

Ten Strategies to Protect State and Local Property After the FCC's Small Cell Preemption Order

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Set to become effective on January 14, 2019, the Federal Communications Commission's new wireless preemption *Order*¹ has states, localities, and publicly-owned utilities rightly alarmed about encroachment on local authority and about forced federal requirements that put at risk the primary purpose of many public assets. In short, the FCC has preempted state and local authority and mandated that wireless companies shall have low-cost, streamlined access to state- and locally-owned public property to mount small cell facilities.²

The impacts of the *Order* promise to be enormous and complex, and we recommend that you consult expert legal counsel to fully understand what it will mean for your locality, utility, or agency. Some localities have asked the FCC to reconsider its *Order* and many other localities have filed, or will soon file, appeals of the *Order*, alleging, among other things, that the FCC lacks authority to preempt state and local management of public rights-of-way and facilities. However these actions may turn out, we recommend that you promptly undertake a robust technical analysis to ensure that you have in place technical standards and requirements to protect your rights-of-way, light poles, utility poles, and other property to the greatest degree possible under the *Order*.

In many states and localities, rights-of-way construction and wireless installation take place with many informal, unstated rules that assume that common sense, good will, and best industry practices will prevail. But the *Order* puts at risk any public-sector property owner that relies on informal practices and mutual goodwill with the industry. While many wireless applicants work in good faith and make efforts to maintain a good relationship with the community or utility, relying on an informal or ad hoc approach could mean reduced control over your own assets. You will be better served to have clear, structured, and complete written standards, even if informality may have worked in the past.

¹ *In the Matter of 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, 2018 WL 4678555, (rel. September 27, 2018) ("Order") (available online: <https://docs.fcc.gov/public/attachments/FCC-18-133A1.pdf>).

² In addition, in the last two years, several states have enacted their own measures to address siting of small cell wireless facilities, and it is likely that more states will consider doing so in 2019. The FCC indicated in its Order that state provisions imposing more demanding standards than the FCC's will prevail over the FCC's standards and the FCC's standards will override less demanding state standards.

The following are some strategies and tactics that you may want to consider so as to protect your assets and their critical missions, subject to the guidance of your legal counsel:

1. **Develop standards for attachments that protect your assets' long-term durability and prioritize their primary use.** Industry rhetoric about placement of small cells on public assets frequently fails to acknowledge the primary, mission-critical purpose of those assets. It falls to asset owners to protect that primary use by ensuring that wireless attachments will not interfere with or compromise the function of the mounting asset. In developing such standards be sure to include all stakeholders within the government to ensure a clear and comprehensive understanding throughout all departments and agencies of the needs, objectives and processes being developed. Your standards for attachments, whether set forth in a local ordinance, a published technical standard, or an attachment agreement, should therefore clearly frame limitations in terms of protecting the assets and their mission-critical purpose. This can apply in the case of traffic and light poles, utility poles, and the right-of-way itself:

Traffic and light poles: In the case of traffic signals or light poles, standards should clearly describe how much space is available for wireless communications use and where attachments are allowed on the structure. The standards should state what type of structural analysis needs to be done by the applicant. They should also define the circumstances under which the structure needs to be replaced to support the new communications use so as to protect the primary use.

Technical standards should also define how large wireless equipment can be and where it can be located with respect to the traffic infrastructure. The standards should also specify how installation and maintenance will be performed in a manner that minimizes disruption to traffic and the public.

Similarly, you may want to develop defensible standards that would limit the size of equipment boxes and other elements of a wireless attachment that can shorten the useful life of the asset or create aesthetic, safety, or other problems.

Utility Poles: In the case of a utility pole owned and/or controlled by a municipal utility, standards should include many of the same items as those for traffic signals and poles. In addition, the standards should state how the wireless structure should be placed in order not to interfere with the operation of the utility and other attaching entities.

Safety is critically important, especially when considering how the attachment will interact with the utility use. As with traffic signals, there should be standards that define how installation and maintenance will be performed in a manner that

ensures the safety, security and reliability of the utility facilities and services, and that minimizes disruption to utility workers, traffic, and the public.

