

# Update on Regulations Impacting Siting of Wireless Facilities

Colorado Municipal League  
Virtual  
Attorneys Conference  
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Recent FCC Orders, Conflicts with  
Colorado State Law, and the 9th Circuit  
Small Cell Decision

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# What We're Going to Cover

- Colorado's Statute on Small Cells
- The FCC Small Cell Orders
- The FCC "clarification" of its Mandatory Collocation Rules
- The FCC 2019 Order on Radio Frequency Emissions Rules
- Conflicts Between State Law and the FCC Regulations
- Ninth Circuit Ruling on the FCC Small Cell Rules

- Defines “small cell”
- Codified at CRS 29-27-401, et seq. and 38-5.5-102, et seq.
- Small cells are a use by right in any zone district
- Subject to local police powers (including zoning requirements)
- Applies existing state shot clock for wireless facilities
- Provides for “batched” applications

## Colorado's Small Cell Law HB 17- 1193

- Authorizes use of local government light poles, light standards, traffic signals, or utility poles in the rights-of-way
- Does not limit fees for attachments to government-owned poles unless fees would be limited if the local government were regulated pursuant to 47 U.S.C. Sec. 224

## Colorado's Small Cell Law HB 17- 1193

# The FCC's Orders

- In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79, Second Report and Order (Mar. 30, 2018) (NEPA and NHPA)
- In the Matter of Accelerating Wireless Broadband Deployment By Removing Barriers to Infrastructure Investment, FCC 18-111, Third Report and Order and Declaratory Ruling, WT Docket No. 17-79 (Moratoria Order – August 2018)
- Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Declaratory Ruling and Third Report and Order, FCC WT Docket No. 17-79 (Small Cell Order – September 2018)
- “5G Upgrade Order” or “Clarification of 6409 Mandatory Collocation Rules” and new NPRM (June 2020 )
- In the Matter of Proposed Changes in the Commission’s Rules Regarding Human Exposure to Radiofrequency Electromagnetic Fields, ET Docket No. 03-137 (Terminated), ET Docket No. 13-84 (Terminated), ET Docket No. 19-226 (RF Order – November 2019)

# FCC Order – NEPA and NHPA

- In March 2018, the FCC amended its rules to clarify that “deployment of small wireless facilities by private parties does not constitute either a “federal undertaking” within the meaning of NHPA or a “major federal action” under NEPA....”
- Neither statute’s review process would be mandated for such deployments
- Small wireless facilities deployments continue to be subject to applicable state and local government approvals
- DC Circuit **overturned** part of the order as arbitrary and capricious in *United Keetoowah Band of Cherokee Indians v. FCC*, 933 F.3d 728 (2019)
  - FCC “failed to justify its confidence that small cell deployments pose little to no cognizable religious, cultural, or environmental risk, particularly given the vast number of proposed deployments and the reality that the Order will principally affect small cells that require new construction.”

# FCC Moratoria Order – August 2018

- In August 2018 FCC determined that express moratoria and *de facto* moratoria on deployment generally “prohibit or effectively prohibit” provision of telecom services in violation of federal law, and are not saved from preemption as a form of ROW management
- *De facto* moratoria examples: freeze and frost laws, restrictions on ROW work at certain times of year on hurricane path evacuation roads
- Upheld, but narrowed in 9th Circuit ruling

# FCC Small Cell Order – September 2018

- Interprets “prohibit or effectively prohibit” under 47 USC Sections 253 and 332 to mean “materially inhibit”
- Creates presumptive limits in various categories, beyond which local requirements presumed to “materially inhibit” provision of service:
  - Creates “cost caps” for regulatory fees both inside and outside of rights-of-way; caps rent within ROW
  - Creates 2 new shot clocks for “small cells”
  - Create requirements for conditions related to aesthetics, undergrounding & spacing



# FCC Small Cell Order – September 2018

- Redefines “Collocation”:

“For purposes of the Section 332 shot clocks, attachment of facilities to existing structures constitutes collocation, regardless whether the structure or the location has previously been zoned for wireless facilities.”

