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ALERT

In Huge Win for Telecommunications Industry, 5G, and Broadband, Ninth Circuit Upholds Vast Majority of FCC Infrastructure Orders

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On August 12, 2020, in a major victory for the telecommunications industry, the U.S. Court of Appeals for the Ninth Circuit issued a decision in *City of Portland v. United States*. In the much-anticipated ruling, the court upheld two orders that the Federal Communications Commission (FCC or Commission) adopted in 2018 to streamline deployment and reduce costs of telecommunications infrastructure and facilitate the provision of fifth generation wireless (5G) and broadband services. The orders at issue applied prior FCC interpretations of preemptive provisions in the Communications Act to limit local barriers to small wireless facility (small cell) siting in a number of areas including fees, aesthetics, and application processing timeframes, and separately, took further action to speed deployment on utility poles and eliminate artificially high pole attachment rates that persist despite prior Commission orders.

In a significant win for the FCC, the telecommunications industry, and the deployment of 5G and broadband, the court rejected all legal challenges brought by the electric industry petitioners and nearly all of the legal challenges brought by the local government petitioners. The court unanimously upheld all aspects of the Commission's order relating to pole attachment rates and deployment on utility poles. The court also upheld the vast majority of the orders as related to small cells, invalidating just two requirements that the FCC had imposed on small cell siting, both of which were related to aesthetic regulations, while leaving intact the other aesthetics-related constraints and the remainder of both of the FCC's orders. In its decision, the court expressly endorsed numerous legal interpretations and findings by

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the FCC that specific local restrictions on wireless siting are preempted by the Communications Act as applied to small cells because of the prohibitory effect such requirements have on the provision of service, including, notably, finding that the agency was within its authority to require that any local fees be limited to recovery of costs, and that local jurisdictions had no right to make a profit from these fees. The court also rejected a challenge raised by some wireless industry petitioners asserting that the small cell orders did not go far enough because the FCC did not adopt an expanded "deemed grant" remedy for siting applications.

One of the three judges on the panel dissented from the court's decision to uphold the aspect of the FCC's orders that requires municipal fees for small cells to be limited to a municipality's costs. Applications for rehearing and rehearing en banc are due within 45 days from entry of judgment.

Where Do Things Stand for Telecommunications Deployment Following the Court's Decision?

As relevant here, the FCC adopted two orders in 2018 to help streamline infrastructure siting, reduce costs, and facilitate 5G deployment: one in August, consisting of two parts (the Moratoria Order and the One-Touch Make-Ready Order); and one in September (the Small Cell Order).

Both the Moratoria Order and the Small Cell Order impact small cell deployment. The Moratoria Order interpreted Section 253 of the Communications Act, which preempts state and local requirements that "prohibit or have the effect of prohibiting" telecommunications service provision, to preclude localities from imposing moratoria on siting applications. The Small Cell Order applied the FCC's previous interpretations of Section 253 and other preemptive provisions in Section 332, which limits local zoning authority over personal wireless service facilities, to the small cell context, finding that the statutes preempt a number of municipal siting practices that have the effect of prohibiting service and otherwise violate the statutes in the areas of siting fees, aesthetics-based regulation, and application processing timeframes.

The One-Touch Make-Ready Order built on prior efforts to speed and reduce costs associated with deployment on utility poles, which is essential to broadband and 5G deployment. The order established the Commission's one-touch make-ready process, which was not challenged on appeal. It also adopted additional rules designed to speed access to utility poles and eliminate artificially high pole attachment rates that electric utilities continue to charge incumbent local exchange carriers (ILECs) despite the FCC's 2011 decision that ILECs are entitled to the same lower just and reasonable rate guaranteed similarly situated telecommunications providers when they attach to utility poles under materially comparable terms and conditions.

The orders have been in effect while the consolidated appeal was pending in the Ninth Circuit. Accordingly, the court's decision to uphold the orders leaves in place the status quo, except as to two limitations on aesthetics-based requirements that the FCC held were necessary to ensure local requirements do not prohibit service in violation of federal law. Specifically, the FCC had found that local aesthetics-based regulations governing small cell facilities must be "objective" and "no more burdensome" than aesthetics-based requirement imposed on other infrastructure deployed in municipal rights-of-way. The court disagreed, invalidating these requirements, while upholding the other constraints on local aesthetics-based regulation

that the FCC found were necessary in the context of small cells, including that aesthetic requirements be "reasonable" and "published in advance."

