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FCC Sets Rules for 5G Infrastructure, Limiting State and Local Control.

The new industry-backed regulations are likely to attract lawsuits from state and local government groups that worry they will cost them revenue, make it easier for internet providers to sue them and do little to address the digital divide.

The Federal Communications Commission (FCC) approved sweeping regulations on Wednesday for 5G wireless infrastructure, significantly curtailing the authority of states and localities.

The industry-backed declaratory ruling includes several preemption provisions aimed at accelerating deployment of 5G networks that are expected to offer higher internet speeds. It prompted immediate pushback from a wide-range of public-sector association groups and is expected to face legal challenges.

"The ultimate result from this is going to significantly and negatively impact local governments' ability to protect and serve public property, safety and welfare," said the National Association of Counties' (NACo) Arthur Scott.

The federal regulations carry major ramifications, particularly given the buildout of 5G networks that's ramping up or is already underway in many larger cities.

Underpinning the networks is wireline fiber supporting "small cell" nodes, typically antennas mounted on street poles or other public infrastructure. Small cells are akin to WiFi-networks in that their coverage is limited, typically 300 to 500 feet, requiring providers to deploy hundreds of the devices to cover relatively small areas.

Time Limits

One of the more controversial provisions of the order establishes "shot clock" time limits for jurisdictions to process applications for mounting small cells on public infrastructure. Installations on existing infrastructure must be processed within 60 days, while requests to build new poles need to be processed within 90 days.

The shot clock resets if a company submits an incomplete application and a government notifies them of the issue within 10 days. Under the new order, failing to act within the specified time limits constitutes a presumptive prohibition of services, giving companies further ammunition to take governments to court.

According to NACo, applications were generally taking about 120 days to process. Scott is concerned that many local governments lack the resources to process them within the new, tighter deadlines and would need to hire additional staff.

"[The ruling] forces local governments to make a decision between rubber stamping applications or facing crippling litigation with these providers in court," he says.

Under the FCC ruling, batch applications of multiple requests for the same type of facilities filed simultaneously are subject to the same deadlines. Greg Wilkinson, the city administrator for Yuma, Ariz., says his city would have no problem processing a few applications quickly but receiving a hundred or more at once could pose challenges. For instance, some companies seek to affix old, bulky equipment to poles, potentially leading to safety concerns or violations of the Americans with Disabilities Act if they obstruct sidewalks.

“You have to look at location by location,” he says. “You can’t just give them blanket approval to deploy everywhere.”

Fee Guidelines

The FCC order also effectively limits what local governments can charge — $500 for an initial application fee covering up to five small cells and $270 for an annual right-of-way access fee per small cell — both considerably lower than what cities have typically charged. Localities could still levy higher fees, but if a wireless provider sued, local officials would need to demonstrate the fees are a “reasonable approximation” of costs incurred. In larger jurisdictions where fees are higher, the FCC ruling could amount to seven-figure losses in unrealized revenues.

Part of the FCC’s motivation for the lower fees is to enable providers to bring high-speed internet to rural and unserved areas of the country.

Commissioner Brendan Carr recounted at Wednesday’s meeting that he heard from officials in unserved communities who worried delays and higher small cell fees levied in big cities would effectively hinder deployment to their jurisdictions.

“Cutting these costs changes the prospects for communities that might otherwise get left behind,” he said.

But state and local officials argue that lower fees will make little difference in bridging the digital divide unless there is adequate market demand making it economically feasible for companies to deploy. Furthermore, the ruling lacks any requirements for telecommunication companies to provide service to unserved and underserved areas.

Some cities fear that the fee recommendations wouldn’t cover their costs. Philadelphia, for instance, provided estimates to Governing tallying labor costs for all approvals and field inspections that amounted to $800 per small cell node.

“The city will have incurred disproportionate, unrecoverable costs and lost all its leverage to incentivize deployment in a manner that ensures a complete citywide deployment and reduces the digital divide,” said Michael Carroll, deputy managing director of the Office of Transportation and Infrastructure Systems, of the ruling.

Some telecoms complain that cities use aesthetic concerns about the small cells as a way to delay wireless infrastructure projects. The FCC order doesn’t prohibit localities from outlining their own aesthetic requirements, provided they are “reasonable” and “no more burdensome than those applied to other types of infrastructure deployments.”

The vast majority of state and local officials filing comments opposed the FCC rules. One of the few expressing support was Chairman Jeffrey Bohm of the St. Clair County (Mich.) Board of Commissioners.

“By making small cell deployments less expensive, the FCC will send a clear message that all

communities, regardless of size, should share in the benefits of this crucial new technology," wrote Bohm.

The order was modeled largely after similar laws passed in 20 states that preempt local authority to varying degrees. They've been mostly adopted in Republican-controlled states, usually passing by wide margins.

Although the FCC's fee levels and regulatory guidelines mirror those passed by states, the ruling would preempt any existing legislation not meeting its requirements. In response, the National Conference of State Legislatures and the National Governors Association filed a joint statement opposing the ruling.

"Not only will these 20 states be affected, but it also ties the hands of any other state that is looking to ensure inclusive and equitable access to high-speed internet services to residents," the groups wrote.

What Happens Next?

Many larger localities, such as Austin, Boston and San Jose, have already entered into agreements with telecoms in states where they're permitted to do so. Attorneys for the municipal advocacy group Next Century Cities believe it is unlikely that telecom providers will pursue litigation seeking to void existing agreements. While the ruling doesn't explicitly exempt preexisting agreements or prohibit local governments from negotiating future agreements, it does significantly reduce their leverage in these deals.

The ruling is expected to face multiple legal challenges over the FCC's regulatory authority.

One group likely to lead litigation on the matter is the Smart Communities and Special Districts Coalition, which is made up of localities and association groups in 11 states and the District of Columbia. Gerard Lavery Lederer, an attorney with Best Best & Krieger representing the group, told Governing prior to the meeting that they were considering litigation.

"We're committed to defending local governments rights wherever we have to do it, including the courts," he said.

Blair Levin, a former FCC official, said that if the rules aren't overturned, a second wave of litigation will ensue over the meaning of several phrases used to define different provisions, such as fees that are a "reasonable approximation" of localities' costs.

Next Century Cities has issued guidance for localities, recommending they quickly move to enact zoning, installation requirements and any other regulations. Developing pre-approved design and aesthetic requirements, it also noted, could be particularly beneficial in processing applications faster and defending legal challenges.

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