Of Towers, Antennas, and Federalism: The Clash of Federal Policy and Local Zoning Over the Placement of Wireless Communications Facilities in America's Communities

By Jay Doegey and Matthew K. Schettenhelm



For decades, the Federal Communications Commission (FCC)—like the federal government generally—has played only a limited role with respect to the placement of wireless communications facilities in America's towns, cities, and counties. This may be changing. The FCC has pushed the bounds of its authority under the Communications Act in an effort to influence and accelerate local communities' zoning decisions. It has also released a far-reaching inquiry, asking whether it should regulate local decisions in this area more extensively. Now Congress has stepped into the area as well, mandating that local governments "shall approve" certain industry requests to replace and modify facilities on existing towers. Meanwhile, wireless service providers are reaching deeper into local communities with antennas that line local highways, streets, and neighborhoods. These facilities are sometimes unsafe; they are often unsightly; and they are frequently controversial.

This article provides an overview of some recent developments in the evolving law of wireless communications facilities. It traces the clash between federal policymakers and local zoning authorities, and highlights a case that may allow the Supreme Court to definitively resolve the proper spheres of authority in this important area.

Section 332(c)(7)

In the Telecommunications Act of 1996, Congress added Section 332(c)(7), 47 U.S.C. §332(c)(7), to the Communications Act to address the regulation of the placement of "personal wireless service facilities,"[1] a term that includes cell towers and other wireless communications facilities. For advocates of preserving local government authority, the statute represented a significant victory. Two years earlier, the situation looked dire. The Cellular Telephone Industry Association (CTIA) had petitioned the FCC to make rules to bar State and local governments from "interfering with the build out of CMRS [Commercial Mobile Radio Service] infrastructure and the development of a competitive, efficient CMRS marketplace, through zoning and other similar regulations."[2] The petition asked the FCC to preempt local and State zoning procedures that it claimed were impeding cell tower deployment.[3] And shortly thereafter, the House of Representatives passed a bill that would have empowered the FCC to "prescribe and make effective a policy regarding State and local regulation of the placement, construction, modification, or operation of facilities for the provision of commercial mobile services," and to make "policies" that would require a local government to act "within a reasonable period of time."[4]

In Section 332(c)(7), however, Congress replaced this "national" model with something that local government advocates found vastly superior. Titled "Preservation of Local Zoning Authority," Section 332(c)(7)—according to the bill's conference report—"prevents Commission preemption of local and State land use decisions and preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement."[5] The statute establishes five express limits on State and local authority, but otherwise instructs that "except as provided", "nothing in [the Communications Act] may limit or affect" this State and local authority.[6] The statute provides a role for the FCC in one (and only one) respect: the Commission may resolve disputes regarding radiofrequency (RF) emissions concurrent with the courts, but otherwise, "the courts shall have exclusive jurisdiction over all other disputes arising under this section."[7] The Conference report explained that "any pending Commission rulemaking concerning the preemption of local zoning author-

ity over the placement, construction or modification of CMS facilities should be terminated."

Thus, in 1996, the prevailing view among local government advocates was that Congress—except for RF matters—largely had chosen to keep federal policymakers out of the business of influencing how wireless communications facilities would be placed in local communities.

Section 332(c)(7)'s Operation: An Experiment in Federalism

For the next 13 years, local advocates had little reason to doubt this view. Local governments and industry frequently clashed over whether and where facilities could be placed, but these disputes were resolved by a State or federal court that would often give substantial deference to a local government's decision so long as it did not defy the statute's five express limitations. These limitations were that a State or local government:

- Shall not unreasonably discriminate among providers of functionally equivalent services;
- Shall not prohibit or have the effect of prohibiting the provision of personal wireless services;
- Shall act on any request within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request;
- Shall make any decision denying an application in writing, which must be supported by substantial evidence contained in a written record; and
- Shall not regulate on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

It is beyond the scope of this article to discuss how the courts have addressed these standards since 1996, a topic that this publication has covered in depth before.[8] It is, however, useful to address the law's basic operation. Congress did not intend the law to create nationally-uniform siting practices, or to accelerate the siting process that each community had individually established. An early First Circuit decision summarized it well:

> The statute's balance of local autonomy subject to federal limitations does not offer a single 'cookie cutter' solution for diverse local situations, and it imposes an unusual burden on the courts. But Congress conceived that this course would produce (albeit at some cost and delay for the carriers) individual solutions best adapted to the needs and desires of particular communities. If this refreshing experiment in federalism does not work, Congress can always alter the law.[9]

With relatively few exceptions, the courts have borne this "unusual burden" ably: they have applied the statute's express limitations, but otherwise deferred to the "needs and desires of particular communities." And one thing can be said with certainty: RF-matters aside, the courts did not look to a federal agency to influence or affect the standards that will control these local decisions.

