FCC Proposed Expansion Of the OTARD Rule

Providers should explore the possible implications of the rule change and share comments with the FCC.

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On April 12, 2019, the FCC Wireless Bureau released a notice of proposed rulemaking (NPRM) concerning the extension of the Over-the-Air-Reception-Devices (OTARD) rule to cover small antenna devices used as carrier hub facilities rather than as consumer signal reception equipment.

Pressure to transform the OTARD rule from a consumer-protection measure into an end run around local regulation for the benefit of wireless carriers is the result of a confluence of historical accidents, driven by the evolution of wireless technology and producing a conflict between public policies that were once seen as parallel.

The primary technological driver has been the rapid rise of wireless platforms as a supplement to and an eventual replacement for wired platforms for pay television, internet access and voice services. Following enactment of the Telecom Act of 1996, the FCC promulgated two parallel sets of rules dealing with the placement of wireless devices on private property. On the one hand, the OTARD rules were intended to preempt almost all local regulation of the placement of consumer reception devices by customers of a wireless service (initially satellite television and, beginning in 2000, fixed wireless data). On the other hand, Section 704 of the Telecom Act largely preserved the ability of local governments to regulate the placement of large, obtrusive structures used to transmit wireless telecommunications signals.

Back then, things seemed clear: local regulation of wireless *reception* devices used by consumers is extremely limited, and local authority over wireless *transmission* devices used by big carriers is preserved.

Inevitably, however, technology evolved in ways that muddy the once-clear distinction between reception and transmission devices and therefore between the regulatory schemes governing their placement. What rules apply to devices that both receive and transmit wireless signals?

CONSIDERING THE IMPLICATIONS

The FCC already stretched the scope of the OTARD rule almost to its breaking point by ruling (in the Triton Networks case) that a wireless antenna relaying signals via a mesh network can qualify as an OTARD device, despite the fact that it serves remote customers, as long as at least one customer is located at or near the antenna site. In the new NPRM, the Wireless Bureau proposes to take the crucial additional step of eliminating the requirement that there be at least one customer at the antenna site so that the OTARD rule protects not only reception devices but transmission hubs as well. To take that step would mean, among other things, that OTARD can no longer be viewed primarily as a pro-consumer measure. On the contrary, the FCC is proposing to transform a rule that allows consumers to install small reception devices in their homes into a license to wireless carriers to install anything they want (provided it does not exceed OTARD's 1-meter-diameter limit) anywhere they want, as long as the carrier owns or leases the site.

If the proposal becomes final, the OTARD rule would have to be seen as a powerful route by which wireless telecommunications and data carriers may escape not only traditional principles of property law but also the reach of almost all traditional police-power regulation at the local level.

The driving force behind the NPRM is the exponential increase in the number of hub or signal relay stations

required to deploy advanced wireless networks, such as 5G, which utilize extremely high-frequency bands in the radio spectrum. Because high-frequency wavelengths are very short, the wave forms are easily distorted; consequently, higher-frequency waves do not travel as far as lower-frequency waves. Shorter travel distances mean more base stations – a *lot* more. Where to put them, if not on someone's private property?

The FCC's rationale for expanding OTARD coverage is as simple as it is circular: 5G networks require dense deployment of smaller antennas across provider networks closer to customers. Because more antenna and relay devices are needed, fewer regulatory restrictions and hurdles are tolerable.

The policy justification for preempting local authority over wireless facilities siting is also familiar – easing regulatory restrictions on the installation of hub and relay antennas will "spur investment" in next-generation wireless networks. In fact, exactly the same logic was used just a few months ago when the FCC issued its declaratory ruling and third report and order in September 2018, limiting the fees that can be imposed on carriers for deploying small-cell antennas in the public right of way. There is ample reason to be skeptical of carrier claims that relief from regulatory burdens is the key to bridging the digital divide. Predictions that repeal of network neutrality rules in June 2018 would "spur investment" were wrong. (See, for example, https://tinyurl.com/y3zdrpqy.)

CUTTING OUT THE MIDDLEMAN

The assumption behind the FCC's OTARD expansion proposal is that carriers are not capable of negotiating reasonable deals with municipal governments. Therefore, the government must intervene in a way that circumvents the need and incentive for carriers to cut a deal with property owners, placing the entire burden of facilities siting on municipal governments and multifamily property owners and conferring the entire benefit on carriers.

In fact, the OTARD proposal goes beyond simply correcting a perceived (but unproven) imbalance in traditional property access negotiations because the new rule actually *prevents* property owners from working with telecom carriers at all. That is true because the proposed OTARD expansion deprives property owners of the one effective tool they possess in their dealings with carriers, which is the power to withhold – and therefore to grant – access to real property for the siting of wireless broadband facilities.

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Why would a telecom carrier bother to talk about access with a local planning board or with the owner of an MDU building (or an owners' association, in the case of a condominium) when access is mandated under the law without negotiation? Is it a good idea to basically *eliminate* municipal governments, HOAs and apartment owners as a voice in discussions concerning the siting of wireless broadband facilities?

In theory (if not in practice), locally elected municipal officials, and to a lesser but still non-negligible extent, apartment owners and HOAs, are supposed to *represent* their constituents, who are voting city residents on the one hand and MDU residents on the other hand. What happens to those represented when the representative is excluded from access negotiations? Is it reasonable to assume that telecom carriers – which, according to surveys, are among the most hated corporations year after year – actually speak for those constituents' interests *more effectively* than do elected city officials and landlords?

To assess the plausibility of this proposition, consider the case of those consumers most in need of representation – consumers in underserved areas that are mostly neglected by cable and telco carriers. What reason is there to believe that the cost savings realized by a carrier by virtue of not having to negotiate access to desirable locations will be invested in the deployment of networks in less desirable areas?

Under Section 332 (c)(7) of the Communications Act, carriers negotiate with municipalities for access to potential sites for cell towers and other facilities; access to more lucrative areas may be conditioned on the carrier's commitment to build out networks in less-lucrative locations. By preempting almost all municipal jurisdiction over facilities siting decisions, OTARD expansion will, in effect, do away with those negotiations altogether.

It is possible that OTARD expansion will, in the end, lead to more cherry-picking of facilities siting locations – and therefore of prime service coverage areas – by carriers that can safely ignore less-lucrative locations.

SUBMITTING COMMENTS

Interested parties may file comments with the FCC on or before June 3, 2019, and may file reply comments on or before June 17, 2019. Comments may be filed electronically using the commission's Electronic Comment Filing System (ECFS), referring *to WT Docket No. 19–71.* ❖

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