

TELECOM UPDATE:  
NEW LAW & NEW TECHNOLOGIES  
September 14, 2021



W. Scott Snyder  
[ssnyder@omwlaw.com](mailto:ssnyder@omwlaw.com)

Daniel Kenny  
[dkenny@omwlaw.com](mailto:dkenny@omwlaw.com)

Emily Miner  
[eminer@omwlaw.com](mailto:eminer@omwlaw.com)

1

THE FEDERAL COMMUNICATIONS  
COMMISSION

*47 USC §151 -*

Regulate interstate commerce in “communication by wire and radio, so far as possible, to all of the people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communication service with adequate facilities at reasonable charges...”

2

## WHAT HAPPENED?

- Industry requests to install Small Cells - 2016
- Cities preparing for Small Cell deployment
- FCC Issued Declaratory Rule & Third Report and Order
  - ✓ Effective Date: January 14, 2019
  - ✓ Pending appeals consolidated before the 9<sup>th</sup> Circuit Court of Appeals
  - ✓ Request for stay was denied both by the FCC and the court
  - ✓ Court upheld most of the FCC order
  - ✓ US Supreme Court denied Writ

## FCC REGULATIONS UPHELD

9<sup>th</sup> circuit decision largely upholding the FCC's comprehensive small wireless facility order is confirmed with the US Supreme Court's denial of a writ of certiorari on June 15, 2021

- What does the Order require of your community?
- What regulatory options remain for your community?

## WIRELESS IN THE ROW



FCC identifies the ROW as the primary location for small wireless facilities



## How to Regulate WCF in the ROW

- Small wireless facilities are not cell towers
- Cities need to encourage public participate upfront in the development of the limited design and aesthetic regulations
- Empower and train staff to process WCF in a timely fashion

## DEFINITION OF SMALL CELL

(l) **Small wireless facilities**, consistent with section 1.1312(e)(2), are facilities that meet each of the following conditions:

(1) **The facilities—**

- (i) are mounted on structures 50 feet or less in height including their antennas as defined in section 1.1320(d), **or**
- (ii) are mounted on structures no more than 10 percent taller than other adjacent structures, **or**
- (iii) do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater;

(2) Each antenna associated with the deployment, excluding associated antenna equipment (as defined in the definition of antenna in section 1.1320(d)), is no more than three cubic feet in volume;

(3) All other wireless equipment associated with the structure, including the wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than **28 cubic feet in volume**;

## AESTHETIC REQUIREMENTS ALLOWED

- Reasonable
- *No more burdensome than those applied to other types of infrastructure deployments*
  - Struck down by the 2020 Court ruling
- *Objective*
  - Struck down by the 2020 Court ruling
- Published in Advance



VS



## APPLICATION TO MACRO CELLS & COLLOCATION

- Materially Inhibit Standard **Not** Limited to Small Cell
- New Definition of Collocation:

*pre-existing structure, does not need to have a WCF on such structure. Except in context of 6409 Eligible Facilities requests*

9

## WHAT DO SHOT CLOCKS APPLY TO?

Any approval that a local jurisdiction or siting authority must issue under applicable law prior to deployment of facility.

## NEW TIME LIMITS FOR REVIEW OF FOR SMALL WIRELESS FACILITIES

- 60 Days to review an application to collocate on an existing structure
- 90 Days to review an application to locate on a new structure

## SIGNIFICANT DIFFERENCE IN TIME LIMIT APPLICATION

Eligible Facility Requests; expansion of existing facilities with set limits. 60 day shot clock. Failure by the City to act within time frame means that the application is “deemed approved.”

“Presumptively reasonable” time limitations. Applicant required to seek judicial order and relief, City can justify lengthy review.

Significant tactical advantage

## EFFECTIVE PROHIBITION – 332 & 253



“materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”  
- *California Payphone (1997 – FCC Case)*



## A CITY MAY NOT:

1. Effectively exclude a Wireless Communications provider from the City;
2. Materially inhibit (delay permits or charge excessive fees)
3. Dictate or limit the technological choices of a provider;
4. Regulate Radio Frequency Emissions; and/or
5. Discriminate Between Service Providers.  
(level playing field)

## A CITY MAY:

1. Address aesthetic issues
2. Regulate new poles in the right-of-way within time frames

## Templates to Prepare

### Prepare templates to streamline WCF review

- Franchise Agreement (if in the ROW)
- Small Wireless Facility Permit (All locations)
- Master Lease Agreement (with site specific addendum – for access to city poles)
- Lease (if not in ROW)



## 6<sup>th</sup> CIRCUIT DECISION REGARDING 2019 FCC ORDER REGARDING CABLE ACT: RECAP

- Summer 2019 - FCC released its Third Report and Order interpreting provisions of the *Cable Act*.
  - In-kind contributions are “franchise fees”
  - Cities can’t regulate cable operators non-cable services
- Fall 2019 – Local governments sued FCC arguing the Order would unlawfully infringe on state and local authority over the growing non-cable services provided by cable companies

## 6<sup>th</sup> CIRCUIT DECISION REGARDING 2019 FCC ORDER REGARDING CABLE ACT: RULING

- Spring 2021 – 6<sup>th</sup> Circuit issued its decision, upholding the FCC Order in part but also siding with the cities in part.
  - **First Part:** Cable operations cannot use “fair market value” when determining value of “in-kind” obligations
  - **Second Part:** Upheld 2019 FCC order preempting local jurisdictions’ abilities to impose telecom fees on cable operators which also provide telecom services (i.e. Comcast) but signaled that future arguments could be considered regarding such fee

