

September 5, 2018

**FCC FACT SHEET**<sup>1</sup>

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**Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment;  
Accelerating Wireline 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

**Background:** To meet rapidly increasing demand for wireless services and prepare our national infrastructure for 5G, providers must deploy infrastructure at significantly more locations using new, small cell facilities. Building upon streamlining actions already taken by state and local governments, this *Declaratory Ruling and Third Report and Order* is part of a national strategy to promote the timely buildout of this new infrastructure across the country by eliminating regulatory impediments that unnecessarily add delays and costs to bringing advanced wireless services to the public.

**What the Declaratory Ruling and Third Report and Order Would Do:**

- Clarify the scope and meaning of the effective prohibition standard set forth in Sections 253 and 332(c)(7) of the Communications Act as they apply to state and local regulation of wireless infrastructure deployment.
- Conclude that Sections 253 and 332(c)(7) limit state and local governments to charging fees that are no greater than a reasonable approximation of their costs for processing applications and for managing deployments in the rights-of-way.
- Identify specific fee levels for small wireless facility deployments that presumably comply with the relevant standard.
- Provide guidance on certain state and local non-fee requirements, including aesthetic and undergrounding requirements.
- Establish two new shot clocks for small wireless facilities (60 days for collocation on preexisting structures and 90 days for new builds) and codify the existing 90 and 150 day shot clocks for non-small wireless facility deployments that were established in the *2009 Declaratory Ruling*.
- Make clear that all state and local government authorizations necessary for the deployment of personal wireless service infrastructure are subject to those shot clocks.
- Conclude that a failure to act within the new small wireless facility shot clock constitutes a presumptive prohibition on the provision of services. Accordingly, we would expect local governments to provide all required authorizations without further delay.

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15. Several provisions of the 1996 Act speak directly to Congress's determination that certain state and local regulations are unlawful. **Section 253(a) provides 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."**<sup>9</sup> Courts have observed that Section 253 represents a "broad preemption of laws that inhibit competition."<sup>10</sup>

16. The Commission has issued several rulings interpreting and providing guidance regarding the language Congress used in Section 253. For instance, in the 1997 *California Payphone* decision, the Commission, under the leadership of then Chairman William Kennard, stated that, in determining whether

a state or local law has the effect of prohibiting the provision of telecommunications services, it “consider[s] whether the ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”<sup>11</sup>

**17. Similar to Section 253, Congress specified in Section 332(c)(7) 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.”**<sup>12</sup> Clause (B)(ii) of that section further provides that “[a] State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.”<sup>13</sup> Section 332(c)(7) generally preserves state and local authority over the “placement, construction, and modification of personal wireless service facilities” but with the important limitations described above.<sup>14</sup> Section 332(c)(7) also sets forth a judicial remedy, stating that “[a]ny person adversely affected by any final action or failure to act by a State or local government” that is inconsistent with the requirements of Section 332(c)(7) “may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction.”<sup>15</sup> The provision further directs the court to “decide such action on an expedited basis.”<sup>16</sup>

### C. Other State and Local Requirements that Govern Small Facilities Deployment

78. There are also other types of state and local land-use or zoning requirements that may restrict Small Wireless Facility deployments to the degree that they have the effect of prohibiting service in violation of Sections 253 and 332. **In this section, we discuss how those statutory provisions apply to requirements outside the fee context both generally, and with particular focus on aesthetic and undergrounding requirements.**

79. As discussed above, a state or local legal requirement constitutes an effective prohibition if it “materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”

80. Given the wide variety of possible legal requirements, we do not attempt here to determine which of every possible non-fee legal requirements are preempted for having the effect of prohibiting service, although our discussion of fees above should prove instructive in evaluating specific requirements. Instead, we focus on some specific types of requirements raised in the record and provide guidance on when those particular types of requirements are preempted by the statute.

81. *Aesthetics.* The *Wireless Infrastructure NPRM/NOI* sought comment on whether deployment restrictions based on aesthetic or similar factors are widespread and, if so, how Sections 253 and 332(c)(7) should be applied to them.<sup>218</sup> Parties describe a wide range of such requirements that allegedly restrict deployment of Small Wireless Facilities. For example, many providers criticize burdensome requirements to deploy facilities using “stealth” designs or other means of camouflage,<sup>219</sup> as well as unduly stringent mandates regarding the size of equipment, colors of paint, and other details.<sup>220</sup> Providers also assert that the procedures some localities use to evaluate the appearance of proposed facilities and to decide whether they comply with applicable land-use requirements are

overly restrictive.<sup>221</sup> Many providers are particularly critical of the use of unduly vague or subjective criteria that may apply inconsistently to different providers or are only fully revealed after application, making it impossible for providers to take these requirements into account in their planning and adding to the time necessary to deploy facilities.<sup>222</sup> At the same time, we have heard concerns in the record about carriers deploying unsightly facilities that are significantly out of step with similar, surrounding deployments.

