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Wireless Infrastructure Reforms Rest on Solid Constitutional Foundations: Congress Should Preempt Local Obstacles to 5G Deployment

by

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A vigorous debate is taking place on Capitol Hill over attempts by some members of Congress to redefine "infrastructure" to mean things that have nothing to do with physical buildings or facilities. But if Congress is serious about rapidly expanding the reach of broadband networks to all Americans, it should focus on encouraging deployment of undisputedly *real* infrastructure: wireless macro cell towers, base stations, and small cell antennas.

Congress has constitutional power under the Commerce Clause to regulate the interstate market for commercial wireless services and thereby promote widespread availability of 5G networks. It has properly exercised this authority, consistent with the Constitution's Supremacy Clause and well-established federalism principles, to preempt state and local government actions that effectively prohibit siting wireless infrastructure facilities. In line with these constitutional foundations, the FCC has issued important clarifying interpretations of federal statutes to remove obstacles to wireless buildouts.

A record 46,000 new cell sites went into service in 2019, but even more are needed to maximize 5G's benefits. To bolster wireless siting reforms and avoid retrenchment, Congress

should exercise its constitutional authority to codify "shot clocks," "deemed granted" remedies, reasonable fee limits, and other pro-deployment measures. The proposed American Broadband Act, described in detail below, embodies the type of pro-reform infrastructure legislation Congress should take up.

According to the Boston Consulting Group, 5G deployment will add $1.4 trillion to $1.7 trillion to the U.S. GDP and create 3.8 million to 4.6 million jobs over the next decade. Future use of 5G networks by manufacturing, construction, health care, and other industries will indirectly add at least $1 trillion to the GDP and create at least 3 million new jobs by 2030. But full realization of 5G's infrastructure benefits depends on timely construction of wireless facilities like macro towers and base stations, as well as placements of small cell antennas. Existing cell sites also must be upgraded with 5G-capable equipment. In turn, these deployments depend on clear rules and efficient permitting processes for proposed construction and modification of wireless sites.

Some local governments have used their powers over permitting, zoning, and rights-of-way access to inhibit new cell site construction and existing site upgrades. The FCC has compiled record evidence of local governments blocking or delaying wireless infrastructure siting. For instance, in its August 2018 *Moratoria Order*, the Commission found that moratoria on processing wireless facility permits were numerous, geographically diverse, and occurring at both the state and local levels across the nation. And its June 2020 *5G Upgrade Order* found record evidence of local governments delaying permit processing by requiring that wireless infrastructure providers satisfy unreasonable time-consuming requirements such as meetings with multiple government departments, obtaining various certifications, and making presentations at public hearings.

To curb these problems, the FCC, often under the leadership of Commissioner Brendan Carr, has issued interpretations of relevant statutory provisions and adopted rules. For example, the Commission has clarified what types of local laws or actions constitute impermissible "effective prohibitions" on infrastructure siting according to Sections 253(a) and 332(c)(7). Its 2018 *Small Cell Order* codified in the agency's formal rules a 150-day "shot clock" as a presumptively reasonable period of time for local governments to act on new siting applications, and a 90-day "shot clock" for applications to collocate equipment on existing sites. That order also included a 90/60 "shot clock" for new placements and collocations of small wireless facilities. A state or local government's failure to act within the applicable timeframe triggers the right of a wireless infrastructure provider to file a lawsuit in federal court to challenge the local government's inaction.

Furthermore, the Commission has identified circumstances in which proposed minor modifications to existing sites are "eligible facilities requests" for streamlined approval under Section 6409(a). Its 2014 *Wireless Infrastructure Order* established a "deemed granted" remedy for cases in which the local government fails to issue a decision within 60 days of receiving a permit application for such minor modifications. And its 2020 *5G Upgrade Order* clarified when the 60-day "shot clock" begins to run and helped ensure local governments can't evade the agency's rules. That order also limited local wireless siting fees to a reasonable approximation of direct and actual costs for processing permit applications.

State and local government actions that conflict with the Commission's interpretations and rules are subject to federal preemption. In consequence, the Commission's wireless infrastructure siting reforms have limited state and local governments' authority over processing applications, preventing undue delays or prohibitions on wireless infrastructure providers' ability to deploy and upgrade cell sites. State and local government actions that conflict with the Commission's interpretations and rules are subject to federal preemption.

Local governments have pushed back against wireless infrastructure siting reforms, including on constitutional grounds. It sometimes has been suggested that federal preemption of local regulation is at odds with constitutional federalism or that it commandeers state officers to implement federal schemes contrary to the 10th Amendment.

But preemption of local regulatory burdens on wireless infrastructure siting rests on solid constitutional foundations. The Commerce Clause in Article I, Section 8 grants Congress the power "To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes." In its early landmark decision of *Gibbons v. Ogden* (1824), the Supreme Court recognized that Congress's authority with respect to commerce "among" states reaches inside a state's borders to further nationwide commercial concerns. As the Court explained in *Gibbons*: "Commerce among the States cannot stop at the external boundary line of each State, but may be introduced into the interior." Although wireless facilities are located within individual states, they are integral components of interconnected wireless broadband networks that transcend state borders. Geographically in-state wireless facilities are vital components of interstate communications networks.