- **Overtaken in part** (aesthetic rules) by 9th Circuit, discussed later

# FCC “5G Upgrade” Order – June 2020

- Declaratory Ruling - Effective June 10, 2020
- Intended to clarify the Commission’s existing rules regarding the types of wireless siting applications local governments may not deny, and must approve under federal law (Section 6409(a) of the Spectrum Act)
- 60 day shot clock starts when (1) the applicant takes the first procedural step that the local jurisdiction requires for 6409(a) applications, and (2) submits written documentation showing the application is an eligible facilities request
- The “first procedural step” cannot be “outside of the applicant’s control” and must be “objectively verifiable”

# FCC “5G Upgrade” Order – June 2020

- Declaratory Ruling - Effective June 10, 2020
- Other changes
  - measuring height
  - defining equipment cabinets
  - narrows definition of “concealment elements”
  - limits how conditions of approval impact future modification

# FCC “5G Upgrade” Order – June 2020

Appeal: *League of California Cities; et al., v. Federal Communications Commission, United States of America*, 9<sup>th</sup> Circuit No. 20-71765 (filed August 7, 2020)

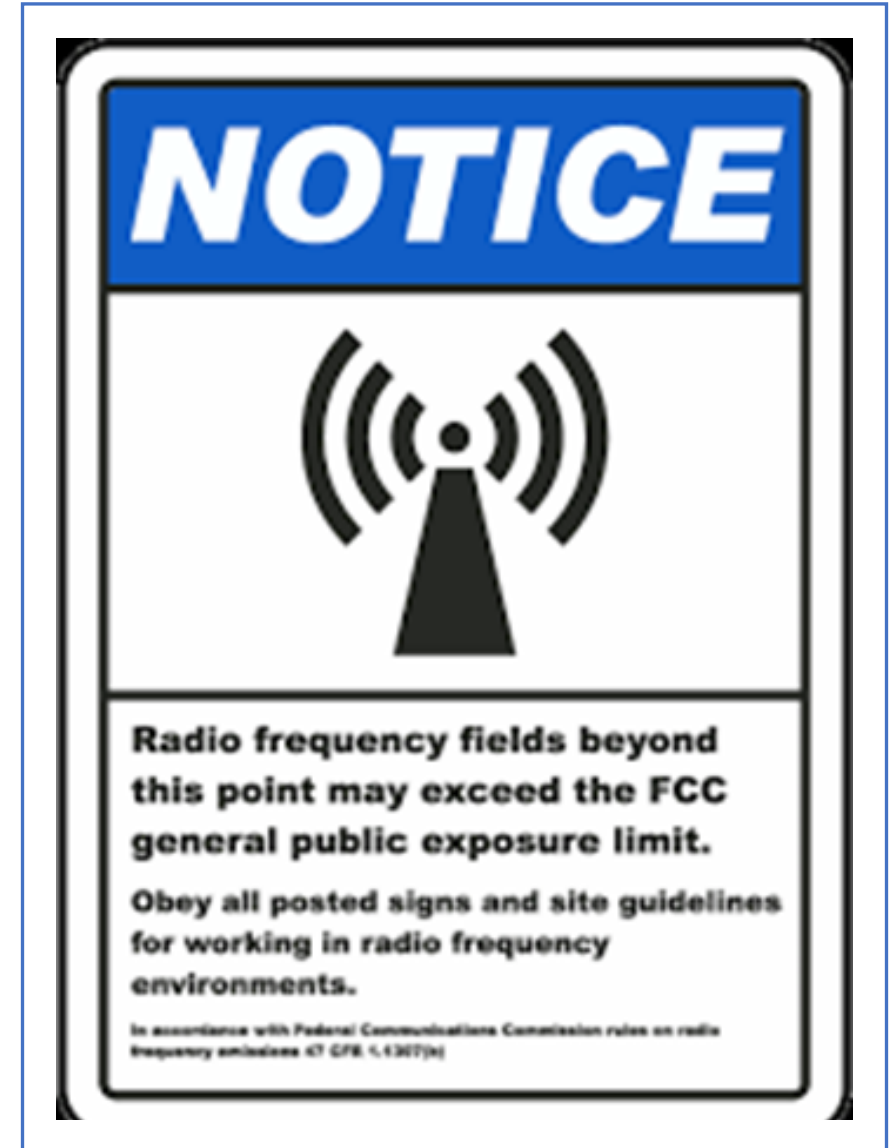
- FCC’s Declaratory Ruling violates both procedural and substantive limitations in the federal Administrative Procedures Act (“APA”)
  - FCC committed a fatal procedural error because it attempted to use an adjudication to substantially change existing regulations adopted through the formal rulemaking process
  - FCC’s proposed “clarifications” also violate APA’s substantive limitations on agency authority to adopt rules that are arbitrary, capricious or otherwise not in accordance with law




# Notice of Proposed Rulemaking – June 2020

- Seeks to clarify that “**current site**” is the currently leased or owned compound area
  - Industry argues current “site” means the property leased or owned by the applicant at the time it submits an application to make a qualifying modification under Section 6409(a)
- Proposal to amend rules to establish that a modification would not cause a “substantial change” if it entails excavation or facility deployments at locations of up to 30 feet in any direction outside the boundaries of a macro tower compound
  - Industry complains difficult to collocate transmission equipment on existing macro towers without expanding the surrounding compounds to deploy additional equipment cabinets on the ground

