SUMMARY OF SEPTEMBER 2018 FCC RULING AND ORDER RESTRICTING CITY AUTHORITY TO REGULATE SMALL WIRELESS FACILITIES IN THE PUBLIC RIGHTS-OF-WAY

As the wireless industry moves toward the next generation of wireless services known as 5G, on September 27, 2018, the Federal Communications Commission ("FCC") issued its Declaratory Ruling and Third Report and Order ("Ruling and Order"),[1] which establishes a new category of "small wireless facilities" and imposes further substantial restrictions on state and local governments' regulation of wireless facilities in the public rights-of-way with respect to fees and aesthetic requirements.

Most significant for local jurisdictions such as Manhattan Beach, the Ruling and Order preempt local regulation in the areas addressed and restrict the types of restrictions that cities and other states and local governments may impose to regulate the public rights-of-way.

1. New Category of "Small Wireless Facilities" Established

The Ruling and related federal regulations establish a new category of "small wireless facilities", which are defined as 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, 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 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;

[1] See 83 Fed. Reg. 51867-01 (October 15, 2018); 2018 WL 4952773(F.R.). The complete Ruling and Order is available online at https://ecfsapi.fcc.gov/file/0927025585935/FCC-18-133A1.pdf. A copy may also be obtained at 2018 WL 4678555 (F.C.C.).

(4) The facilities do not require antenna structure registration under 47 C.F.R. Part 17;

(5) The facilities are not located on Tribal lands, as defined under 36 C.F.R. 800.16(x); and

(6) The facilities do not result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified in section 47 C.F.R. 1.1307(b).[2]

2. Applicable Standard to Determine if a City's Legal Requirements Constitute a Prohibition or Effective Prohibition on the Deployment of Small Wireless Facilities

Relying on Sections 253 and 332(c)(7) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (collectively "Communications Act"),[3] which prohibit state or local requirements from prohibiting or having the effect of prohibiting wireless telecommunications services, a 1997 FCC decision, *California Payphone Ass'n.*, 12 FCC Rcd 14191 (1997), and decisions from several federal circuit courts, the FCC reaffirmed that a state or local legal regulation will have the effect of prohibiting wireless telecommunications services *if it materially inhibits the provision of such services*.[4] The FCC issued the following clarifications with respect to this standard:

- *An effective prohibition occurs where a state or local legal requirement materially inhibits a provider's ability to engage in any of a variety of activities related to its provision of a covered service, including but not limited to materially inhibiting additional services or improving existing services.* This may occur when filling a coverage gap, densifying a wireless network, introducing new services or otherwise improving service capabilities.[5]

- *Providers of wireless services must be allowed to compete in a fair and balanced regulatory environment.*[6] A state or local legal requirement can function as an effective prohibition either because of the resulting financial burden, or because of a resulting competitive disparity.[7]

[2] 83 Fed. Reg. 51867, 51885; new 47 C.F.R. § 1.6002(l).
[3] All statutory references are to Title 47 of the Communications Act, except as otherwise provided in this Advice Letter.
[4] 83 Fed. Reg. 51867, 51868 at ¶ 6.
[5] *Id*.
[6] *Id.*, pp. 51868-51869 at ¶ 8.
[7] *Id.*

3. Shot Clocks Applicable to Small Wireless Facilities

A city is required to timely act on applications for small wireless facilities in accordance with the following new time deadlines (or shot clocks). The Ruling also imposes short time deadlines for a city to notify the applicant that a small wireless facility application is incomplete.

