

March 11, 2019



Summary of Final FCC Small Cell Order

Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment; Declaratory Ruling and Third Report and Order; WT Docket No. 17-79; WC Docket No. 17-84

*Prepared in collaboration with Mark Del Bianco, Principal,
Law Office of Mark C. Del Bianco*

DISCLAIMER: This document is intended to be a tool for education and information. It offers a summary of the proposed FCC order. This document is not intended to provide legal advice, or to be a legal analysis or a comprehensive list of all potential outcomes of this order. We offer this information for reference purposes only, as a starting point for analysis by interested parties.

At its September 2018 open meeting, the FCC adopted a report and order (collectively, the "Order") in its ongoing proceeding to streamline the rollout of infrastructure for broadband services, including small cells for 4G and 5G wireless service.[i] This summary addresses the effect of the Order on the issues of most importance to NCC members that have or are considering enacting small cell ordinances, or have or will be negotiating agreements with carriers or infrastructure providers such as Mobilitie or Crown Castle.

The Order has two parts: (1) a new set of regulations (the "Rules") that govern shot clocks and other limited aspects of the rollout of small wireless facilities (a/k/a "small cells") and (2) a Declaratory Ruling that does not enact any new regulations but is the FCC's interpretation of how the provisions of Section 253 and 332(c)(7) of the Communications Act that limit state or local regulations that "effectively prohibit" the provision of wireless services should be applied.[ii] The Declaratory Ruling portion of the Order adopts the position that a state or local government need only "materially inhibit" a particular small wireless facility deployment in order for its action to constitute an "effective prohibition" under Section 253 or 332(c)(7). Based on this conclusion, the Declaratory Ruling provides guidance on fees local governments may charge and on how they may regulate ancillary rollout issues such as tower spacing, equipment design and other aesthetic concerns. In lay terms, this means the FCC is making it easier for private companies to take local governments to court if they believe municipal policies are effectively prohibiting network investment.



Key Takeaways from the Order

- The Order is a blatant effort by the FCC to strengthen the hand of carriers in negotiations with local governments over small cell deployment and to limit the ability of local governments to negotiate in the public interest around small cells.
- The good news is that the FCC has left local governments with some power and flexibility to enact reasonable regulations governing small cell deployments. With the right approach and partner, local governments have a higher hill to climb but can still negotiate win-win outcomes that benefit carriers while addressing citizens' concerns.
- Local governments should immediately take proactive steps to maintain their leverage in possible negotiations with carriers.
- Local governments should move expeditiously to enact zoning and other regulations to address issues of importance to their community. These may include application processing cost recovery, antenna design, location and spacing, additional pole and equipment aesthetic requirements, and other factors of local concern.
- In particular, setting out and standardizing aesthetic requirements, including pre-approval of antenna, equipment cabinet and street furniture designs where appropriate, will make it easier for local governments to process applications reasonably expeditiously and to defend challenged siting decisions or failures to meet shot clock deadlines.

Key Issues for Members

What types of facilities does the Order apply to?

The Order applies to all types of facilities used to provide wireless services. There are specific shot clock and other rules that govern certain small wireless facilities, i.e., generally those less than 50 feet tall and on which the antenna size is less than 3 cubic feet.

What happens if a local government already has an agreement with a carrier or infrastructure provider that covers small wireless facilities?

- The FCC did not address whether existing agreements are preempted by the Order. While existing agreements were not explicitly grandfathered, there is no obvious means of voiding them. The result is that local governments should be able to keep existing agreements.
- In order to preempt existing agreements involving private parties, the FCC would have to make certain findings that doing so was in the public interest. It did not do so in the Order.



- Further evidence that the FCC did not intend to preempt existing agreements is its expressed intent in the Order to facilitate "mutually agreed solutions."
- Any attempt to preempt an existing agreement would require the carrier to file a lawsuit against the municipality, which seems very unlikely.
- Even if a carrier filed a case, we do not believe it would be able to convince a court to void a freely negotiated commercial agreement.

Going forward, can a local government negotiate new agreements with carriers or infrastructure providers? If so, are there issues that cannot be addressed in an agreement?

