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A Moving Legal Target: Local Government Regulatory Authority Over Small Cell Wireless Facilities

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Promoting Innovation in Municipal Government

Preface

This paper, “A Moving Legal Target: Local Government Regulatory Authority Over Small Cell Wireless Facilities,” is part of the NJLM Educational Foundation’s ongoing “Friends of Local Government” Policy Paper series.

Recent developments in federal regulation of small cell technology will be examined as will the implications for local government control over siting of these facilities in public rights of way (ROW). The article is contributed by Ken Fellman, Esq., of counsel at Helmer, Conley and Kasselman.

On behalf of the Board of the NJLM Educational Foundation, we thank the author for his contributions that intend local government officials to benefit from the knowledge shared in the following pages when moving forward through this issue. We would also like to acknowledge the support of the Foundation’s Board for this project, as well as staff from the New Jersey State League of Municipalities. Previously published white papers from NJLMEF can be found at the website, www.njlmef.org.

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About the Author

Ken Fellman is of counsel to Helmer, Conley and Kasselman. He has over 35 years of legal experience, focusing on local government representation, particularly telecommunications, utilities and general local government law. Fellman has represented local governments, non-profit organizations and governmental associations nationwide in connection with cable television franchising, deployment of community broadband networks, tower and antenna siting, rights of way management, public safety communications issues, communications service contracts, and gas and electric utility franchising. He also works with local governments in connection with telecommunications related litigation and administrative proceedings before the Federal Communications Commission (FCC). He has provided legal services for the New Jersey League of Municipalities and has been a speaker at multiple League conferences and educational programs. Appointed in 2011, Ken currently serves as a local government legal counsel member of the FCC’s Intergovernmental Advisory Committee.

Introduction

The Federal Communications Commission (FCC) has prioritized the deployment of 5G wireless technology,¹ despite the lack of formal technical standards for the technology.² Between March and September of 2018, the FCC issued three rulings which impact how small cell technology is deployed.³ Further, the FCC appears poised to continue changing its regulatory approach. During the FCC's April 2019 open meeting, the Commissioners unanimously approved a notice of proposed rule-making to examine how the current Over-the-Air-Reception Devices rules could be applied to small cell wireless facilities.⁴

This paper will provide an overview of these recent changes in federal law and discuss the implications for local government authority to regulate the deployment of small wireless facilities. We will also briefly discuss the status of the federal court appeals currently challenging the lawfulness of the three FCC orders described below.

Summary of the FCC's Orders

- In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79, Second Report and Order (Mar. 30, 2018) (NEPA and NHPA Order)
- In the Matter of Accelerating Wireless Broadband Deployment By Removing Barriers to Infrastructure Investment, Third Report and Order and Declaratory Ruling, WT Docket No. 17-79 (Aug. 3, 2018) (Moratoria Order)
- In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Declaratory Ruling and Third Report and Order, FCC WT Docket No. 17-79 (Sep. 27, 2018) (Small Cell Order)

All three orders take aim at removing so-called barriers to the deployment of small cell facilities.⁵ The NEPA and NHPA Order exempted small cell facilities from certain federal historical and environmental review processes.⁶ The Moratoria Order preempts express and de facto moratoria, which could affect deployment of small cell wireless.⁷ The Small Cell Order subjects local governments' authority on siting wireless facilities to a series of preemptive

¹ See e.g. FCC, The FCC's 5G FAST Plan, <https://www.fcc.gov/5G>. (last visited Apr. 19, 2019).

² Harold Feld, *Why "Wi-Fi 6" Tells you Exactly What You're Buying, But "5G" Doesn't Tell You Anything*, Wetmachine: Tales from the Sausage Factory (Dec. 28, 2018), <https://wetmachine.com/tales-of-the-sausage-factory/why-wi-fi-6-tells-you-exactly-what-youre-buying-but-5g-doesnt-tell-you-anything/>.