82. State and local governments add that many of their aesthetic restrictions are justified by factors that the providers fail to mention. They assert that their zoning requirements and their review and enforcement procedures are properly designed to, among other things, (1) ensure that the design, appearance, and other features of buildings and structures are compatible with nearby land uses; (2) manage ROW so as to ensure traffic safety and coordinate various uses; and (3) protect the integrity of their historic, cultural, and scenic resources and their citizens' quality of life.<sup>223</sup>

83. Given these differing perspectives and the significant impact of aesthetic requirements on the ability to deploy infrastructure and provide service, we provide guidance on whether and in what circumstances aesthetic requirements violate the Act. This will help localities develop and implement lawful rules, enable providers to comply with these requirements, and facilitate the resolution of disputes. We conclude that aesthetics requirements are not preempted if they are (1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments, and (3) published in advance.

84. Like fees, compliance with aesthetic requirements imposes costs on providers, and the impact on their ability to provide service is just the same as the impact of fees. We therefore draw on our analysis of fees to address aesthetic requirements. We have explained above that fees that merely require providers to bear the direct and reasonable costs that their deployments impose on states and localities should not be viewed as having the effect of prohibiting service and are permissible.<sup>224</sup> Analogously, aesthetic requirements that are reasonable in that they are reasonably directed to avoiding or remedying the intangible public harm of unsightly or out-of-character deployments are also permissible. In assessing whether this standard has been met, aesthetic requirements that are more burdensome than those the state or locality applies to similar infrastructure deployments are not permissible, because such discriminatory application evidences that the requirements are not, in fact, reasonable and directed at remedying the impact of the wireless infrastructure deployment.

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The Commission then addresses other issues related to both the existing and new shot clocks. In particular we address the specific types of authorizations subject to the "Reasonable Period of Time" provisions of Section 332(c)(7)(B)(ii), finding that "any request for authorization to place, construct, or modify personal wireless service facilities" under Section 332(c)(7)(B)(ii) means all authorizations a locality may require, and to all aspects of and steps in the siting process, including license or franchise agreements to access ROW, building permits, public notices and meetings, lease negotiations, electric permits, road closure permits, aesthetic approvals, and other authorizations needed for deployment of personal wireless services infrastructure.<sup>415</sup> The Commission also addresses collocation on structures not previously zoned for wireless use,<sup>416</sup> when the four Section 332 shot clocks begin to run, the impact of incomplete applications on our Section 332 shot clocks, and how state imposed shot clocks effect our Section 332 shot clocks.

4. Finally, the Commission discuss the appropriate judicial remedy that applicants may pursue in cases where a siting authority fails to act within the applicable shot clock period.<sup>420</sup> In those situations, applicants may commence an action in a court of competent jurisdiction alleging a violation of Section 332(c)(7)(B)(i)(II) and seek injunctive relief granting the application. Notwithstanding the availability of a judicial remedy if a shot clock deadline is missed, the Commission recognizes that the Section 332 time frames might not be met in exceptional circumstances and has refined its interpretation of the circumstances when a period of time longer than the relevant shot clock would nonetheless be a reasonable period of time for action by a siting agency.<sup>421</sup> In addition, a siting authority that is subject to a court action for missing an applicable shot clock deadline has the opportunity to demonstrate that the failure to act was reasonable under the circumstances and, therefore, did not materially limit or inhibit the applicant from introducing new services or improving existing services thereby rebutting the effective prohibition presumption.

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**§ 1.6002 Definitions. Terms used in this subpart have the following meanings:**

(a) *Action* or *to act* on a siting application means a siting authority's grant of a siting application or issuance of a written decision denying a siting application.

(e) *Applicant* means a person or entity that submits a siting application and the agents, employees, and contractors of such person or entity.

(f) *Authorization* means any approval that a siting authority must issue under applicable law prior to the deployment of personal wireless service facilities, including, but not limited to, zoning approval and building permit.

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Coal. Comments, Docket 16- 421, at 47 (filed Mar. 8, 2017) (referenced by Austin's Comments).