Clear procedures should be developed to allow the utility to shut off the wireless equipment to protect utility workers who would otherwise be exposed to radio frequency (RF) emissions when on the poles. Similarly, standards for warning signs can be established so as to ensure utility workers are alerted about exposure to RF radiation.

Rights-of-way: Rights-of-way standards for small cell facilities placement should make clear whether construction methods (e.g., directional boring, hand digging, micro-trenching) are prohibited or are required in particular areas; what is required in terms of restoration of sidewalks, roads, and parkway; and anything that is required to protect public or private property.

2. **Conduct a legal “red flag” review.** Work with counsel to survey the legal landscape, review local and state law relating to zoning, tower ordinances, right-of-way management, local franchising, and telecommunications regulation to determine what, if any, immediate action may be needed (for example, a definitional conflict with existing macro-cell ordinances), and to understand the boundaries within which you and the small cell provider must act.
3. **Develop Attachment Agreements.** It is vitally important to recognize that there is a difference between access to the public rights-of-way and access to government-owned structures, such as streetlight poles and utility poles that are located within the public rights-of-way. All wireless providers and infrastructures providers must obtain written authorization not just to occupy public rights-of-way, but also to attach their facilities to municipal poles and other structures. Local governments need to develop pole attachment agreements governing access to municipal facilities.
4. **Publish a thorough and complete technical manual, and/or provide a one-stop online resource.** Ideally all technical standards and processes should be available in a single document, and standards and process-related content should be available at a single online location.
5. **Generate detailed application forms.** Applications for wireless facility siting in the rights-of-way and on particular municipally-owned poles or structures should clearly identify and request all information reasonably required to enable a timely review; specify the size and format of required drawings; and note the required format for map coordinates, electronic files, and other elements of the application.

The application should also state the qualifications required for the individuals who develop the design submittal, structural analysis, and other key components of the application (such as a Professional Engineer stamp).

To facilitate a quick and thorough initial review of the submittal, the application should include a clear checklist to enable the reviewer to scan for completeness. This will enable a reviewer to immediately recognize whether information is missing—thus increasing the likelihood that the review can be completed within the stringent FCC-mandated shot clocks.

6. **Make the entire application submittal and review process electronic.** Electronic submission and review benefits the process by streamlining the process for applicants (and eliminating one of their areas of continuous complaint). It will also improve your ability not just to review the application but also to track and report on the status of applications to the applicant and the public as needed.
7. **Develop a bottom-up analysis of the time and resources needed to perform the steps involved in the application process.** The level of effort to review applications may vary with the technical complexity of the application (e.g., minor modification, colocation, new structure), and the review time will change if you receive multiple applications at once. Be sure to include the time needed to receive input from and respond to the public, and to obtain corrections of erroneous and incomplete applications. These insights will be the basis for your efforts to streamline the process, to prepare for and handle a potentially large number of applications (potentially with the addition of reviewers and inspectors as needed), and to justify cost recovery.
8. **Prepare cost studies to ensure you can justify application and rental fees.** The *Order* limits assessment of fees for the initial application, the ongoing rental of attachment space, and the use of the rights-of-way to a “reasonable approximation” of the government entity’s “objectively reasonable costs” associated with the deployment in question, and applied in a nondiscriminatory manner.³ Notably, the *Order* provides no guidance on how costs should be calculated. The *Order* goes on to specify certain presumptively reasonable fees (1) for one-time applications and (2) for annual access to public-rights-of-way and facilities (combined). The *Order* leaves room for higher fees if they are justified by reasonable costs, and it also leaves room for attachers to challenge the presumptive levels as exceeding costs.

³ *Order*, ¶ 50.

The courts will ultimately determine whether the FCC has authority to limit state and local governments to cost-based fees. In the meanwhile, we suggest that you have ample good reasons to undertake rigorous and methodical cost studies that will enable you to understand your true costs and to defend your pricing decisions.