³ In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79, Second Report and Order (Mar. 30, 2018) [hereinafter NEPA and NHPA Order]; In the Matter of Accelerating Wireless Broadband Deployment By Removing Barriers to Infrastructure Investment, FCC 18-111, Third Report and Order and Declaratory Ruling, WT Docket No. 17-79 [hereinafter Moratoria Order]; Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Declaratory Ruling and Third Report and Order, FCC WT Docket No. 17-79 [hereinafter Small Cell Order].

⁴ In the Matter of Updating the Commission's Rule for Over-the-Air Reception Devices, WT Docket No. 19-71, Notice of Proposed Rulemaking (Apr. 12, 2019).

⁵ NEPA and NHPA Order at ¶¶ 63-64; Moratoria Order at ¶ 4; Small Cell Order at ¶ 1.

⁶ NEPA and NHPA Order at ¶¶ 94-95.

⁷ Moratoria Order at ¶ 4.

presumptions on fees, aesthetics, timing, and other requirements.⁸ Each order is examined in more detail below.

NEPA and NHPA Order

In March 2018, the FCC amended its rules to clarify that “deployment of small wireless facilities by non-federal entities does not constitute either a ‘federal undertaking’ within the meaning of NHPA or a ‘major federal action’ under NEPA....”⁹ Neither statute’s review process would be mandated for such deployments; however, small wireless facilities deployments continue to be subject to applicable state and local government approvals.¹⁰ This Order has been appealed by a coalition of American Indian Tribes, the National Resources Defense Council, and the National Trust for Historic Preservation in the United States.¹¹ The coalition has raised a range of issues including the elimination of the obligation under the law to consult with the Tribes on siting of facilities on American Indian heritage sites and the lawfulness of the FCC’s decision to exclude small cell siting from federal historical and environmental review.¹² The appeal was filed May 14, 2018.¹³ Oral argument was heard March 15, 2019, and we await the D.C. Circuit’s opinion.¹⁴

Moratoria Order

In August 2018 the FCC determined that express moratoria and de facto moratoria on deployment of facilities generally “prohibit or effectively prohibit” provision of wireless telecommunications services in violation of federal law, and are not saved from preemption as a form of ROW management.¹⁵ Examples of de facto moratoria are freeze and frost laws or restrictions on ROW work at certain times of year on hurricane path evacuation routes.¹⁶ Wireless industry representatives have also been making the argument that if a locality takes too long to review an application that this is also a de facto moratorium, and therefore an effective prohibition of service.¹⁷ The City of Portland, Oregon, filed a petition for review of this Order on October 2, 2018.¹⁸ The case, after some delay occasioned by a pending petition for reconsideration at the FCC, has been associated with the appeal of the Small Cell Order.¹⁹ Both

⁸ Small Cell Order at ¶¶ 10-13.

⁹ NEPA and NHPA Order at ¶ 4.

¹⁰ NEPA and NHPA Order at ¶ 77.

¹¹ *United Keetoowah, et al. v. FCC & USA*, No. 18-1129 (D.C. Cir. argued Mar. 15, 2019).

¹² See Brief for Petitioners and Intervenors, *United Keetoowah, et al. v. FCC & USA*, No. 18-1129 (D.C. Cir. Jan. 25, 2019); Brief for Petitioner Nat. Res. Def. Council et al., *United Keetoowah, et al. v. FCC & USA*, No. 18-1129 (D.C. Cir. Jan. 25, 2019).

¹³ See Petition for Review, *United Keetoowah, et al. v. FCC & USA*, No. 18-1129 (D.C. Cir. May 14, 2018).

¹⁴ *United Keetoowah, et al. v. FCC & USA*, No. 18-1129 (D.C. Cir. argued Mar. 15, 2019).

¹⁵ Moratoria Order at ¶ 4; ¶ 160.

¹⁶ Moratoria Order at ¶ 143; Statement of Commissioner Jessica Rosenworcel Approving in Part, Dissenting in Part.