The FCC's Order: An Experiment in ~~Federalism~~ Federalization?!?

In 2009, this changed. Thirteen years after Congress adopted Section 332(c)(7), the FCC elected to implement it with its own federal administrative policy framework. On July 11, 2008, CTIA-The Wireless Association filed a petition urging the FCC to read Section 332(c)(7) to establish fixed time frames in which State and local governments must act on an application. In late 2009, the FCC granted CTIA's petition, and ruled in its favor in significant part.[10] To implement the requirement under Section 332(c)(7)(B)(ii) that States and local governments must act on a zoning application within a "reasonable period of time," the FCC created 90- and 150-day "shot clocks" for State and local action on a complete application.[11] The FCC ruled that if a State or local government does not act within these time frames (absent an agreement to extend the deadlines between the locality and the applicant[12]), a "failure to act" under Section 332(c)(7)(B)(v) will have occurred.[13] For the next 30 days, the provider can sue the State or local government and the local government will be presumed to have delayed unreasonably;[14] it is then up to the locality to rebut the presumption in court.[15] In addition, the FCC declared that a State or local government that denies an application solely because "one or more carriers serve a given geographic market" has engaged in unlawful regulation that "prohibits or ha[s] the effect of prohibiting the provision of personal wireless services."[16]

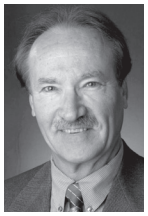
The Fifth Circuit's Decision

Perhaps the most surprising aspect of the FCC's decision was the agency's conclusion that it had the authority to address this area at all. Questioning the agency's jurisdiction, the City of Arlington, Texas,

Continued on page 16



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filed a Petition for Review of the Order with the U.S. Court of Appeals for the Fifth Circuit in early 2010.[17]

Arlington and the supporting Intervenors noted that the FCC's jurisdictional conclusion could not be squared with Section 332(c)(7)'s plain language and history. The FCC relied on its general authority under the Communications Act in four sections—Sections 1, 4(i), 201(b), and 303(r)—that appear *outside* of Section 332(c)(7).[18] But the agency did not directly explain how it could use these provisions to affect State and local authority when Section 332(c)(7)(A) states that, "[e]xcept as provided in *this paragraph*, *nothing in this Act* shall limit or affect" State and local authority.[19] The FCC also did little to rebut the legislative history discussed above, which directed the agency to terminate its rulemaking in this area and to leave disputes to the courts. The Commission claimed that this forbids the agency from adopting "additional" limitations, but not from using its general authority to implement the limitations Congress had already adopted.[20] This response is creative, but nothing in Section 332(c)(7)(A)'s language or its history draws such a distinction.

To Arlington's and the other Intervenors' disappointment, however, the Fifth Circuit upheld the FCC's order in a decision released in January of this year.[21] Importantly, though, the court did not uphold the order because it agreed that the FCC had presented the better reading of the jurisdictional statutes. Instead, the court found that its precedent required it to apply the deferential *Chevron* doctrine, which the Fifth Circuit interpreted to mean that in every circumstance—even where the issue is whether an agency has jurisdiction—a court must defer to an agency's reasonable statutory interpretation, even if the court finds another interpretation is superior.[22] The court found that Section 332(c)(7)(A) does not "unambiguously preclude"[23] the FCC from regulating in this area, and that the agency's determination that it could implement Section 332(c)(7) was "permissible."[24] The Fifth Circuit declined to review its decision in response to a petition for rehearing *en banc*.

