[16] In short, all associated charges for the siting, permitting, and installation of small wireless facilities, regardless of whether the municipality owns the structure that is sought for the installation, are subject to the "direct, reasonable, and nondiscriminatory" requirements if they exceed the presumption.

Aesthetic and Safety Requirements

Local regulations that impose aesthetic requirements, including camouflaging and minimum spacing prescriptions, and safety considerations are explicitly preserved by the ruling. However, in order for a municipality to enforce such local standards, the regulations must be "(1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments, and (3) published in advance."[17] The FCC notes that certain undergrounding requirements for some wireless facilities would constitute an unlawful prohibition of service by a local government, as some of the auxiliary equipment for small cell sites cannot installed underground. Similarly, overly restrictive or onerous aesthetic considerations, even when published in advance, may run afoul of the TCA unless they are objective and "reasonable in that they are technically feasible and reasonably directed to avoiding or remedying the intangible public harm of unsightly or out-of-character deployments."18

3. New Shot Clocks

In addition to modernizing the terms and requirements of the TCA to reflect the realities presented by the installation of small wireless infrastructure, the FCC adopted new shot clocks for the siting applications of these network nodes. Under this rule, "small wireless facilities" are defined as antennas of no more than three cubic feet and associated equipment totaling no more than 28 cubic feet, placed on a structure that is either no more than 50 feet in height, no more than 10 percent taller than adjacent structures, or no more than 10 percent taller than the structure's preexisting height after the new antenna is placed. Local governments have 60 days to complete their review of applications for collocated small cells, and 90 days for applications to install small cells on new structures. "Collocation," under the rule, is defined as placing an antenna on any existing structure, regardless of whether that structure already has wireless equipment on it, or whether it was constructed specifically to host wireless equipment. Defining collocation with such breadth significantly increases the number of applications that are subject to the shorter clock.

Included in the new small cell shot clocks timeframe are "all aspects of and steps in the siting process." Therefore, any mechanism for review, permitting, licensing must be completed within the clock, including "mandatory pre-application procedures, license/franchise agreements for ROW access, public notice and meet-

ing periods, lease negotiations, building/encroachment/electric/road closure permits, and any other approvals imposed by the local siting authority."[19] The clock begins to run upon the submission of an application, irrespective of the application's completeness. However, the clock may be "tolled" (i.e. paused) if a local government notifies the applicant within 30 days of receipt that the application is incomplete, or through mutual agreement of the locality and the applicant. As was articulated in previous FCC rulemaking, moratoria on siting applications are prohibited and will not terminate the clocks.

What Do We Do Now?

Or, How Cities and Villages May Preserve ROW Control and Enforce Local Considerations

To ensure that local authorities preserve and retain control over considerations such as aesthetics and safety, municipal officials must clearly establish the standards for which applications will be reviewed. The FCC specifically states that local aesthetic requirements must be reasonable and objective, meaning local policies "must incorporate clearly-defined and ascertainable standards, applied in a principled manner – and must be published in advance."[20] While many cities and villages may not have previously implemented telecommunications policies that dictate how siting applications are reviewed, it is imperative that local governments establish written standards moving forward.

While articulating every consideration that a siting authority will impose when reviewing an application for the installation of small wireless facilities may seem like an arduous task, establishing a published set of requirements is the only way to enforce local standards. NYCOM recommends that cities and villages memorialize their standards in writing as quickly as possible and modify this policy as necessary. The FCC's rulemaking suggests that local governments will have an additional 180 days to adopt local considerations after the regulation is published in the Federal Register. However, the effective date of the rule remains January 14, 2019, thus local policies must be adopted without delay.

In addition to addressing aesthetics and safety issues, local governments should also provide written fee structures by either by adopting the FCC's presumptive fees or establish their own. While gross-revenue fees and other revenue-generating payments are prohibited, as previously noted, fees may exceed the presumptions established by the FCC when they are reasonable, neutral and nondiscriminatory, and reflect a "reasonable approximation of the locality's reasonable costs." Furthermore, because local governments are expressly prohibited from recovering any cost not directly related to ROW maintenance, such fees should reflect the all of the costs incurred by the municipality. Cities and villages are urged to determine and document all the direct and actual costs they sustain. Armed with the evidence of their reasonable and genuine expenditures, local governments may decide to either rely on the presumptive fee structure articulated by the FCC or rebut the presumption and establish their own fees.