- Yes, local governments can still negotiate with carriers and infrastructure providers. Nothing in the Order preempts local governments' ability to negotiate future agreements in order to provide a mutually acceptable process for deployment of small cells.[iii] However, the Rules and presumptions created by the Order give carriers more leverage when negotiating with local governments and reduce the ability of local governments to enact regulations that achieve desirable outcomes when carriers are unwilling to engage in good faith negotiations, or to negotiate at all.
- The Declaratory Ruling provides guidance on some parameters of the deployment of small cells, including such factors as the cost, aesthetic requirements and location, but it does not prohibit local governments or carriers from reaching their own arrangements on these or any other factors. This means that if a local government wants to follow the Lincoln model of offering very rapid permitting in return for fees higher than the FCC sets, it may still do so.

Are there limits on the amounts that local governments can charge for small cell application and use fees?

- There is a presumed safe harbor for application and use fees, but no specific cap on fees.
- The safe harbor amounts are (a) \$500 for a single up-front application that includes up to five Small Wireless Facilities, with an additional \$100 for each Small Wireless Facility beyond five, (b) \$270 per Small Wireless Facility per year for all recurring fees, including any possible ROW access fee or fee for attachment to municipally-owned structures in the ROW, and (c) \$1,000 for non-recurring fees for a new pole.
- The FCC views these amounts as safe harbors because it believes they are low enough that no carrier would challenge them if they were imposed unilaterally in a local government's regulations.
- Nothing in the Order prevents a local government from charging higher fees. However, under the FCC's framework, if a carrier files a lawsuit challenging the fees imposed by a local government, the burden would be on the local government to demonstrate that the amount is a reasonable approximation of its costs and that its costs are reasonable.
- The FCC did not specify a methodology for calculating cost, or what expenses could be included.



- We believe that the revenue-reducing effect of a cost-based methodology will be much greater for usage fees than for application fees, because usage fees are recurring.

Can a local government require in-kind contributions or set application or use fees at levels to achieve social goals such as closing the digital divide?

- If a court were to accept the FCC conclusion that fees must be cost-based, local governments would not be able to require in-kind contributions or set application or usage fees above cost.
- Local governments can still negotiate agreements containing provisions for non-cost-based fees (as San Jose and Honolulu did), but the Order attempts to remove most of a local government's negotiating leverage on these issues, so there will now be little incentive for a provider to agree to do so.

What are the new application shot clocks?

- The Rules create four new shot clocks:
 - § Collocation of small wireless facilities: Local government has 60 days to act upon to an application
 - § Collocation of facilities other than small wireless facilities: 90 days.
 - § Construction of new small wireless facilities: 90 days.
 - § Construction of new facilities other than small wireless facilities: 150 days.
- The Rules also provide for the resetting or pausing of the shot clock when a local government determines that an application is incomplete. If a municipality determines that an application is materially incomplete within ten day of filing and notifies the applicant of the deficiencies, the shot clock resets when the completed application is filed. In order to prevent last minute "pausing" of the shot clock by local governments, an incompleteness determination must be made by the 30th day after an application is filed, and within 10 days after resubmission if a re-submitted application is still incomplete.

What is the legal effect of the new shot clocks?

- The shot clock deadlines have no direct legal effect.
- If an application is not acted on within the deadline, nothing happens unless a carrier either commences a formal complaint proceeding at the FCC or files a case in state or federal court. In either case, the carrier would have to demonstrate that the failure to act on the application amounts to an "effective prohibition" on wireless service under Section 253 or 332.
- Either process will take months, perhaps years.
- The Order recognizes that the shot clock is only a presumption, and that local governments have the ability to demonstrate to a court that the delay is reasonable under the circumstances.
- If a court finds that a shot clock violation is an effective prohibition, it will most likely order the local government simply to make a decision by a specific date in



the near future; a court is very unlikely to order a local government to grant a specific application.

- We believe that carriers prefer certainty and rather than litigate over a few shot clock violations will be willing to negotiate a reasonable time for guaranteed local government action on applications.

Do different shot clock deadlines apply when multiple applications are filed at the same time (batched)?

- No.
- However, the FCC acknowledged that batched applications could strain local governments' resources and potentially justify a failure to meet shot clock deadlines.[iv]
- We believe that in any carrier lawsuit that was based on a failure to meet the shot clock deadlines on a large batch of applications, a court would be very sympathetic to a local government's argument that the batch application had caused a legitimate overload on its permitting resources.

What types of local government permits/authorizations do the new shot clocks apply to?

- The Rule applies to any request for authorization to place, construct, or modify wireless service facilities, including a zoning permit, a building permit, an electrical permit, a road closure permit, and an architectural or engineering permit.
- The Order does not specify whether or how the shot clocks apply to requests to use light poles and other government facilities, whether located in or outside the right of way.