Potential Supreme Court Review

The decision may not be the end of this story, however. The Fifth Circuit's view that *Chevron* applies to jurisdictional issues is at odds with decisions of several other courts of appeal. As the Fifth Circuit put it here:

> The Supreme Court has not yet conclusively resolved the question of whether *Chevron* applies in the context of an agency's determination of its own statutory jurisdiction, and the circuit courts of appeals have adopted different approaches to the issue. Some circuits apply *Chevron* deference to disputes over the scope of an agency's jurisdiction, some do not, and some circuits have thus far avoided taking a position.[25]

The FCC has pushed the bounds of its authority under the Communications Act in an effort to influence and accelerate local communities' zoning decisions. It has also released a far-reaching inquiry, asking whether it should regulate local decisions in this area more extensively.

The case thus presents an unusually strong vehicle for the Supreme Court to examine a recurring question of administrative law: whether a court must defer to an agency's determination of its own jurisdiction. This question is especially important here, where the agency has unilaterally expanded its jurisdiction over State and local governments. Arlington and others expect to present this issue to the Supreme Court in a petition for a writ of certiorari due this summer.

No one disputes that the *Chevron* doctrine often plays a useful role in ensuring that an administrative agency resolves issues that Congress intended it to address, without interference from the courts. But where the question is not the propriety of an agency's action in an area where Congress intended it to act, but whether Congress intended to delegate authority to the agency in the first place, the issue is different. It is highly doubtful that an agency is better-suited than a court to decide basic questions about jurisdiction. For this and other reasons, scholars have argued that courts should not apply *Chevron* to jurisdictional questions.[26]

We are hopeful that the Court will be interested in clarifying this issue in this case. We believe that if the Fifth Circuit had reviewed the interaction of Section 332(c)(7) and the other provisions of the Act *de novo*, it would have concluded that the best reading is that Congress did not intend for the FCC to use these other statutes to "affect" State and local authority that Section 332(c)(7) addresses. If the Court agrees to take the case, we expect briefing to occur this fall.

Other Recent Developments

In April 2011, the FCC released a broad notice of inquiry asking whether it should expand its regulation of State and local siting practices.[27] Sensing an opportunity, the industry filed extensive comments urging the FCC to adopt additional rules limiting local authority. A coalition of local government organizations, including IMLA, filed extensive comments showing that the FCC lacks authority to adopt these measures, and urging the Commission to instead work cooperatively with local governments toward their shared goals.[28] So far, the FCC appears to be following the approach proposed by IMLA and its partners. The Commission has not proposed additional wireless facility siting rules, but has, instead, held two workshops to share best practices in the field.[29] We are hopeful that the Commission will continue to pursue this cooperative approach.

Congress has recently preempted certain local authority over collocations. For the first time since 1996, Congress

also addressed State and local zoning authority in a measure adopted earlier this year. Tucked deep in the Middle Class Tax Relief and Job Creation Act of 2012, Section 6409 of the Act provides that "[n]otwithstanding [Section 332(c)(7) of the Communications Act] or any other provision of law," 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."[30] The statute leaves most of the key terms undefined. For example, it does not define "wireless tower," "base station," or explain what constitutes a "substantial[ ] change [in] the physical dimension."[31] Like the FCC's shot clock order, the statute also presents interesting questions. For example, may the federal government not only preempt local authority, but also *order* a local government to take a legislative action—to "approve" a request—against its will? Must a local government "approve" a request even if it presents a safety hazard? These questions and others will no doubt arise in the years to come. For now, local government attorneys should be aware of the new law, and ensure that local ordinances are updated to reflect it.

Conclusion

Although for decades the federal government has appeared content to leave authority over the placement of wireless communications facilities primarily to State and local governments, this may be changing. Local government attorneys should remain vigilant of federal policymakers' desire to accelerate broadband deployment at the expense of other important community values.