¹⁷ See e.g. Moratoria Order at n. 554, citing industry comments in the proceeding.

¹⁸ See Petition for Review, *City of Portland v. USA*, No. 18-72689 (9th Cir. Oct. 2, 2018).

¹⁹ See Amended Order on Motions (Consolidation and Case Management Conference), *City of Portland et al. v. USA*, No. 18-72689, *Sprint Corp. et al. v. FCC*, No. 19-70123 (9th Cir. Mar. 20, 2019); Accelerating Wireline Broadband Deployment By Removing Barriers to Infrastructure Investment, *Petition for Reconsideration*, WC Docket No. 17-84 (Sep. 14, 2018).

orders arose in the same agency docket, and were issued about a month apart.²⁰ The status of the combined Moratoria and Small Cell Order is discussed in more detail below.

Small Cell Order

The Small Cell Order was issued September 2018, and interpreted provisions of the 1996 Telecommunications Act (Act) in a way that weakens local government authority over the siting of small wireless facilities.²¹ Under Sections 253 and 332 of the Act, local regulations cannot “prohibit or effectively prohibit” the provision of personal wireless services.²² The FCC has interpreted the statutory terms “prohibit or effectively prohibit” to mean “materially inhibit.”²³ The Small Cell Order creates a series of tests to determine if local government action exceeds the “materially inhibit” standard.²⁴ These tests ascertain whether local government fees, aesthetics, and undergrounding and spacing, “act in a timely manner,” and other requirements materially inhibit service.²⁵ The Small Cell Order also creates two new shot clocks for small cells and redefines “Collocation” in a manner that further restricts local control.²⁶

These tests are structured as a series of legal presumptions. A legal presumption alters the way that the burden of proof work in a court case. Usually, when one party sues another in a civil case, the plaintiff bears the burden of presenting evidence sufficient to persuade the court that, more likely than not, they have the facts and the law on their side. If, and only if, they meet this burden does the case proceed where the defendant puts on evidence to rebut the plaintiff’s allegations. Finally, after the defendant rests, the court will deliberate and either the judge or jury will make a determination about which side prevails. Legal presumptions alter this back and forth sharing of the legal burdens by most often tipping the scales in the plaintiff’s favor.

Here, the Small Cell Order implements a series of legal presumptions that make it easier for a wireless company to challenge certain local government actions as unlawful. For example, the Small Cell Order determined that regulatory fees may not exceed the reasonable costs incurred by the local government in permitting these wireless sites and created a presumption on regulatory fees both inside and outside of rights-of-way (ROW).²⁷ If any local government’s fee exceeds the presumptively reasonable amount, an applicant for a site could file a court action and only have to demonstrate that the fee exceeds the amount of the fee cap in the Small Cell Order, and the local government would be presumed to violate the statute.²⁸ The local government would have to put on evidence to demonstrate why the fee is an accurate reflection of its actual costs that those costs are reasonable; and therefore, the fees do not have the effect of prohibiting

²⁰ Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment WC Docket No 17-84; Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure WT Docket No. 17-79.

²¹ Small Cell Order at ¶¶ 14-15.

²² 47 U.S.C. § 253 (2019); 47 U.S.C. § 332 (2019).

²³ Small Cell Order at ¶ 10.

²⁴ Small Cell Order at ¶¶ 11-13.

²⁵ Small Cell Order at ¶¶ 11-13; 81; 90-91.

²⁶ Small Cell Order at ¶¶ 105; 140.

²⁷ Small Cell Order at ¶¶ 78-80.

²⁸ Small Cell Order at ¶¶ 80.

the deployment of small wireless facilities.²⁹ This burden shifting is meant to enhance deployment of small wireless facilities by replacing jurisdiction by jurisdiction local control with “one size fits all” rules that the FCC deems reasonable. The specific presumptions adopted by the Small Cell Order are discussed in more detail below.