May a local government still take aesthetics into account in its small cell zoning regulations?

- Yes.
- Aesthetic requirements must be reasonable, no more burdensome than those applied to similar types of infrastructure deployments (e.g., equipment cabinet size and color requirements would need to be similar to those for telco or cable company cabinets), and objective and published in advance.[v]

May a local government require minimum spacing between small wireless facilities?

- Yes. The Order considers spacing requirements to be a subset of aesthetics requirements, and thus subject to same standard.
- The Order gives no guidance on what might be a reasonable spacing distance.



What if a local government has an undergrounding requirement for all utilities?

- Regulations requiring all utility facilities (including antennas) to be placed underground would effectively prohibit wireless services because antennas have to be placed above ground in order to function.
- Regulations requiring all wireless equipment other than antennas to be placed underground would be permissible, so long as they are applied on a non-discriminatory basis to other service providers, e.g. telco and cable companies.
- It is not clear what sorts of poles or other above ground antenna facilities a local government would have to allow access to in order to avoid being considered “effectively prohibiting wireless service.”

Frequently Asked Questions

What happens if a city is in negotiations with a carrier and they demand that the agreement provisions on such issues as fees, spacing and aesthetic requirements follow the "guidelines" in the FCC small cell Order?

In that case, the city has two or perhaps three options. First, the city can capitulate to the carrier's claims about what the Order requires. Obviously, we do not believe any city should do so. The second option is for the city to abandon the negotiation process and instead act unilaterally to adopt an ordinance, a set of regulations or a model franchise agreement (if it has a franchising process in place) that it believes is consistent with the desires of its residents and at the same time presents a low (and thus acceptable) risk of a court challenge.

If a city has already negotiated a small cell facility agreement with one or more carriers/infrastructure providers, it has a third option. It can adopt an ordinance or draft a template agreement reflecting essentially the same terms as the executed agreement. In either case, it becomes much more difficult (albeit not impossible) for other carriers to challenge the model agreement or ordinance on its face because it contains essentially the same terms that the first carrier has already agreed do not effectively prohibit it from providing a wireless service.

What are cities doing to prepare for the Jan 13 deadline?

Most NCC members seem to be either negotiating agreements with carriers, taking unilateral steps to develop and put in place a process for consideration of applications to place small cell wireless facilities, or doing both simultaneously.

If a city enters into an agreement with a carrier and then the Order is overturned, is the city stuck with the agreement?

The answer in general is yes. No city is required to enter into any agreement with a carrier or infrastructure provider. If a city does so voluntarily, it will almost certainly be held to the terms of the agreement by a court. However, a city might be able to resolve this problem by including in the agreement a clause voiding the agreement or requiring



its modification, in the event of a regulatory change (including the overturning of the Order). Many types of telecommunications agreements contain such regulatory change clauses because parties recognize that the wording or scope of specific provisions in the agreement has been dictated by the then-existing telecommunications regulatory scheme, and should be changed if the regulations change.

If a city enacts an ordinance and then the Order is overturned, can it adjust the ordinance?

Yes. However, unless the original ordinance specifically permits retroactive application of aesthetic or other requirements, existing wireless facilities approved under the first ordinance may be effectively grandfathered. Almost certainly, neither application nor usage fee increases could be applied retroactively.

What is the risk if a city does not have an ordinance in place prior to the Jan 13 deadline?

The only risk we are aware of for a city that has no process in place to consider applications for placement of small cell wireless facilities is the risk that it will be sued in state or federal court by a carrier arguing that the failure constitutes a city action that "effectively prohibits" it from providing wireless service. In the short term (say 180 days after January 13), there is very little risk that a carrier will bring such a lawsuit. There is little benefit to a carrier in doing so. The only relief a carrier could get in such a case would be an order requiring the city to enact an ordinance within a certain period of time. A court could not order the placement of specific antennas or create its own process for a city to follow. If a city is taking observable public steps to develop an ordinance, a lawsuit is unlikely and it is even more unlikely that a judge would rule against a city.

In the longer term (say after mid-2019), the risk of a lawsuit will increase and it becomes less defensible for a city not to have an approval process in place (or at least publicly in development). That is why we recommend that cities publicly begin developing a process for small cell facility regulation now. Doing so will allow adequate time for consideration of all the issues and the development of a policy that reflects residents' concerns, while at the same time providing for placement of infrastructure for the next generation of wireless services.

