

MEMORANDUM

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DATE: February 4, 2019

RE: FCC *2018 Small Cell Order*¹ and Model Ordinance for Siting of Wireless Facilities in Local Rights-of-Way

We have been asked to draft a Model Ordinance regulating the siting of wireless telecommunications facilities in local rights-of-way (“**ROW**”), taking into account the *2018 Small Cell Order*, which was recently released by the Federal Communications Commission (“**FCC**”). The order will have a profound effect on Wisconsin cities and villages when exercising their authority to regulate the use of local ROW by providers of wireless telecommunications services pursuant to their statutory home rule powers, Wis. Stat. § 196.58(1r), and Wis. Stat. § 182.017(1r). As discussed below, the order imposes new and significant limitations on a municipality’s ability to regulate wireless facilities in the ROW.² The effective date of the *2018 Order* with respect to the new limitations on ROW fees and deadlines for acting on permit applications was January 14, 2019, and the new limitations on aesthetic standards will go into effect April 15, 2019.³

¹ *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Declaratory Ruling and Third Report and Order*, WT Docket No. 17-79, WC Docket No. 17-84, FCC 18-133, 2018 WL 4678555 (released Sept. 27, 2018)(“**2018 Small Cell Order**” or “**2018 Order**”).

² The *2018 Order* limits state and local regulation in the same way, but this memorandum focuses on local regulation.

³ *2018 Order* at ¶¶ 89 and 153.

While the *2018 Order* affects municipal regulation of all wireless telecommunications facilities in the ROW, the order is directed at small wireless facilities⁴ (“**SWF**”) used to provide personal wireless services to the public (e.g., cell phone service). Small cell systems, as well as distributed antenna systems, which are similar to small cell systems, are deployed to serve areas of high demand and to enhance broadband capacity. These systems typically use relatively small antennas and equipment cabinets installed on utility poles, street light poles, traffic signal poles, or stand-alone poles. Small cell and distributed antenna system components in the ROW can include: poles, antennas, base stations or equipment cabinets, power sources or meters, canisters or boxes attached to a pole for housing antennas or equipment, and fiber lines.⁵

This memorandum will briefly summarize the *2018 Order* and will serve as a guide to the Model Ordinance, explaining the legal basis for the central provisions of the ordinance and discussing issues a municipality will have to consider in adapting the Model Ordinance to its specific circumstances. It is important to understand that the Model Ordinance is not a one-size-fits-all ordinance and that it will have to be reviewed carefully and adapted by the municipal attorney in conjunction with the departments responsible for administering the ordinance.

In that regard, some municipalities may already have detailed ROW ordinances. In such cases, we would expect that these municipalities would look to the Model Ordinance to update their existing ordinances by incorporating the provisions relating to wireless telecommunications facilities and excluding any redundant provisions (e.g., Sections 10 and 11 pertaining to the relocation or abandonment of facilities). On the other hand, municipalities with less robust ordinances may wish to consider developing an ordinance pertaining to the installation and maintenance of wireless and other utility facilities in the ROW, such as electric, wireline telecommunications, and cable TV facilities.

The following documents and information are provided with this memorandum:

- Attachment A: Model Ordinance
- Attachment B: Application Checklist
- Attachment C: Sample Aesthetic Standards
- Attachment D: Relevant Laws and Regulations

⁴ The term “small wireless facilities” is defined in 47 C.F.R. § 1.6002(l). All of the regulations cited in this memorandum appear in full in Attachment D.

⁵ Practical Law Government Practice, *Small Wireless Facilities in Public Rights-of-Way*, Practical Law Practice Note 10-014-4949 (last accessed Jan. 23, 2019).

A. FCC'S 2018 SMALL CELL ORDER

The purported object of the *2018 Small Cell Order* is to remove perceived barriers to the deployment of wireless broadband services by ensuring that wireless broadband providers have low-cost and easy access to municipal property located in local ROW. The *2018 Order* attempts to achieve this purpose by limiting municipal authority to regulate the placement of SWF in local ROW and on municipally owned structures in the ROW, including light poles, traffic light poles, and utility poles.

1. Source of FCC Authority

The FCC looks to Sections 253 and 332 of the Telecommunications Act of 1996 (the “Act”) as the basis for its legal authority. First, Section 253(a) of the Act, 47 U.S.C. § 253(a), provides that “[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” In addition, Section 253(c) preserves state and local authority to regulate the ROW and “to require fair and reasonable compensation from telecommunications providers,” provided that such regulations are “competitively neutral” and “nondiscriminatory.”

