KLRD

James Fisher
Research Analyst
785-296-3181
James.Fisher@klrd.ks.gov

Utilities and Energy

M-4 Small Wireless Facility Siting

The fifth generation of mobile communication network, referred to as 5G, will be deployed primarily through a network of small wireless antennas. With each new generation of wireless networks, cellular and internet connection speed has improved. 5G is projected to increase connection speed, possibly enabling speed ten times faster than current 4G networks. It is also projected to increase connectivity and capacity, allowing more people to communicate using their devices at the same time. In an effort to accelerate deployment of next generation cellular technology, the Federal Communications Commission (FCC) approved a *Declaratory Ruling and Third Report and Order* (Report) addressing 5G siting in the United States on September 26, 2018. This article reviews certain sections of the Report and addresses how the Report may impact Kansas law.

FCC Declaratory Ruling and Third Report and Order Overview

The FCC states the purpose of the Report is to:

- Clarify the scope and meaning of the "effective prohibition" standards set forth in Sections 253 and 332(c)(7) of the Telecommunications Act of 1996 (Act) as they apply to state and local regulation of wireless infrastructure deployment;
- Conclude Sections 253 and 332(c)(7) limit state and local governments to charging fees that allow for cost recovery only for processing applications and managing structures in rights-of-way;
- Identify specific fee levels for small wireless facility deployments that comply with the relevant standard;
- Provide guidance on certain state and local non-fee requirements, including aesthetic and undergrounding requirements;
- Establish new "shot clocks" for small wireless facilities ("shot clocks" refers to timeliness for a municipality to review small wireless facility applications);
- Codify existing shot clocks for non-small wireless facility deployments established by the *2009 Declaratory Ruling* (not discussed in this article);

- Clarify all state and local government authorizations necessary to deploy personal wireless service infrastructure are subject to these shot clocks; and
- Establish that a failure to act within the new small wireless facility shot clocks constitutes a presumptive prohibition on the provision of services, and set the expectation that local governments shall provide all required authorizations without further delay.

The FCC states its intent is to "promote the timely build out of new infrastructure across the country by eliminating regulatory impediments that unnecessarily add delays and costs to bringing advanced wireless services to the public." Further, the FCC states, "America is in a transition to the next generation of wireless service," and this action "is the next step in the FCC's ongoing efforts to remove regulatory barriers that would unlawfully inhibit the deployment of infrastructure necessary to support these new services." The Report was published in the *Federal Register* on October 1, 2018, and will be in effect 90 days after publication.

According to the National Conference of State Legislatures (NCSL), the Report places new limits on local wireless infrastructure siting review and has the potential to preempt the 20 states, including Kansas, that have enacted small cell legislation.

Standard for Determining Effective Prohibition of Service

One of the expressed purposes of the Report is the intent to clarify the FCC's interpretation of the term "effective prohibition," found in Sections 253 and 332(c)(7) of the Act. Paragraph 37 of the Report states that effective prohibition occurs where a state or local legal requirement materially inhibits a provider's ability to engage in any of the variety of activities related to its provision of a covered service. This would include both inhibiting additional services or improving exiting ones.

Fees

Another purpose of the Report is intended to resolve confusion regarding limits on state and local fees. Paragraph 50 of the Report states right-of-way access fees and fees for the use of government property in the right-of-way, as well as application or review fees and similar fees imposed by a state or local government as part of their regulation of the deployment of small wireless facilities inside and outside the right-of-way, violates Sections 253 and 332(c)(7) of the Act unless the following conditions are met:

- The fees are a reasonable approximation of the state or local governments costs;
- Only objectively reasonable costs are factored into those fees; and
- The fees are no higher than the fees charged to similarly situated competitors in similar situations.

Paragraph 79 of the Report prescribes the following fee structure that the FCC believes would not violate Sections 253 and 332(c)(7) of the Act:

- $500 for a single up-front application that includes up to five small wireless facilities with an additional $100 for each additional facility; and
- $270 annually per small wireless facility for all recurring fees.

Aesthetic Requirements

The Report also uses the FCC's interpretation of Sections 253 and 332(c)(7) of the Act to provide guidance on certain potential regulations imposed by local governments.

Regarding aesthetic regulations, the FCC clarifies in Paragraph 86 of the Report that requirements must meet the following three criteria to be permissible under the Act:

- Be reasonable;
- Be no more burdensome than those applied to other types of infrastructure deployments; and
- Be objective and published in advance.

Paragraph 90 of the Report indicates some jurisdictions have adopted blanket ordinances or regulations requiring all wireless facilities to be deployed under ground, some for aesthetic reasons. The FCC clarifies this would amount to an effective prohibition due to the characteristics of wireless signals and violate Sections 253 and 332(c)(7) of the Act.

Minimum spacing requirements are addressed in Paragraph 91 of the Report. The FCC clarifies spacing requirements that prevent providers from replacing preexisting facilities or collocating equipment would be unreasonable. An example of this would include requiring facilities be sited a certain minimum distance away form other facilities.

Review Deadlines and Remedies

Paragraph 105 of the Report establishes the following new shot clocks or timelines for a municipality to review small wireless facility applications:

- 60 days for an application for collocation of small wireless facilities on preexisting structures; and
- 90 days for an application for new construction of small wireless facilities.

In Paragraph 113 of the Report, the FCC indicates that because small wireless facilities are likely to be deployed in large numbers as part of a system to cover a particular area, it anticipates some providers will submit batched applications. "Batched" is defined as multiple separate applications filed at the same time, each for one or more sites or a single application covering multiple sites. As a result, the FCC states in Paragraph 114, with regard to the new shot clocks, these types of applications should follow the same rules as if the applications were filed separately. In addition, if an application contains both sites for collocation and new construction, then it should adhere to the longer 90-day shot clock.