Undertake a cost analysis related to your application fee, so as to document the full range of expenses incurred for reviewing an application. If your actual costs, including staff time, exceed the FCC's fees, such a study may protect you in the event you are challenged for assessing higher fees than the presumptively reasonable fees specified in the *Order*. While much remains to be understood about the *Order* and its limitations, reasonable application review costs might include:

- IT investments to enable online applications
- Review of applications for completeness, technical suitability, and compliance with standards
- Field inspections before and after construction
- Administration of a public notification process

Undertake a cost analysis related to your ongoing attachment or rental fee, so as to document the expenses you incur to maintain and support the asset on which the wireless equipment is mounted. To determine ongoing fees, reasonable costs to consider might include:

- The attacher's share of maintenance, repair, and replacement specific to the particular mounting asset
- Lost opportunity or revenue because you are forced to forego the use of the pole or space for other purposes
- IT investments to track and manage attachment data

9. **Develop a plan to reserve space on your assets to meet your and other public sector user needs.** One of our main concerns about the *Order* is that it may effectively give wireless companies forced access to public assets, regardless of the existing or anticipated needs of the public asset owner. If this is the case, you may have less access to your own assets for core government and utility functions for which the facilities were erected, as well as for future wireless attachments to meet your Internet of Things, Smart Communities, public safety, and other needs, in light of the fact that light poles and utility poles typically cannot hold more than one small cell attachment. For this reason, we

recommend you evaluate and document the existing and future public sector need for use of the assets. The resulting plan should demonstrate why and how it is necessary to reserve some of those assets for future public sector use. Such a plan could be instrumental in enabling you to keep private deployers off those assets that you will need to meet public sector uses in the future.

10. **Establish or update and publish aesthetic standards for attachments.** In the *Order*, the FCC claims that “providers...densify their networks with new small cell deployments that have antennas often no larger than a small backpack.”⁴ The image of a small cell attachment as a “small backpack” (or, as the industry like to say, a “pizza box”) ignores the actual size and visual impact of the related cabling and equipment boxes, which can be dozens of times larger than the antenna itself. In fact, the *Order* itself defines a “Small Wireless Facility” as one that has an antenna occupying no more than 3 cubic feet and support facilities collectively occupying no more than *28 cubic feet*.

That said, the *Order* goes on to note that “aesthetics requirements are not preempted if they are (1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments, and (3) objective and published in advance.”⁵

Given this framework, we recommend making sure your aesthetic standards are clearly defined and published, and compliant with your counsel’s interpretation to the *Order*. Most public sector review processes already include aesthetic considerations, and these should now be reviewed, updated, and published in light of the *Order*. In our experience, aesthetic standards may include requirements or guidance for:

- Size of antennas, equipment boxes, and cabling
- Painting of attachments to match mounting structures
- Use of shrouds, stealth techniques, or other camouflage
- Flush-mounting of antennas
- Placement of equipment in the pole base rather than on the outside of the pole
- Consistency with the character of historic neighborhoods

⁴ *Order*, ¶ 3.

⁵ *Order*, ¶ 86.

- Minimum spacing between attachments

If an applicant seeks to place a device in a residential neighborhood, aesthetic standards for the community should clearly state any minimum setback from dwellings, parks, or playgrounds; maximum structure heights; or limitations on the use of small, decorative structures as mounting locations.

Consult your legal counsel for full analysis and a timeline for how long the FCC will allow for public entities to publish aesthetic standards.⁶

In sum, the bad news in this *Order* for public entities is clear: Your control and influence over your own assets (and the primary purpose of those assets) has been greatly diminished. Indeed, the FCC *Order* ensures that failure to prepare will virtually eliminate any remaining control over the assets you may have.

But you *can* exert some level of control over this process and protect your assets and their mission-critical primary purposes. To do this, we recommend you undertake significant technical and legal planning to ensure that you have in place reasonable, standards and efficient processes that best serve your interests.

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⁶ The FCC noted in the *Order* that it expected localities to publish their aesthetic standards within 180 days of publication of the *Order* in the Federal Register. *Order*, ¶ 89.