

An Update on the FCC and Small Cells

Section 253-d, Title 47 in the US Code of law allows the FCC to remove state and local barriers to market entry in telecommunications. The law prescribes an ability to preempt state or local statutes, regulations, or legal requirements to the extent they prohibit the ability to provide telecommunication services within a state or between states. This does not, however, preclude a state from imposing *competitively neutral requirements*, for instance, to protect the public safety and welfare, nor does it preclude a state or local government from managing public right of way or requiring *fair and reasonable compensation* from a telecom provider, on a *competitively neutral and nondiscriminatory basis*, for use of public right-of-way, if the compensation required is *publicly disclosed by such government*. Public right of way is being relied upon heavily to deploy and connect small cell sites for the provision of broadband telecommunications.

Over the past year wireless industry executives have been quoted in the media concerning the lack of uniformity among the nation's local jurisdictions related to permit fees and requirements to deploy small cell technology. Likewise, FCC commissioners and members of Congress have gone on record to support the need for massive implementation of next generation technology to the public, as quickly as possible. In this regard, infrastructure provider, Mobilitie LLC presented the FCC a Petition for a Declaratory Ruling, November 15, 2016, to prohibit excessive charges for access to public right of way. The purpose of the request for a ruling is to end controversy and remove uncertainty regarding language in Section 253-c.

Specifically, Mobilitie is requesting the FCC to interpret three phrases in the law, as highlighted below:

1. Interpret *fair and reasonable compensation* so a jurisdiction's right of way charges only recapture its costs to issue use permits, construction permits, and manage its rights of way.
2. Interpret *competitively neutral and nondiscriminatory basis* so jurisdictions can't charge more for a provider's right of way access than what has been charged to another provider for similar access.
3. Interpret *publicly disclosed by such government* to obligate each jurisdiction to provide a schedule detailing amounts charged to others for access to public right of way.

The reasons Mobilitie stated for making a ruling on these interpretations are as follows:

1. To stop the imposition of excessive and unfair fees being charged for access to rights of way.
2. To provide clarity and certainty for telecom providers and local jurisdictions, alike.
3. To avoid and resolve disputes between telecom providers and local jurisdictions.
4. To allow for the acceleration of investment necessary to support America's exploding demand for deployment of wireless broadband.

In response to Mobilitie's request, the FCC's Wireless Telecommunications Bureau invited public input for ways the FCC might promote wireless infrastructure deployment through a declaratory ruling. Reply Comments regarding this FCC Docket (#16-421), "Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies" are were to the FCC by April 7, 2017.

As of April 7, 2017, almost 927 comments were filed with the FCC, mostly by individuals, but also by wireless industry advocates, municipalities, groups representing cities, non-profit organizations, and home owner associations. All comments made to date are available to view on the FCC website at: https://www.fcc.gov/ecfs/search/filings?proceedings_name=16-421&sort=date_disseminated,DESC.

While this Inquiry is closed for comments is the FCC has opened two new related Notices of Proposed Rulemaking (NPR) on removing barriers to wireless and wireline infrastructure development investment. See https://www.fcc.gov/ecfs/search/filings?proceedings_name=17-79&sort=date_disseminated,DESC, & https://www.fcc.gov/ecfs/search/filings?proceedings_name=17-84&sort=date_disseminated,DESC for fact sheets on these proceedings or to view or make comments (at <https://www.fcc.gov/ecfs/filings/express>). The Docket #'s are 17-79 and 17-84 respectively. Note: Your comments will be viewable publicly.

John Rowe, COWA Regulatory Committee, February 20, 2017 (Amended 4/10/2017)

spection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and non-discriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) “Incumbent local exchange carrier” defined

For purposes of this section, the term “incumbent local exchange carrier” has the meaning provided in section 251(h) of this title.

(June 19, 1934, ch. 652, title II, §252, as added Pub. L. 104-104, title I, §101(a), Feb. 8, 1996, 110 Stat. 66.)

REFERENCES IN TEXT

This chapter, referred to in subsec. (g), was in the original “this Act”, meaning act June 19, 1934, ch. 652, 48 Stat. 1064, known as the Communications Act of 1934, which is classified principally to this chapter. For complete classification of this Act to the Code, see section 609 of this title and Tables.

§ 253. Removal of barriers to entry

(a) In general

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State regulatory authority

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and local government authority

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and non-discriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) Preemption

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

(e) Commercial mobile service providers

Nothing in this section shall affect the application of section 332(c)(3) of this title to commercial mobile service providers.

(f) Rural markets

It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) of this title for designation as an eligible telecommunications carrier for that area before being permitted to provide such service. This subsection shall not apply—

(1) to a service area served by a rural telephone company that has obtained an exemption, suspension, or modification of section 251(c)(4) of this title that effectively prevents a competitor from meeting the requirements of section 214(e)(1) of this title; and

(2) to a provider of commercial mobile services.

(June 19, 1934, ch. 652, title II, §253, as added Pub. L. 104-104, title I, §101(a), Feb. 8, 1996, 110 Stat. 70.)

§ 254. Universal service

(a) Procedures to review universal service requirements

(1) Federal-State Joint Board on universal service

Within one month after February 8, 1996, the Commission shall institute and refer to a Federal-State Joint Board under section 410(c) of this title a proceeding to recommend changes to any of its regulations in order to implement sections 214(e) of this title and this section, including the definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for completion of such recommendations. In addition to the members of the Joint Board required under section 410(c) of this title, one member of such Joint Board shall be a State-appointed utility consumer advocate nominated by a national organization of State utility consumer advocates. The Joint Board shall, after notice and opportunity for public comment, make its recommendations to the Commission 9 months after February 8, 1996.

(2) Commission action

The Commission shall initiate a single proceeding to implement the recommendations from the Joint Board required by paragraph (1) and shall complete such proceeding within 15 months after February 8, 1996. The rules established by such proceeding shall include a definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for implementation. Thereafter, the Commission shall complete any proceeding to implement subsequent recommendations from any Joint Board on universal service within one year after receiving such recommendations.

(b) Universal service principles

The Joint Board and the Commission shall base policies for the preservation and advance-