Sections of Small Cell Order

1. Definitions

The Small Cell Order redefines the legal definition of collocation.³⁰ Previously, in connection with FCC rules governing mandatory collocations under Section 6409 of the 2012 Spectrum Act, collocation meant locating a wireless facility on a structure that had already been approved for wireless use and already supports or houses wireless equipment.³¹ However, the Small Cell Order, while maintaining this definition for mandatory collocations, clarified that collocation as used elsewhere in their regulations means mounting equipment on any pre-existing structure, even those that have not been approved for wireless facilities.³²

The Small Cell Order also adopted a definition of small cell wireless facility. The Order defined a small cell wireless facility as:

- each antenna no more than 3 cubic feet and equipment of no more than 28 cubic feet,
- can be located on structures of up to 50 feet in height or may extend existing structure to 50 feet or 10% increase in height, whichever is greater.³³

Important to note about this definition is that it may conflict with the small cell bill that has been introduced in New Jersey. The Small Wireless Facilities Deployment Act (A4422/S3572), introduced in the New Jersey Legislature in September 2018 and referred to the Assembly Telecommunications and Utilities Committee, defines small cell wireless facility differently than the federal regulations:

“Small wireless facility” means a wireless facility that meets both of the following qualifications:

- a. each antenna is located inside an enclosure of no more than 6 cubic feet in volume or, in the case of an antenna that has exposed elements, the antenna and all of its exposed elements could fit within an imaginary enclosure of no more than 6 cubic feet; and
- b. all other wireless equipment attached directly to a utility pole associated with the facility is cumulatively no more than 25 cubic feet in volume. The following types of associated ancillary equipment are not included in the calculation of equipment volume: electric meter, concealment elements, telecommunications demarcation box, ground-

²⁹ Small Cell Order at ¶¶ 80

³⁰ Small Cell Order at ¶ 140.

³¹ 47 C.F.R. 1.6100(b)(1)(iii)-(iv) (2018).

³² Small Cell Order at ¶ 140; 47 C.F.R. 1.6002(g)(2018).

³³ 47 C.F.R. § 1.6002(l).

based enclosures, grounding equipment, power transfer switch, cut-off switch, and vertical cable runs for the connection of power and other services.³⁴

The Small Cell Order is not clear as to whether and what provisions of state small cell bills are preempted by the FCC rules.³⁵ These contradictions between state and federal law, as well as the lack of clarity about pre-emption form part of the basis of the current legal challenge to the Small Cell Order³⁶.

2. Shot Clocks

The Small Cell Order adopted two new shot clocks for wireless facilities.³⁷ The FCC rules now provide for 60 days for collocating small cells and provide for 90 days for locating a new small cell facility.³⁸ If a local government receives an application that is “materially incomplete,” it has 10 days to notify the applicant of the incompleteness and detail what must be provided, then the shot clock will reset with the revised application.³⁹ However, if the notice of incompleteness is sent within 30 days instead of within the first 10 days, the shot clock stops and restarts when the new information is filed.⁴⁰

Further, the Small Cell Order extends the shot clock to pre-application conferences.⁴¹ If a local government requires an applicant to attend a pre-application conference, that pre-application conference can have the effect of starting the shot clock, even if an application has not been filed.⁴² To address this contradiction, we recommend that municipalities make pre-application conferences for this type of land use optional, and if the applicant chooses to use a pre-application conference for siting wireless facilities, they must acknowledge that the shot clock does not start until an application is filed.

It is important to note that to the extent that New Jersey land use law requires public processes for approval of these kinds of deployment, with timings and approval criteria that conflict with the Small Cell Order, these requirements are likely considered pre-empted under federal law, as prohibitions of the ability to provide wireless service.

3. Fees

As noted above, the Small Cell Order has adopted a legal presumption that fees that exceed these amounts have the effect of prohibiting the ability to provide service in violation of federal law:

- \$500 for non-recurring fees, including single up-front application that includes up to five small wireless facilities, with an additional \$100 for each small wireless facility beyond five, or

³⁴ A.4422, 218th Leg., 1st Ann. Sess. (N.J., 2018).

