

Overview of Legal Challenges to the FCC's 5G Order on Small Cell Siting

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On September 26, 2018, the Federal Communications Commission (FCC) adopted a [Declaratory Ruling and Third Report and Order](#), titled “Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment” (the Order). In the Order, the FCC clarified when the Telecommunications Act of 1996 (P.L. 104-104) preempts state and local requirements related to the deployment of fifth-generation (5G) wireless infrastructure. It also set time frames (or “shot clocks”) for localities to review 5G infrastructure applications. As [described](#) in a press release, the FCC issued the Order in order to “remove regulatory barriers that inhibit the deployment of infrastructure necessary for 5G and other advanced wireless services.” Some cities, however, have criticized the Order as federal overreach. For instance, the CEO and Executive Director of the U.S. Conference of Mayors [stated](#) that the Order “misapplies federal law to federalize local public property” and “needlessly introduce[s] increased risk of right-of-way and other public safety hazards.” On the other hand, [several mobile service providers](#) have maintained that the FCC did not go far enough, arguing that the Order should have included a “deemed granted” provision automatically approving applications after the shot clocks expire. A number of [localities](#) and [mobile service providers](#) have acted on these views by filing petitions challenging the Order in various federal appellate courts. Although the Order went into effect on January 14, 2019, these challenges remain ongoing and have been consolidated in the Ninth Circuit Court of Appeals.

This Sidebar begins by providing a brief overview of 5G networks. It then reviews the substance of the Order, discusses the legal challenges to the Order, and, finally, offers considerations for Congress concerning the ongoing litigation.

5G Networks

5G networks are the [latest generation](#) of mobile phone technologies. Mobile service providers are currently in the process of deploying 5G networks throughout the country, and some providers have already launched 5G services in certain cities. Once fully implemented, 5G will offer increased bandwidth and faster speeds than previous generations of mobile phone technologies. In part, this increased speed and capacity will be achieved through improvements to 4G networks and by using [higher radio frequencies](#) (frequencies in the 30 to 300 gigahertz range), which have not been used for mobile radio communications previously.

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The use of higher frequencies requires mobile service providers to install new infrastructure and equipment. Previous generations of mobile technology relied on lower-frequency waves that can travel longer distances and through buildings and other objects, and thus used [tall towers](#) spaced far apart to provide service. In contrast, the high-frequency waves used for 5G can travel short distances and cannot [easily penetrate objects](#). Consequently, the 5G network employs numerous, smaller cell sites placed close together to relay signals across longer distances and around obstacles. These are referred to as “[small cell sites](#)” or “[Small Wireless Facilities](#).” These small cell sites can be installed on structures such as street lights, utility poles, or buildings. 5G networks are discussed in further detail in the [CRS Report R45485](#), *Fifth-Generation (5G) Telecommunications Technologies: Issues for Congress*, by Jill C. Gallagher and Michael E. Devine.

The Order

Because installing small cell sites generally requires approval from state or local governmental bodies, the FCC issued the Order to limit state and local “[regulatory barriers](#).” The Order [notes](#) that, while many cities have acted to “facilitate the deployment of 5G,” some “outlier conduct persists.” The Order [points](#) to instances of cities imposing high fees and onerous zoning and other requirements, as well as situations where cities failed to rule on installation applications for long periods of time. To that end, the Order addresses state and local action in two main ways. First, it clarifies when the Telecommunications Act preempts state and local regulations that may inhibit a mobile service provider’s ability to provide a service to an area; in particular, it addresses preemption of state and local fees and other requirements, such as aesthetic limitations. Second, it sets time frames applicable to localities’ review of small cell site applications.

