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Ninth Circuit Upholds FCC's 2018 Small Cell, Local Moratoria, and One-Touch Make-Ready Orders

By Maria T. Browne, Alan Galloway, and John D. Seiver

08.17.20

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On August 12, 2020, a three-judge panel of the Ninth Circuit in *City of Portland v. FCC* rejected multiple challenges to the Federal Communications Commission's (FCC) Small Cell, Local Moratoria, and OTMR orders in all but one respect—the panel found that elements of the Small Cell Order that sought to standardize local government interpretations of 5G node aesthetics were arbitrary and capricious.

The decision is undoubtedly a win for both wireless and wireline providers as it affirms a number of FCC regulations implemented to help expedite broadband deployment. More than 50 local governments, associations, pole owning utilities, and even wireless carriers petitioned for review of multiple aspects of the three orders that were briefed and argued in the Ninth Circuit last February.

Small Cell Order

In September 2018, the FCC issued a Declaratory Ruling and Third Report & Order (Small Cell Order) intended to help speed the deployment of 5G facilities and services. The Small Cell Order:

> (1) Reestablished the FCC's *California Payphone* standard for interpreting whether a local ordinance had the effect of prohibiting telecommunications service within the meaning of Sections 253 and 332 of the Communications Act;
>
> (2) Preempted local Right-Of-Way (ROW) access fees, and fees for the use of government property in the ROW, including utility poles, unless they are based on reasonably incurred costs and are

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including aesthetics-based restrictions not meeting the FCC's reasonableness and objective criteria; and

(4) Adopted new shot clocks for state or local review of wireless infrastructure siting applications.

As a preliminary matter, the local government petitioners challenged the FCC's standard for interpreting Section 253(a), arguing that it does not preempt a state or local fee or requirement unless the fee or requirement constitutes an "actual prohibition" of service.

In a show of deference to the FCC, the panel interpreted the FCC's "material inhibition" standard as consistent with the Ninth Circuit's 2009 decision in *Sprint Telephony PCS, L.P. v. County of San Diego*, which held that more than "the mere possibility" of prohibition was required to trigger preemption. That decision, the panel held, still applied the same "material inhibition standard" as the FCC in determining whether there has been an effective prohibition.

The panel then analyzed each of the petitioners' challenges to the FCC's decision using that standard.

Fees

Because excessive fees imposed by many localities have delayed 5G deployment and effectively prohibited telecommunications service, the Small Cell Order placed limitations on fees that state and local governments may charge for accessing the public ROW. Specifically, the

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Facilities"[1] that are presumed lawful if not exceeded:

- (1) $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);
- (2) $1,000 non-recurring fees for a new pole (i.e., not a collocation) intended to support one or more Small Wireless Facilities; and
- (3) $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.

The local government petitioners in this case challenged these restrictions, asserting "that there is no rational connection between whether a particular fee is higher than that particular city's costs, and whether that fee is prohibiting service." In rejecting this argument, the panel held that the FCC's fee limitation did not violate Section 253(c) of the Communications Act, noting that the "calculation of actual, direct costs is a well-accepted method of determining reasonable compensation."

Judge Bress's dissenting opinion, which was confined to this issue, argued that the FCC did not adequately justify a prohibition an all above-cost fees, as it did not sufficiently explain the "intrinsic relationship between a fee's approximation of costs and its prohibitive effect on service providers . . . [to] justify a blanket prohibition on all above-cost fees."

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Cell Order provided that aesthetic regulations were preempted unless "(1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments, and (3) objective and published in advance."

The panel held that the FCC's "no more burdensome" standard contravenes Section 332 of the Communications Act because the statute "explicitly contemplates" that some discrimination among attachers related to differing technologies is permitted.

The panel also rejected the FCC's objectivity requirement because "intangible public harm of unsightly or out-of-character deployments" is inherently subjective, and thus the FCC's objective standard was "neither adequately defined nor its purpose adequately explained."

Shot Clocks

The panel also upheld the new "shot clocks" (or timeframes) for acting on wireless deployment applications. Specifically, the FCC shortened the shot clock for approving/denying applications for installation of Small Wireless Facilities on existing infrastructure (i.e., collocation) from 90 to 60 days and abbreviated the shot clock for all other collocation applications from 150 to 90 days.

Petitioners challenged the FCC's reliance on a "limited survey of state laws" and argued that most state and local entities would not be able to comply with the new shot clocks. The panel disagreed and upheld the FCC's new timeframes, explaining that the "FCC's reliance on the survey

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Utilities and localities were not the only petitioners that challenged aspects of the Small Cell Order. Wireless service providers contested the FCC's refusal to adopt a "deemed granted" remedy if local governments fail to process permit and zoning applications in accordance with shot clock deadlines. However, the panel held the shorter shot clocks and other measures alleviated the bar to deployment caused by the old shot clock regime and that factual findings in the case did not support a deemed granted remedy.