The Order identifies application and usage fee amounts that are neither caps nor safe harbors, but simply what the FCC believes are levels at which carriers will not file legal challenges. What local government usage fees are covered by these FCC "guidelines"?

The Order identifies \$270 per year as a presumptively reasonable annual usage fee. This covers the right to attach an antenna to a pole or other facility and to locate associated equipment nearby. But if a city is providing not just the right to place antennas on city-owned poles, but ancillary facilities or services (such as access to electricity, existing underground ducts and underground casements at each pole), the FCC fee "guidelines" do not apply and the city can set the usage fees at any level it



wishes. Cities should not be misled by carriers falsely claiming that the FCC's \$270 annual usage fee includes anything other than the right to mount an antenna on a pole and put equipment nearby.

Does the Order impose non-discrimination requirements, i.e., does it require municipalities to treat wireless carriers the same as they treat electric companies, cable companies or other utilities?

No. The non-discrimination requirements identified in the Order are the FCC's interpretations of the language of Sections 253 and 332(C)(7), and are limited in scope. Section 253(a) addresses only state or local government actions (including discrimination) that effectively prohibit "any interstate or intrastate telecommunications service," while Section 332(c)(7)(B)(i)(II) is even narrower: only actions that effectively prohibit "personal wireless services," which is a small subset of telecommunications service. Thus, Section 253 only limits discrimination between providers of "telecommunications service," and the only type of discrimination that could potentially be problematic under Section 332(C)(7) would be discrimination between "competing wireless services." Therefore, the Order does not (and the FCC could not) prohibit discrimination in fees, aesthetic requirements and application requirements as between wireless carriers and companies that do not provide "telecommunications service," a category that includes not only traditional utilities, but also cable companies and even wireline broadband Internet access providers (which under current FCC rules are not providers of telecommunications services).

How does the Order's interpretation of the "effective prohibition" language affect the ability of localities to regulate the number or location of small cell wireless antennas? If a carrier has full geographic coverage already, can a locality require it to justify the need to add additional capacity?

In the Small Cell Order, the FCC reaffirmed its interpretation that a locality can violate the "effective prohibition" language of Sections 253 and 332 by enacting regulations that merely "materially inhibit" the ability of wireless carriers to provide services. It specifically included in this category local regulations that affect carriers' ability to densify their networks or to add capacity to their networks. If this interpretation survives on appeal, then it would be unlikely that a locality could successfully defend a broad regulation that required a carrier to justify every requested small cell facility placement. However, NCC believes that a regulation that allows for reasonable rollout of small cell facilities based on objective criteria that reflect community concerns would be consistent with the FCC's interpretation. Such a regulation should not be seen as "materially inhibiting" any carrier's ability to offer its services, so long as a reasonable number of potential wireless facility locations would be available under the objective criteria. Such a regulation would be even more defensible if it has a "safety valve" that allows a carrier to meet capacity needs by allowing for placement of additional wireless facilities that do not meet the objective criteria. The regulation could even place the burden on the carrier to demonstrate the need for any additional non-compliant facility. A single "safety valve" decision would involve a limited geographic area and would be fact-specific, and should not be challengeable as a "material inhibition" on provision of wireless service in the locality.



Bottom Line

- This order significantly diminishes local decision making, but does not eliminate it.
- Local governments cannot say no to all small cell antennas within specific neighborhoods or other areas of their communities.
- Local governments can charge more than the recommended permitting fees and annual fees, but may have to show how the fees correlate with the local government's cost for managing the permitting and right of way.
- The order decreases a community's capacity to receive recompense for the use of their right of way that is in excess of the cost of managing that right of way.
- Local governments that are prepared by proactively putting in place policies and procedures will be able to retain some local control.
- If you have an existing agreement, we believe it will be hard for a vendor to justify a request to change that agreement and it seems unlikely that the courts would side with them.
- There will very likely be court challenges to this order.