Preemption

The Order’s discussion of preemption [begins](#) by interpreting the Telecommunication Act’s two relevant preemption provisions: Sections 253 and 332(c)(7). Subject to certain exceptions, these sections preempt state and local requirements that “prohibit or have the effect of prohibiting the ability of any entity” to provide “telecommunications” or “personal wireless services.” The Order interprets these provisions as imposing a “material inhibition” standard, [concluding](#) that a law “ha[s] the effect of prohibiting” a telecommunications entity from providing service 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.” The Order [notes](#) that this “material inhibition” standard was first adopted in the FCC’s 1997 [California Payphone](#) decision and is consistent with decisions of the First, Second, and Tenth Circuit Courts of Appeals. The Order acknowledges that some courts have read the preemption provisions as requiring evidence of a “[coverage gap](#)” or “[an existing or complete inability to offer a telecommunications service](#).” However, the Order rejects these alternative interpretations, [reasoning](#) that the “‘effectively prohibit’ language must have some meaning independent of the ‘prohibit’ language.”

After establishing the “material inhibition” standard, the Order applies it to fees. The Order [explains](#) that state or local fees charged to mobile service providers for deploying small cell sites violate Sections 253 and 332(c)(7) unless they: (1) are a reasonable approximation of the state or local government’s costs, (2) only factor in costs that are “objectively reasonable,” and (3) are no higher than fees charged to similarly situated competitors. Along with setting out this three-part test, the Order identifies specific fee limits that are presumptively allowed under Sections 253 and 332(c)(7). For non-recurring fees, such as up-front applications for small cell site installations, localities [may charge up to \\$500](#), subject to certain exceptions. For recurring fees, such as access fees, localities [may charge up to \\$270](#) per year. While fees within these limits presumptively comply with Sections 253 and 332, the Order [explains](#) that localities

may charge fees above these amounts by showing that they nonetheless comply with the three-part test due to local cost variances.

In addition to fees, the Order applies the “materially inhibits” standard to three types of non-fee requirements. Specifically, it addresses state and local laws imposing [aesthetic requirements](#), [undergrounding requirements](#) (i.e., laws mandating that wireless infrastructure be deployed underground), and [minimum spacing requirements](#) (i.e., laws requiring wireless facilities be a certain minimum distance apart from each other). The Order articulates a three-part test for evaluating these restrictions. [According to the Order](#), such requirements are not preempted if they are: “(1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments, and (3) objective and published in advance.” While the Order [explains](#) that this standard should be applied to all three types of requirements, it also [notes](#) that laws requiring all wireless facilities be deployed underground would amount to an “effective prohibition,” given the “propagation characteristics of wireless signals.”

Shot Clocks

The [other main component](#) of the Order sets time frames governing how quickly localities must review applications for installing small cell sites. Under these shot clocks, state and local governments must decide applications within either [60 or 90 days](#), depending on whether the installation will be on an existing structure or new structure. As with past shot clocks, the Order [roots](#) the legal authority for these shot clocks in Section 332(c)(7), which [requires](#) localities to “act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable time.”

The FCC [declined](#), however, to adopt a “deemed granted” remedy, which would automatically deem an application granted whenever the locality fails to decide it within the shot clock periods. The Order [explains](#) that in situations where a jurisdiction missed the shot clock deadline, the applicant should, in most cases, be able to obtain expedited relief in court under Section 332(c)(7), which [directs](#) courts to decide suits brought by any adversely affected person on an “expedited basis.” [According to the Order](#), in such cases, applicants should have a “relatively low hurdle to clear in establishing a right to expedited judicial relief,” since missing the shot clock would amount to a presumptive violation of Section 332(c)(7).

Legal Challenges

About a month after the FCC approved the Order, on October 24, a number of municipalities filed [petitions for review](#) in the Ninth Circuit. These petitions generally [allege](#) that the Order exceeds the FCC’s statutory authority, is arbitrary and capricious and an abuse of discretion, and is otherwise contrary to law. Shortly thereafter, several mobile service providers (including AT&T, Verizon, and Sprint) also filed [petitions for review](#) in various federal appellate courts, alleging that the FCC’s failure to adopt a “deemed granted” remedy was “arbitrary and capricious.” While most of these petitions were initially consolidated in the Tenth Circuit, they have now all been [transferred to the Ninth Circuit](#). Before transferring the petitions to the Ninth Circuit, however, the Tenth Circuit [denied](#) petitioners’ motion to stay the Order’s effect pending the outcome of the litigation. Consequently, while the Ninth Circuit is still scheduled to consider petitioners’ challenges to the validity of the Order, the Order has been effective since [January 14, 2019](#).

