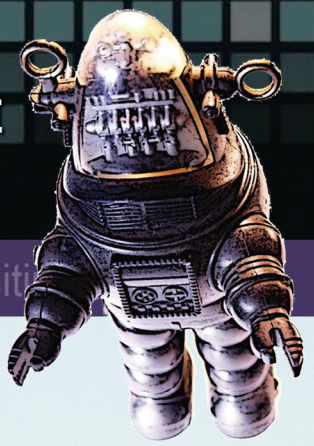
Tower Market Report

4th Annual Market Survey Results
Trends and Forecasts



Infrastructure, regulatory and financial information for the antenna-siti

ABOVE GROUND LEVEL

agl™

DAS and Small Cells Magazine

Enterprise-level BYOD/X

Spectrum Conditioning for DAS

Unified Communications

Advances in Wireless

OSHA Inspections

Supreme Court Upholds Shot Clock

Site and Tower Information Modeling

Antenna Alignment

agl-mag.com A BIBY PUBLISHING, LLC PUBLICATION

September 2013

Supreme Court Upholds Antenna-siting Shot Clock

It's called deference, and thanks to a recent Supreme Court ruling, federal courts may have to extend more of it to U.S. regulatory agencies after a ruling in a case involving the antenna-siting shot clock.

By Anthony B. Gioffre III, Andrew P. Schriever, Lucia Chiocchio and Ryan Tougias

In a case having potentially far-reaching implications for the level of deference that courts are to afford federal administrative agencies charged with implementing congressional legislation, the United States Supreme Court recently confirmed the FCC's authority to interpret the Telecommunications Act of 1996 (TCA), recognizing that "[s]tatutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency." (See *Arlington v. FCC*, 11-1545, slip op. at 5, 2013 WL 2149789 [May 20, 2013]).

In *Arlington v. FCC*, the Court affirmed the FCC's authority to issue its *Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B)* [see 24 F.C.C.R. 13994 (2009)], the so-called shot clock ruling whereby the FCC established guidelines for what constitutes a reasonable time for municipalities to review and act on wireless facility-siting applications. Prior to this FCC ruling, many wireless facility-siting applicants experienced indefinite municipal review delays, and they asserted that such delays frustrated federal communications policy by thwarting the rapid development of wireless infrastructure and the goal of providing wireless data access to all Americans. The FCC issued the shot clock ruling in response to a petition seeking clarification of Section 704 of the TCA, which requires a municipality to "act on any request for authorization to place, construct, or modify personal wireless service facilities *within a reasonable period of time* after the request is duly filed with such government or instrumentality." [Emphasis added.] In its declaratory ruling, the FCC interpreted this provision to hold that it is presumptively unreasonable when a municipality exceeds 90 days in considering a collocation application and 150 days in considering other wireless facility applications.

Prior to this FCC ruling [the antenna-siting shot clock], many wireless facility-siting applicants experienced indefinite municipal review delays.

Arlington resolved an inherent tension between a court's authority to interpret acts of Congress and the authority vested in an administrative agency charged with the same task, with Justice Antonin Scalia writing for the majority and finding that in this instance, courts are required to defer to the FCC's interpretation of a statutory ambiguity in the TCA. The opinion applied the now-canonical formula derived from *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* which set forth the criteria to be applied when a court reviews an agency's construction of a statute that the agency is charged with administering. A court must first look at whether the federal statute has spoken to the precise question at issue, in this case, the meaning of what constitutes a "reasonable period of time" under the TCA. If the statute is silent or ambiguous on the issue, as was the case here, the court reviewing an agency's interpretation must decide whether the agency's answer is based on a permissible construction of the statute.

Entitled to deference

The Supreme Court found that because Congress delegated general authority to the FCC to administer the TCA through administrative rulemaking and adjudication, Congress permitted the FCC to issue the shot clock ruling to address the statutory ambiguity and clarify exactly what constitutes "reasonableness," and because the FCC stayed within the bounds of its statutory authority, its interpretation of the TCA was entitled to deference.

Justice Scalia's opinion lends strong support to the argument that in a case in which a court's interpretation of an ambiguous federal statute is at odds with the interpretation of an administrative agency charged with administering the statute, the agency's interpretation should control even if that means departing from prior court precedent.

District court authority

By way of illustration, in addition to the "reasonableness" issue, the shot clock ruling also addressed a disagreement among federal Courts of Appeals as to "whether a State or local policy that denies personal wireless service facility siting applications solely because of the presence of another carrier should be treated as a siting regulation that prohibits or has the effect of prohibiting such services." In other words, some jurisdictions have held that a municipality does not effectively prohibit the provision of personal wireless services under the TCA by denying one carrier's ability to enter a market where that market is already served by another. Under this approach, if Carrier A sought to build a wireless facility, but Carrier B already served the targeted area, then a municipality could deny Carrier A's application because Carrier B already provides service. In its declaratory ruling, the FCC rejected that approach, finding "we construe the statute to bar State and local authorities from prohibiting the provision of services of individual carriers solely on the basis of the presence of another carrier in the jurisdiction." In light of *Arlington*, to the extent a district court finds itself caught between conflicting interpretations as between its governing circuit court and the FCC, the Supreme Court now provides a district court with authority (and one could argue a mandate) to treat the FCC's interpretation as carrying the force of law, as opposed to viewing the FCC's decision as merely persuasive authority.