- *Small Wireless Facility Collocations Using an Existing Structure.* A city must make a decision on the collocation application **within 60 days** from the date of filing a complete application.[8] Upon initial receipt of the application, a city has only **ten days** to notify the applicant in writing that the application is incomplete. If this ten-day deadline is met, the 60-day shot clock **restarts** at zero upon the date the applicant resubmits the missing information or documentation.[9] Upon the applicant's supplemental submittal of missing information or documentation, a city has **ten days** to advise the applicant in writing whether the collocation application is incomplete. Upon issuance of a new notice of incomplete application, the 60-day shot clock date is **tolled** until the applicant submits all supplemental documentation and information identified in the new notice.[10]

- *Deployments of Small Wireless Facilities Using New Structures.* A city must make a decision on the application **within 90 days** from date of filing of a complete application for a small wireless facility using a new structure.[11] Upon initial receipt of the application, a city has only **ten days** to notify the applicant in writing that the application is incomplete. If this ten-day deadline is met, the 90-day shot clock **restarts** at zero upon the date the applicant resubmits the missing information or documentation.[12] Upon the applicant's supplemental submittal of missing information or documentation, a city has **ten days** to advise the applicant in writing whether the application is incomplete. Upon issuance of a new notice of incomplete application, the 90-day shot clock date is **tolled** until the applicant submits all supplemental documentation and information identified in that new notice.[13]

- *Batched Small Wireless Facility Applications Must Be Processed in Accordance with the 60 or 90-Day Shot Clocks. A city must* accept an application for small wireless facilities that includes multiple (or "batched") deployments.[14] If the application includes a mix of

[8] *Id.*, p. 51867, 51885; new 47 C.F.R. § 1.6003(c)(1)(i).
[9] *Id.*; new 47 C.F.R. § 1.6003(d)(1).
[10] *Id.*; new 47 C.F.R. § 1.6003(d)(3).
[11] 83 Fed. Reg. 51867, 51886; new 47 C.F.R. § 1.6003(c)(1)(iii).
[12] *Id.*; new 47 C.F.R. § 1.6003(d)(1).
[13] *Id.*; new 47 C.F.R. § 1.6003(d)(3).
[14] *Id.*; new 47 C.F.R. § 1.6003(c)(2(iii).

small wireless facility deployments for collocation using existing structures and using new structures, the applicable shot clock is **90 days**.[15]

- *Tolling of Shot Clocks by Mutual Agreement.* The running of the small wireless facility shot clocks may be tolled by mutual agreement.[16]

- *A city or other state or local agency is presumed to have not acted within a reasonable period of time upon the agency's failure to act upon an application on or before the shot clock date.*[17] These 60-day and 90-day shot clocks are presumed to be reasonable periods of time to act on an application for a small wireless facility.[18]

4. Codification of Shot Clocks Applicable to Other Personal Wireless Facilities

The 90-day and 150-day shot clocks imposed on other personal wireless facilities under the prior FCC Decisions, for other personal wireless facilities, are codified in the Code of Federal Regulations.

- *Other Collocation Applications Using an Existing Structure.* A city must make a decision on the application for a personal wireless facility other than a small wireless facility or eligible facility **within 90 days** from the date of filing, subject to any tolling period.[19]

- *Deployment of Other Facilities Using New Structures.* A city must make a decision on the application for a personal wireless facility other than a small wireless facility or eligible facility **within 150 days** from date of filing, subject to any tolling provisions.[20]

- *Tolling of 90-Day or 150-Day Shot Clock upon Issuance of Incomplete Notice within 30 Days after Application Filing.* In accordance with the prior FCC Decisions, the 90-day or 150-day shot clock for personal wireless facilities other than small wireless facilities or eligible facilities is tolled upon issuance of notice of incomplete application **within thirty (30) days** after the date the application was submitted. If this deadline is met, the 90-day or 150-day shot clock is **tolled** until the date the applicant resubmits the missing information and documentation.[21]

- *Tolling of 90-Day or 150-Day Shot Clock for Other Resubmitted Applications.* In accordance with the prior FCC Decisions, for resubmitted applications for personal