Second, Section 332(c)(7)(B)(i) of the Act, 47 U.S.C. § 332(c)(7)(B)(i), provides that “[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government ... (I) shall not unreasonably discriminate among providers of functionally equivalent services; and (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.” In addition, Section 332(c)(7)(B)(ii) requires state and local governments to act on wireless siting applications “within a reasonable period of time.”

By its terms, Section 253 applies to both wireline and wireless telecommunications facilities located in the ROW. Thus, it is no surprise that the FCC looks to Section 253 for its authority. However, though not limited by its express language, Section 332(c)(7) had previously only been applied to wireless facilities outside the ROW. The *2018 Order* clarifies that Section 332(c)(7) also applies to wireless facilities inside the ROW and that both 253(a) and 332(c)(7) apply to “wireless telecommunications services as well as to commingled services and facilities.”⁶

⁶ *2018 Small Cell Order* at ¶ 36.

2. New Effective Prohibition Standard

As stated above, both Sections 253(a) and 332(c)(7)(B)(i)(II) provide that municipal regulations are preempted if they **prohibit or have the effect of prohibiting** the provision of a telecommunications service or personal wireless service. In the *2018 Small Cell Order*, the FCC adopted a new standard to determine whether a municipal regulation constitutes an effective prohibition on the provision of a telecommunications or personal wireless service. Specifically, the FCC declared that an effective prohibition occurs where a municipal legal requirement “**materially limits or inhibits** any competitor’s or potential competitor’s ability to compete in a fair and balanced legal and regulatory environment.”⁷

The FCC rejected the rulings of those federal circuit courts that have “held that a denial of a wireless siting application will ‘prohibit or have the effect of prohibiting’ the provision of personal wireless service under Section 332(c)(7)(B)(i)(II) only if the provider can establish that it has a significant gap in service coverage in the area and a lack of feasible alternative locations for siting facilities.”⁸ The effective prohibition test now applies not only when a provider is attempting to fill a gap in coverage, but also when the provider proposes to densify its existing wireless network, introduce new services, or otherwise improve service capabilities.⁹ Effectively, all ROW regulations as applied to telecommunications service providers will now be scrutinized under the new effective prohibition test. The FCC goes on to discuss its new test as applied to fees and other non-fee legal requirements, such as aesthetic and undergrounding requirements.

B. LIMITATIONS ON MUNICIPAL REGULATORY AUTHORITY

Although municipalities have the right to regulate wireless telecommunications facilities sited in local ROW pursuant to their statutory home rule powers, Wis. Stat. §§ 196.58(1r), and 182.017(1r), there are significant limitations imposed on municipal regulatory authority by both state and federal laws and regulations.

While this memorandum focuses on the new federal limitations, it is also important to have a general understanding of state law limitations on municipal regulatory authority. Under Wisconsin law, a municipality has the authority to regulate utility facilities in the ROW, subject to the requirement that those regulations be “reasonable”

⁷ *Id.* at ¶¶ 35-37 (emphasis added).

⁸ *Id.* at ¶ 34.

⁹ *Id.* at ¶ 37.

and defensible on public health, safety, and welfare grounds.¹⁰ The Public Service Commission of Wisconsin (“PSC”) has been authorized to hear complaints by utility companies challenging a particular municipal regulation as unreasonable.¹¹ The PSC’s role is to determine, after a hearing, whether the regulation is unreasonable. If the PSC so concludes, the challenged regulation is void.¹²

1. Moratoria

Express or *de facto* moratoria on the deployment of wireless facilities are prohibited.¹³ Unlike express moratoria, which are formally codified by municipalities as outright prohibitions, *de facto* moratoria are “local actions that are not express moratoria, but that effectively halt or suspend the acceptance, processing, or approval of applications or permits for telecommunications services or facilities in a manner akin to an express moratorium.”¹⁴ Such *de facto* moratoria include: (i) blanket refusals to process applications; (ii) refusals to issue permits for a category of structures; (iii) frequent and lengthy delays of months in issuing permits and processing applications; and (iv) claims that applications cannot be granted until pending local, state, or federal legislation is adopted.¹⁵

2. Deadlines for Acting on a Wireless Siting Application

Both state and federal law impose certain time limits for review of and action on applications to place wireless telecommunications facilities in local ROW. These time limits, discussed in detail below, are commonly referred to as “shot clocks” and can vary based on the type of application submitted. Municipalities must be familiar with the shot clocks and be sure to structure their application review processes to allow for final action on an application within the applicable shot clock time period.