The invalidated aesthetics requirements have been remanded to the FCC, but no further action from the agency is required, and the orders otherwise remain in effect. The Commission is unlikely to take up the remanded issues anytime soon, particularly given that the remainder of the limitations on local aesthetic regulation were upheld.

It is possible that the local government petitioners will file for rehearing en banc, especially since one of the judges dissented as to the court's ruling on the ability of localities to assess fees on small cells.

Breaking Down the Court's Decision

Petitioners representing a wide range of local government stakeholders and the electric industry brought a number of challenges to various aspects of the FCC's orders. All challenges from the electric industry were rejected and nearly all of the local government challenges were as well. In addition, wireless providers challenged the orders for not going far enough when it came to remedies for unlawful conduct, but their challenges were rejected. The court's ruling on each of the challenges is taken in turn.

A. Small Cell and Moratoria Orders

Governing Standard. The local government petitioners argued that, by broadly prohibiting certain local government practices as applied to small cells, that the FCC was both misinterpreting the effective prohibition provisions in Sections 253 and 332 and misconstruing its own *California Payphone* standard for assessing an effective prohibition, which asks whether a state or local requirement has "materially inhibited" the ability of providers "to compete in a fair and balanced regulatory environment." The court disagreed, finding that "[t]he FCC has explained that [*California Payphone*] applies a little differently in the context of 5G, because state and local regulation, particularly with respect to fees and aesthetics, is more likely to have a prohibitory effect on 5G technology than it does on older technology" because 5G "requires rapid, widespread deployment of more facilities." Accordingly, the court found the FCC had used the correct standard and properly applied it in the orders: "The FCC's application of its standard in the Small Cell and Moratoria Orders is consistent with [the Ninth's Circuit ruling in *Sprint Telephony v. County of San Diego*], which endorsed the material inhibition standard as a method of determining whether there has been an effective prohibition. The FCC here made factual findings, on the basis of the record before it, that certain municipal practices are materially inhibiting the deployment of 5G services. Nothing more is required of the FCC under *Sprint*."

Fees. The FCC held in the Small Cell Order that to avoid an effective prohibition, localities must limit siting fees assessed on small cell facilities to the locality's costs, or may elect to set fees at levels that fall within a per-facility safe harbor established in the Order. The local government petitioners argued that this aspect of the FCC's order was arbitrary and capricious because a particular city's costs, in the petitioners' view, has no bearing on whether its fees prohibit the provision of service. The court rejected this challenge, explaining that "[t]he FCC did not base its fee structure on a determination that there was a relationship between particular

cities' fees and prohibition of services," but "instead found that above-cost fees, in the aggregate, were having a prohibitive effect on a national basis." The court emphasized the FCC's finding in the proceeding that "there was no readily-available alternative" to limiting small cell fees to municipal costs, asserting that "[a]dministrability is important." The court further concluded that the FCC's fee limitation is not invalidated by Section 253(c) of the Communications Act, which saves from preemption municipal fees that collect "fair and reasonable compensation" for cities' management of their rights-of-way. Importantly, the court expressly rejected the notion that localities should be able to profit from wireless siting notwithstanding Section 253: "[Section 253(c)] requires that compensation be 'fair and reasonable;' this does not mean that state and local governments should be permitted to make a profit by charging fees above costs."

Judge Bress dissented on this aspect of the court's ruling. He would have found that while costs can be prohibitory, it does not make sense to tie the "prohibitory" nature of fees to whether they are based on municipal costs—in his opinion, the only relevant question is impact on carriers, as the local government petitioners asserted, and that under the law of the Ninth Circuit it is not appropriate to find all non-cost based fees are "automatically preempted." The majority answers this by noting that here the FCC had a record that showed there was actual prohibition with respect to non-cost-based small cell fees, so this is not a case of the Commission finding that there was simply automatic preemption by the terms of the statute, but instead preemption of a specific category of fees based on record evidence.

Aesthetics. The Small Cell Order imposed several requirements on local aesthetics-based regulation of small cell facilities. The FCC found that to pass muster under Sections 253 and 332, local aesthetics-based regulation of small cells must be "reasonable," "objective," "published in advance," and may not be "more burdensome than those the state or locality applies to similar infrastructure deployments." The FCC also found that requirements that facilities be deployed or moved underground or adhere to minimum spacing criteria may cause an effective prohibition, and that each of those circumstances should be evaluated under the same terms as other aesthetic limitations. The local government petitioners asserted that the FCC's aesthetic limitations were arbitrary and capricious, but the court agreed with petitioners only with respect to the requirements that aesthetic regulations be "objective" and "no more burdensome." The court invalidated those while leaving intact all of the other limitations on aesthetic regulation.