Important Tips and Action Steps

- **ANTENNA PLACEMENT** - you cannot say no to any antennas on poles in an area. However, you can say no to a specific placement as long as there is a reasonable alternative.
- **UNDERGROUND** - you cannot require that all of this infrastructure be placed underground, but you may be able to require that all but the antenna be placed underground. However, if you are planning to do so, you must do so for ALL utilities and you must have an ordinance in place.
- **STREET FURNITURE** - you can require that street furniture have a certain aesthetic and a setback from the street (for both aesthetic and public safety reasons, such as to prevent loss of parking due to inability to open car doors). You must have an ordinance in place that applies to ALL utilities' street furniture in the local government's right of way.
- **SHROUDING** - You can require a certain aesthetic for certain neighborhoods and certain types of poles. If these requirements are in place in advance of a carrier approaching you, you are less likely to experience push back and your position will be more defensible if challenged in court.
- **PERMITTING** - The time to revise and organize your permitting process is now. If your permitting process includes a plan to adhere to the shot clocks in the order, you will more likely be able to meet them.
- **SHOT CLOCK DEADLINES** - The deadlines may be difficult to meet, but there is NO DEEMED GRANTED provision in this order. Batch permitting may be particularly problematic for local governments as the scope of such requests can overwhelm a permitting department, but if you work in good faith, keep the carrier updated, and are still unable to meet the deadline, it is likely the carrier will work with you. If instead they take you to court, your due diligence and proactive efforts will work in your favor.
- **APPLICATION COSTS** - The costs listed in the order are for guidance. If you stay at or below them, your fees very likely will not be challenged in court. However, you can charge more if you have evidence that your costs are higher.



Including your engineering costs, permitting staff costs, and post-installation inspection costs may justify a higher application fee. If those costs are reasonable, the fee is unlikely to be challenged and if challenged, will likely be upheld even under the FCC's test.

- ANNUAL ROW FEE - If at or below the cost specified by the order (\$270/year), this fee will very likely be unchallenged by carriers. If higher, a court may require the local government to justify the fee as being directly related to cost.
- NEGOTIATING - Remember that one of the single most valuable characteristics of your permitting from the carrier perspective is predictability. If you can give a high degree of certainty that permits will be finished in a predictable manner, carriers will be much more willing to negotiate for higher fees or more public interest requirements than those set by the FCC.



Endnotes

[i] Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, Declaratory Ruling and Third Report and Order, WT Docket No. 17-79; WC Docket No. 17-84 (the "Order").

[ii] Section 253(a) provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." Section 332(c)(7) provides that "[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—(I) shall not unreasonably discriminate among providers of functionally equivalent services; and (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services."

[iii] However, parts of the Declaratory Ruling and even the Rules acknowledge the ability of local governments and carriers to negotiate outcomes different from those envisioned in the Declaratory Ruling. For example, with regard to proposals to allow local governments to implement best practices or an informal dispute resolution process, the FCC stated "Although we do not at this time adopt these proposals, we note that the steps taken in this order are intended to facilitate cooperation between parties to reach mutually agreed upon solutions. For example, as explained below, mutual agreement between the parties will toll the running of the shot clock period, thereby allowing parties to resolve disagreements in a collaborative, instead of an adversarial, setting." Order, ¶ 131. That reference is to 47 C.F.R. § 1.6003(d), which allows local governments and carriers to agree to toll (i.e., lengthen) the shot clock period for any type of wireless facility. Similarly, nothing in the Declaratory Ruling prohibits local governments from reaching agreements with carriers and infrastructure providers that contain provisions fleshing out (or even departing from) the broad FCC guidelines on cost, aesthetic requirements, antenna location and other factors.

[iv] The FCC noted that under its "approach, in extraordinary cases, a siting authority, as discussed below, can rebut the presumption of reasonableness of the applicable shot clock period where a batch application causes legitimate overload on the siting authority's resources. Thus, contrary to some localities' arguments, our approach provides for a certain degree of flexibility to account for exceptional circumstances.

* * *

The siting authority then will have an opportunity to rebut the presumption of effective prohibition by demonstrating that the failure to act was reasonable under the circumstances and, therefore, did not materially limit or inhibit the applicant from introducing new services or improving existing services. Order, ¶¶ 115-119.

[v] The Order's discussion of the first two factors is brief and provides little guidance: "[A]esthetic requirements that are technically feasible and reasonable in that they are reasonably directed to avoiding or remedying the intangible public harm of unsightly or out-of-character deployments are also permissible. In assessing whether this standard has been met, aesthetic requirements that are more burdensome than those the state or locality applies to similar infrastructure deployments are not permissible, because such discriminatory application evidences that the requirements are not, in fact, reasonable



and directed at remedying the impact of the wireless infrastructure deployment." Order,
¶ 87.