¹⁰ See Wis. Stat. §§ 196.58(1r)(a) and 182.017(1r).

¹¹ See Wis. Stat. §§ 196.58(4) and 182.017(8).

¹² Wis. Stat. § 196.58(4)(a).

¹³ *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Third Report and Order and Declaratory Ruling*, WT Docket No. 17-79, WC Docket No. 17-84, FCC 18-111, 2018 WL 3738326 at ¶¶ 145 and 149 (Aug. 3, 2018) (“**Moratoria Declaratory Ruling**”).

¹⁴ *Id.* at ¶ 149.

¹⁵ *Id.*

a. Federal Shot Clocks

In its *2009 Declaratory Ruling*, the FCC decided to use shot clocks to define a presumptive “reasonable period of time” beyond which a municipality’s inaction on a wireless siting application would constitute a “failure to act” within the meaning of Section 332.¹⁶ It determined that 90 days was a reasonable period of time for a municipality to act on an application to collocate a wireless telecommunications facility on an existing structure and that 150 days was reasonable for acting on an application for a facility requiring a new support structure.

The *2018 Small Cell Order* adopts two new shot clocks that apply to applications to place SWF in local ROW. The order also preserves and codifies the shot clocks adopted in the *2009 Declaratory Ruling*.

The new SWF shot clocks allow:

- 60 days for reviewing an application for the attachment of SWF to existing structures,¹⁷ and
- 90 days for reviewing an application for the placement of SWF on new structures.¹⁸

The shot clocks begin to run from the day the application is submitted (or the next business day if a submission is made on a holiday), rather than the day the municipality determines that the application is complete.¹⁹ If an applicant files multiple applications at the same time (a “**batched application**”), whether under one application cover sheet or separate cover sheets, the longest shot clock applicable to any application in the batch will apply to the entire batch.²⁰

¹⁶ *2018 Small Cell Order* at ¶ 104 (citing *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994 (2009) (“**2009 Declaratory Ruling**”), *aff’d*, *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff’d*, 569 U.S. 290 (2013)).

¹⁷ 47 C.F.R. § 1.6003(c)(1)(i).

¹⁸ 47 C.F.R. § 1.6003(c)(1)(iii).

¹⁹ *2018 Small Cell Order* at ¶ 19 (citing *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket No. 13-328, Report and Order, 29 FCC Rcd 12865, 12970 at ¶ 258 (2014), *aff’d*, *Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015)).

²⁰ *2018 Small Cell Order* at ¶ 114.

If the municipality misses the applicable shot clock deadline, it is presumed to have violated the effective prohibition standard under Sections 253(a) and 332(c)(7)(B)(i)(II). The applicant may then commence an action in a court of competent jurisdiction alleging a violation of the effective prohibition standard and seeking injunctive relief granting the application. However, if the applicant brings a court action because the federal shot clock deadline was missed, the municipality has the opportunity to demonstrate that the failure to act was reasonable under the circumstances and, therefore, did not materially limit or inhibit the applicant from introducing new services or improving existing services, thereby rebutting the effective prohibition presumption.²¹

b. Eligible Facilities Requests Under Section 6409(a) of the Spectrum Act²²

Because the Model Ordinance is designed to apply to all wireless facilities, it also addresses eligible facilities requests, which have their own federal shot clock and remedy. An eligible facilities request is any request to add, remove, or replace transmission equipment (e.g., antennas) on an existing privately owned wireless tower or base station where the proposed work will not substantially change the physical dimensions of the tower or base station.²³ A “tower” includes any structure built for the sole or primary purpose of supporting any FCC-licensed or authorized antennas and their associated facilities.²⁴ “Base stations” consist of structures other than towers that support antenna, transceiver, or other associated equipment, even if the structure was not built for the sole or primary purpose of providing such support, but does not include structures that do not, at the time of a request, support or house base station components.²⁵

If the proposed project meets the definition of an eligible facilities request, the municipality must grant the request within 60 days, regardless of whether the application meets the standards that the municipality would apply to other wireless telecommunications facilities applications.²⁶ If the 60-day shot clock deadline is

²¹ *Id.* at ¶ 130 and Appendix C at ¶ 4.

²² Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96 (codified at 47 U.S.C. § 1455) (“*Spectrum Act*”).

²³ 47 C.F.R. § 1.6100(b)(3).

²⁴ 47 C.F.R. § 1.6100(b)(9).

²⁵ 47 C.F.R. § 1.6100(b)(1).

²⁶ 47 C.F.R. § 1.6100(c).

missed, the application is deemed granted.²⁷ To prevent the project from going forward, the municipality must seek injunctive relief in a court of competent jurisdiction.²⁸

c. Broadened Applicability of Shot Clocks

FCC shot clocks no longer apply just to applications to install or modify wireless telecommunications facilities. For all federal shot clocks (except for eligible facilities requests), all permits and authorizations necessary for the deployment of wireless facilities must now be approved or denied within the applicable shot clock period, unless the municipality and the applicant agree to a different time frame.²⁹ This includes such authorizations as building permits, ROW access permits, lease or license agreements, road closure permits, aesthetic approvals, excavation permits, and any pre-application procedures. If there are any public meetings or hearings on the applications or a local appeal of a denial, those processes must also be completed within the time limits. The shot clocks also apply to negotiation of any lease or license agreements to collocate wireless facilities on municipally owned property in the ROW, such as street lights, traffic poles, or utility poles.

We do not yet know how the shot clocks, in practice, will be applied to negotiating lease or license agreements for SWF to be placed on municipally owned structures in the ROW. However, we recommend developing written technical and aesthetic requirements now that will protect the municipality's street lights, utility poles, and other property to the extent possible in light of the *2018 Order*. That being said, we would expect that the providers and municipalities will be able to agree to extend the shot clock deadlines to accommodate the negotiation process.

²⁷ *Id.*

²⁸ 47 C.F.R. § 1.6100(c)(5).

²⁹ *2018 Small Cell Order* at ¶ 132.

d. Deadlines for Review of SWF and Non-SWF Applications for Completeness

The *2018 Order* also sets deadlines for the initial review of wireless applications to determine whether the applications are complete or are missing any required information:

- 10 days to review a SWF application for completeness and notify the applicant in writing of the missing information. The applicable shot clock resets to zero when the missing information is submitted.³⁰
- 30 days to review any wireless application for completeness (including SWF applications where the 10-day deadline is missed) and to notify the applicant in writing of the missing information. The applicable shot clock is tolled until the missing information is submitted.³¹
- 10 days to review the missing information that the provider submits and notify the applicant in writing of the information that is still missing. The applicable shot clock is tolled until the missing information is submitted.³²

The notification that the application is “materially incomplete,” must “clearly and specifically” identify:

- the missing documents or information, and
- the specific rule or regulation creating the obligation to submit such documents or information.³³

See the table in section 2.e below for a summary of all of the federal review deadlines that currently apply to the placement of telecommunications facilities in the ROW.

³⁰ 47 C.F.R. § 1.6003(d)(1).

³¹ 47 C.F.R. § 1.6003(d)(2).

³² 47 C.F.R. § 1.6003(d)(3).

³³ 47 C.F.R. § 1.6003(d)(1).

e. Table of Federal Shot Clocks and Completeness Review Deadlines

ACTIVITY	DEADLINE (calendar days)	TYPE OF APPLICATION	FCC RULE
REVIEW FOR COMPLETENESS	10 days	Review SWF application and notify applicant in writing of missing information. Shot clock is reset to zero when the applicant submits the missing information.	47 C.F.R. § 1.6003(d)(1)
	30 days	Review any wireless facility application and notify applicant in writing of missing information. Shot clock is tolled until the applicant provides the missing information.	47 C.F.R. §1.6003(d)(2)(iii)
	10 days	Review a resubmission and notify applicant of any missing information. Shot clock is tolled again until applicant submits the additional information.	47 C.F.R. § 1.6003(d)(3)(iii)
GRANT PERMIT OR DENY APPLICATION	60 days	Application to collocate SWF on an existing structure (including non-telecommunications structures)	47 C.F.R. § 1.6003(c)(1)(i)
	90 days	Application for SWF involving construction of a new structure	47 C.F.R. § 1.6003(c)(1)(iii)
	90 days	Application to collocate non-SWF facility on an existing structure	47 C.F.R. § 1.6003(c)(1)(ii)
	150 days	Application for a non-SWF facility involving construction of a new structure	47 C.F.R. § 1.6003(c)(1)(iv)
	60 days	Eligible Facilities Request to add, remove, or replace equipment on an existing tower or base station that doesn't substantially change the physical dimensions of the tower or base station	47 C.F.R. § 1.6100(c)(2)

