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D.C. Circuit Delivers Setback to FCC's 5G Network Deployment Efforts

In a recent decision, the U.S. Court of Appeals for the D.C. Circuit struck down key portions of a 2018 order by the Federal Communications Commission that would have exempted certain small wireless facilities from environmental and historic preservation review. The court's decision is a setback to the FCC's recent efforts to facilitate the deployment of small wireless facilities, or "small cells," which are necessary to support 5G wireless networks and the new technologies that will rely on those networks (including the Internet of Things, autonomous vehicles, and artificial intelligence-driven devices and services). In a partial win for the FCC, however, the court upheld other parts of its order, including changes to the tribal consultation process for larger wireless facilities.

The FCC Order

5G wireless networks rely heavily on high-band spectrum that can carry significant mobile broadband traffic with very low latency. However, because this type of spectrum has poor area coverage and penetration characteristics, 5G networks require a large number of small antenna systems to be deployed in close proximity to each other, rather than on traditional cell towers or monopoles separated by great distances.

Facilitating the deployment of the potentially hundreds of thousands of small cells necessary to support 5G networks has been a priority for FCC Chairman Ajit Pai. [As we reported previously](#), the FCC released an order on March 30, 2018, that contained several provisions intended to reduce the regulatory requirements for small wireless facilities. The order exempted certain small wireless facilities from the environmental and historic preservation review requirements of the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA). In particular, wireless facilities were exempted if they met specified height and volume requirements, did not require antenna structure registration, were not located on tribal lands and did not result in human exposure to radiofrequency radiation in excess of applicable safety standards.

Various tribal and environmental groups filed petitions for review of the order, raising claims that the FCC violated the Administrative Procedure Act, NEPA and the NHPA.

Environmental and Historic Preservation Reviews for Small Cells

In general, NEPA and the NHPA require environmental and historic preservation reviews when a federal agency proposes to undertake, fund or authorize the construction of a project. In the case of wireless facilities, there is no statutory requirement for providers to obtain a permit from the FCC before commencing construction. But by regulation, the FCC has required NEPA and NHPA compliance for wireless facilities that (1) are subject to the antenna structure registration requirements or (2) fall within the "limited approval authority" set forth in the FCC's rules. FCC approval pursuant to these rules has been treated as federal action for purposes of triggering the requirement for NEPA and NHPA review. The order amended the FCC rules to exempt certain small

wireless facilities (based on their size and other specifications).

The court struck down the parts of the order creating this small cell exemption from NEPA and NHPA requirements. The court ruled that the order's deregulation of certain small wireless facilities was arbitrary and capricious because the FCC did not justify its determination that it was no longer in the public interest to require environmental and historic preservation reviews for small cells.

The court held that the FCC had mischaracterized and downplayed the impacts of small cell deployment on environmental, historic and cultural resources, explaining that the FCC focused on the impacts of small cells that could be collocated on existing structures "without addressing the many thousands that cannot be." The court noted several features of small cell deployments that belied the FCC's claim that small wireless facilities would have little to no impacts on environmental, historic and cultural resources: the order was not limited to collocations but also exempted small wireless facilities involving new ground disturbance; small wireless facilities could be mounted on structures of up to 50 feet in height or no more than 10% taller than adjacent structures; and the order did not address the potentially significant cumulative impacts of small cell densification, which could require 800,000 small cell deployments by 2026.

In addition, the court held that the FCC did not adequately address the societal costs of exempting entire classes of small cells from environmental review. Before the order, many small wireless facilities were already exempt from NEPA and NHPA requirements if they were collocated on existing structures and met certain other conditions intended to limit their impacts on the environment and historic resources. The court held that the FCC did not explain why further deregulation was necessary in light of these existing streamlining measures. The court also held that the FCC did not adequately account for the potential benefits of retaining individualized NEPA and NHPA review or of further streamlining, rather than completely eliminating such review.

Changes to the Tribal Consultation Process

The court upheld the order's changes to the tribal consultation procedures under Section 106 of the NHPA.

First, the court held that the order did not change any legal requirement for applicants to pay up-front fees to tribes to comment on proposed deployments. Even though applicants have routinely paid up-front fees, these payments have been voluntary under existing regulations of the Advisory Council on Historic Preservation. The court concluded that the order "does no more than recognize and reiterate the Advisory Council's existing rule."

Second, the court held that the order permissibly authorized applicants to contract with non-tribal parties to identify and evaluate cultural resources. The court explained that the order contained appropriate limits on the use of non-tribal contractors by requiring that contractors be "properly qualified," which in some circumstances could require applicants to hire tribes (for example, when tribes have unique knowledge of historic or cultural resources).

Third, the court upheld the shortened timeline for tribes to respond to notifications of proposed wireless facility construction. The court concluded that the FCC acted within its discretion and reasonably justified its decision as a compromise between the interests of the wireless industry and tribes.

Takeaways

The court vacated the portions of the order that exempted small cells from NEPA and NHPA reviews, delivering a setback to the FCC's efforts to speed up small cell deployment for 5G networks. Cases challenging another recent FCC order that limits local government control over small wireless facilities are currently pending before the U.S. Court of Appeals for the Ninth Circuit.

However, it is also significant that the court upheld the other parts of the order, delivering a victory to the FCC and the wireless industry and achieving some measure of the order's primary objective: to accelerate the regulatory review necessary before the buildout of new 5G wireless network facilities.

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