# RADIO FREQUENCY EMISSIONS – November 2019




- FCC approved minor changes in rules pertaining to NEPA implementation related to RF emissions from radio transmitters.
- FCC concluded that the best available scientific evidence supports maintaining the existing RF exposure limits – no need for modifications
- Local governments can find FCC guidance regarding RF emissions in Office of Engineering and Technology (OET) Bulletin 65, which explains the criteria for exclusion from RF evaluation, and in OET Bulletin 56, which explains the effects and potential hazards of RF emissions. The FCC's Consumer Guide regarding guidelines for cellular antenna sites may also be helpful.





# Conflicts Between Colorado Statute and FCC Small Cell Order: Collocation

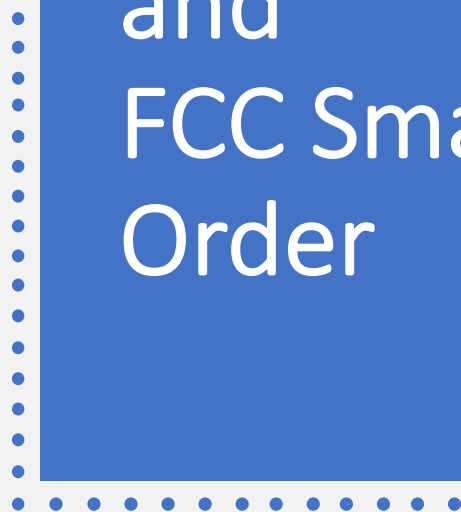

- Small Cell Order:
  - Redefines “Collocation”
  - “For purposes of the Section 332 shot clocks, attachment of facilities to existing structures constitutes collocation, regardless whether the structure or the location has previously been zoned for wireless facilities.
- State Law Definition:
  - State definition of collocation - mounting equipment on a tower, building, or structure with existing broadband service equipment



# Conflicts Between Colorado Statute and FCC Small Cell Order

- State definition of small cell: each antenna to fit w/in enclosure of no more than 3 cubic feet and primary equipment enclosures of no more than **17 cubic feet**, with some equipment excepted; height is subject to local zoning
- FCC Rules: each antenna no more than 3 cubic feet and equipment of no more than **28 cubic feet**, PLUS, can be located on structures of up to 50 feet in height or may extend existing structure to 50 feet or 10% increase in height, whichever is greater





# Conflicts Between Colorado Statute and FCC Small Cell Order

- State shot clock: 90 days for location or collocation of small cell network facilities
- shot clock stops if you notify applicant of incomplete application within 30 days and restarts when new information filed
- FCC Rules: collocating small cells – 60 days; new small cell facility – 90 days;
- if notified of a “materially incomplete” application with details of what must be provided w/in 10 days, shot clock stops and starts over with revised application
- FCC Rules: requirement for a pre-application conference could have the effect of starting the shot clock – even though the application has not yet been filed!

# Conflicts Between Colorado Statute and FCC Small Cell Order




## Fees (state law):

- License and Permit fees under state law:  
Limited to recovery of actual costs incurred by the local government in connection with the permit process; CRS Sec. 38-5.5-107
  - *Bloom v. City of Fort Collins*, 784 P.2d 304 (Colo. 1989)
  - *Colorado Union of Taxpayers Found. v City of Aspen*, 410 P.3d 625 (Colo. 2018)
- Pole Attachment fees under state law:  
cannot charge in excess of the amount that would be authorized if the local government were regulated pursuant to 47 U.S.C. Sec. 224, as amended

# Conflicts Between Colorado Statute and FCC Small Cell Order




## Fees (FCC Rules):

- presumption that fees that exceed these amounts have the effect of prohibiting the ability to provide service in violation of federal law:
- \$500 for non-recurring fees, including 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
- for recurring fees like pole attachments, \$270 per small wireless facility per year for attachment to local government-owned structures in the ROW



# Conflicts Between Colorado Statute and FCC Small Cell Order

- State Law: Use of local government structures in the ROW under state law: subject to CRS Sec. 38-5.5-101 *et seq.*, and CRS Sec. 29-27-403 and 404, and a local government entity's police powers, a provider has right to locate small cell facilities or networks on light poles, light standards, traffic signals, or utility poles in the ROW owned by local governments
- FCC Rules: apply to all local government structures in the ROW suitable for hosting small cells – not limited to zoning or other police power restrictions