f. Wisconsin Shot Clocks

Wisconsin law also imposes shot clocks on wireless telecommunications facilities applications.³⁴ As between state and federal law, the more restrictive shot clock requirement applies. Wisconsin law provides a 60-day shot clock for applications to place or modify utility facilities in the ROW.³⁵ If the municipality fails to either approve or deny the permit within the 60-day statutory window, the application is deemed approved and the installation can go forward.³⁶

Since this shot clock begins to run when the application is received and not when the application is determined to be complete, a municipality may have no choice but to deny the permit on incompleteness grounds.³⁷ It would be up to the provider to resubmit the application with the missing information. In any event, if the municipality denies the permit, it must “provide the applicant a written explanation of the reasons for the denial at the time the municipality denies the application.”³⁸

Although outside the scope of the Model Ordinance, it is important to be aware that Wisconsin also has timelines for reviewing permit applications for wireless installations outside the ROW. Under Wis. Stat. § 66.0404(3)(c) and (2)(d), a municipality has 45 days in which to either approve or deny an application to place a “mobile service” facility on an existing structure not requiring substantial modification and 90 days when the facility requires a new support structure or the substantial modification of an existing structure. These shot clocks begin to run when the application is complete. If, upon receipt of an application, the municipality fails to take the proper actions within the prescribed deadline, the “applicant may consider the application approved.”³⁹

g. Model Ordinance Comment

Due to the complexity of determining which of the federal and/or state shot clocks apply to any given application, we suggest that the municipality require the wireless provider to specify in its application the shot clocks that apply and the basis for that

³⁴ A municipality’s local code of ordinances may also contain relevant time limits. They would apply if they set a shorter time in which to act than either federal or state law.

³⁵ Wis. Stat. § 182.017(9).

³⁶ *Id.*

³⁷ Before doing so, the municipality should consult with counsel to determine the implications of this denial on the federal shot clock deadlines, if any.

³⁸ *Id.*

³⁹ Wis. Stat. § 66.0404(2)(d) and (3)(c).

determination. This application requirement is contained in Section 6(b)(4) of the Model Ordinance.

One should also keep in mind that the shot clocks may be extended by mutual agreement. An agreement extending the applicable shot clock deadlines may be particularly appropriate in the case of batched applications, where an applicant submits many applications at the same time and the municipality may need to outsource review of the applications to a third-party contractor. Section 5(b)(11) of the Model Ordinance gives the person charged with administering the ordinance the power to enter into agreements with applicants to extend a shot clock.

3. Limitations on Application Fees, ROW Access Fees, and Charges for Use of Municipally Owned Structures in the ROW

The *2018 Order* declares that application fees, ROW access fees, and fees charged for the use of municipally owned property in the ROW (including street lights, traffic poles, and utility poles) are unlawful unless the following three conditions are met:

- the fees are a reasonable approximation of the municipality's costs,
- only objectively reasonable costs are factored into those fees,⁴⁰ and
- the fees are no higher than the fees charged to similarly situated competitors in similar situations.⁴¹

The fees subject to these conditions include all fees pertaining to the deployment of the wireless facilities, including one-time application or permit fees “such as siting applications, zoning variance applications, building permits, electrical permits, parking permits, or excavation permits” as well as recurring fees such as ROW access fees and “fees for the attachment to or use of property within the ROW owned or controlled by the government (*e.g.*, street lights, traffic lights, utility poles, and other infrastructure within the ROW suitable for the placement of Small Wireless Facilities).”⁴²

⁴⁰ The FCC confirms that municipalities may hire third party contractors or consultants to assist with processing applications (as many municipalities do in the case of batched applications). However, the fees for those third-party contractors or consultants may only be passed on to the applicant if the fees are, themselves, reasonable and not “excessive.” *2018 Small Cell Order* at ¶ 70.