## 6<sup>th</sup> CIRCUIT DECISION REGARDING 2019 FCC ORDER REGARDING CABLE ACT: REASSESS

Impact to Cities and Towns: Reassess how “in-kind services” are offset  
against franchise fees



## RF EMISSIONS COURT DECISION

### Background

- FCC preempts local authority related to RF Emissions (47 U.S.C. 302a(a))
- FCC standards related to RF radiation exposure have been in place for 25 years
- Federal Law requires federal agencies to account for the environmental effects of their proposed actions

## RF EMISSIONS COURT DECISION

*Environmental Health Trust v. FCC*, 20-1025, 2021 WL (D.C. Cir. August 13, 2021)

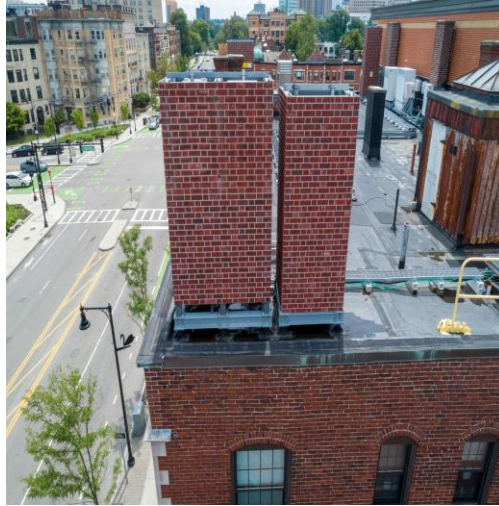
- Pursuant to Federal Law, the FCC issued guidelines in 1996 that outlined the acceptable level of human exposure to RF radiation.
- In 2013, the FCC sought comments on five issues related to the intersection of WCF and scientific standards
- In 2019, the FCC issued a final order declining to undertake any changes recommended by the comments sought in 2013.
- Environmental Health Trust sought challenge of 2019 FCC order
- DC Circuit Court of Appeals granted Trust's appeal petition and remanded to the FCC to explain its determination that its guidelines adequately protect against the impacts of RF radiation exposure unrelated to cancer

## RF EMISSIONS COURT DECISION

- Many local jurisdictions recently received one (perhaps more) letter that demands the City take a range of actions in response to this court decision.
- The requested actions are either not appropriate ("alert the public that it can no longer trust that wireless devices are safe and instruct them to reduce exposure.") or they are well outside the scope of the jurisdiction's authority ("remove the FCC from regulating health effects of wireless.").
- This court decision is not a basis to stop acting on properly submitted small wireless applications.
- This court decision does not give local jurisdictions the right to now regulate health impacts of small wireless facilities.
- Residents (and even your City) can continue to reach out to your elected representatives in Washington DC and the FCC on the topic of RF Emissions.

## NEW AND EVOLVING TECHNOLOGY

- New technology outside of small cells definition
- Light poles of the future
- Broadband Access



### New Technology outside of Small Cell Definition

- Repeaters are used to extend transmissions so that the signal can cover longer distances
- Repeaters don't fit within definition of SWF, so have to consider how to regulate them



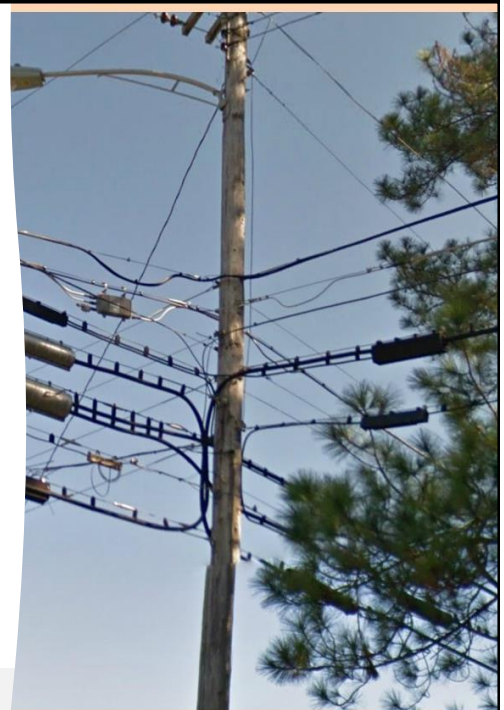


## Smart Light Poles

- Site small wireless facilities
- Can save on energy costs
- Measure traffic congestion
- Provide weather alerts
- Assist in finding parking

## Broadband Access

- **Background:**
  - Under previous legislation enacted in 2000, PUDs have been able to build out the infrastructure for broadband internet, but were required to let private internet service providers deliver service.
  - Cities allowed to provide municipal broadband
- **HB 1336 and SB 5383 adopted this year**
  - Allows non-profit, community owned PUDs, ports, and counties to provide retail broadband service directly to customers
- Washington state has a goal of providing access to broadband internet with 150 Mbps download and upload speeds by 2028.



## Questions?



OMW

27

27

## Contact Us

Ogden Murphy Wallace: (206) 447-7000

W. Scott Snyder - [ssnyder@omwlaw.com](mailto:ssnyder@omwlaw.com)

Daniel Kenny- [dpkenny@omwlaw.com](mailto:dpkenny@omwlaw.com)

Emily Miner- [eminer@omwlaw.com](mailto:eminer@omwlaw.com)

OMW

28