Use of Government-Owned Property

The Small Cell Order clarified that the FCC's rules extended not only to the public ROW that local governments own or control but also to the use of government-owned property within such ROW—including light poles, traffic lights, and utility poles. Public pole owners contended that the Small Cell Order does not apply to them because Section 224 of the Communications Act, which governs attachment of certain communications facilities to private utility poles, contains an "express exclusion for government-owned utilities."

The panel disagreed, concluding that Section 253 imposes independent authority to prescribe limitations on amounts charged by municipalities for pole attachments. Local governments and public pole owners also argued that Section 253(a) preemption does not apply to them when acting "like private property owners in controlling access to, and construction of facilities in the rights-of-way." The panel rejected this argument and agreed with the FCC's assertion that "cities act in a regulatory capacity when they restrict access to the public rights-of-way

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The panel also rejected one county petitioner's claims that the FCC's failure to address radiofrequency (RF) standards raised in an earlier rulemaking docket or in the Small Cell Order, itself, was grounds for reversal. The panel found that not only had the FCC subsequently addressed the RF standards, concluding that its existing RF rules did not require amendment, but also that U.S. Supreme Court precedent gives the FCC "significant latitude as to the manner, timing, content, and coordination of their regulations."

Moratoria Order

In August 2018, the FCC issued a declaratory ruling (Moratoria Order) finding that state and local moratoria on telecommunications services and facilities deployment were barred by section 253(a) of the Communications Act because they "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

The FCC specifically banned moratoria on accepting, processing, or approving wireless deployment applications including ordinances that expressly ban 5G deployment, as well as "de facto" ordinances and practices that unreasonably or indefinitely delay 5G deployment. The FCC left open the ability of state and local governments to impose "emergency" bans on 5G facilities provided they are competitively neutral, geographically targeted, and necessary to address an ongoing safety concern.

The City of Portland criticized the moratoria definitions as "overly broad."

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the delay "continues for an unreasonably long or indefinite amount of time."

The panel also dismissed Portland's claim that the rule exceeded permissible limits prescribed by Section 253(a), which prohibit a government restriction only if it "specifically targets the provision of telecommunication services." In doing so, the panel upheld the FCC's emergency ban exception as consistent with the public safety and welfare limitations imposed by Section 253(b).

While the panel upheld the FCC's moratoria policies, it noted, as had the FCC, that application of the Moratoria Order could be challenged on a case-by-case basis.

Constitutional Challenges to the Small Cell and Moratoria Orders

The Ninth Circuit also rejected petitioners' claims that the: (1) Small Cell Order resulted in physical and regulatory takings in violation of the Fifth Amendment; and (2) the Small Cell and Moratoria Orders violate local governments' sovereignty guaranteed by Tenth Amendment. The panel held that the Small Cell Order is not a physical taking because it "continues to allow municipalities to deny property for a number of reasons" and is not a regulatory taking because it allows for the recovery of actual costs. Further, the panel reasoned that both orders do not violate the Tenth Amendment in preempting state and local policies because the "FCC did not commandeer State and local officials" to

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ready" (OTMR) process to expedite both wireline and wireless attachments to utility poles. The OTMR rules allow new attachers to use their own utility-approved or qualified contractors to perform "simple" make-ready work in the communications space.

The OTMR Order also adopted:

> (1) Expedited timeframes for standard (non-OTMR) make-ready;
>
> (2) A new "self-help" remedy authorizing attachers to directly hire utility-approved contractors to do "complex" communications make-ready and work above the communications space, including in the power supply space;
>
> (3) Specific notice-only rules governing overlashing; and
>
> (4) A rule prohibiting pole owners from charging new attachers or overlashers for correcting pre-existing safety violations or using such non-compliance to delay attachment or overlashing.

In the same order, the FCC shifted the presumption governing rates charged by electric utility pole owners for attachments made by incumbent local exchange carriers (ILECs), finding that the latter should be presumed to be governed by the FCC formula setting maximum permitted attachment rates for telecommunications providers. Higher attachment rates can be required if the electric utility can rebut the presumption by demonstrating that the ILEC has superior rights in its attachment agreement compared to traditional cable and

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non-compliance, the new self-help remedy, and ILEC attachment rates. The panel upheld the FCC with respect to each of these rules.