³⁵ Small Cell Order at ¶ 6.

³⁶ Motion for Stay, *Seattle v. FCC*, No. 18-957, at 12 (10th Cir. Dec. 17, 2018).

³⁷ Small Cell Order at ¶ 105.

³⁸ Small Cell Order at ¶ 105.

³⁹ Small Cell Order at ¶ 143.

⁴⁰ Small Cell Order at ¶ 143.

⁴¹ Small Cell Order at ¶ 145.

⁴² Small Cell Order at ¶ 145.

- \$1,000 for non-recurring fees for a new pole (i.e., not a collocation) intended to support one or more small wireless facilities; and
- for recurring fees like pole attachments, \$270 per small wireless facility per year for attachment to local government-owned structures in the ROW.⁴³

The rule creates the legal presumption that if a local government exceeds the \$500 fee cap, then those fees necessarily exceed those needed to recover the local government’s actual costs, and thereby prohibit the ability to provide service in violation of the Act.⁴⁴ This presumption is an example of one of the significant logical errors in the Small Cell Order, because the primary factor in determining local government costs for permitting is the cost of labor. The FCC’s one-size-fits-all cap (whether it is \$500 or \$5,000) assumes that the cost of labor is the same across every locality in the United States.

Our recommendation for addressing the Small Cell Order fee cap is to document the costs recovered by your permitting fees. Compile a calculation to demonstrate how you arrived at the permitting fee and offer to meet with industry in advance of application filing to explain how you calculated these numbers. In our experience this approach, at least during the pendency of the appeal challenging the Small Cell Order, is likely to assuage most wireless industry challenges if your permitting fees and actual costs incurred exceed the FCC caps.

4. Aesthetics

The Small Cell Order adopts a rule that local government aesthetics requirements are not preempted if they are:

- objectively reasonable,
- no more burdensome than those applied to other types of infrastructure deployments, and
- published in advance.⁴⁵

Two of these three criteria are drafted vaguely and have potential to generate litigation. What does “objectively reasonable” mean? What is the requirement about other types of infrastructure in the ROW? Can local governments impose aesthetic requirements if the same requirements have not been imposed on utility poles or traffic signals? Municipalities generally do not impose aesthetic requirements on this other infrastructure, which makes local government authority to regulate aesthetics less clear.

However, the requirement that aesthetic requirements must be published in advance can be done in any way that works for you. The section of the Small Cell Order on aesthetic requirements went into effect on April 15, 2019.⁴⁶ Many jurisdictions have been scrambling to get something up and published, even if not complete. If your jurisdiction has not adopted aesthetic standards for small wireless facilities yet, we recommend prioritizing this task.

⁴³ Small Cell Order at ¶ 79.

⁴⁴ Small Cell Order at ¶¶ 69-70.

⁴⁵ Small Cell Order at ¶¶ 84-89.

⁴⁶ Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Order Denying Motion for Stay, FCC WT Docket No. 17-79 WC Docket No. 17-84, (Dec. 10, 2018) at n. 63.

5. Aesthetics and Public Safety

The Small Cell Order adopts similar restrictions on undergrounding of facilities and spacing.⁴⁷ The FCC rules hold that a requirement to underground all utilities is preempted and even a requirement to underground limited facilities could be preempted if it “materially inhibited” provision of wireless service.⁴⁸ Spacing requirements may be preempted if not deemed to be “objectively reasonable.”⁴⁹

Appeal of the Small Cell Order

Numerous local governments across the United States and some industry entities have challenged the rules in federal court.⁵⁰ Local governments have challenged the Small Cell Order on the grounds that they have erred in interpreting the statutory language of “effective prohibition of service”; that they are not based upon evidence in the record; and that they violate the 10th and Fifth Amendments.⁵¹ The industry is challenging the rules on the grounds that the FCC should have adopted a “deemed granted” remedy for violations.⁵² That is, should a local government fail to act on an application within the shot clock timeframe, then the application would be deemed granted and the site permitted.⁵³

