

ALERT

Fourth Circuit Upholds the FCC's Infrastructure Order

December 18, 2015

Today the Fourth Circuit issued a published opinion in *Montgomery County, Maryland v. FCC*, – F.3d –, No. 15-1284 (4th Cir. 2015), upholding the Federal Communications Commission's (FCC) Infrastructure Order^[1] (Order) against constitutional and administrative law challenge. Adopting arguments advanced by Wiley Rein on behalf of intervenors CTIA – The Wireless Association and PCIA – The Wireless Infrastructure Association, the court held that the Order “is fully consonant with the Tenth Amendment,” and that “the FCC has reasonably interpreted the ambiguous terms of Section 6409(a) of the Spectrum Act.” Slip op. at 4. The panel decision was unanimous.

The Spectrum Act was enacted in 2012 to speed deployment of wireless facilities. The Act provides that “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.” 47 U.S.C. § 1455(a). The FCC promulgated the Infrastructure Order in 2014. It defines the statutory terms “substantially change” and “base station,” and provides that if a local authority fails to act upon an eligible request with 60 days, the request will be deemed granted.

Petitioners, a number of local governments, argued that the deemed grant conscripts the states in violation of the Tenth Amendment, and that the FCC's interpretations of “substantially change” and “base station” are unreasonable. The Fourth Circuit squarely rejected both arguments. In regard to the Tenth Amendment, the court held that the deemed grant “does not require the states to take any action at all.” Slip op. at 13. And in regard to the FCC's statutory interpretations, the

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court afforded deference under *Chevron* because the terms were ambiguous and the agency's interpretations reasonable. See slip op. 17-26.

Megan L. Brown argued the case for intervenors CTIA and PCIA. Joshua S. Turner and Jeremy J. Broggi were on brief.

[1] *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 29 FCC Rcd. 12865 (Oct. 17, 2014), amended by 30 FCC Rcd. 31 (Jan. 5, 2015).