[15] *Id.*; new 47 C.F.R. § 1.6003(c)(2)(ii).
[16] *Id.*; new 47 C.F.R. § 1.6003(d).
[17] *Id.*, new 47 C.F.R. § 1.6003(a).
[18] *Id.*; new 47 C.F.R. § 1.6003(c).
[19] *Id.*; new 47 C.F.R. § 1.6003(c)(1)(ii).
[20] *Id.*; new 47 C.F.R. § 1.6003(c)(1)(iv).
[21] 83 Fed. Reg. 51867, 51885; new 47 C.F.R. § 1.6003(d)(2).

wireless facilities other than small wireless facilities or eligible facilities, a city has **ten days** to review the supplemental submittal and to advise the applicant in writing whether the application is incomplete. If this ten-day deadline is met, the shot clock date is **tolled** until the applicant submits all supplemental documentation and information identified in the new notice of incomplete application.[22]

- *Tolling of Shot Clocks by Mutual Agreement.* The running of the 90-day or 150-day Shot Clocks may be tolled by mutual agreement.[23]

5. Broad Scope of Wireless Ruling to City Permits

- *The Shot Clocks Apply to All Authorizations Necessary for the Deployment of Personal Wireless Services Infrastructure in the PROW.* Any city permits or other authorizations required to access the PROW or to place, construct or modify personal wireless facilities or infrastructure in the PROW will be subject to these shot clocks pursuant to Section 332(c)(7)(B)(ii). This includes license or franchise agreements to access PROW, electrical or building permits, public notices and meetings, lease negotiations, road closure permits, aesthetic approvals, and other authorizations needed for deployment of personal wireless services infrastructure.[24]

6. Remedies for Violations of Small Wireless Facility Shot Clock Requirements

- *New Remedy for Violation of Shot Clocks for Small Wireless Facilities.* In order to reduce the likelihood of the need for applicant to seek judicial remedies, the Ruling provides a new remedy for a city's failure to comply with the shot clocks for Small Wireless Facility applications.[25]

  (1) A state or local agency's failure to act on a small wireless facility siting application within the applicable shot clock constitutes a "failure to act" within the meaning of Section 332(c)(7)(B)(v), entitling the provider to file a judicial action within 30 days for injunctive relief. This is the same process and remedies available for a state or local agency's failure to act within the shot clocks for other facilities under the prior FCC Decisions.[26]

  (2) A state or local agency's failure to act by the end of the small wireless facility shot clock period also amounts to a presumptive prohibition on the provision of personal wireless services within the meaning of Section 332(c)(7)(B)(i)(II). The Ruling

[22] *Id.*; new 47 C.F.R. § 1.6003(d)(3).
[23] *Id.*; new 47 C.F.R. § 1.6003(d).
[24] 83 Fed. Reg. 51867, 51877 at ¶ 74.
[25] *Id.*, pp. 51867, 51875 at ¶ 53.
[26] *Id.*; at ¶ 54.

provides that the agency must issue all necessary permits without further delay; and if the agency fails to do so, the applicant would have a straightforward case for obtaining expedited relief in court.[27]

(3) The Ruling does not impose a "deemed approved" determination as a result of the violation of the shot clock rules applicable to small wireless facilities.

7. Aesthetics, Undergrounding and Spacing Requirements for the Deployment of Small Facilities

The Ruling and Order provides guidance regarding the permissible scope of non-fee requirements for small wireless facilities in the PROW, particularly those relating to aesthetics, undergrounding and spacing.

- *New Guidance on Permissible Aesthetic Requirements.* A city's aesthetic requirements are not preempted if the aesthetic requirements are:

  (1) Reasonable,

  (2) No more burdensome than those applied to other types of infrastructure deployments, and

  (3) Published in advance.[28]

- *Aesthetic Requirements Must Be Technically Feasible and Reasonably Directed to Avoiding or Remedying the Intangible Public Harm of Unsightly or Out-of-Character Deployments.*[29] A city cannot impose aesthetic requirements on small wireless facilities that are more burdensome than those the city applies to similar infrastructure deployments.[30]

- *Aesthetic Requirements Must Be Objective and Incorporate Clearly-Defined and Ascertainable Standards.*[31] A city must publish its requirements in advance in order to prevent the city from relying on "secret" rules that require applicants to guess at what will be allowed.[32]

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[27] *Id.*, at ¶ 55.
[28] *Id.*, pp. 51867, 51871 at ¶ 30.
[29] *Id*.
[30] 83 Fed. Reg. 51867, 51871 at ¶ 30.
[31] *Id*., p. 51871 at ¶ 31,
[32] *Id.*, pp. 51871-51872 at ¶ 31.

