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# FCC's Proposals Promoting Infrastructure Deployment Don't Violate Anti-Commandeering Rule

**by**

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To its credit, the FCC has taken concrete steps to clear away regulatory barriers to the deployment of wireline and wireless infrastructure for next-generation broadband services. The Commission has specifically targeted barriers imposed by local governments that impede timely siting of cell towers and small cell antennas needed for 5G deployment. Yet some state and local government officials have pushed back by suggesting that FCC-imposed shot clocks, "deemed granted" provisions, and other limits on their powers violate the Supreme Court's anti-commandeering doctrine.

But anti-commandeering arguments against streamlining wireless infrastructure sitings don't hold up. The Commission's reform proposals are based on express statutory authority and backed by the Constitution. Commission-imposed shot clocks, deemed granted remedies, limits on excessive fees, and similar reforms don't require local governments to directly implement a federal regulatory scheme or to take any action at all. Court precedents reinforce these conclusions. The Commission should adopt its legally sound wireless siting reform proposals.

Analysts project that exponential growth in data demands by consumers, enterprises, and governments will continue for the foreseeable future. According to Cisco's 2017 *Visual Network Index (VNI) Forecast Report*, global mobile data traffic in the year 2021 will be seven times

higher than in 2016. Average Internet data traffic for North American users will total 181 GB in 2021. A June 2018 Ericsson Mobility Report forecasts 43% compound annual growth in global data traffic over the next five years. Sharp increases in wireline data traffic also will continue. Wireline facilities support Wi-Fi offloading and backhaul for wireless traffic.

Supplying these future demands depends on strong capital investment and timely construction of fiber broadband facilities. Prompt siting of cell towers and placement of small cell antennas are also critical to 5G. These advanced networks will be heavily relied on to deliver Internet-of-Things (IoT) and other innovative services.

The FCC understands these time-sensitive network deployment needs. Correctly, the Commission also has recognized that federal regulations have posed barriers to new infrastructure investment and build-out. In its *Wireless Infrastructure Order* (2018), the Commission streamlined small cell deployment critical for 5G network deployment by exempting small antennas from NEPA and NHPA requirements. That order was particularly important because, according to Accenture, 5G networks will depend on 10 to 100 times as many antenna locations as 3G and 4G networks. Additionally, in its *Wireline Infrastructure Order* (2018), Commission streamlined network notification for legacy voice services and low-speed data services, better allowing providers to retire outdated systems and focus their resources on advanced network service deployments.

The Commission has similarly recognized that local permitting processes and fees have posed major barriers to new infrastructure investment and build-out. It has proposed to issue rules that would remove such barriers and speed up 5G network deployment. In June 2017, Free State Foundation President Randolph May and I filed public comments in the Wireless Infrastructure proceeding recommending the Commission: (1) adopt a "deemed granted" remedy when local governments fail to act upon infrastructure siting applications within the Commission's "shot clock"; (2) reduce colocation "shot clock" timeframes from 90 days to 60 days; and (3) set standards for identifying actions that "prohibit or have the effect of prohibiting" wireless services. These and other reforms proposed in that proceeding – including limiting excessive permit fees and prohibiting discriminatory denials of access to public rights-of-ways – would leave intact local governments' basic decisionmaking authority to approve or deny permit applications.

A June letter to the FCC filed on behalf of cities such as Atlanta, Boston, and more argues that federalism principles prohibit many of the Commission's recently adopted or proposed infrastructure deployment reforms. And the letter argues the Supreme Court's June 2018 anti-commandeering decision in *Murphy v. NCAA* disallows the Commission from adopting reduced shot clock timeframes, "deemed granted" remedies, limits on permit fees, and more. Other state and local government officials have also invoked the anti-commandeering doctrine. However, on closer examination, those arguments don't hold up.

*Murphy* reaffirmed the anti-commandeering doctrine that is frequently associated with the 10th Amendment's proviso: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." According to Supreme Court in *Murphy*: "The anticommandeering doctrine… is simply the expression of a

fundamental structural decision incorporated into the Constitution… to withhold from Congress the power to issue orders directly to the States." That is, the anti-commandeering doctrine bars the federal government from requiring state and local government officials to directly administer federal regulatory schemes and from telling states what they must permit or prohibit.

