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Wireless Site Applications: It's My Party (the FCC) and I'll Decide How I Want To

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When a Federal statute is ambiguous, who gets to decide what it means—judges or the agency in charge of administering the statute? In its recent holding in *City of Arlington v. Federal Communications Commission* issued earlier this year, the U.S. Supreme Court sided with the latter.

Although the Court's ruling pertains to a narrow issue of administrative law, the *City of Arlington* decision, which centered around FCC guidelines for local government approval of wireless site applications, may have practical implications for the telecommunications industry. As anyone involved in the wireless telecommunications industry knows, wireless telecommunications networks require towers and antennas; proposed sites for those towers and antennas must be approved by local zoning authorities. The *City of Arlington* decision may result in more timely local approvals of installations of wireless service equipment and upgrades. However, the decision may also impose a financial strain on local zoning and planning agencies, which may end up being passed down to the wireless provider or building owner and tenant (the customers).

The Federal Telecommunications Act recognizes that State and local agencies have jurisdiction over the placement, construction, and modification of personal wireless service facilities, but places express limitations on the power of these local agencies. The limitation subject to the decision in the *City of Arlington* case is that the State or local agency considering the application of a wireless provider must act on the application "within a reasonable period of time."[i]

But what is a "reasonable period of time" and who gets to decide that issue?

Acting on a petition from the wireless industry, in 2009 the FCC defined a "reasonable period of time" to "presumptively" mean (subject to rebuttal), 90 days to process a collocation application (an application to place a new antenna on an existing tower) and 150 days to process all other wireless facilities applications.

Recognizing the burden these time frames would have on administrators, various State and local governments opposed the FCC determination on the ground that the FCC lacked the "authority" to interpret the ambiguous provisions of the Act (wanting, instead, a Federal court to make the decision). Asserting that ground of objection, the cities of Arlington and San Antonio, Texas, petitioned the U.S. Supreme Court for a decision on the question of whether a Federal agency or a Federal court gets to determine the scope of an agency's authority to interpret the statute which it is delegated to administer by the U.S. Congress.

The leading case in this area is a 1984 U.S. Supreme Court decision in *Chevron v. Natural Resources Defense Council* (NRDC). In that case, the NRDC challenged a regulation by the Environmental Protection Agency (EPA) that attempted to clarify an ambiguous standard in the Clean Air Act. When the lower court ruled in favor of the NRDC, Chevron, an interested party, appealed. The Court upheld the EPA's interpretation, holding that when Congress gives a Federal agency the power to issue regulations, that agency is also entitled to interpret any ambiguities in the original legislation as long as such interpretation is reasonable.

But what about an agency's authority to determine the scope of its own power to administer a Federal statute? Can the agency determine the scope of its own jurisdiction, where the statute is ambiguous, not just the application of the statute, where its application is

ambiguous? For example, if the Telecommunications Act lets the FCC regulate "common carriers", can the FCC determine that Internet Service Providers are common carriers, or should a Federal judge, make the call because it is a "jurisdictional" question?

The City of Arlington clearly wanted a Federal court to decide whether a 90-day and 150-day period for considering carrier applications was "reasonable" and couched its argument in terms of the "*who, what, where,* and *when* of regulatory power"—the jurisdiction of the agency.

The U.S. Supreme Court rejected these arguments and clarified the preemptive effect of the FCC's authority, and in doing so effectively confirmed Congress' intent to limit the scope of local governments' power, which many lower courts had until now challenged by ruling in favor of traditional local authority.

While wireless providers, landowners and tenants may benefit from the timely approval and installation of wireless service equipment and upgrades, the burden caused by these time frames on a municipality may ultimately be costly to the end user/customer. What happens if a city needs to hire additional manpower to meet these time frames? What about the cost of defending against alleged violations of these "reasonable" time frames? How will these additional costs be recouped, and by whom: the taxpayers or wireless providers? And how will these increased costs affect rooftop or tower lease negotiations?

The full extent of Arlington's impact on the industry is yet to be known. On a broader, policy-making note, *Arlington* will undoubtedly impact decisions by the current and future administrations as they relate to ambiguities in other Federal statutes, such as the Affordable Care Act and the Wall Street Reform and Consumer Protection Act.

An early test of *Arlington's* impact will be the D.C. Circuit opinion in *Verizon Communications Inc. v. FCC*, in which Verizon challenged the FCC's authority to classify Internet service providers as quasi-common carriers. The *Arlington* majority's clear implication is that the *Chevron* standard should apply here and, not surprisingly, following the *Arlington* case, the FCC promptly filed a supplement to its brief with the D.C. Circuit.[ii]

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[i] The other limitations imposed on state and local agencies in regulating wireless telecommunications providers are: (i) any denial of an application must be in writing and supported by substantial evidence, (ii) any person adversely affected by any agency's action inconsistent with Federal requirements must commence a lawsuit within 30 days, and (iii) agencies may not regulate tower placement based on the environmental effects of radio frequency emissions if such facilities comply with the FCC's regulations on emissions.

[ii] This case is currently pending in the U.S. Court of Appeals for the District of Columbia, which directly reviews the rulemaking of Federal agencies, often without a district court's prior hearing.