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**States Can Promote Next-Generation Wireless by Removing
Regulatory Barriers**

by

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State lawmakers should enact policies they believe to be sound, expedient and consistent with current federal law. Good state policymaking should not get sidetracked by speculations about future federal agency actions, as in the case with the FCC and cell tower sitings.

Federal law and regulations regarding placement of cell towers and other wireless facilities pose plenty of ambiguities. States should be proactive in pursuing policies to promote private investment in wireless facilities to ensure high-speed wireless broadband services in local communities. This year, state legislatures in Georgia, Missouri and Washington passed bills to restrict their local governments from delaying decision making and imposing arbitrary fees on permit applications. Other states should consider following in their path.

The issue of authority over wireless facilities permit approval is especially important because cell towers and distributed antenna systems are critical for next-generation wireless broadband services. In its *Global Mobile Data Traffic Forecast Update, 2012–2017*, Cisco Systems forecasted that “[g]lobal mobile data traffic will increase 13-fold between 2012 and 2017.”

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Placement of new cell towers, distributed antenna systems and other infrastructure is critical to ensuring that wireless data-traffic capacity is widely available, reliable and inexpensive for consumers.

Federal and state laws governing wireless facilities placement operate concurrently. The federal law sets guidelines and puts limits on state authority, but states retain room in setting local government permit procedures. States still have authority over whether or not to approve individual permit applications for cell tower sitings or antenna collocations.

When it comes to placing or modifying wireless facilities, Section 332(c)(7)(B) of the Communications Act provides that state and local government regulation shall not “unreasonably discriminate among providers” or “prohibit or have the effect of prohibiting” wireless services. Nonetheless, in its *Wireless Competition Reports*, the FCC has identified local government permit processing as *the* significant regulatory constraint faced by wireless infrastructure providers that need to add or modify cell sites.

Local regulatory constraints prompted a 2009 Declaratory Ruling in which the FCC interpreted Section 332(c)(7)(B) to mean that if a local government denies a siting application “solely because one or more carriers serve a given geographic market,” it “has engaged in unlawful regulation that prohibits or ha[s] the effect of prohibiting the provision of personal wireless services.” The FCC’s Declaratory Ruling also set up a “shot clock” that defined presumptively reasonable time parameters for local governments to approve or deny cell site applications. Under the FCC’s shot-clock, if local governments fail to act on collocation applications within 90 days of filing or fail to act on all other siting applications within 150 days, wireless providers can raise challenges in federal court.

But federal regulatory requirements still pose plenty of ambiguities. For example, the FCC’s 2009 Declaratory Ruling didn’t specify how the shot clock applies in certain situations. Is the shot clock satisfied when a local government administrator or zoning board makes an initial ruling denying a permit within the 90 or 150 day deadline? Or is the shot clock still triggered where an initial ruling is issued under the deadline but the local governmental body with final authority – such as a county or city council – fails to act on an appeal of the permit denial? Does another shot clock kick in when an appeal of an initial ruling is made? Many other issues were left unaddressed, including application completion requirements.

Consistent with sometimes uncertain federal requirements, states are at liberty to adopt policies for clearer and more rapid permit approval decision-making on wireless facility placement. The FCC’s shot clock on local government inaction provides a backstop. But it can also mean lengthy delays for wireless providers seeking vindication in federal courts. A state can better avoid those delays and legal costs by adopting “deemed granted” provisions. That involves setting a timeframe for local governments to act on tower siting permit applications and by deeming such applications granted by operation of state law if the local governments fail to act. States can also clarify permit application completion requirements to address concerns over local government refusal to fairly consider applications.

When written with reasonable care, state solutions should not conflict with federal law and preemption problems, and a state would have the benefits of a clearer and swifter process for processing wireless infrastructure facilities permits. ALEC's *Wireless Communications Tower Siting Act* offers a useful model that addresses many wireless facility siting concerns at the state level. There is also PCIA's model state legislation.

The FCC is now proposing to further clarify federal rules regarding wireless infrastructure. That proposal is at least partially prompted by the 2012 Spectrum Act. The 2012 Act included a proviso that a local government "may not deny, and shall approve," a modification to an existing tower or base station that "does not substantially change" its physical dimensions. Among other things, it is likely the FCC will try to further define what "substantially increase" means for purposes of distributed antenna system (DAS) collocation.

But any forthcoming FCC rulemakings will have to grapple with the contours of state sovereignty. States possess some degree of irreducible constitutional powers over when and where ground-level facilities may be constructed. And states possess sovereign authority over their local governments and how they operate. While bringing greater clarity to federal rules regarding wireless infrastructure siting, careful balancing will be required by the FCC.

Future FCC interpretation of federal law regarding cell tower siting and DAS collocation can hardly be predicted or controlled by the states, but states can control how they exercise their sovereign powers. States should act responsibly to reduce regulatory barriers to investment in next-generation wireless broadband investment, including proactively pursuing clearer standards and swifter processing of wireless facility permit applications.

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Further Readings

Seth L. Cooper, "[Calling for Fast Action on FCC's Wireless Infrastructure Proposal](#)," *FSF Blog* (February 02, 2014).

Seth L. Cooper, "[Cautionary Consideration Regarding FCC Outage Reporting Regulations](#)," *FSF Blog* (August 09, 2013).

Seth L. Cooper, "[Breaking Down Barriers to Wireless Broadband Build-Out](#)," *FSF Blog* (October 17, 2012).

Seth L. Cooper, "[The FCC's Section 706 Report and Wireless Broadband Build-Out](#)," *FSF Blog* (August 14, 2012).

Seth L. Cooper, "[Wireless Tower Construction Is Critical to Maryland's Consumers and Economy](#)," *FSF Blog* (August 08, 2012).

Seth L. Cooper, "[4G Wireless Networks Need Relief from Cell Siting Barriers: Economy Would Benefit Through New Jobs and Investment](#)," *Perspectives from FSF Scholars*," Vol. 7, No. 7 (March 29, 2012).