While the parties have not yet filed briefs detailing their legal theories, one source of contention may be the validity of the FCC’s “material inhibition” standard. In particular, the FCC will likely need to grapple with the Ninth Circuit case [Sprint Telephony PCS, L.P. v. County of San Diego](#). In *County of San Diego*, the Ninth Circuit overturned its prior decision in *City of Auburn v. Qwest Corp.*, which held that Section 253 preempts state and local regulations whenever they “create a substantial . . . barrier” to the provision

of services. The court [reasoned](#) that *City of Auburn* mistakenly read Section 253 to preempt laws that “may” have the “effect of prohibiting” service, rather than only preempting laws that actually have the “effect of prohibiting service.” Consequently, it adopted a narrower standard, [holding](#) that plaintiffs “must show actual or effective prohibition, rather than the mere possibility of prohibition.” The court further [held](#) that this conclusion “rests on the unambiguous text” of the statute. In light of this holding, a key issue will likely be whether *County of San Diego* forecloses the FCC’s interpretation. Under the [Chevron doctrine](#) (established by the Supreme Court case *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*), courts typically defer to an agency’s reasonable interpretation of an ambiguous statute, even if that interpretation differs from a court’s previous interpretation. However, the Supreme Court has [held](#) that this deference does not apply when there is “judicial precedent holding that the statute unambiguously forecloses the agency’s interpretation.”

In addition to the preemption standard, another issue will likely be whether the FCC’s decision not to include a “deemed granted” remedy for shot clock violations was arbitrary and capricious under [Section 706](#) of the Administrative Procedure Act (“APA”). As the Supreme Court has [explained](#), a federal agency’s determination is arbitrary and capricious—and therefore invalid—if the agency “has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” To prevail under this standard, the mobile service providers will likely need to make fact-specific arguments showing that, for example, the FCC failed to grapple adequately with evidence in the record or failed to address an important argument related to the “deemed granted” remedy. Ultimately, however, arbitrary and capricious review generally favors the FCC, as the Ninth Circuit has [described](#) it as “highly deferential.” For more background on arbitrary and capricious review, see [CRS Report R44699](#), *An Introduction to Judicial Review of Federal Agency Action*, by Jared P. Cole.

Considerations for Congress

Given the litigation surrounding the Order, Congress may be interested in addressing the extent to which the Telecommunications Act limits state and local action affecting 5G infrastructure deployment. At least [one bill](#) introduced in the 116th Congress would declare the Order to have “no force or effect.” However, no legislation has been introduced in the 116th Congress that would amend the Telecommunications Act’s preemption provisions. Should Congress consider whether to do so in the future, it might address when state or local laws “have the effect of prohibiting the ability of any entity” to provide service, as the interpretation of this language is central to the FCC’s Order. In particular, future legislation might clarify whether state or local laws are preempted whenever they “materially inhibit” the provision of service (the [FCC’s interpretation](#)) or only when they “[essentially guarantee](#)” rejection of all wireless applications or create an [existing](#) inability to provide service (as some courts have suggested). The former approach would preempt a broader range of state and local laws and would give the FCC more discretion to determine when particular laws are preempted (as it did in the Order). The latter approach would apply to a narrower range of laws, likely only preempting laws that completely prevent providers from offering mobile service. Future legislation might also address how the general preemption standard applies specifically to fees or other specific types of requirements, such as aesthetic limitations, and when the FCC should set shot clocks and adopt “deemed granted” remedies.

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