Additionally, the Court held in *Gibbons* that when state or local restrictions on commercial activity conflict with federal policy regarding interstate commerce, it is "unequivocally manifested that Congress may control the State laws so far as it may be necessary to control them for the regulation of commerce." Preemption of conflicting state or local laws also follows from the Supremacy Clause in Article VI, Clause 2. Thus, state and local government permitting processes that effectively prohibit wireless infrastructure siting are proper subjects for preemption because they conflict with federal policy. Importantly, FCC orders from 2009, 2014, 2018, and 2020 exercising preemptive authority in the wireless infrastructure siting context have been upheld by the Supreme Court and lower courts.

Moreover, federal circuit courts of appeals have rejected "anti-commandeering" challenges to the Commission's wireless infrastructure siting reforms. According to Supreme Court decisions such as *NCAA v. Murphy* (2018), the anti-commandeering doctrine bars the federal government from requiring state and local government officials to directly administer federal regulatory programs and from telling states what they must permit or prohibit. The anti-commandeering doctrine is rooted in 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."

In its September 2020 decision of *City of Portland v. FCC*, the Ninth Circuit concluded that the *Small Cell Order*'s prohibition on wireless facility application fees that exceed a

"reasonable approximation of the state or local government's costs" did not financially compel states to enforce a federal program. Rather, the Commission was "interpreting and enforcing the 1996 Telecommunications Act, adopted by Congress pursuant to its delegated authority under the Commerce Clause, to ensure that municipalities are not charging small cell providers unreasonable fees." Similarly, the Ninth Circuit concluded that the *Small Cell* and *Moratoria Order*s' preemption of state and local policies that conflicted with the agency's rules regarding permitting fees, shot clocks, as well as express and de facto moratoria on processing permits, did not commandeer state and local officials. Citing the Supreme Court's decision in *Murphy*, the Ninth Circuit held that the Commission's orders simply conferred on wireless providers a federal right to place and modify cell sites subject only to certain federal constraints.

Additionally, the Fourth Circuit's 2015 decision in *Montgomery County v. FCC* held that the Commission's 2014 *Infrastructure Order* interpreting and implementing Section 6409(a) did not run afoul of the Supreme Court's anti-commandeering doctrine by providing that an application to make minor changes to an existing site is "deemed granted" if the state or local government fails to act on it within the 60-day shot clock. As the Fourth Circuit explained, "the 'deemed granted' remedy obviates the need for the states to affirmatively approve applications." Instead, such a remedy "allows the applications to be granted by default if the state does not affirmatively approve them within sixty days."

Some local governments have lobbied for repeal of the Commission's reforms, and legislation to repeal the 2018 *Small Cell Order* was introduced in the 116th Congress. Moreover, in April of this year, FCC Commissioner Brendan Carr reportedly expressed concern that there could be some "retrenchment" of wireless infrastructure siting reforms under the newly-constituted Commission. To prevent such retrenchment and thereby ensure that wireless facilities are speedily built to deliver 5G network services nationwide, Congress should exercise its constitutional authority over interstate commercial wireless services and consider additional restrictions on state and local government actions that effectively prohibit or unduly delay wireless infrastructure siting.

The American Broadband Act, a draft bill unveiled by Republican members of the House Energy and Commerce Committee in May 2021, embodies a pro-reform approach to wireless infrastructure siting. The bill would codify the Commission's 150/90 "shot clocks" for new wireless facility constructions and collocations, as well as its 90/60 "shot clock" for new placements and collocations of small cells. And the bill would provide that a state or local government's failure to act within the applicable timeframe would result in the application being deemed granted by operation of federal law. The draft bill similarly codifies Commission rules for streamlined approval of minor upgrades to existing sites under Section 6409(a), adding a deemed granted remedy in the event that local governments fail to act within 60 days. Also, the draft bill codifies limits on local wireless siting fees to a reasonable approximation of direct and actual costs for processing permit applications. And it would exempt small cell constructions and collocations from historic and environmental reviews for certain federal projects.

In sum, the FCC's recent wireless infrastructure siting reforms are backed by Congress's authority to regulate interstate commerce. And the agency's preemption of conflicting state and local actions have been carefully tailored to avoid commandeering state and local government officials. For the Commission or Congress to undo those reforms would stymie 5G network deployment with local restrictions and extra costs, potentially undermining billions in economic benefits and hundreds of thousands of new jobs. To ensure a vibrant 5G for America, Congress should exercise its constitutional authority to codify the Commissions siting reforms and remove additional obstacles to wireless infrastructure deployment.

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Further Readings

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Andrew Long, "'Future-Proofing' Subsidized Broadband Would Inflate Consumer Prices," *FSF Blog* (April 13, 2021).