



November 2009

FCC Takes Baby Steps To Expedite Tower Siting

Davina Sashkin
sashkin@fhhlaw.com
703-812-0458

In a Declaratory Ruling released November 18, the Commission has thrown a couple of (small) bones to wireless facility siting applicants by specifying what constitutes a “reasonable time” for state and local zoning authorities to act on applications, and by clarifying that zoning authorities are prohibited from denying an application solely based on the existence of comparable service by a competing provider. The Commission declined, however, to force automatic grant of siting applications that are not acted on within a specified timeframe, and did not find a need to preempt state and local regulations requiring zoning variance for wireless facilities tower sites.

The ruling was issued in response to a petition for declaratory ruling filed by CTIA – The Wireless Association® requesting that the Commission clarify certain provisions of Sections 253 and 332(c)(7) of the Communications Act regarding state and local review of wireless facility siting applications. In its Petition, CTIA argued that ambiguity in the Act permitted zoning authorities to subject applicants to burdensome requirements and unreasonably long application processing timeframes, frustrating the goals of the Act and delaying the deployment of new wireless infrastructure to the people. As a remedy, CTIA asked for: (i) establishment of definitive timeframes in which zoning authorities must act on siting requests for wireless towers or antenna sites; (ii) clarification that the denial of applications based on the existence of a provider already serving the area is an illegal restriction on competition; and (iii) alleviation of burdensome state and local ordinances, such as requiring all wireless service providers to obtain zoning variances.

As you might expect, industry commenters supported the Petition; state and local governments as well as airport authorities resoundingly opposed. The Commission seems to have come down somewhere in the middle. This “half a loaf” approach is probably unsatisfying to both camps, but at least the FCC acted ever so slightly to improve the siting process. While treating the issue of delays in siting approvals as a potentially major roadblock to the national broadband plan the FCC is drafting, the Commission nonetheless found itself constrained by the Act to tread lighter than its pro-broadband agenda might otherwise have dictated. The Commission determined that Section 332(c)(7) of the Act grants it interpretive authority as to the limits imposed by Congress

on state and local governments with regard to wireless facility siting, but nothing in the Act or the legislative history gives the FCC the go-ahead to override state and local governments outright on the matter.

Finding ample evidence of widespread unnecessary delays, the Commission determined that it *could* specify as “reasonable” certain time periods in which a zoning authority must act on an application and that it could clarify that applicants may seek relief from the courts upon a “failure to act” – the expiration of the applicable timeframe in that jurisdiction. The timeframes selected – 90 days for the review of collocation applications and 150 days for the review of other siting applications – do not preempt shorter timeframes adopted by state and local government. The FCC’s timeframes are substantially longer than CTIA requested, but, says the Commission, they will give applicants greater certainty while providing sufficient flexibility to the governmental authorities to process applications and affording both sides the right to redress in the court system, as envisioned by Congress. Also in light of evidence of Congressional intent that the courts, not the FCC, fashion remedies for failures to act on applications, the Commission declined CTIA’s request to automatically deem an application granted immediately upon expiration of the processing timeframe.

While wriggling into the middle ground on the issue of application action timeframes, the Commission decided to stay clear of a requested blanket preemption of state and local requirements that all wireless services facility siting applications necessitate a zoning variance. Interestingly, the Commission shied away not because it found limited authority in the Act for such intervention, but rather because CTIA neither (a) actually asked for blanket preemption, nor (b) provided enough evidence of a controversy in need of resolution.

One area in which the Commission did not find itself constrained was in its determination that state and local governments have been unlawfully denying applications on the basis of preexisting service by competing providers. This sort of barrier to the deployment of advanced technologies rightfully gives the pro-competition Genachowski FCC conniptions. The Commission managed to find authority embedded in the Act’s pro-competitive purpose to render a ruling explicitly prohibiting it.

In all, the Commission played it very safe, offering a modicum of relief for wireless providers and the potential for much speedier wireless service facility siting approvals by state and local authorities. The Declaratory Ruling nevertheless also affirmed the power that state and local governments can exert in the deployment and delivery of advanced wireless services, a hard pill to swallow by a Commission nearly 100% focused on promoting deployment of broadband and advanced services.