



SEPTEMBER 14, 2020

SUMMARY FOR LOCAL OFFICIALS: CITY OF PORTLAND V. FCC

*United States Court of Appeals for the Ninth
Circuit in City of Portland v. FCC, No. 18-72689
(Slip Op. Aug. 12, 2020)*



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

On August 12, 2020, the U.S. Court of Appeals for the Ninth Circuit issued its decision in the *City of Portland v. FCC*. The consolidated case involves numerous appeals of three FCC orders issued in 2018 – *the Small Cell Order*,¹ the Moratoria Order, and the One Touch Make-Ready Order. This summary addresses the effect of the court's decision on the issues in the Small Cell Order that are of highest importance to NCC members, most of whom are considering enacting or amending ordinances governing small wireless facilities (i.e. "small cells").

For background, the Small Cell Order had two parts. The first was a new set of regulations (the "Rules") that govern the time within which it is reasonable for localities to act on applications for approval of small cells (a.k.a. "shot clocks") and limit the flexibility of localities to regulate certain other aspects of the rollout of small cells. The second part was a Declaratory Ruling that did not enact any new regulations. Rather, it set out the FCC's interpretation of how the provisions of Sections 253 and 332(c)(7) of the Communications Act limiting state or local regulations that "effectively prohibit" the provision of wireless services should be applied.²

The Declaratory Ruling adopted 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 provided guidance on fees local governments may charge and on how they may regulate ancillary rollout issues. In particular, the issues included aesthetic concerns such as tower spacing, equipment design, and concealment requirements.

¹ 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"). Small wireless facilities for purposes of the order are generally those less than 50 feet tall and on which the antenna size is less than 3 cubic feet.

² 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."

Key Takeaways from the Court's Decision

- The court upheld most parts of the Small Cell Order. In particular, the court:
 - upheld the Rules, including the new, shorter shot clocks for small cell facilities;
 - generally affirmed the Declaratory Ruling, including the FCC's adoption of
 - the "materially inhibit" standard to determine when local actions constitute an "effective prohibition" on wireless service;
 - "safe harbors" (i.e., soft caps) for fees charged by localities for processing of small cell applications and for use of their rights-of-way, utility poles and other facilities; and
 - a requirement that any fees that exceed the safe harbors be based on the locality's actual cost.
- Notably, the court rejected the FCC's interpretation and application of the "materially inhibit" standard in the aesthetic context, thus strengthening the ability of local governments to enact reasonable regulations governing the aesthetic aspects of small cell deployments.
- Local governments should move expeditiously to enact or tighten zoning and other regulations to address aesthetic issues of importance to their community. These may include facility setbacks, antenna design, facility location and spacing, additional pole and equipment aesthetic requirements, and other factors of local concern. Local governments may also want to bring their application and access fee structures up to date in order to assure offset the increased costs they incur in processing applications and maintaining rights-of-way and municipal facilities used by wireless providers.
- Setting out and standardizing aesthetic requirements, including pre-approval of antenna, equipment cabinet and street furniture designs, is still recommended because it 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.
- However, the court's decision makes clear that a certain degree of subjectivity is permissible in applying aesthetic concerns. Not all aesthetic requirements need to be standardized and set out in advance in writing.

Impact on Local Government Authority

To what extent may a local government still take aesthetics into account in its small cell regulations?

- The court strengthened the ability of local governments to take aesthetics into account when making small cell siting and approval decisions.
- Per FCC order, aesthetic requirements imposed by local governments must be: (a) reasonable, (b) no more burdensome than those applied to infrastructure deployments by other providers of communications services, (c) published in advance, and (d) objective.³
- Under the statute, different aesthetic rules for providers of different types of services are allowed, so long as such treatment does not “unreasonably discriminate among providers of functionally equivalent services.” 47 U.S.C. § 332(c)(7)(B)(i)(I). The court held that only wireless services were “functionally equivalent” for purposes of § 332(c)(7). Since the Declaratory Ruling required small cell facilities to be treated in the same manner as facilities used to provide communications services that were not functionally equivalent (e.g., wireline voice or broadband), the court held that it was contrary to the statute.
- The court also held that the FCC’s requirement that all aesthetic criteria be “objective” lacked a reasoned explanation and was contrary to the statutory language that permitted reasonable discrimination.
- Therefore, local aesthetics requirements are acceptable so long as they are reasonable and no more burdensome than those applied to infrastructure deployments by other wireless service providers.

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

- Yes. The court did not specifically address spacing, but the Order considered spacing requirements to be a subset of aesthetics requirements, and thus subject to the same standard.

³ Order, ¶ 87.

- The Order gives no guidance on what might be a reasonable spacing distance.
- We should note that the spacing requirement must be measured only against the facilities of the applicant, not any wireless facilities of other carriers. Otherwise, such a rule would “unreasonably discriminate among providers of functionally equivalent services” by allowing first-movers to situate their facilities so as to prevent competitors from building out their networks.

May a local government require an applicant to show a significant gap in coverage as part of its application in those states where that has been the governing standard, such as states in the Fourth Circuit?

- Probably not. The court did not specifically address the "gap in service" issue. However, it did say that the FCC correctly found that restrictions that are not onerous when applied to a few big towers can materially inhibit wireless service when applied to the thousands of facilities involved in small cell rollouts.
- The "materially inhibit" test already applied in several circuits and has consistently been interpreted to preclude the "significant gap in coverage" criterion. Our expectation is that since the FCC adopted this as a national interpretation and the Ninth Circuit affirmed, other courts will follow suit.
- Even if the "significant gap in coverage" standard were retained, the relevant gap would be in broadband wireless service, not 3G or 4G voice service. Any local regulation that requires a carrier to demonstrate a significant gap in coverage for each of dozens or hundreds of small cell facilities in the locality would almost certainly be struck down by the FCC or a court because it materially inhibited the rollout of wireless service.

