Telecommunications Alert: FCC Issues Declaratory Ruling Clarifying Processes For State And Local Responses To Tower Siting Requests

11/23/2009

On November 18, 2009, the Federal Communications Commission (FCC or "Commission") issued a Declaratory Ruling (the "Ruling") addressing matters related to the permitting and related processes that wireless carriers face to secure antenna siting approval. Below is a brief summary of the Ruling.

Background

The Ruling responds to a petition filed by the CTIA–The Wireless Association (CTIA) (the "Petition") that sought the relief as described below.

First, the Petition requested that the FCC interpret Section 332(c)(7)(B)(v), which provides (in relevant part): "Any person adversely affected by any final action or ***failure to act*** by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction…." (emphasis added). The Petition requested that the FCC interpret this provision to mean that (a) a State or local government "fails to act" if it does not render a final decision within 45 days of the filing of a wireless siting collocation application or within 75 days of the filing of a wireless siting non-collocation application; and (b) an application is deemed granted if a State or local government fails to act within these timeframes, or alternatively that the failure to act within these timeframes establishes a presumption entitling the applicant to a court-ordered injunction granting the application unless the zoning authority can justify the delay.[1]

Second, the Petition requested that the FCC interpret Section 332(c)(7)(B)(i)(II)—which forbids zoning decisions that "prohibit or have the effect of prohibiting the provision of personal wireless services"—to bar decisions based solely on the fact that service is already being provided to a particular area by other carriers.[2]

Finally, the Petition asked the FCC to rule that local ordinances or State laws that automatically require a wireless service provider to obtain a variance before siting facilities are unlawful and preempted under Section 253(a).[3]

Summary of the Ruling

The FCC granted the Petition in part (and denies it in part), deciding:

1. it has authority to issue a declaratory ruling interpreting Section 332(c)(7)(B);
2. State and local governments must process siting applications within 90 days for collocation facilities and 150 days for all other facilities and, subject to specified exceptions (discussed below), a State or local government's failure to process an application within these time periods is presumptively an unreasonable failure to act under Section 332(c)(7)(B);
3. if a State or local government denies an application for personal wireless service facilities ***solely*** because one or more carriers already serve a given geographic market, such denial is an unlawful prohibition under Section 332(c)(7)(B)(i)(II); and
4. the Petition did not present any specific controversy to justify declaratory relief that zoning ordinances requiring variances for all applications are unlawful and preempted by Section 253.

The FCC Has Authority To Interpret Section 332)(c)(7)(B) and Issue Guidelines for Compliance with that Provision

The FCC concluded it has authority to issue a declaratory ruling interpreting Section 332(c)(7)(B). In so concluding, the FCC rejected the argument by State and local governments that Congress vested exclusive jurisdiction to the courts to interpret Section 332(c)(7)(B).

The Ruling Sets Specific Limits on Processing Time for Personal Wireless Service Applications, and Concludes a State or Local Government's Failure To Process an Application Within These Times Is Presumptively an Unreasonable and Unlawful Failure to Act

The Ruling provided the following interpretation of, and guidelines for compliance with, Section 332(c)(7)(B)(v) of the Act:

- A reasonable period of time to process personal wireless service facility siting applications is presumptively 90 days for applications requesting collocations, and 150 days to process all other applications.[4]
- If applications are not acted upon within those timeframes, then a "failure to act" has occurred within the meaning of Section 332(c)(7)(B)(v), and an applicant may seek redress in court within 30 days of this failure to act as provided by Section 332(c)(7)(B)(v).[5]
- In such a court challenge, the failure to act by a State or local government within the appropriate 90- or 150-day period is presumed unreasonable, but the State or local government has an opportunity to rebut this unreasonableness presumption.[6]
- If a court finds that the State or locality has not rebutted the presumption of failure to act within a reasonable time, the court should determine an appropriate remedy based on the record, which could, but need not necessarily be, an injunction ("The State or local authority's

exceeding a reasonable time for action would not, in and of itself, entitle the siting applicant to an injunction granting the application").[7]

- The 90- or 150-day "reasonable period of time" thresholds can be extended by mutual consent of the applicant and the State or local government, and the 30-day period for filing suit is tolled in such instances.[8]
- The Ruling is not meant to interfere with enforcement mechanisms for shorter periods under State or local law, such that "where the review period in a State statute or local ordinance is shorter than the 90-day or 150-day period, the applicant may pursue any remedies granted under the State or local regulation when the applicable State or local review period has lapsed."[9]
- Generally, for currently pending applications (applications pending as of the Ruling), the applicable 90- or 150-day period runs from the date of the Ruling. (So, for example, if an application for a collocation facility was filed on October 18, 2009, and had been pending 30 days when the Ruling was issued, the 90-day period runs from November 18, 2009, not from when the application was filed).[10]
- However, for applications that have already been pending for longer than the applicable 90- or 150-day period as of the November 18, 2009 Ruling date, an applicant may choose to give the State or local government notice of the Ruling (which notice must include a copy of the Ruling, itself). An applicant can then file suit if the State or local government fails to act within 60 days of receiving notice of the Ruling.[11]
- When applications are deemed incomplete as filed, the 90- or 150-day timeframes do not include the time that an applicant takes to respond to a request for additional information, provided that the State or local government notifies the applicant that the application is incomplete/additional information is needed within 30 days of the application's filing date.[12]

The Ruling Confirms that Denial of an Application Solely Because Another Carrier Serves a Given Geographic Market Is an Unlawful Prohibition under Section 332(c)(7)(B)(i)(II)

The Ruling concludes that "a State or local government that denies an application for personal wireless service facilities solely because 'one or more carriers serve a given geographic market' has engaged in unlawful regulation that 'prohibits or ha[s] the effect of prohibiting the provision of personal wireless services,' within the meaning of Section 332(c)(7)(B)(i)(II)."[13] In so concluding, the Ruling purports to resolve differing interpretations of this issue by the courts.[14] Moreover, in so ruling, the FCC "agree[d] with the Petitioner that the fact that another carrier or carriers provide service to an area is an inadequate defense under a claim that a prohibition exists, and … any other interpretation of this provision would be inconsistent with the Telecommunication Act's pro-competitive purpose."[15]

The FCC Refuses To Declare that Section 253 Preempts Ordinances that Require Variances for All Applications, Finding No Case or Controversy

Finally, the Ruling denies "CTIA's request for preemption of ordinances that impose blanket variance requirements on the siting of wireless facilities," concluding that, "[b]ecause CTIA does

not seek actual preemption of any ordinance by its Petition, we decline to issue a declaratory ruling" that such ordinances are unlawful and will be struck down if challenged under Section 253 preemption.[16] Moreover, the FCC also stated that "we make no interpretation of whether and how a matter involving a blanket ordinance for personal wireless service facility siting would be treated under Section 332(c)(7) and/or Section 253…."[17]

Endnotes

[1] Ruling, ¶ 10.

[2] *Id.*, ¶ 11.

[3] *Id.*, ¶ 12. Section 253(a) states: "No 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."

[4] *Id.*, ¶ 32.

[5] *Id.*

[6] *Id.*

[7] *Id.*, at fn. 99.

[8] *Id.*, ¶ 49.

[9] *Id.*, ¶ 50.

[10] *Id.*, ¶ 51.

[11] *Id.*

[12] *Id.*, ¶¶ 52-53.

[13] *Id.*, ¶ 56.

[14] *Id.*, at fn. 175 (discussing cases).

[15] *Id.*, ¶ 56.

[16] *Id.*, ¶ 67.

[17] *Id.*

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