Notes

1. "[P]ersonal wireless services" means "commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services." 47 U.S.C. § 332(c)(7)(C)(i). "Personal wireless service facilities" means "facilities for the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(C)(ii) (West 2012).
2. CTIA's Petition for Rulemaking, *In re Amendment of the Commission's Rules To Preempt State and Local Regulation of Tower Siting for Commercial Mobile Service Providers*, RM-8577, at 17 (Dec. 22, 1994).
3. *Id.* at 10.
4. H.R. Rep. No. 104-204 at 25, 1996 U.S.C.C.A.N. 10 (1995).
5. H.R. Conf. Rep. 104-458 at 207- 208 (emphasis added).
6. 47 U.S.C.§ 332(c)(7)(A) (West 2012).
7. H.R. Conf. Rep. 104-458 at 207- 208.
8. J. Hobson and M. Schettenhelm, *Wireless Facility Siting Under the Communications Act: An Update on Judicial Decisions Applying 47 U.S.C. § 332(c)(7)*, Municipal Lawyer (Nov./Dec. 2008).
9. Town of Amherst v. Omnipoint Commc'ns Enter., Inc., 173 F.3d 9, 17 (1st Cir. 1999).
10. *In re Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, 24 FCC Rcd 13994, ¶ 71 (FCC 2009) ("Order").
11. Order ¶¶ 4, 32, 37, 45, 53. If an application is incomplete when filed, the "shot clocks" for action are tolled until the application is completed—but only if the State or local government notifies the applicant within the first 30 days that its application is incomplete.
12. Order ¶ 49.
13. Order ¶¶ 4, 32, 37.
14. Order ¶¶ 42.
15. Order ¶¶ 19, 34 n.111.
16. Order ¶ 56 (citing 47 U.S.C. § 332(c)(7)(B)(i)(II)). The FCC also declined to grant CTIA's request that it preempt ordinances that impose variance requirements. Order ¶ 67. The Commission ruled that CTIA had not presented the agency with sufficient information or evidence of a specific controversy on which to base such action or ruling. *Id.*
17. The City was joined by a number of Intervenors, including the City of Carlsbad, California; City of Dallas, Texas; City of Dubuque, Iowa; Fairfax County, Virginia; City of Glendale, California; City of Los Angeles, California; Los Angeles County, California; City of Portland, Oregon; County of San Diego, California; Texas Coalition of Cities for Utility Issues; the International Municipal Lawyers Association; the National League of Cities; the United States Conference of Mayors; and the National Association of Telecommunications Officers and Advisors. The City of San Antonio, Texas, filed a separate petition for review after the FCC refused to reconsider its order.
18. Order ¶¶ 23, 72.
19. 47 U.S.C. § 332(c)(7)(A) (West 2012).
20. Order ¶ 25.
21. City of Arlington, Texas v. FCC, 668 F.3d 229 (5th Cir. 2012).
22. *Id.* at 250-254.
23. *Id.* at 250.
24. *Id.* at 253.
25. *Id.* at 248 (internal references omitted).
26. D. Lyons, *Tethering the Administrative State: The Case Against Chevron Deference for FCC Jurisdictional Claims*, 36 Iowa J. Corp. L. 823 (2011); N. Sales, *The Rest is Silence: Chevron Jurisdiction, Agency Deference, and Statutory Silences*, 2009 U. Ill. L. Rev. 1497 (2009); T.W. Merrill, *Chevron's Domain*, 89 Geo. L.J. 833, 909-911 (2001) (noting courts have also policed this "by exercising especially vigorous statutory interpretation at Chevron's step one").
27. *In re Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, WC Docket No. 11-59 (April 7, 2011).
28. Comments of the National League of Cities *et al.*, WC Docket No. 11-59 (July 18, 2011).
29. Public Notice, DA 12-671, *Wireless Telecommunications Bureau Announces Workshop Agenda: Promoting Mobile Broadband in Your Community by Collocating Wireless Antennas on Communications Towers and Other Structures* (April 27, 2012); Public Notice, DA 12-97, *Wireless Telecommunications Bureau Announces Workshop Agenda: Augmenting Mobile Broadband in Your Community an Overview of Distributed Antenna Systems and Small Cell Solutions* (Jan. 27, 2012).
30. 47 U.S.C. § 1455(a) (West 2012).
31. Some of these terms (or very similar terms) appear in the FCC's Nationwide Programmatic Agreement, and the Nationwide Collocation Programmatic Agreement which govern the FCC's review of facilities under the National Historic Preservation Act. These agreements are available at the FCC's website, http://wireless.fcc.gov/siting/npa.html. **M**