

FCC Small Cell Rules: What Ohio Townships Need to Know Now

As wireless communications companies prepare for 5G (5th generation) cellular service, they are installing hundreds of thousands of “small cell” wireless antennas. Those antennas are capable of ultra-fast, super high capacity wireless communications over a very limited distance. To do this in a cost-effective way, providers have sought to place these facilities in the public right of way (ROW). Yet, local governments have been challenged by a lack of clear rules for reviewing small cell applications. They often grapple with incomplete applications that lack even basic essential information.

At the same time, wireless providers complain that local governments tie up small cell installations with red tape, and charge excessive fees. In response, a number of state legislatures have adopted regulations to speed up the deployment of small cells and make it easier and cheaper to put them in the public ROW.

Ohio HB 478: An Attempt to Speed Deployment of Small Cells in the ROW

On August 1, 2018, the Ohio legislature amended R.C. Chapter 4939 by passing HB 478 – the result of a collaborative effort by the wireless industry and municipal representatives to increase ROW access for small cells, while still protecting local communities. The bill standardized a consent process and timeline (also known as a “shot clock”) for installing small cell facilities



in the ROW. It also capped the fees a municipality may charge at \$250 per application and \$200 annually to use municipal poles.

Applications to put small cells on existing poles are to be processed within 90 days, while for new poles, 120 days are allowed. If a municipality doesn't act within these periods, the application is deemed approved. Extra time is available automatically for sufficiently large batches of applications, or by agreement.

The height of a new pole can be limited to 40 feet. Additional undergrounding and concealment measures can be required in certain areas

and in historic districts. Finally, reasonable written design guidelines to safeguard the aesthetics and character of the community can be enforced.

The benefit of HB 478 to townships is limited, because Chapter 4939 applies only to municipalities. Still, it establishes a framework that will likely impact the way wireless operators put together their small cell applications. And Ohio townships do have some regulatory control over small cells in

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their ROW, although it is limited. The Ohio Attorney General in Opinion 017-012 found that Ohio townships may regulate small cell facilities in the ROW under R.C. §5571.16, which applies to excavations in the ROW to install telecommunications equipment and permits charging a \$50 fee if more than 5 poles are involved.

New FCC rules: Partial Preemption of New Ohio Small Cell laws

On September 26, 2018, the U.S. Federal Communications Commission (FCC) struck a blow against the authority of local governments over small cell facilities in the ROW when it acted in two pending proceedings to create new federal rules that preempt inconsistent state and local regulations. This action seriously threatens the enforceability of HB 478, and municipal regulations adopted pursuant to that bill. It also clouds the applicable processes and legal standards.

For example, the new FCC rules define small cells differently than HB 478, so that a small cell under HB 478 (which can be up to six cubic feet in size) may not qualify as one under the new federal rules (not more than three cubic feet). The FCC rules allow taller new poles (up to 50 feet) and greater increases in the height of existing poles.

There is also a different “shot clock” to process applications under the FCC rules: 60 days for collocating on existing poles, and 90 days for new poles. And to further muddy the waters, the new rules provide a different legal remedy if local governments violate the shot clocks. Where the remedy for a failure to act timely under Chapter 4939 is for the application to be deemed approved, the new FCC rule contemplates court action and injunctive relief.

In addition, the fee provisions of the new FCC rules are different than those under the current Ohio law. The FCC rules cap small cell fees at a “reasonable approximation” of the local government’s reasonable cost that is “specifically related to and caused by the deployment.” The FCC found that an application fee of \$500 is “presumptively acceptable” for up to five small cell facilities, as was \$100

extra per facility beyond five. For occupancy of a local government- owned pole, the FCC found that \$270 per year was presumptively acceptable. As discussed above, current Ohio law is different, allowing fees of \$250 per application and only \$200 per year for occupancy of municipal poles. Finally, the new FCC rules permit application of “aesthetic standards,” if reasonable and published in advance. But Ohio’s small cell design guidelines standards are articulated differently.

The differences between the new FCC rules and recently-enacted Ohio small cell law may well increase, rather than decrease, small cell siting litigation. While the FCC has authority to preempt inconsistent state and local regulations in many circumstances, the piecemeal result will require a painstaking review of local regulations. Confusion about what local governments are permitted to



do under the law will likely either gum up the process – the opposite of the intended result – or result in less robust protection of the ROW. Neither outcome is desirable.

Effect of the FCC Rules on Ohio Townships

For townships, confusion around the new FCC rules muddies the picture. But these rules, unlike R.C. Chapter 4939, are not limited to municipalities. Therefore, the new “shot clock” provisions under the FCC rules might apply to township review of applications for excavation permits for small cell wireless poles in the ROW. Given that township authority under R.C. §5571.16 is limited to excavation circumstances, the 90 day (rather than 60 day) shot clock under the FCC rule likely applies. However, it

would be prudent to confirm the applicable time for review with an applicant to avoid disputes resulting from a lack of clarity.

The new FCC rules will take effect 90 days after their publication in the Federal Register, which would likely

place the effective date sometime in January 2019. Seattle, Washington has already indicated its intent to challenge the new rules in court, but such action would not result in an automatic stay of the implementation of the rules. ■

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