changing consumer demands for HD cable services and high-speed broadband services.'"

FCC Asks Supreme Court To Reject Tower Appeal

The FCC has called on the Supreme Court to uphold a federal appeals court ruling that determined the agency was within its authority when it adopted a time line in 2009 for states and localities to follow when it comes to considering tower-siting applications, saying the agency is merely interpreting standards put in place by Congress.

As part of the brief it filed with the high court in ***City of Arlington, Texas et al. v. FCC, et al.*** (case nos. 11-1545 and 11-1547), the Commission said the U.S. Court of Appeals for the Fifth Circuit (New Orleans) correctly upheld its interpretation of section 332(c)(7)(B) of the 1996 Telecommunications Act that requires state and local governments to act on siting requests within a reasonable amount of time.

"As the agency charged with administration of the Communications Act, the FCC has authority to interpret the Act's ambiguous provisions, including Section 332(c)(7)," the FCC wrote. "Several sections of the Communications Act confirm the agency's broad authority to do so."

While petitioners in the case argued that the Fifth Circuit should have followed the action of other courts and not deferred to the Commission's view that it has the authority to adopt the rules, the FCC argued that other rulings did not conflict with the findings of the New Orleans court.

"The decision below does not create a direct conflict with the Seventh and Federal Circuit cases cited by petitioners," the Commission wrote. "Unlike in those cases, the statutory interpretation at issue here does not implicate the agency's jurisdiction to make rules or adjudicate particular disputes. It merely permits the FCC to offer guidance to the courts, which remain the ultimate arbiters of disputes over whether state and local governments have addressed wireless siting applications 'within a reasonable period of time.'"

Under the FCC declaratory ruling adopted in November 2009, states and localities have 90 days to review collocated tower projects and 150 days to review other applications. After those deadlines have past, applicants can file for court relief within 30 days (*TR*, Dec. 1, 2009). The FCC also said that state or local governments that deny a wireless facility application because service is available from another provider would be violating section 332(c)(7) of the 1934 Communications Act, as amended.

The item addressed a petition filed in July 2008 by CTIA, which had sought tower review deadlines of 45 and 75 days and had asked the FCC to rule that applications not acted upon by then would be deemed granted.

Feds: Wireless Call Data Isn't Protected Under Constitution

The federal government asked a U.S. district court in Washington recently to reject a request to suppress cell site data, telling it that third-party calling records are not protected under the Constitution, that the carriers themselves own the records, and that carriers should be allowed to make them available to law enforcement.

As part of its Sept. 5 filing in ***U.S. v. Antoine Jones*** (case 05-CR-386(1) (ESH)), the government argued that precedent is clear that call information does not have Fourth Amendment protection, given that the cell-site information obtained as part of the records "is too imprecise to place a wireless phone inside a constitutionally protected space" and is part of routine business records.

"The cell-site data that the government obtained via court order in this investigation was not in the hands of the cell phone user at all, but rather in the business records of the third party — the cell phone company," the federal government stated. "The Supreme Court has held that a customer has no privacy interest in business records of this kind."

Citing a high court ruling in the 1976 case ***United States v. Miller*** that dealt with bank records, the U.S. asserts "the privacy interest in cell-site information is even less than the privacy interest in a dialed phone number or bank records. The location and identify of a cell phone tower handling a customer's call is generated internally by the phone company and is not, therefore, typically known by the customer. A customer's Fourth Amendment rights are not violated when the phone company reveals to the government its own records that were never in the possession of the customer."

The brief was filed in opposition to a request made by the defendant in the case, a convicted drug dealer whose conviction was overturned by the Supreme Court in January when it found that the government's use of a Global Positioning System device on his vehicle was an illegal search (*TR*, Feb. 1). The U.S. now seeks to use the phone records in question to show where Mr. Jones was when he made and received wireless calls back in 2005.