Can you hear me now?

By Debbi Sellers

In the past, cities and towns have regulated wireless facilities through their zoning codes. However, in 2018, the Federal Communications Commission (FCC) issued a two-part Declaratory Ruling with the intent to streamline the installation and placement of Fourth Generation (4G) and Fifth Generation (5G) mobile communication infrastructure. The ruling took effect on January 14, 2019 and the FCC offers a one-page fact sheet outlining the important changes. According to the Fact Sheet, the Declaratory Ruling 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.” The ruling is intended to clarify the scope and meaning of the effective prohibition standards 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. In addition, the ruling provides guidance and recommendations focusing on three main areas: identifying specific fee levels for small wireless facility deployments; guidance on state and local non-fee requirements regarding aesthetic and undergrounding requirements; and the establishment of two new shot clocks for small wireless facilities.

Remember when 4G was the newest and best broadband cellular network technology? Well now 5G is here and wireless cell providers will need to deploy significantly more small wireless facilities in order to upgrade their wireless infrastructure. Verizon estimates it will need 10 to 100 times more antenna locations than currently exists, and AT&T estimates providers will need to deploy hundreds of thousands of new wireless facilities, in the next few years alone. Because of this, the impact of per-facility fees charged to providers will be magnified. The FCC has concluded that right-of-way (ROW) access fees, and fees for the use of government property in the ROW as well as application, review and similar fees violate Sections 253 or 332(c)(7) unless the following conditions are met:

(1) The fees are a reasonable approximation of the state or local government's costs;
(2) Only objectively reasonable costs are factored into these fees; and
(3) The fees are no higher than the fees charged to similarly situated competitors in similar situations.

The second area the FCC provides guidance on is the impact of other non-fee requirements. Like fee requirements, 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 permissible. However, municipalities will have to be cautious about adopting any non-fee requirements, including those for undergrounding which require an all or nothing
scenario. For example, requiring all wireless facilities be installed below ground could prohibit a cell provider from providing services. While undergrounding requirements may be permissible, requiring 100% of infrastructure to be installed underground could amount to an effective prohibition. In addition to being reasonable, non-fee requirements can’t be more onerous than those applied to other types of infrastructure deployments and must be published in advance.

The final and perhaps most significant change outlined in the ruling is the establishment of new timeframes, called shot clocks, tailored to the deployment of small-scale facilities. All state and local governments authorizing deployment of small cell wireless facilities are subject to the shot clocks. The FCC adopted shot clocks of 60 days for collocation of Small Wireless Facilities on preexisting structures and 90 days for new construction of such facilities. The Commission further finds that failure to act within the new shot clock timeframes, constitutes a presumptive prohibition on the provision of services. While the ruling took effect on January 14, 2019, numerous lawsuits have been filed by governments and by service providers in courts across the country on a variety of the ruling’s points. WCIA recommends members discuss the FCC’s Declaratory Ruling with its agency attorney to determine if any changes need to be made in the permitting of small cell facilities. The FCC offers a one-page Fact Sheet or for more detail you can read the full Declaratory Ruling.