

# FCC ACTION ON DEPLOYMENT OF WIRELESS INFRASTRUCTURE FOR 5G CONNECTIVITY IMPOSES NEW LIMITS ON MUNICIPAL AUTHORITY

*Telecommunications Alert*  
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As part of its ongoing efforts at removing regulatory barriers inhibiting the deployment of wireless infrastructure required for 5G and other advanced telecommunications services, the FCC issued (September 26, 2018) in a *Declaratory Ruling* and a *Third Report and Order*. Local fees for the approvals necessary to deploy small wireless facilities are addressed in the *Declaratory Ruling*. Matters regarding shot clocks are addressed in the *Third Report and Order*.

## *Declaratory Ruling*

1. This Ruling clarifies when state or local regulation of wireless infrastructure deployment constitutes an effective prohibition of service prohibited by certain sections of the Communications Act. Specifically, it expresses FCC agreement with the “materially inhibit” standard articulated by three circuit courts as the appropriate standard for determining whether a state or local law operates as a prohibition or effective prohibition within the meaning of Sections 253 and 332.
2. Because state and local fees and other charges associated with the deployment of wireless infrastructure can unlawfully prohibit the provision of service, the Ruling creates a standard regarding small wireless facilities and declares that “fees are only permitted to the extent that they are nondiscriminatory and represent a reasonable approximation of the locality’s reasonable costs.”
3. Specific fee levels for small wireless facility deployments are identified by the Ruling that presumably comply with the relevant standard and are created so as to avoid unnecessary litigation over fees.
4. Recognizing the “...the significant impact of aesthetic requirements on the ability to deploy infrastructure and provide service,” the Ruling provides guidance on whether and in what circumstances aesthetic requirements may amount to an effective prohibition of service. It declares that aesthetics requirements are not preempted if they are reasonable, no more burdensome than those applied to other types of infrastructure deployments, and objective and published in advance.

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Note: The published in advance requirement should be seen as a call to arms for municipalities to enact regulations. Even moratoriums commonly used to gain breathing space may well be seen as running afoul of the Decision

With respect to small wireless infrastructure deployment, the *Third Report and Order*:

- Reduces the shot clock for the review of an application for the collocation of small wireless facilities using a preexisting structure from 90 days to 60 days. Several reasons were expressed for the reduced shot clock: collocation applications are generally easier to process than new construction because the community impact is likely to be smaller; adding an antenna to an existing tower or other structure is unlikely to have a significantly visual impact on the community; the size of small wireless deployments poses little or no risk of adverse effects on the environment or historic preservation and many jurisdictions do not require public hearings for collocation attachments. Adopting a 60 day shot clock, the FCC believes, will encourage service providers to collocate instead of choosing to build new siting structures.
- Reduces the shot clock for new builds involving small wireless deployments from 150 days to 90 days. The FCC concluded that review of an application to deploy a small wireless facility using a new structure warrants more review time than mere collocation but less than the construction of a macro tower.
- Declares that state and local government approvals needed for the deployment of personal wireless service infrastructure are subject to those shot clocks.
- Creates a new remedy for violations of the small wireless facilities shot clocks by finding that a failure to act within the new small wireless facility shot clock amounts to a presumptive prohibition on the provision of services. According to the FCC, creating an additional remedy will substantially reduce the likelihood that applicants will need to pursue additional and costly litigation, in the form of expedited permanent and injunctive relief, at the expiration of the shot clock time periods.
- Clarifies certain corollary issues regarding shot clocks.

The Declaratory Ruling and Order will significantly impact local laws and review of applications.

Please contact Charles Malcomb and Michael Reyen for more information.