Arlington's effect probably will be significant. The decision presents an advocate in the administrative and federal regulatory arena with a useful tool with which to resolve tensions arising between the courts and administrative agencies when it comes to which body's decision should be controlling, with the governing rule now being that the agency's interpretation of an ambiguous federal statute, if made within the scope of its authority, should be given deference even if the interpretation is at odds with court precedent. In the short term, this approach may exacerbate tensions between administrative agencies and courts that might be reluctant to depart from their own precedent. In the long term, *Arlington's* clear mandate as to when an agency's interpretation should be controlling will lend itself to a more predictable, uniform approach across the federal circuits as courts apply and defer to lawfully issued agency interpretations of congressional legislation. For the telecommunications industry, the ruling probably will result in greater certainty in how federal courts as well as state

and local administrative agencies across the country will apply the TCA with due respect to the FCC's binding interpretations. Because the FCC is charged with ensuring the rapid deployment of wireless infrastructure to provide greater access to all Americans, we can expect that courts and administrative agencies that will be required to apply lawfully exercised FCC interpretations with the force of law will issue more and more decisions that help fulfill that mandate.

Arlington gives advocates in the administrative arena a powerful tool with which to persuade municipalities, as well as courts reviewing municipal decisions, to adhere to FCC and other administrative agency interpretations.

Arlington also provides the wireless industry with another tool for use in the on-the-ground application process and implementation of Section 6409 of the federal 2012 Middle Class Tax Relief and Job Creation Act for the expeditious build-out of critical wireless infrastructure. Section 6409(a) provides in part: "Notwithstanding Section 704 of the Telecommunications Act of 1996 or any other provision of law, 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."

Section 6409 effectively pre-empts the use of a discretionary approval process for modifications to existing, eligible wireless facilities so that critical wireless infrastructure can be deployed in a timely manner. U.S. Rep. Fred Upton (R-Mich.), in support of Section 6409, explained that it "streamlines the process for siting of wireless facilities by pre-empting the ability of State and local authorities to delay collocation of, removal of, and replacement of wireless transmission equipment." His statement appears in the *Congressional Record* for Feb. 24, 2012. Although Section 6409 is intended to promote the expeditious build out of wireless infrastructure, like most new federal laws, its intended effect has not yet been realized in many communities.

In addition to requiring many communities to revisit their local zoning and land use regulations for compliance with the federal law, Section 6409 created some ambiguity among the industry and state and local governments regarding its application and interpretation. As the industry sought implementation of Section 6409 for rapid infrastructure build out, many questions arose about the meaning of the

phrase "wireless tower or base station" and the definition of "substantial changes" to existing facilities. In some cases, the result of these uncertainties undermined the purpose of Section 6409 by delaying administrative review of eligible facility requests while the applicant and municipality debated the meaning of the terms in Section 6409.

In response to inquiries from the industry and state and local governments about these uncertainties, on Jan. 25, 2013, the FCC offered guidance on the interpretation of Section 6409 in a public notice, "Wireless Telecommunications Bureau Offers Guidance On Interpretation Of Section 6409(a) Of The Middle Class Tax Relief And Job Creation Act Of 2012." In this document, the FCC explained what it means to "substantially change the physical dimensions" of a tower or base station and defined "wireless tower or base station" to include "a structure that currently supports or houses an antenna, transceiver or other associated equipment that constitutes part of a base station" as well as a distributed antenna system and small cells.

So, how can *Arlington* be a useful regulatory tool for the industry in applying Section 6409 and its intended effect of promoting timely deployment of wireless infrastructure? Simply put, *Arlington* gives stronger weight to the FCC's guidance in interpreting provisions of Section 6409 because the Supreme Court's reasoning can be used to resolve the uncertainties and ambiguities of Section 6409 that may arise as it is implemented. When faced with questions about whether a proposed modification is an "eligible facilities request" afforded pre-emption from local discretionary review under Section 6409, applicants can point to the FCC guidance document for clarification and use *Arlington* to support the decision that a municipality is bound by the FCC's interpretation. Thus, similar to its effect in the litigation realm creating a more uniform approach across federal courts, *Arlington* provides the industry with a legal framework to argue for the consistent application of Section 6409 on the local and state level as the industry seeks to build out its infrastructure.

In sum, *Arlington* gives advocates in the administrative arena a powerful tool with which to persuade municipalities, as well as courts reviewing municipal decisions, to adhere to FCC and other administrative agency interpretations. The effect will be to reduce, and in many cases eliminate, legal wrangling over statutory construction issues that have been resolved by the administrative agency and, for the telecommunications industry, to promote greater uniformity in municipal decision-making, furthering the federal goal of rapidly deploying wireless infrastructure. ■

Anthony B. Gioffre III, Andrew P. Schriever, Lucia Chiocchio and Ryan Tougias are members of the Cuddy & Feder law firm's telecommunications department. They can be reached at (914) 761-1300 or email *telecommunications@cuddyfeder.com*.