These shot clocks are being established under the FCC interpretation of Section 332 of the Act. The FCC notes these shot clocks are similar to shot clocks adopted in a Declaratory Ruling issued by the FCC in 2009 for non-small cell wireless facilities (which have been further clarified by the Report, but are not addressed in this article). The FCC notes the 2009 shot clocks were affirmed by the Fifth Circuit and the Supreme Court in *City of Arlington v. FCC* in 2013.

Section B Paragraphs 116 through 131 of the Report clarify that failure to adhere to the small wireless facility shot clock deadlines is considered a presumptive prohibition of service, violating Section 332 of the Act, and an applicant would be able to seek relief in court through a preliminary or permanent injunction.

Kansas Law

Kansas is one of 20 states to enact legislation dealing with the siting of small cell wireless facilities. Senate Sub. for HB 2131 (2016) established application processes, limitations, and construction procedure for operating and maintaining equipment in the public right-of-way.

Kansas Fees

Under KSA 66-2019, authorities cannot charge an application fee, consulting fee, or other fee associated with the submission, review, processing, and approval of an application that is not required for other wireless infrastructure providers or wireline telecommunications or broadband providers in their jurisdiction.

Further, the law directs an authority (defined as any governing body, board, agency, office, or commission of a city, county, or the state that is authorized by law to make legislative, quasi-judicial, or administrative decisions concerning an application) can only assess fees for the actual costs relating to granting or processing an application that are directly incurred. This portion is in line with what is required by the FCC Report.

Kansas law also limits the amount an authority can receive from application charges and fees to:

- $500 for a collocation application that is not a substantial modification, small

cell facility application, or distributed antenna system application; or

- $2,000 for an application for a new wireless support structure or for a collocation application that is a substantial modification of a wireless support structure.

As noted above, the Report allows for a maximum application fee of $500 for the first five sites and $100 for every site thereafter. There is no distinction between collocated sites and new support structures in the Report.

Kansas law also allows for small cell network applications with no greater than 25 individual facilities of similar design within a jurisdiction of a single authority to file a consolidated application and receive a single permit for the installation, construction, maintenance, and repair of the network instead of filing separate applications for each.

An authority also has the ability to enter into a lease with an applicant for the use of public lands, buildings, and facilities. The lease must be at market rate and at least ten years in duration, unless otherwise agreed to by both the applicant and the authority. Charges for placement of wireless facilities on public lands, if the authority chooses to charge, are required to be competitively neutral and not unreasonable, discriminatory, or in violation of existing federal or state law. The FCC's Report suggests that a reoccurring fee of no more than $270 per facility would be acceptable when determining if such a fee creates an "effective prohibition" under the Act.

Kansas Application Review Process

Similar to the Report, KSA 66-2019 establishes a shot clock for review and issuance of a final decision for small cell network applications by an authority. Kansas law requires local authorities to adhere to the following time lines:

- Review and issue a final decision for consolidated applications for small cell networks containing no more than 25 individual and similar small cell facilities within 60 calendar days;
- Review and issue a final decision for applications for substantial modification to an existing wireless support structure within 90 calendar days; and
- Review and issue a final decision for applications for a new wireless support structure within 150 calendar days.

With regard to modified and new wireless structures, if an authority fails to act within the required time the application is considered approved.

The shot clocks in Kansas law are several weeks longer than what is mandated by the Report, depending on how a wireless provider wants to install a small cell network. However, Kansas law eliminates the need for a provider to seek relief through a court injunction if an application is not reviewed by the deadline, because it is deemed approved at the end of the shot clock period.

Kansas Aesthetic Requirements

Kansas law states that an authority has the right to prohibit the use or occupation of a specific portion of the public right-of-way due to reasonable public interest necessitated by public health, safety, and welfare so long as such interest is exercised in a competitively neutral manner and is not unreasonable or discriminatory. Kansas law further states a wireless services provider or wireless infrastructure provider, subject to an application, shall have the right to construct, maintain, and operate wireless support structures, utility poles, small cell wireless facilities or distributed antenna systems along, across, upon, under, or above the public right-of-way. (*Note:* the limitation of access for aesthetic reasons is not expressly stated in statute.) The authority must be competitively neutral with regard to other users of the public right-of-way, may not be unreasonable or discriminatory, and may not violate any applicable state or federal law, rule, or regulation.

Comparison of Certain Requirements for Siting of Small Wireless Facilities		
Requirement	**FCC Report**	**KSA 66-2019**
Co-location Application Fee	$500 for first five facilities, $100 for each beyond initial five	$500 for non-substantial modification to existing structure. $2,000 for substantial modification
New Structure Application Fee	$500 for the first five facilities, $100 for each beyond initial five	$2,000
Batched Application Fee	$500 for the first five facilities, $100 for each beyond initial five	$500 or $2,000 depending on application. Can only be applied for by a network with 25 or fewer individual facilities
Co-location Application Review	60 days	90 days
New Structure Application Review	90 days	150 days
Batched Application Review	90 or 150 days depending on if the application requires construction of a new wireless support structure	60 calendar days for networks with 25 or fewer individual facilities

Response

In response to the Report, NCSL and the National Governors Association sent a joint letter to express their concerns regarding the preemptive nature of the ruling for the 20 states that have worked with the industry and localities to address small cell wireless facility siting. They also indicated the ruling may compromise the traditional authority of state and local governments.

For more information, please contact:

James Fisher, Research Analyst
James.Fisher@klrd.ks.gov

Erica Haas, Principal Research Analyst
Erica.Haas@klrd.ks.gov

Kansas Legislative Research Department
300 SW 10th Ave., Room 68-West, Statehouse
Topeka, KS 66612
Phone: (785) 296-3181