The appeal of the Small Cell Order was originally assigned to the 10th Circuit, but was transferred to the Ninth Circuit because of the appeal of the Moratoria Order pending there.⁵⁴ At the same time that the 10th Circuit transferred the appeal to the Ninth Circuit,⁵⁵ the court also denied the request for a stay of the effectiveness of the Small Cell Order filed by local governments.⁵⁶ The court’s decision rested on grounds that the local governments had not sufficiently demonstrated irreparable harm.⁵⁷ Local governments generally believe that the transfer to the Ninth Circuit is beneficial to the appeal. Besides the judicial economy of consolidating the appeal of the Moratoria and Small Cell Order, the Ninth Circuit is preferable because there is an en banc decision from the Ninth Circuit holding that the legal standard for a finding effective prohibition of service requires a showing of an actual prohibition under the specific facts of the case.⁵⁸ This contradicts the looser approach in the Small Cell Order, in which a showing that local regulations that simply materially inhibit provision of service (like making it timelier or costlier) violates federal law.

⁴⁷ Small Cell Order at ¶¶ 90-91.

⁴⁸ Small Cell Order at ¶¶ 90-91.

⁴⁹ Small Cell Order at ¶¶ 90-91.

⁵⁰ *City of Portland et. al v. USA*, No. 18-72689 (9th Cir. Oct. 2, 2018), *Sprint Corp. et al. v. FCC*, No. 19-70123 (9th Cir. Jan. 14, 2019).

⁵¹ See Petition for Review, *City of Seattle et al. v. USA*, No. 18-72886 (9th Cir. Oct. 24, 2018).

⁵² Petition for Review, *Sprint v. FCC*, No. 18-9563 (10th Cir. Oct. 25, 2018).

⁵³ Petition for Review, *Sprint v. FCC*, No. 18-9563 (10th Cir. Oct. 25, 2018).

⁵⁴ Order Granting Transfer, *Sprint et al., v. FCC*, No. 18-9563 (10th Cir. Jan. 10, 2019).

⁵⁵ *Id.*

⁵⁶ Order denying Motion to Stay, *Sprint et al., v. FCC*, No. 18-9563 (10th Cir. Jan. 10, 2019).

⁵⁷ *Id.*

⁵⁸ *Sprint Tel. PCS, LP v. Cnty. of San Diego*, 543 F.3d 571 (9th Cir. 2008).

The Ninth Circuit conducted a Case Management Conference with all parties on April 18, 2019, in order to resolve outstanding procedural issues.⁵⁹ At this point, the parties are set to brief the appeal between June and September, with the goal of reaching oral argument before the end of 2019.⁶⁰ The FCC had attempted to hold the appeal in abeyance because of a pending petition for reconsideration of the Moratoria Order and the Small Cell Order at the Commission, but the Ninth Circuit recently denied its motion.⁶¹ We are cautiously optimistic that we may be able to proceed expeditiously to oral argument before the end of the year.

Conclusion

Small cell wireless technology, how it is being deployed, and the laws that govern it are evolving. If you have questions on what these changes mean for your municipality, we encourage you to be in touch with their municipal attorney and land use attorney.

⁵⁹ Order Setting Case Management Conference, *City of Portland et. al v. USA*, No. 18-72689, *Sprint Corp. et al. v. FCC*, No. 19-70123 (9th Cir. Mar. 28, 2019).

⁶⁰ Order Setting Briefing Schedule, *City of Portland et. al v. USA*, No. 18-72689, *Sprint Corp. et al. v. FCC*, No. 19-70123 (9th Cir. Apr. 18, 2019).

⁶¹ Order Denying FCC Motion to Hold Petitions in Abeyance, *City of Portland et. al v. USA*, No. 18-72689, *Sprint Corp. et al. v. FCC*, No. 19-70123 (9th Cir. Apr. 24, 2019).