- *Undergrounding and Minimum Spacing Requirements Should be Evaluated under the Aesthetic Standards.* The requirement for technically feasible and objectively defined aesthetic standards applies to undergrounding and minimum spacing requirements.

  (1) Undergrounding requirements can amount to an effective prohibition by materially inhibiting the deployment of wireless services. The Ruling and Order provides that requiring all wireless facilities to be deployed underground would probably amount to an effective prohibition in violation of Section 253, because of the propagation characteristics of wireless signals. [33]

  (2) Minimum spacing requirements generally are imposed to prevent excessive overhead "clutter" that would be visible from public areas. The Ruling and Order emphasizes the need to evaluate space requirements on a case-by-case basis, because some spacing requirements are reasonable aesthetic requirements while other requirements may violate Section 253(a).[34]

8. The Ruling and Order Applies to Agreements for Use of City Property within the PROW

The FCC does not exempt leases, licenses and other agreements between a city and a wireless provider from the requirements of the Ruling and Order.

- *States and Localities Act in Their Regulatory Capacities, Not Proprietary Capacities, When Authorizing and Setting Terms for Wireless Infrastructure Deployment in Public Rights of Way.* In the past, leases, licenses and other agreements relating to use of city-owned property within a PROW have been viewed as part of a city's proprietary role as owner of the subject property. However, the Ruling and Order rejects the interpretation that states and local governments act in a proprietary capacity when regulating access to the PROW or use of government-owned property within the PROW. According to the FCC, Sections 253(a) and Section 332(c)(7)(B)(i)(II) do not make a distinction between proprietary and regulatory conduct, or carve out an exception for proprietary conduct from the preemptive effect of the Ruling and Order.[35] As such, it appears that the FCC will evaluate all permits, leases and other agreements and other "authorizations" for siting of small wireless facilities under the same requirements and standards outlined above.

- *The Ruling and Order Requirements and Limitations on Fees and Non-Fee Regulations Preempt City Requirements for Deployment of Wireless Facilities on City-Owned or Controlled Property within the PROW.* The Ruling and Order extends to state and local

[33] *Id.*
[34] *Id.*, p. 51872 at ¶ 34.
[35] 83 Fed. Reg. 51867, 51872 at ¶¶ 35-39.

governments' terms for access to PROW that they own or control, including areas on, below, or above public roadways, highways, streets, sidewalks, or similar property, as well as their terms for use of or attachment to government-owned property within such PROW, such as new, existing and replacement light poles, traffic lights, utility poles, and similar property suitable for hosting Small Wireless Facilities.[36]

- *The Ruling and Order Applies to Existing Agreements.* Existing agreements and provisions contained in the agreements are not exempt from either Section 253 or 332, or the effects of the Ruling and Order. However, the application of the Ruling and Order to each agreement will depend upon all the facts and circumstances of that specific case.[37]

- *Fee Requirements Imposed in Contracts Will Be Subject to the Requirement that Compensation Must Be "Fair and Reasonable.* As outlined above, Section 253(a) of the Communications Act requires that compensation for use of the PROW must be "fair and reasonable". Under the Ruling and Order, this requirement applies to charges imposed via contracts or other arrangements between a city and a party engaged in wireless facility deployment.[38]

[36] *Id.*, p. 51872 at ¶ 35.
[37] Ruling, pp. 36-37 at ¶ 66.
[38] 83 Fed. Reg. 51867, 51872 at ¶ 36.