

FCC Power Grab of Small Cell Antenna Approval

By Thomas Magee



The next generation of cellular communications services known as 5G will require the placement of hundreds of thousands of small cell antennas on poles and other locations in public rights of way (ROW). The Federal Communications Commission estimates 455,000 of these sites by 2020, and nearly 800,000 by 2026.

To believe the wireless carriers (Verizon, AT&T, Sprint, and T-Mobile), 5G will be a “quantum leap” forward from what 4G has enabled and will carry the world through the next industrial revolution. But first they need access to local ROWs and poles.

The wireless telecommunications carriers have aggressively pursued state legislation to facilitate small cell antenna installations in the ROWs, and to date 20 states have enacted small cell legislation to make such access faster and less expensive. This state legislation limits government review time and ROW access fees, some set attachment rates for access to municipal electric utility poles, and most allow wireless companies to install their own poles. Of the states with NWPPA members, only Utah and Arizona have enacted such small cell legislation. Legislation was passed by the California legislature but was vetoed by then-Governor Brown.

Not content with state legislation, in November 2016 the wireless industry petitioned the FCC for a rulemaking, complaining that local government site approval was too slow and expensive. Following this proceeding, the FCC adopted its Small Cell Order on September 26, 2018, which became effective on January 14, 2019.

The FCC’s Small Cell Order bars states and localities from prohibiting wireless infrastructure deployment; limits the fees government entities can charge for reviewing small cell deployments; limits fees they can charge for ROW access and access to poles; sets “shot clocks” for acting on small cell applications; and provides guidance on aesthetic and undergrounding requirements. The Order establishes the presumptions nationwide that the following fees for small cell applications would be considered lawful under the act: “(a) \$500 for non-recurring

fees, including a single up-front application that includes up to five Small Wireless Facilities, with an additional \$100 for each Small Wireless Facility beyond five, or \$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 (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.”

NWPPA member utilities own utility poles, and an important question is whether the FCC’s Small Cell Order applies to them. The Order applies to “siting authorities,” which are defined as “a state government, local government, or instrumentality of a state government or local government, including any official or organizational unit thereof, whose authorization is necessary prior to the deployment of personal wireless service facilities.”

NWPPA members are therefore impacted by the Order to the extent that they qualify as “siting authorities,” i.e., government entities or “instrumentalities” of state or local governments. Municipal-owned utilities, certain public utility districts, and certain public power districts might all be considered state or local governments, or instrumentalities thereof. In addition, entities governed by boards appointed by city or county governments might also be considered instrumentalities of state or local governments.

The local government and utility response to the FCC’s Small Cell Order was fast. The American Public Power Association and numerous state and local entities (along with several carriers) filed appeals in several U.S. courts of appeal. Although the carrier-friendly 10th Circuit in Denver was selected to hear the appeals, state and local entities successfully argued that the case should be moved to the 9th Circuit in San Francisco. As we stand, and in advance of any briefing in those cases, both the FCC and the 10th Circuit have denied stays of the FCC’s Order, so that it continues in effect.

Among the legal issues to be raised on appeal will be that the Federal Pole Attachment Act specifically precludes FCC

pole attachment jurisdiction over poles owned by state and local government entities. For its part, the Small Cell Order did not even attempt to explain how its ruling, which affects municipal utility poles, comports with the Pole Attachment Act.

On January 14, 2019, Representative Anna Eshoo (D-Calif.), a former member of the San Mateo County Board of Supervisors for 10 years, introduced a bill in Congress (the Accelerating Wireless Broadband Development by Empowering Local Communities Act of 2019 (HR 530)) that would overturn the FCC's preemption of state and local regulation of 5G wireless services. The bill has been referred to the House Committee on Energy and Commerce.

Unless and until the Small Cell Order is overturned by the 9th Circuit or by federal legislation, it remains in effect. Because it asserts federal preemption over state and local decisions, it could be used to override not only contrary provisions in the small cell legislation enacted by 20 states, but could also be used to override any existing franchise or attachment agreement that a local government or "siting authority" has entered into with the wireless carriers for access to the ROWs and poles they control.

Because it wrests control over local ROW and pole attachment decisions from local entities, the Small Cell Order is viewed by many local governments and others as an unnecessary and overreaching power grab by the FCC that will hamstring local governments who need to manage rights of

way, transfer vast sums of money from local governments to wireless carriers at the expense of the public, and have no effect on bringing the much-publicized benefits of next-generation 5G wireless services to the less lucrative areas of the country (including rural America). **NWPPA**

Thomas Magee, a partner at Keller and Heckman LLP, provides legal counsel to investor-owned electric utilities, electric cooperatives, and municipalities across the country regarding pole attachments and the joint use of utility pole distribution systems. He can be reached at magee@khlaw.com and (202) 434-4128.

Editor's note: NWPPA supports the deployment of broadband. NWPPA Resolution 2019-09, Safeguarding Local Control – FCC & Pole Attachments, recognizes member concern regarding FCC overreach and disregard for local decision making in the regulation of public rights of ways for pole attachments, permit fees, and integrity of electrical facilities. NWPPA supports the American Public Power Association's legal challenge to the FCC Small Cell Order and will file an amicus letter in the 9th Circuit in support of that legal challenge. NWPPA also supports Rep. Eshoo's bill (H.R. 530) and will encourage its delegation in the House of Representatives to co-sponsor that bill.

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