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New Federal Communications Commission Rule Regarding Small Wireless Facilities (5G Technology)

Prepared for the Massachusetts Municipal Association Meeting, January 2020

In order to facilitate the rollout of 5G technology, the Federal Communications Commission ("FCC") has issued a new rule: Declaratory Ruling and Third Report and Order in Docket No. 18-133 ("New FCC Rule") pertaining to the local regulation of Small Wireless Facilities. The New FCC Rule contains specific requirements relating to municipal regulation of Small Wireless Facilities on municipally-owned or controlled property, such as public rights of way ("ROW"), light poles, traffic lights, utility poles, and similar property suitable for hosting Small Wireless Facilities. The New FCC Rule interprets Sections 253 and 332 of the Federal Telecommunications Act of 1996, U.S. Code, Title 47 ("TCA") so as to provide a consistent national policy framework for the deployment of 5G technology.

The New FCC Rule is available at: https://docs.fcc.gov/public/attachments/FCC-18-133A1.pdf

I. Small Wireless Facilities Covered By the New FCC Rule

The New FCC Rule only applies to "Small Wireless Facilities," which meet 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 47 CFR § 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;

(4) The facilities do not require antenna structure registration under part 17 of this chapter;

(5) The facilities are not located on Tribal lands, as defined under 36 CFR 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 47 CFR § 1.1307(b).

II. FCC Limitations Imposed on the Local Control of Small Wireless Facilities

1. Fees

The New FCC Rule requires that municipal fees assessed for Small Wireless Facilities must constitute a reasonable approximation of the local government's objectively reasonable costs and be non-discriminatory—meaning they are

no higher than the fees charged to similarly-situated competitors in similar situations. This requirement applies to all fees charged an applicant seeking approval to install a Small Wireless Facility, including application or permit fees (siting applications, building permits, electrical permits, and excavation permits), ROW access fees, and fees for the use of government property in the ROW.

The New FCC Rule establishes a "safe harbor" of presumptively reasonable fee amounts, including the following:

- **$500 Non-Recurring Fee** – applies to a single up-front application that includes up to five Small Wireless Facilities, with an additional $100 for each Small Wireless Facility beyond five;
- **$1,000 Non-Recurring Fees** – applies to applications for new pole (*i.e.*, not a collocation) intended to support one or more Small Wireless Facilities
- **$270 Annual Recurring Fee (per Small Wireless Facility)** – applies to annual licensing fee for right-of-way access or attachment to municipally-owned structures.

State and local governments may charge fees in excess of those that are presumptively reasonable, provided the state or local government's actual, objectively reasonable costs are higher. The New FCC Rule cautions that not all fees incurred by state and local governments will be considered objectively reasonable and that "any unreasonably high costs, such as excessive charges by third party contractors or consultants, may not be passed on through fees even though they are an actual 'cost' to the government."

2. Permitting Shot Clocks

The New FCC Rule requires local governments to act expeditiously in on siting applications. Accordingly, the following shot clocks have been imposed for local permitting decisions:

- **60-day Shot Clock** – applies to permitting of Small Wireless Facility on an existing structure.
- **90-day Shot Clock** – applies to permitting of a Small Wireless Facility using a new structure.

Shot clock deadlines begin to run upon the filing of an application and can be extended by mutual agreement. If a municipality finds that an application is incomplete, it may freeze the shot clock by providing written notice to the applicant of the specific details that render the application incomplete.

A failure by a municipality to timely act on an application will not result in a constructive approval of the application, but will be considered a presumptive prohibition of the provision of personal wireless services in the event an applicant files suit against the municipality alleging violation of the TCA. Municipalities will be provided an opportunity in such an action to rebut that presumption and show that the failure to act was reasonable under the circumstances.

The New FCC Rule anticipates that Small Wireless Facility applications will be filed in batches, and the same shot clock applies to a batch of applications as would apply to a single application. If a batch includes applications for both collocated and new construction facilities, the 90-day shot clock will apply to all applications in the batch.

3. Aesthetic, Undergrounding and Minimum Spacing Regulations

The New FCC Rule provides that municipalities may exercise local oversight of issues relating to aesthetics, undergrounding and minimum spacing requirements of Small Wireless Facilities, provided those requirements are

"reasonable in that they are technically feasible and reasonably directed to avoiding or remedying the intangible public harm of unsightly or out-of-character deployments."

Municipally-imposed requirements may not be more burdensome that those applied to similar infrastructure deployments and "must be objective - *i.e.*, they must incorporate clearly-defined and ascertainable standards, applied in a principled manner - and must be published in advance." The New FCC Rule suggests April 15, 2019 as a reasonable time period in which municipalities could implement Small Wireless Facility regulatory controls. However, nothing in the New FCC Rule limits the ability of municipalities to implement local regulations after that date.

III. Recommended Municipal Action

Most municipalities already have an established practice of regulating Small Wireless Facilities through the Grant of Location/Pole Attachment provisions of G.L. c.166, §22 as it pertains to the locating of poles and attachment of wireless telecommunications facilities to existing structures located within the public ROW. In addition, many municipalities routinely require a license or lease agreement when authorizing the attachment of wireless telecommunications equipment on municipally-owned infrastructure or municipally-owned property not within the ROW. Nothing in the New FCC Rule preempts the ability of municipalities to continue authorizing Small Wireless Facilities in this manner.

It is recommended that municipalities review their existing procedures under G.L. c.166, §22 with regard to the permitting of Small Wireless Facilities to ensure that municipal fee structures and permitting timelines are consistent with the New FCC Rule. Municipalities may also consider adopting and publishing local regulations and policies in connection with G.L. c.166, §22 Grant of Location approvals and developing standard licensing agreements and procedures to address areas of local concern, such as aesthetics, undergrounding and minimum spacing requirements. Absent a written, published regulation or policy applied in a non-discriminatory manner, municipalities may be limited in the types of issues that may be address in the context of the G.L. c.166, §22 Grant of Location review or through local licensing agreements.

Municipalities must remain cognizant in their permitting processes of Small Wireless Facilities that outright denials of applications for Small Wireless Facilities, will, in most instances, be susceptible to legal challenge in Federal Court and may be preempted by the TCA.

If you have questions regarding the New FCC Rule, or require assistance in the drafting of regulations or local policies regarding aesthetic, undergrounding and minimum spacing requirements, please contact Attorney Katherine Laughman (klaughman@k-plaw.com) or Attorney Mark Reich (mreich@k-plaw.com)