⁴¹ *Id.* at ¶ 50.

⁴² *Id.* at ¶ 69.

The *2018 Order* sets out fee levels (“safe harbors”) the FCC presumes would meet the three conditions:

Application Fees: \$500 for a single up-front application that includes up to five small wireless facilities, with an additional \$100 for each SWF beyond five, or \$1,000 for a new pole to support a SWF.

Recurring Fees: \$270 per SWF, per year, for all recurring fees (including any possible ROW access fee⁴³ or fee for attachment to municipally owned structures in the ROW).⁴⁴

It is important to understand that these safe harbors are not absolute caps on the fees a municipality may charge, but rather are fee levels that presumptively do not constitute an effective prohibition under Section 253(a) or Section 332(c)(7)(B)(i)(II) and are presumed to be “fair and reasonable compensation” under Section 253(c).⁴⁵ The safe harbors are purported to help avoid disputes over the level of compensation required by the municipality.

a. Model Ordinance Comment

Fees are addressed in Section 6(d) of the Model Ordinance. We have not set out any specific fees in the Model Ordinance and assume that each municipality will adopt fees that reflect its costs and that those fees will be set from time to time via ordinance or resolution or otherwise as part of the wireless regulations provided for in Section 5(b)(1) of the Model Ordinance. Each municipality will need to decide whether to rely on the safe harbors or set fees that are more or less than the safe harbors.

Ultimately, each municipality should undertake a cost study to determine the full costs incurred in reviewing wireless siting applications for completeness and granting

⁴³ ROW access fees are not allowed under Wisconsin law if the fees are not cost-based but rather are designed to raise revenue. See *Wisconsin Telephone Co. v. Milwaukee*, 223 Wis. 251, 256-57, 270 N.W. 336 (1936) (A municipality cannot impose a ROW fee on a telephone company or another public utility for the purpose of raising revenue. Such a provision would not be within the lawful exercise of a municipality's police power.); see also *Wisconsin Telephone Co. v. Milwaukee*, 126 Wis. 1, 13, 104 N.W. 1009 (1905) (“where the power to license exists, a reasonable discretion is vested in the municipality, but courts will look into ordinances with a view of determining whether they are passed for the purpose of raising revenue, although sought to be upheld as police regulations”).

⁴⁴ *2018 Small Cell Order* at ¶ 79.

⁴⁵ *Id.* at ¶ 80. Section 253(c) of the Telecommunications Act of 1996, 47 U.S.C. § 253(c), provides that state and local governments may require “fair and reasonable compensation from telecommunications providers” for use of the public ROW, as long as the requirement is “competitively neutral and nondiscriminatory” and “publicly disclosed.”

permits. Such cost studies will be crucial in defending the municipality's application and permit fees if those fees are challenged by an applicant. In conducting a cost study, the municipality should consider such things as the cost of municipal staff time and that of outside legal counsel and engineers for tasks such as:

- reviewing applications for completeness, technical suitability, compliance with electric safety and traffic safety standards, and compliance with the Americans with Disabilities Act of 1990;
- conducting any necessary pre- or post-construction inspections; or
- administering a public notification process.

Regarding the level of recurring fees for the attachment of SWF to street lights, utility poles, and other municipally owned structures in the ROW, a municipality should be prepared to document fees by also undertaking a cost study. That study should consider such things as the municipality's investment in the facility, the cost to maintain, repair, and replace the facility and how such costs may be fairly allocated between the municipality and the wireless provider. In addition, to protect its assets in the ROW, the municipality may wish to develop a written plan for the future use of currently unused space on the facility for municipal and public safety uses. In that way, the municipality will have a principled basis on which to deny attachment requests from wireless providers and to defend its decision if challenged in court.

4. New Effective Prohibition Standard Applies to Non-Fee Legal Requirements, Such as Aesthetics

In adopting the new effective prohibition standard, the FCC makes clear that the standard applies to both fees and other non-fee legal requirements, including aesthetic, undergrounding, and minimum spacing requirements.⁴⁶ The FCC states that complying with aesthetic and other such requirements imposes costs on SWF providers that may impact their ability to provide service, just as fees may do. Aesthetic and other similar requirements, therefore, violate Sections 253(a) and 332(c)(7)(B)(i)(II) unless they are:

- reasonable,
- no more burdensome than those applied to other types of

⁴⁶ 2018 Small Cell Order at ¶ 82.