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

- There is no hard cap on fees. The court upheld the FCC's safe harbors for application and use fees, in part because it recognized that they were not actually caps.

- Nothing in the court's decision prevents a local government from charging higher fees. However, the court also affirmed the part of the Order where the FCC said that the fees imposed by a local government must be cost-based, i.e., a reasonable approximation of its actual costs and those costs must be reasonable.
- Neither the court nor the FCC has specified a methodology for calculating cost, or what expenses could be included.

Did the court address whether different shot clock deadlines apply when multiple applications are filed at the same time (batched)?

- No, the court did not address batching.
- 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. For example, the Order acknowledged that batched applications could strain local governments' resources and potentially justify a failure to meet shot clock deadlines.

What if a local government has an undergrounding requirement?

- The court did not specifically address undergrounding. However, undergrounding is a subset of aesthetics, so the court's ruling on aesthetics would also govern undergrounding.
- Regulations governing undergrounding must be reasonable and no more burdensome than those applied to infrastructure deployments by other providers of wireless services.
- Regulations requiring all utility facilities (including antennas) to be placed underground would effectively prohibit wireless services (and thus not be reasonable) 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 wireless service providers.

Additional Takeaways⁴

- Except on the issue of aesthetic regulation, the decision largely upheld the parts of the Order that significantly diminished local decision-making.
- Local governments still cannot prohibit 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 over fees and aesthetic aspects.
- If you have an existing agreement, we believe it will still be hard for a carrier to justify a request to change that agreement and it seems unlikely that the courts would side with them.
- There may be further appeals of the parts of the decision that applied to the Small Cell Order.

Important Tips & Action Steps for Local Officials

ANTENNA PLACEMENT | Local officials cannot say no to any antennas on all poles in an area. However, you can say no to a specific placement as long as there is a reasonable alternative.

UNDERGROUND | Local governments cannot require that all of this infrastructure be placed underground, but may be able to require that all but the antenna be placed underground. However, if local officials are planning to do so, they must do so for ALL other wireless service providers (but not all other utilities) and have an ordinance in place.

⁴ Reference the [Summary of Final FCC Small Cell Order Memo](#) for additional discussion points.

STREET FURNITURE | Municipalities can require that street furniture have a certain aesthetic and a minimum 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). As with undergrounding, the governing ordinance must apply to all wireless providers' street furniture in the local government's right of way.

SHROUDING AND CAMOUFLAGE | Local governments can impose aesthetic requirements for certain neighborhoods and certain types of poles. These may differ depending on the neighborhood. If these requirements are in place in advance of being approached by a carrier, it minimizes opportunities for push back and your municipality's position will be more defensible if challenged in court. HOWEVER, not all requirements need to be set out in advance. A certain amount of subjectivity or discrimination is permitted.

PERMITTING | The time to revise and organize your permitting process is now. It should include a plan to adhere to the shot clocks in the Order.

SHOT CLOCK DEADLINES | The deadlines may be difficult to meet, but there is NO DEEMED GRANTED provision in this order. That is, there is no automatic penalty of any type if you fail to meet a shot clock deadline. Batch permitting may be particularly problematic for local governments as the scope of such requests can overwhelm a permitting department, but if local officials make a good faith effort to process permit applications, keep the carrier updated, and are still unable to meet the deadline, it is likely the carrier will work with you. Should a dispute be addressed in court, your due diligence and proactive efforts will work in the local government's favor.

APPLICATION AND USAGE FEES | The safe harbor fees listed in the Order are for guidance. Fees at or below those benchmarks are unlikely to be challenged in court. Local governments can charge more if their actual costs are higher. Including your engineering costs, permitting staff costs, maintenance costs, and post-installation inspection costs may justify a higher application or usage fee. If those costs are reasonable, the fee is unlikely to be challenged. Even if it were, it would 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 and challenged by a carrier, a court may require the local government to justify the fee as being directly related to cost.**NEGOTIATING** | From a carrier's perspective, predictability is one of the single most valuable characteristics of the permitting process. When there is a high degree of certainty that permits will be acted upon in a predictable manner and time frame, carriers will be much more willing to negotiate for higher fees or longer approval times than those set by the FCC.

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[NCC Member Resources](#)

[Understanding the Small Cell Order](#) 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.

[Moving Towards 5G: What Cities Need to Know](#) includes key steps that cities can take to be collaborative with potential providers.

A [Mayoral Letter to the FCC](#) which emphasized the importance of local control in 5G deployment.

National League of Cities and National Association of Telecommunications Officers and Advisors (NATOA)'s developed [Model Code for Municipalities](#), a roadmap to assist local governments in adopting their own ordinances governing use of the rights of way by communications providers.

[Examples of Small Cell Agreements executed in NCC Member Municipalities:](#)

- [Austin, Texas](#)
- [Boston, Massachusetts](#) and Verizon Wireless
- [Fayetteville, Arkansas](#)
- [Huntington Beach, California](#) ([Mobilitie, AT&T](#))
- [Lincoln, Nebraska](#)
- [Los Angeles, California](#)
- [San Jose, California](#)
- [Seattle, Washington](#)