# Conflicts Between Colorado Statute and FCC Small Cell Order

- Aesthetics under State law: local zoning preserved, which includes authority to impose aesthetic requirements
- FCC Rules: aesthetics requirements are not preempted if they are
  - reasonable
  - no more burdensome than those applied to other types of infrastructure deployments, and
  - objective and published in advance
- **Largely overturned** by 9th Circuit ruling, discussed shortly

## Conflicts Between Colorado Statute and FCC Small Cell Order: Specific Issues Related to Aesthetics and Public safety

- Undergrounding of facilities: state law would allow, both for aesthetic reasons and public safety (such as a narrow ROW where above ground equipment cabinet would limit access for pedestrians)
- Undergrounding of facilities: FCC rules hold a requirement to underground all utilities is preempted and even a requirement to underground limited facilities could be preempted if it “materially inhibited” provision of wireless service
- 9<sup>th</sup> Circuit decision may allow for some undergrounding, at least for aesthetic reasons



# *Portland v. U.S.*, 969 F.3d 1020 (9th Cir. 2020): Small Cell Decision

## General Standard of Review

- **Upheld** the FCC's reliance on its *California Payphone* decision, and the finding that if a regulation "materially inhibits" deployment of wireless facilities and the provision of wireless services, it amounts to an effective prohibition of service in violation of the Telecom Act

## Moratoria

- **Upheld** the FCC's decision that moratoria materially inhibit provision of service and are therefore preempted
- Court **noted** that generally applicable laws, i.e. those that do not target small cells, are not de facto moratoria and are not preempted unless they cause a delay that continues for an unreasonably long or indefinite amount of time

# *Portland v. U.S.*, 969 F.3d 1020 (9th Cir. 2020): Small Cell Decision

## Fees

- The Court **upheld** that part of the FCC small cell order setting presumptively reasonable fees
- Found that fees in excess of those amounts are presumed to recover more than just local government costs
- Local governments can still impose higher fees so long as it can be demonstrated that the fees are limited to recovery of actual and reasonable costs
- **Dissent:** Judge Bress wrote that the FCC did not adequately explain how all above-cost fees amounted to an “effective prohibition” on telecommunications or wireless service, because an effective prohibition under the Telecom Act must look to the “actual effects” of a state or local ordinance, not what effects the ordinance “might possibly allow.”



# *Portland v. U.S.*, 969 F.3d 1020 (9th Cir. 2020): Small Cell Decision

## Shot Clock

- The Court **upheld** the FCC's ruling that shot clocks are appropriate, noting they are "presumed" to be sufficient time to act, and local governments can still overcome that presumption if they can demonstrate more time is reasonably necessary
- The Court **upheld** the application of the shot clock to all permits, including "non-zoning" permits that are necessary in order to deploy small cell facilities

# *Portland v. U.S.*, 969 F.3d 1020 (9th Cir. 2020): Small Cell Decision

## Aesthetic Requirements

- The court **vacated** as arbitrary and capricious the FCC's rule that aesthetic requirements must be objective and no more burdensome than requirements imposed on other users in the right of way
- **Upheld** the FCC's rule that aesthetic requirements must be in writing and published in advance
- Requirements must still be "reasonable," and construed "reasonable" narrowly to mean only that aesthetic requirements must be "technically feasible and reasonably directed" at remedying aesthetic harms

# *Portland v. U.S.*, 969 F.3d 1020 (9th Cir. 2020): Small Cell Decision

## RF Emissions

- The Court **held** that local government arguments challenging the FCC's failure to consider and update its RF regulations to deal with small cell facilities were moot, given the fact that after the adoption of the small cell order, the FCC made a determination in a separate proceeding that changes to its 1996 RF rules to specifically address 5G were not warranted

## Constitutional Challenges

- The Court **found** that the FCC small cell order does not violate the 5th or 10th Amendments
- **Held** that limiting fees to costs is not a regulatory taking, and that the small cell order does not compel local governments to enforce a federal program in violation of the 10th Amendment

# FCC Small Cell Order – Petition for *En Banc* Review, filed September 28, 2020

- **Petition for *en banc* review filed in the Ninth Circuit**

- The decision is inconsistent with the longstanding “actual prohibition” standard from *Sprint Telephony v. County of San Diego*, 543 F.3d 571 (2008)
- Upholding the FCC’s rule allowing only cost-based fees conflicts with precedent that declined to hold that all non-cost based fees are automatically preempted
- The FCC failed to conduct meaningful review of the evidence under the APA
- The panel fundamentally misunderstood the distinction between regulatory and proprietary municipal actions in regard to municipally-owned property in the rights of way



4G leads to 5G.  
5G leads to  
preemption.

Preemption leads  
to suffering.

**QUESTIONS?**

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