



Managing Small Cell Facilities in a Challenging Legal Environment

By Dan Cohen, Esq. and Mike Roberts, Esq., Cohen Law Group

When most of us think of the facilities that provide service for our cellphones and other wireless devices, we likely envision large towers, hundreds of feet tall. In recent years, wireless facilities have shrunk in size and increased in number.

They have also moved closer to homes and businesses. As wireless companies rush to upgrade their networks to meet the growing demand for mobile broadband, new types of wireless facilities – most commonly known as small cells – are becoming the norm.

Wireless communication worldwide is expected to increase seven-fold between 2017 and 2022. In 2018, small cell wireless facilities made up over 60 percent of all wireless facilities in the U.S.

In addition to smartphones and digital tablets, these small cell “towers” will be used to manage autonomous vehicles.

This change in industry technology has also led to changes in the laws governing them.

Small cell antennas are either being placed on existing utility poles or on brand new poles in

public rights-of-way. While they create denser, faster networks, these facilities also create new headaches for local governments.

What Are Small Cell Facilities?

Large cell towers are being phased out in favor of smaller, more numerous small cell sites, which deploy a network of poles, antennae, fiber-optic cables, and other support infrastructure near underserved areas within existing wireless networks, typically in residential neighborhoods and dense business districts.

A small cell network includes the placement of three- to five-foot high antennas, control boxes, and other equipment on existing utility poles. If existing poles cannot be used, then new ones are installed that are between 30 to 50 feet but can be as high as 120 feet.

According to the wireless tower industry, a record 323,448 small cell sites were in operation at the end of 2017. The number of new small cell deployments is expected to increase 550 percent.

This new infrastructure places new burdens on public rights-of-way – property for which

municipalities are responsible for protecting and maintaining. In addition, it can create public safety issues and have an adverse aesthetic impact on residential neighborhoods.

Finally, it adds new administrative costs for municipalities as they respond to the installation requests of new providers, inspect the equipment, and monitor activity in public rights-of-way. It is critical, therefore, for municipalities to develop a comprehensive wireless ordinance to address these facilities and avoid being caught unprepared when an application is received.

Telecommunications Act

The basis for local regulation of wireless sites is covered by the Telecommunications Act of 1996 (TCA). It preserves local zoning authority over “the placement, construction, and modification of personal wireless service facilities.”

This authority is subject to three main limitations:

- 1) Local governments may not unreasonably discriminate among wireless service providers;



- 2) Local governments may not prohibit or have the effect of prohibiting wireless service; and
- 3) Local governments may not regulate health effects of radio frequency emissions so long as they comply with Federal Communications Commission (FCC) regulations.

Subject to these limitations, wireless facilities can be regulated through a municipality's zoning ordinances.

Managing the Small Cell Revolution

In what the FCC advertised as an effort to "streamline" the deployment of small cells – after considerable lobbying from the wireless industry – the commission released its Declaratory Ruling & Third Report and Order in 2018.

A small wireless facility consists of an antenna that is no more than three cubic feet in volume, with accessory equipment (i.e., power supplies, equipment cabinets, etc.) of no more than 28 cubic feet in volume. The antenna must be mounted on a structure that is either 50 feet or lower in height or no more than 10 percent taller than adjacent similar structures.

It created a small wireless facility designation and established several new regulations for them.

A small wireless facility consists of an antenna that is no more than three cubic feet in volume, with accessory equipment (i.e., power supplies, equipment cabinets, etc.) of no more than 28 cubic feet in volume. The antenna must be mounted on a structure that is either 50 feet or lower in height or no more than 10 percent taller than adjacent similar structures.

The order also establishes new "shot clocks," for small wireless facilities, limits the fees local governments can assess, and allows for aesthetic requirements for wireless facilities within certain parameters.

First, the two new shot clocks set the timeframes during which local governments must act on applications. For facilities that are to be installed on an existing structure (typically a utility pole), a municipality must issue a decision within 60 days of submission. For wireless facilities requiring the installation of a new

pole, a municipality must issue a decision within 90 days.

In addition, municipalities must notify applicants within 10 days of receipt of an application of any missing information necessary to complete the application.

The order also establishes what the FCC deems to be "presumptively reasonable" fee ceilings.

- Initial applications for small wireless facility on an existing structure:
 - o \$500 for a single application covering up to five antennas,
 - o \$100 per additional antenna included in the same application, and
 - o \$1,000 for a single application for the installation of a new pole supporting an antenna.
- Recurring annual fees:
 - o \$270 per site per year, including fees both for use of the public rights-of-way and fees for attachment to municipally-owned poles.

continues on page 62...

continued from page 61...

Local governments can exceed these fee ceilings if they can show these higher fees are:

- 1) a reasonable approximation of the municipality's costs,
- 2) that those costs themselves are reasonable, and
- 3) that they are non-discriminatory.

Finally, the order allows local governments to create aesthetic requirements, also known as design guidelines, for small wireless facilities with the following requirements:

- 1) reasonable,
- 2) no more burdensome than those applied to other types of infrastructure,
- 3) objective, and
- 4) published in advance.

This means *any* requirements relating to the design of small wireless sites must be codified or otherwise published and phrased as clearly as possible so as to leave no room for interpretation.

Given these dramatic changes in wireless regulation, local governments should either enact a new or amend their existing wireless facilities ordinance within the zoning ordinances in order to comply with these new rules and protect their communities.

Given the short shot clocks, municipalities should have a

wireless facilities application and review procedure developed and codified prior to receipt of any applications.

Potential State Legislation

Despite the major financial and regulatory benefits to the wireless industry granted by the FCC order, wireless providers continue to lobby state governments to enact bills that further limit municipalities' ability to manage wireless facilities in their rights-of-way.

Most recently, the PA House Consumer Affairs Committee is considering HB 1400, which would have effectively eliminated all municipal zoning authority over small cell wireless facilities. The bill also would further limit the fees municipalities could assess.

The PA House Consumer Affairs Committee scheduled a vote for June 2019 which was cancelled due to concerns by municipalities. Nevertheless, the bill is expected to be considered for a vote before the end of the year.

The world of wireless technology is constantly changing and, as it does, so is the regulatory landscape for managing wireless facilities. It is crucial for municipalities to take the necessary steps to ensure that they are prepared. By taking a proactive approach to implementing proper

regulations and procedures, a borough can ensure it can manage these facilities safely, legally, and effectively.



About the authors: Dan Cohen, Esq. and Mike Roberts, Esq. are attorneys with the Cohen Law Group in Pittsburgh. The Cohen Law Group specializes exclusively in assisting municipalities in cable, wireless, and broadband issues. To learn more, visit www.cohenlawgroup.org. 

MEMBER ACTION ALERT SYSTEM

Did you act on a PSAB legislative alert?

Let us know.

Send an email to actnow@boroughs.org.

Stay in the know.

Sign up for email alerts at <https://boroughs.org>.