Setback For 5G Deployment

By Will Dodge

The D.C. Circuit recently dealt a setback to the Federal Communications Commission (FCC) effort to accelerate small cell technology deployment nationwide. *United Keetoowah Band of Cherokee Indians in Oklahoma v. FCC*, ___ F. 3d __, 2019 WL 375673 (D.D.C., Aug. 9, 2019). The Court held that the FCC, in promulgating regulations to exempt "small cell" sites from environmental and cultural resource review, had acted arbitrarily and capriciously, failing to "adequately address possible harms of deregulation and benefits of environmental and historical review." The decision, though likely to be appealed, has implications for wireless in New Hampshire and beyond. The Court's decision provides a thorough exploration of two important "cooperative federalism" laws affecting wireless — the National Environmental Policy Act of 1969 (NEPA) and the National Historic Preservation Act of 1966 (NHPA).

Background on Small Cell Technology

For years, the public has been hearing about the coming of cutting-edge 5G wireless tech. 5G speeds for wireless access to the internet are expected to range between 10x and 20x that of current 4G LTE offered by most carriers. Once unleashed, this new wave promises to connect an unlimited number of wireless devices — vehicles, home appliances, wearable devices, and more — to the internet, making us even more interconnected in our professional and personal lives.

The key to nationwide 5G involves mass deployment of small cell facilities — essentially "microsites" where small antennas, operating equipment, and utility connections are mounted on utility poles, streetlights, and building walls. The conventional "macrosite" used in NH today provides broad coverage and/or network capacity to a defined geographic area from towers and other tall structures using three-sided arrays of between six and twelve ±8' tall antennas per carrier. By contrast, small cells amplify the signal strengths from macrosites using multiple 1' to 2' tall antennas distributed throughout a high-traffic area, allowing for a "densification" of the network so that more users — people and machines — can use devices simultaneously without experiencing slowness. Even before 5G technology is rolled out, small cells are being introduced in cities, and at ski areas, public parks, and other areas with high wireless traffic usage.

The FCC's Second Order

In its so-called "Second Order," the FCC attempted to remove for 5G deployment certain legal barriers that it concluded had slowed deployment of previous generations of wireless technology. *In the Matter of Accelerating wireless Broadband Deployment by Removing Barriers to Infrastructure Investment* (Second Order), 2018 WL 1559856 (F.C.C. March 30, 2018). Recognizing the promise of 5G for the consumer wireless experience (e.g., "our country finds itself at the brink of another technological revolution"), and noting the hundred-thousands of sites needed to satisfy the "seemingly insatiable consumer demand for increased coverage and capacity for data services," the FCC created a new regulation to exempt small cells from being considered a federal "undertaking" under NHPA, or a "major Federal action" under NEPA. 47 C.F.R. 1.1312(e)(2) (2018).

The exemption effectively meant that new small cells would not be reviewed by state or tribal historical preservation officers, nor would consultants need to assess impacts to wetlands, floodplains, protected species, and other resources before new microsites are installed. To qualify for the exemption, each facility had to consist of antennas of no greater than three cubic feet, and operating equipment no greater than 28 cubic feet, mounted on (i) poles of 50 feet or less in height, (ii) new structures no more than 10 percent taller than adjacent structures, or (iii) an extension on an existing structure of no more than 10 percent of the structure's existing height.

Central to the FCC's rationale was its conviction that "the world of small wireless facility deployment is materially different from the deployment of macrocells in terms of the size of the facility, the importance of densification, and the lower likelihood of impact on surrounding areas." Rather than producing a detailed factual record, the FCC relied upon written comments from carriers, industry groups, consumer advocates, and municipal/state/tribal officials. Commissioner Jessica Rosenworcel dissented, noting the potential "policy and legal frailties" associated with an exemption-based approach to NHPA / NEPA.

Shortly after issuance, several Native American tribal organizations, together with the Natural Resources Defense Council, challenged the Second Order.

D.C. Circuit Decision

The D.C. Circuit began with a thorough review of NHPA and NEPA, the import of those acts for wireless facilities, and the importance of nationwide programmatic agreements along with the electronic Tower Construction Notification System in ensuring that state and tribal governments review and comment on new installations. For tribes, this includes facilities located in areas of the country outside of reservations where they may have longstanding land claims. (For instance, the Rhode Island-based Narragansett Tribe frequently reviews new sites in New Hampshire.)

The Court then recited a legal standard of review that seems obvious in hindsight, but may have been ignored in creating the Second Order: i.e., that no deference is owed to the FCC in interpreting NHPA or NEPA. Those acts impose obligations on the FCC directly and indirectly in assessing impacts on licensees building new facilities. Moreover, the FCC is charged with following rules and guidelines established by the Advisory Council on Historic Preservation (for NHPA) and the Council on Environmental Quality (for NEPA) for administering the public airwaves. The Councils must then coordinate with state and tribal agencies on how federal actions are reviewed (i.e., cooperative federalism).

Having reviewed the analytical framework, the Court proceeded to excoriate the FCC for the exemption, raising the following arguments:

- The scale of small-cell deployment nationwide – with potentially 800,000 new sites by 2026 – made it "impossible on this record to credit the claim that … [deployment] would leave little to no environmental footprint."
- The Second Order — in including new structures requiring new ground disturbances, as well as extensions on tall structures — went far beyond established processes, affording none of the limited protections existing in NHPA programmatic agreements for review of macrosite installations on or in historically-significant buildings.
- The FCC failed to thoughtfully respond to comments that "spiritual and cultural traditions of Tribal Nations frequently involve the uninterrupted view of a particular landscape, mountain range, or other view shed," all of which small cells hold the potential to disrupt.
- The FCC dismissed the benefits of cultural and environmental reviews as "generalized" or *de minimis* as a percentage of overall deployments, without accounting for instances where a site is moved or cancelled as a result of adverse comments, and without recognizing the alleged cultural and environmental impacts in those few instances where site locations are successfully challenged.

The Court held that "the FCC's conclusion that small cells are inherently unlikely to trigger concerns is arbitrary and capricious," and remanded the case for reconsideration of its approach to deregulation.

Effect on New Hampshire Wireless Deployment

New Hampshire has not seen widespread small cell deployment as of the date of this article; however, it is poised to see these facilities before long. Following passage of SB101 in 2013, state law exempts from local land use permitting the installation of wireless facilities on "utility poles," a term which covers structures owned and operated by utilities, municipalities, and co-ops designed specifically for and used to carry lines, cables or wires for telephone, cable TV, electrical lines, or lighting. RSA 12-K:2,XXVI; RSA 12-K:10,IV. Infrastructure providers must follow the Public Utilities Commission rules for pole attachments, and may need to engage with municipalities and/or NHDOT for access to public rights-of-way. For now, the D.C. Circuit's decision on the Second Order also requires providers to conduct NEPA/NHPA reviews of small cells by adhering to the current programmatic agreements for tower- and collocation-based macrosites as closely as possible.

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