Another 5G Infrastructure Win for the Wireless Industry - Part 1

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The FCC has made another ruling that will expedite the wireless industry’s deployment of 5G infrastructure. In September 2018, the Commission released its order on “small cells” allowing for the proliferation of 5G transmitters on lights, poles, and other structures located in municipal rights-of-way (“ROWs”) across the country (for more on that, see our previous blog post). That order was appealed by dozens of local jurisdictions from coast-to-coast and remains on appeal in the U.S. Ninth Circuit Court of Appeals. Now prompted by petitions from the wireless industry, in a Declaratory Ruling the FCC’s seeks to “interpret and clarify” rules with respect to modifications of existing infrastructure. As part of the same document, the Commission included a Notice of Proposed Rulemaking that seeks to expand even further the infrastructure rights of wireless carriers at the expense of local authorities.

The analysis of this Declaratory Ruling and Notice of Proposed Rulemaking will be broken down into three parts. This is Part 1.

Declaratory Ruling

Background

Intending to assist FirstNet in deploying its wireless public safety network, Congress enacted Section 6409(a) of the Spectrum Act. That provision provides that a “State or local government may not deny, and shall approve, any eligible facilities...
request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.” In its 2014 Infrastructure Order the FCC adopted rules implementing Section 6409(a). Nevertheless, the interpretation of what constitutes a “substantial change” has resulted in continuing disputes between wireless carriers and local siting authorities. Issues have also arisen over the commencement and tolling of the 60-day period established by the Commission for section 6409(a) reviews of existing facilities conducted by local authorities. Both CTIA and WIA petitioned the Commission to resolve these issues in favor of the wireless industry. In response, the FCC issued a Declaratory Ruling rejecting procedural arguments by local authorities that the Administrative Procedure Act (“APA”) required a notice and comment rulemaking for what amounts to new rules. Below are some of the key issues addressed in the Commission’s Declaratory Ruling.

The second blog post in this series will highlight some of the key issues addressed in the Commission’s Declaratory Ruling. Part three of this post will focus on the Notice of Proposed Rulemaking.

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