- infrastructure deployments,⁴⁷ and
- objective and published in advance.⁴⁸

Aesthetic requirements are reasonable if “they are technically feasible and reasonably directed to avoiding or remedying the intangible public harm of unsightly or out-of-character deployments.”⁴⁹ The FCC reasons that an aesthetic requirement that is imposed on wireless infrastructure deployments but not on similar non-wireless infrastructure deployments is evidence that the requirement is unreasonable and not directed at remedying the negative aesthetic impact of the wireless deployment.⁵⁰ Likewise, the FCC opines that the increased cost to comply with an aesthetic standard may, in some cases, materially inhibit the provider’s provision of service.⁵¹

Undergrounding and minimum spacing requirements are to be evaluated using the same standards as the FCC uses to evaluate aesthetic requirements.⁵² For example, a minimum spacing requirement that would prevent the provider’s wireless system from functioning efficiently may amount to an effective prohibition of service. Likewise, a regulation that required all wireless facilities to be placed underground would be preempted if it could be shown that, to operate, wireless facilities must be above ground.

a. Model Ordinance Comment

Section 7(c) of the Model Ordinance provides somewhat generic standards related to aesthetics and similar requirements. Attachment C provides examples of standards for the municipality to consider if it wishes to.⁵³ These standards may cover such things as:

- Size of antennas, equipment boxes, and cabling;

⁴⁷ We find this criterion problematic in that it apparently requires the municipality to apply the same non-fee legal requirements on wireless infrastructure as it does on electric utility poles, even though the electric utility and the wireless provider are not similarly situated, which is a standard element for unlawful discrimination.

⁴⁸ *2018 Small Cell Order* at ¶ 86.

⁴⁹ *Id.* at ¶ 87.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at ¶¶ 90-91.

⁵³ These examples are provided to assist the municipality in developing its own standards particularized to local circumstances.

- Use of shrouds, stealth techniques, or other camouflage;
- Painting of attachments to match mounting structures;
- Flush-mounting of antennas;
- Placement of equipment in the pole base rather than on the outside of the pole;
- Consistency with the character of historic neighborhoods; and
- Minimum spacing between attachments.⁵⁴

Whether the particular standards the municipality adopts will violate the effective prohibition standard will, of course, depend on whether or not they materially inhibit the provision of a telecommunications or personal wireless service. Keep in mind that they will not be reasonable under the *2018 Order* if they are applied only to wireless facilities and if they impose unreasonable costs on the provider. Finally, it is very important that these standards be published in advance of receiving an application; otherwise, they cannot be enforced with respect to that application.

5. Existing Agreements

Existing license or lease agreements between a municipality and a wireless provider for use of municipally owned property in the ROW (e.g., street lights or utility poles) are not exempt from the new rules and standards adopted in the *2018 Order*.⁵⁵ The FCC, however, recognizes that the order's effect on any particular agreement cannot be determined without considering all the facts and circumstances of the specific agreement. Thus, whether or not provisions in a particular wireless attachment agreement are preempted is a determination that would be made by a court.

C. STATUS OF *2018 SMALL CELL ORDER*

Communities across the country and several municipal organizations have filed petitions challenging the *2018 Order*.⁵⁶ These cases raise substantial questions regarding the validity of the order, and, among other things, challenge the FCC's new effective prohibition test. Given the possibility that the order may be overturned, we have tried to avoid incorporating the FCC's standards themselves into the Model

⁵⁴ See Baller, Stokes & Lide, PC, *Ten Strategies to Protect State and Local Property After the FCC's 5G Preemption Order* (Nov. 12, 2018), <https://www.baller.com/2018/11/ten-strategies-to-protect-state-and-local-property-after-the-fccs-small-cell-preemption-order/>.

⁵⁵ *2018 Small Cell Order* at ¶ 66.

⁵⁶ The main case is *City of San Jose v. FCC*, Docket No. 19-9568, which was filed in the Tenth Circuit but was transferred to the Ninth Circuit on January 10, 2019.

Ordinance. Otherwise, there is a risk that the ordinance may require the municipality to continue to comply with those standards even after they have been overturned. A municipality may also wish to consider adding a standard condition to its wireless facilities permits causing the permit to terminate if it was granted based on any rules or orders that are later held to be unlawful.