

FCC Proposes Preemption, Fee Cap for Local Small Cell Deployment

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After more than a year of deliberation, the Federal Communications Commission has released its draft [*Declaratory Ruling and Third Report and Order*](#), focusing on state and local management of small cell wireless infrastructure deployment. The document, if approved by a majority of commissioners at the FCC's September 26 open meeting, would enact substantial new limits on local wireless siting review.

The proposal would result in huge revenue losses for local governments from small cell lease agreements, new unfunded mandates and a loss of local control over issues like undergrounding, negotiations for public benefits and the ability to fully control the appearance of city streets. The proposal offers many of the benefits of utility status to wireless providers, without any resulting requirement to build out and provide service to all residents in a timely fashion. By removing the leverage that cities have in negotiations with wireless providers, this proposal threatens to widen the digital divide, allowing providers to cherry-pick the most marketable areas for infrastructure, while leaving rural and less-profitable places behind.

The declaratory ruling and report and order:

- Establishes or affirms definitions of two key terms:
 - **“Small wireless facilities”** are defined as including an antenna of no more than three cubic feet and equipment totaling no more than 28 cubic feet, placed on a structure that is either no more than 50 feet in height, no more than 10 percent taller than adjacent structures, or no more than 10 percent taller than the structure's preexisting height after the new antenna is placed.
 - **“Collocation”** is defined as placing an antenna on *any* existing structure, regardless of whether that structure already has wireless equipment on it, or whether it has been zoned for placing that equipment.
- Creates **two new categories of shot clocks** for small cell wireless facility review. Local governments would have 60 days to complete review of applications for collocated small cells, and 90 days for small cells on new structures. These shot clocks include “all aspects of and steps in the siting process,” including mandatory pre-application procedures, license/franchise agreements for rights-of-way access, public notice and meeting periods, lease negotiations, building/encroachment/electric/road closure permits, and other approvals. The shot clock begins upon submission of an application, regardless of completion. They may only be paused if a local government notifies the applicant within 30 days of receipt that the application is incomplete, or through mutual agreement between the locality and the applicant.
- **Limits application fees for all small wireless facilities** to \$500 for up to five sites, and \$100

- per site for each site thereafter.
- **Limits recurring fees for small cells in the rights-of-way**, such as rights-of-way access fees or lease fees, to a “reasonable approximation” of the locality’s “objectively reasonable costs” for maintaining the rights-of-way or a structure within the rights-of-way, which must be no higher than fees for similar actors. The FCC finds a presumptively reasonable recurring fee to be \$270 per site, per year. Local governments are expressly prohibited from recovering any cost not directly related to rights-of-way maintenance, charging fees above cost recovery, or recovering “unreasonable” costs, such as excessive contractor or consultant fees. The FCC also finds gross revenue fees to be presumptively unreasonable. *Existing agreements are not grandfathered.*
 - **Limits allowable local aesthetic requirements**, including minimum spacing requirements, to those that are “(1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments, and (3) published in advance.” The FCC notes that undergrounding requirements for all wireless facilities would constitute an illegal prohibition of service by a local government, but it does not clarify whether local governments may require auxiliary equipment for small cell sites, such as equipment cabinets and fiber backhaul, to be undergrounded.
 - **Determines that shot clock overruns are “prohibition on the provision of services,”** allowing wireless site applicants to seek expedited injunctive relief in court within 30 days of a local government missing a shot clock deadline. **More restrictive state laws will remain in effect** and will not be replaced by this order.

There are some small possible wins for local government in this ruling. The FCC considered, but declined to enact, a “deemed granted” remedy for shot clock overruns, in which any application not decided by the shot clock deadline would be automatically granted. However, it states that it retains the option to do so in future. The ruling also allows aesthetic requirements, with some restrictions.

If approved during the open meeting, the new regulations would go into effect 30 days after publication in the Federal Register. Local governments could then face enforcement action if wireless providers or other small cell applicants challenge them in court based on noncompliance with the above requirements. NLC has produced a [Small Cell Wireless Infrastructure Municipal Action Guide](#) to help city officials better understand this technology, regardless of what federal regulations go into effect.

NLC and its local government partners will oppose this proposal. To support our efforts, you can send a letter to the FCC expressing your opposition by September 18, before the FCC publishes its official “sunshine agenda” for the open meeting. To support our advocacy, use [this template letter](#) to register your opposition with the FCC no later than September 18, 2018.



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