

## *New York Town Challenges Applicability of FCC Order to 4G LTE DAS Configurations*

On May 24, 2017, telecommunications facility provider Crown Castle NG East LLC (“Crown Castle”) filed a complaint against the Town of Hempstead (“Town”) in the U.S. District Court for the Eastern District of New York, alleging various violations of Sections 253 and 332 of the federal Communications Act of 1934, 47 U.S.C. §§ 253, 332. Following the FCC’s September 2018 *Declaratory Ruling & Third Report & Order, In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv.*, WT Docket Nos. 17-79, 17-84, FCC 18-133 (Sept. 26, 2018) (“FCC Small Cell Order”), Crown Castle filed a Notice of Supplemental Authority, which argued that the FCC Small Cell Order provided critical clarification of a number of issues in dispute in the litigation. The Town responded to Crown’s Notice of Supplemental Authority with a letter which denied the applicability of the FCC Small Cell Order to the present litigation. The Town in its letter argued that the 4G LTE services provided by Crown Castle’s distributed antenna system (“DAS”) facilities are broadband information services rather than telecommunications services, and that the proposed DAS sites are not “small wireless facilities” as defined by the FCC.

### **Litigation Background**

Crown Castle, as a provider of telecommunications facilities, sought access to the Town’s public right-of-ways to expand its network of DAS facilities. Crown Castle alleged in its amended complaint, among other claims, that the Town’s failure to approve its applications constituted an effective prohibition of telecommunications services in violation of 47 U.S.C. § 332(c)(7)(B)(iii).

Prior to the litigation, Crown Castle first met with Town representatives in December 2016 to discuss a proposed

expansion of telecommunication facilities. After submitting multiple application filings, Crown Castle alleged that the Town responded to its application with unsupported claims of adverse visual impact and challenged Crown Castle’s need for the proposed DAS facilities, despite having received documentation demonstrating justification for the facilities.

### **FCC Order**

As summarized in our November 2018 [Client Alert](#), the FCC Small Cell Order established “safe harbor” ceilings on state and local government fees for small cell deployments and also limited the authority of state or local governments to impose aesthetic requirements on small cell deployments.

### **Application to Case**

In the pending case, Crown Castle in its Notice of Supplemental Authority has argued that the FCC Small Cell Order:

- Provides clarification on what constitutes a prohibition of telecommunications services to include local laws that materially inhibit not only wireless “coverage gap” deployments, but also those for “densifying a wireless network, introducing new services or otherwise improving service capabilities” *Notice of Supplemental Authority, Crown Castle NG E. LLC v. Town of Hempstead*, No. 2:17-CV-03148 (E.D.N.Y. Nov. 15, 2018), ECF No.27 at 2 (quoting *Declaratory Ruling & Third Report & Order* at ¶37);
- Applies Sections 253 and 332 not only to wireless telecommunications services, but also to commingled services and facilities;



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- Holds that certain excessive fees constitute a prohibition on wireless deployment; and
- Requires local aesthetic requirements for small cell deployments to be objective, clearly defined and published in advance.

To underscore its argument that the FCC Small Cell Order applies in the pending litigation, Crown Castle, in the Notice of Supplemental Authority, referenced a previously filed declaration from a senior radio frequency engineer which stated that:

4G LTE wireless network provides "personal wireless service" within the meaning of Section 332(c)(7)(B)(i)(II) of the Communications Act, because the Communications Act [in 47 U.S.C. § 332(c)(7)(C)(i)] defines "personal wireless service" to mean "commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services."

*Declaration of Gregory Sharpe, Crown Castle NG E. LLC, No. 2:17-CV-03148, ECF 24-10 at ¶18 (quoting 47 U.S.C. § 332(c)(7)(c)(i)(2018)).*

Further, the Declaration had previously put on the record that the 4G LTE network provides "personal mobile services" and "common carrier wireless exchange access services" within the meaning of the federal Communications Act. It also noted that the Voice over LTE service is a personal wireless service rather than an Internet service and, therefore, subject to Sections 253 and 332, as well as the FCC Small Cell Order. *Declaratory Ruling & Third Report & Order* at ¶17 n. 20.

In its letter, the Town rejected the argument regarding the application of Sections 253 and 332 and the FCC Small Cell Order to the 4G LTE services provided by the DAS facilities. The Town argued that the services are purely broadband information services rather than a commingling of services, and rejected a distinction between Voice over LTE services and Internet services, citing *Cellco P'ship v. Bd. of Supervisors of Fairfax Cty.*, 140 F. Supp. 3d 548 (E.D.Va. 2015). The Town argued that the DAS facilities are therefore not "small wireless facilities" within the purview of the FCC Small Cell Order. Crown Castle has requested a hearing before the court to discuss the necessity of further briefing on this point. *Letter Re: Plaintiff's Notice of Supplemental Auth., Crown Castle NG E. LLC, No. 2:17-CV-03148, ECF 28 at 1.*

### Additional Assistance

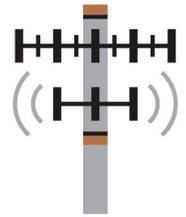
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