Conclusion

Despite the FCC rigorously defending its authority to impose the regulations outlined here, most municipalities in the United States are arguing that the requirements represent a $2 billion subsidy for wireless service providers.[21] Some cities are mounting legal actions to challenge the preemption.[22] According to the FCC's own projections, the $2 billion savings for telecommunications providers represent less than one percent of the estimated $275 billion investment national 5G deployment will require over the next decade.[23]

Any resolution preserving local authority or upholding the FCC's regulations is years away and cities and villages in New York State must be proactive in preserving their remaining autonomy. Adopting policies that articulate the ways in which applications will be reviewed and aesthetic considerations will be imposed is paramount. Without articulated standards published in advance of their imposition, service providers will challenge the propriety of the regulations and may successfully avoid compliance with local policies under the new rule. Additionally, local governments must determine the actual costs they incur related to the installation and occupancy of small wireless facilities in the ROW in order to enforce any application and use fees exceeding the presumption established by the FCC.

For more information relating to the regulation of telecommunication services and to obtain copies of sample telecommunications policies, please contact NYCOM Counsel Rebecca Ruscito at (518) 463-1185 or by email at rebecca@nycom.org.

Endnotes

1. *Roger Cheng, Not just speed: 7 incredible things you can do with 5G, CNET, March 2, 2017, available at https://www.cnet.com/news/5g-not-just-speed-fifth-generation-wireless-tech-lets-you-do-vr-self-driving-cars-drones-remote/.*
2. *47 U.S.C.A. § 253.*
3. *47 U.S.C.A. § 253(c)*
4. *Accelerating Wireless and Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment [hereinafter, "Register"], 83 Fed. Reg. 51867 (October 15, 2018), available at https://www.gpo.gov/fdsys/pkg/FR-2018-10-15/pdf/2018-22234.pdf.*
5. *Id. at 51868.*
6. *Id.*
7. *Declaratory Ruling and Third Report and Order [hereinafter, "Declaratory Ruling"], at 13, September 5, 2018, available at https://docs.fcc.gov/public/attachments/DOC-353962A1.pdf.*
8. *Id at 14.*
9. *Id. at 15.*
10. *Id. n.75.*
11. *Id. at 21.*
12. *Id.*
13. *Register, supra note 4, at 51869 see also, Declaratory Ruling, supra note 7, at 31.*
14. *Declaratory Ruling, supra note 7, at 25.*
15. *Register, supra note 4, at 51870; see also, Declaratory Ruling, at 25-26.*
16. *Register, supra note 4, at 51869.*
17. *Id. at 51871; see also, Declaratory Ruling, supra note 7, at 38-40.*
18. *Register, supra note 4, at 51871*
19. *National League of Cities, Summary of FCC Small Cell Order, September 18, 2018.*
20. *Register, supra note 4, at 51871.*
21. *See, Jon Brodkin, Cities will sue FCC to stop $2 billion giveaway to wireless carriers, ARS Technica, October 3, 2018, available at https://arstechnica.com/tech-policy/2018/10/cities-will-sue-fcc-to-stop-2-billion-giveaway-to-wireless-carriers/.*
22. *Hiawatha Bray, Towns upset over new FCC limits on telecom fees, The Boston Globe, October, 2, 2018, available at, https://www.bostonglobe.com/business/2018/10/02/mass-towns-upset-over-new-fcc-limits-telecom-fees/T0bKqkzAHF9AwCEVrdwv9M/story.html; see also, Gordon Friedman, Portland may sue Trump's FCC over new 5G tech rulings, The Oregonian, October 2, 2018, available at https://www.oregonlive.com/portland/index.ssf/2018/10/portland_may_sue_trumps_fcc_ov.html.*
23. *Declaratory Ruling, supra note 7, at 2.*