<sup>310</sup> See *infra* para. 139.

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114. State or local inaction by the end of the Small Wireless Facility shot 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). Accordingly, we would expect the state or local government to issue all necessary permits without further delay. In cases where such action is not taken, we assume, for the reasons discussed below, that the applicant would have a straightforward case for obtaining expedited relief in court.<sup>311</sup>

115. As discussed in the Declaratory Ruling, a regulation under Section 332(c)(7)(B)(i)(II) constitutes an effective prohibition if it materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.<sup>312</sup> Missing shot clock deadlines would thus presumptively have the effect of unlawfully prohibiting service in that such failure to act can be expected to materially limit or inhibit the introduction of new services or the improvement of existing services.<sup>313</sup> Thus, when a siting authority misses the applicable shot clock deadline, the applicant may commence suit in a court of competent jurisdiction alleging a violation of Section 332(c)(7)(B)(i)(II), in addition to a violation of Section 332(c)(7)(B)(ii), as discussed above. The siting authority then will have an opportunity to rebut the presumption of effective prohibition by demonstrating that the failure to act was reasonable under the circumstances and, therefore, did not materially limit or inhibit the applicant from introducing new services or improving existing services.

116. Given the seriousness of failure to act within a reasonable period of time, we expect, as noted above, siting authorities to issue without any further delay all necessary authorizations when notified by the applicant that they have missed the shot clock deadline, absent extraordinary circumstances. Where the siting authority nevertheless fails to issue all necessary authorizations and litigation is commenced based on violations of Sections 332(c)(7)(B)(i)(II) and/or 332(c)(7)(B)(ii), we expect that applicants and other aggrieved parties will likely pursue equitable judicial remedies.<sup>314</sup> Given the relatively low burden on state and local authorities of simply acting—one way or the other—within the Small Wireless Facility shot clocks, we think that applicants would have a relatively low hurdle to clear in establishing a right to expedited judicial relief. Indeed, for violations of Section 332(c)(7)(B), courts commonly have based the decision whether to award permanent injunctive relief on several factors. As courts have concluded, permanent injunctions fulfill Congressional intent that action on applications be timely and that courts consider violations of Section 332(c)(7)(B) on an expedited basis.<sup>315</sup> In addition, courts have observed that “[a]lthough Congress in the Telecommunications Act left intact some of local zoning boards’ authority under state law,” they should not be owed deference on issues relating to Section 332(c)(7)(B)(ii), meaning that “in the majority of cases the proper remedy for a zoning board decision

<sup>311</sup> Where we discuss litigation here, we refer, for convenience, to “the applicant” or the like, since that is normally the party that pursues such litigation. But we reiterate that under the Act, “[a]ny person adversely affected by” the siting authority’s failure to act could pursue such litigation. 47 U.S.C. § 332(c)(7)(B)(v).

<sup>312</sup> See *supra* paras. 34-40.

<sup>313</sup> See *supra* paras. 34-40.

<sup>314</sup> See, e.g., *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12978, para. 284.

<sup>315</sup> See, e.g., *Green Mountain Realty Corp. v. Leonard*, 750 F.3d 30, 41 (1st Cir. 2014) (addressing claimed violation of Section 332(c)(7)(B)(i)(II) of the Act); *Nat’l Tower, LLC v. Plainville Zoning Bd. of Appeals*, 297 F.3d 14, 21-22 (1st Cir. 2002) (same); *Cellular Telephone Co. v. Town of Oyster Bay*, 166 F.3d 490, 497 (2d Cir. 1999) (addressing violation of Section 332(c)(7)(B)(v) of the Act); *AT&T Mobility Svcs., LLC v. Village of Corrales*, 127 F. Supp. 3d 1169, 1175-76 (D.N.M. 2015) (addressing violation of Section 332(c)(7)(B)(i)(II)); *Bell Atlantic Mobile of Rochester v. Town of Irondequoit*, 848 F. Supp. 2d 391, 403 (W.D.N.Y. 2012) (addressing violation of Section 332(c)(7)(B)(ii)); *New Cingular Wireless PCS, LLC v. City of Manchester*, 2014 WL 79932, \*8 (D.N.H. Feb. 28, 2014) (addressing violation of Section 332(c)(7)(B)(i)(II)).

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that violates the Act will be an order. . . instructing the board to authorize construction.”<sup>316</sup> Such relief also is supported where few or no issues remain to be decided, and those that remain can be addressed