

Wiley Rein Helps Persuade Fourth Circuit to Uphold FCC's Infrastructure Order

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Today the U.S. Court of Appeals for the Fourth Circuit issued a published opinion in *Montgomery County, Maryland v. FCC*, No. 15-1284, upholding the FCC's Infrastructure Order against a 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.” 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.

The 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.” And in regard to the FCC's statutory interpretations, the court afforded deference under *Chevron* because

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the terms were ambiguous and the agency's interpretations were reasonable.

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