Overlashing

The panel rejected petitioners' claims that the FCC's new overlashing rule, which allows attachers to overlash facilities to existing attached facilities upon no more than 15 days' notice and prohibits pole owners from requiring advance permits or costly engineering studies, stripped the utilities of their statutory right to deny attachers access for reasons of *safety, capacity, reliability, or engineering standards* set forth in Section 224.

The panel found sufficient evidence in the record to support the FCC's findings that advance notice requirements—frequently negotiated in the past on a voluntary basis—had been "sufficient to address safety and reliability concerns." The panel also rejected petitioners' claims that the rule would preclude pole owners from recovering costs related to overlashing.

Preexisting Violation Rule

The panel upheld the FCC's codification of long-standing precedent, that communications attachers and overlashers may not be charged to correct preexisting violations not caused by their new attachments/overlashing, rejecting arguments that the rule raises safety concerns. Rather, the panel agreed with the FCC that the rule does not prevent the timely correction of non-compliance but ensures that utilities do not improperly shift responsibility for correcting preexisting violations to entities seeking to deploy new communications facilities.

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Self-Help Rule

The panel denied challenges to the FCC's new self-help remedy, allowing attachers to hire and supervise utility-approved contractors to perform make-ready work in the power supply space. The panel rejected utility claims that this rule exceeded the FCC's authority under Section 224 (utilities claimed it was tantamount to regulation of electric facilities rather than the pole itself).

The panel noted numerous measures that the FCC adopted to mitigate safety risks and reminded the petitioners that not only do these contractors have to be approved by the utility, but the attacher must also give the utility advance notice of its use of the self-help remedy. The panel also rejected arguments that the FCC had sidestepped its procedural obligation to propose the new self-help remedy before announcing the final rule. The panel instead held the self-help remedy was "a logical outgrowth of the NPRM" based on the clearly expressed purpose of the rulemaking and on responsive industry comments seeking to expand the self-help remedy to performing preparatory work on the entire pole.

Rate Reform Rule

Finally, the panel upheld the FCC's decision to further harmonize pole attachment rates by applying rates traditionally applied to CLEC attachments to ILEC attachments. In so doing, the panel rejected arguments that the FCC had exceeded its authority. The panel agreed with the FCC's reasoning that "historic differences between ILECs and

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It is very likely that government and pole-owning petitioners will seek en banc review of the Panel's decision. Because the respondent is a government entity, such petitions for rehearing would be due within 45 days of the panel's decision (i.e., by September 11, 2020).

If rehearing is denied or if rehearing is granted, parties would have 90 days from such denial or decision on rehearing to file petitions for certiorari in the Supreme Court. We are following this litigation and will supplement this analysis as the proceedings develop.

4th Update: On June 28, 2021, the U.S. Supreme Court denied the petition for certiorari filed by the municipal governments and associations. The FCC's Order stands affirmed except for two of the FCC's three criteria for preempting state and local regulation of wireless equipment that the Ninth Circuit struck down ("We therefore conclude that the requirement ... that limitations on small cells be 'no more burdensome' than those applied to other technologies, must be vacated" ... "We conclude that the FCC's requirement that all aesthetic regulations be 'objective' is arbitrary and capricious"). As a result, the proceeding will be remanded to the FCC to address the Ninth Circuit's holdings on those two issues.

3rd Update: On March 22, 2021, thirty-five local governments and municipal associations filed a petition for certiorari (Docket No. 20-1354) seeking Supreme Court review of the FCC's small cell order, and to a lesser extent, the moratorium order, that were both affirmed by the Ninth

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The focus of the municipal challenge in their petition for certiorari pertains to both the rent that a locality may charge for wireless facilities and the standard under which municipalities will be deemed to have effectively prohibited wireless service by local action. Last March, SCOTUS issued a standing order that reset the time for parties to seek certiorari, extending the time for filing from 90 days to 150 days, so this petition from the Ninth Circuit's denial of rehearing last October is timely. The current date for parties to respond to the Petition is April 26, 2021.

2nd Update: On October 22, all petitions for panel and en banc rehearing were denied. This starts the clock running for parties to seek certiorari in the Supreme Court.

Update: On September 28, the municipal and investor owned electric utilities, as well as municipalities, sought panel and en banc rehearing of the August decision. Under the rules, other parties may not file responses unless the panel or full court requests the parties to respond. The federal rules provide that rehearing petitions will not "ordinarily" be granted unless responses have been requested by the court. Ninth Circuit rules specifically provide that no rehearing *en banc* will be ordered without giving the other parties an opportunity to express their views on whether en banc rehearing is appropriate. Where an en banc petition has been filed, the Circuit Advisory Committee notes allow up to 21 days for a circuit judge to request consideration of rehearing petitions.

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