Yet all or nearly all the FCC's proposed wireless infrastructure siting reform proposals easily avoid anti-commandeering problems. As an initial matter, the FCC's proposals regarding "deemed granted" remedies, shot clocks, as well as implementing guidance on prohibitive actions and excessive fees are based on express grant of authority by Congress. Sections 253(a) of the Communications Act and 332(c)(7)(B)(i)(II) of the Telecommunications Act of 1996 both prohibit local government actions that "prohibit or have the effect of prohibiting" telecommunications services. And although local governments may charge fees for use of rights-of-way, Section 253(c) states that fees must be "fair and reasonable compensation" and assessed on a "competitively neutral and nondiscriminatory basis." Under Section 253(d), the Commission has express authority to preempt state and local regulations that the Commission determines are contrary to federal law. These statutory provisions, in turn, are squarely based on Congress's constitutional power to regulate interstate commerce under Article I, Section 8.

Importantly, the Commission's wireless infrastructure siting proposals do not directly order state or local governments to administer federal regulatory schemes. Nor do the Commission's proposals regarding "deemed granted" remedies, shot clocks, effective prohibitions or excessive fees require local government officials to permit or prohibit certain actions. Rather, force of federal law via agency preemption would bar impermissible local government actions or excessive fees – without the Commission standing in the shoes of local government officials. If the Commission's proposals were adopted, state and local governments would not need to do anything. Local officials' inaction on wireless infrastructure permit applications would result in their being granted by operation of federal law.

Indeed, the Commission's infrastructure reforms – both proposed and recently adopted – are categorically distinct from federal statutory provisions that the Supreme Court has struck down on anti-commandeering grounds. In *Murphy*, the Court ruled that a federal statute's prohibition of state authorization of sports gambling violated the anti-commandeering rule. The statute "unequivocally dictate[d] what a state legislature may and may not do… as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals."

In *New York v. United States* (1992), the Court struck down a federal law requiring a state, under certain circumstances, either to assume ownership and liability for radioactive waste or to "regulat[e] according to the instructions of Congress." And in *Printz v. United States* (1997), the Court struck down a federal statute requiring state and local law enforcement officers to conduct background checks and related functions for handgun license applications. By contrast, the FCC has not proposed to strong-arm local government officials into allowing or prohibiting anything, nor has the FCC proposed to dragoon local government officials into servicing a federal regulatory program.

Lower court precedents support the conclusion that the Commission's infrastructure siting reform proposals do not run afoul of the anti-commandeering doctrine. In *Montgomery County v. FCC* (2015), the Fourth Circuit "readily conclude[d]" that a Commission-adopted "deemed granted" remedy comported with the doctrine. That "deemed granted" remedy was based on Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012. It applied when local governments failed to act within a 60-day shot clock on applications to make non-substantial modifications to wireless equipment on existing towers or other facilities. As the Fourth Circuit recognized: "the 'deemed granted' remedy obviates the need for the states affirmatively to approve applications." Rather, the remedy is an exercise of federal preemption meant "to ensure that states do not circumvent statutory requirements by failing to act upon applications."

Like all federal agencies, the FCC must be mindful to adopt rules based on delegated authority and also to avoid commandeering state and local governments. The FCC's infrastructure siting reform proposals adhere to those precepts. The Commission should proceed to adopt its reform proposals to promote infrastructure build-out needed for gigabit-capable wireline networks and 5G wireless networks.

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## Further Readings

Gregory J. Vogt, "STREAMLINE 5G Processes to Match the Speed of Business," *FSF Blog* (July 9, 2018).

Seth L. Cooper, "Free Market Policy Prescriptions for the 'Internet of Things,'" *Perspectives from FSF Scholars*, Vol. 13 No. 16 (April 27, 2018).

Michael J. Horney, "Reaching Rural America: Free Market Solutions for Promoting Broadband Deployment," *Perspectives from FSF Scholars*, Vol. 13 No. 10 (March 19, 2018).

Michael J. Horney, "Local Governments Should Promote 5G Smart Cities, Not Municipal Broadband," *FSF Blog* (February 20, 2018).

Randolph J. May, "Spurring Broadband Deployment and Reforming Communications Law," *FSF Blog* (January 26, 2018).

Comments of the Free State Foundation, In the Matter of Accelerating Wireless Broadband by Removing Barriers to Infrastructure Deployment, WT Docket No. 17-79 (June 15, 2017).

Seth L. Cooper, "A Shot Clock Would Streamline Broadband Deployment on Federal Land," *FSF Blog* (October 30, 2015).