Reasonableness of Aesthetic Regulation. With respect to the limitations on aesthetic regulation it upheld, the court held that petitioners had not seriously challenged the advance publication requirement, and thus upheld this provision. The court rejected petitioners' claim that the reasonableness requirement imposed by the FCC was vague and overbroad. The court explained that this requirement preempts only when "aesthetic regulations are not 'technically feasible and reasonably directed' at remedying aesthetic harms." The court held that this limitation is consistent with Ninth Circuit case law and Congressional intent.

Burden Posed by Aesthetic Regulation. In contrast, the court found that the requirement that small cell aesthetic regulations be "no more burdensome" than those applied to other infrastructure was inconsistent with both case law and Congressional intent regarding Section 332, which in addition to preempting prohibitory state and local practices, preempts conduct that discriminates among functionally equivalent

providers. The court explained that under Ninth Circuit case law, Section 332 "expressly contemplates that some discrimination among providers . . . is allowed," and that Congress "recognized that applying different standards for physically different infrastructure deployments may, in some situations, be a reasonable use of local zoning authority." Accordingly, the court found, "[r]equirements imposed on 5G technology are not always preempted as unrelated to legitimate aesthetic concerns just because they are 'more burdensome' than regulations imposed on functionally equivalent services."

Objectivity of Aesthetic Regulation. With respect to the objectivity requirement, the court held that the harm caused by "unsightly or out-of-character deployments" is "at least to some extent, necessarily subjective" and falls within traditional zoning authority that serves a public purpose. Thus, "the FCC's requirement that all aesthetic regulations be 'objective' is arbitrary and capricious," and that "[a]t the very least, the agency must explain the harm that it is addressing, and the extent to which it intends to limit regulations meant to serve traditional zoning objectives of preventing deployments that are unsightly or out of neighborhood character."

Shot Clocks. The Small Cell Order took two actions related to shot clocks, or the timeframes in which localities must grant siting applications under FCC rules to presumptively comport with Section 332's requirement that localities act in a "reasonable period of time":

1. the FCC found that all of the necessary authorizations to construct facilities must be granted within the prescribed period; and
2. it adopted small-cell specific shot clocks of 60 days for applications related to existing infrastructure and 90 days for all other applications (the generally applicable shot clocks under Section 332 are 90 and 150 days, respectively).

The court rejected local government petitioners' argument that the new shot clocks were arbitrary and that localities will be unable to meet them. Instead, it held that applying the shot clocks to all necessary authorizations was consistent with the text of Section 332, and that because the timeframes in the shot clocks only operate as presumptions, it was appropriate for the FCC to rely on record evidence that some municipalities can meet the shorter timeframes in order to adopt these shorter limits.

Deemed Grant. A group of wireless industry petitioners challenged one aspect of the Small Cell Order: specifically, they argued that the FCC did not go enough by clarifying the breadth of shot clock requirements and adopting a small-cell-specific shot clock. Instead, the industry petitioners argued, the FCC should have adopted a "deemed grant" remedy, under which a siting application would be deemed granted if a locality fails to act on the application within the timeframe required by the shot clock. The FCC already has adopted a deemed grant remedy to implement Section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012 (also known as the "Spectrum Act"), a broadly preemptive statute that requires localities to grant certain applications to modify existing facilities. The court found because the FCC found that the shorter shot clocks would reduce small cell siting delays, "the factual findings here do not compel the adoption of a deemed grant remedy," and that the differing language in the statutes means that the FCC was not compelled to adopt a similar remedy.

Moratoria. In the Moratoria Order, the FCC found that both express and de facto moratoria on the acceptance, processing, or approval of siting applications (of all facility types, not just small cells) violate the effective prohibition provision in Section 253. The City of Portland challenged the FCC's conclusion on moratoria as overly broad, asserting that it "preempts even benign seasonal restrictions on construction, such as freeze-and-frost laws." The court found that it was the city's characterization that was overly broad, and that the FCC "carefully explained" the scope of the moratoria prohibition in the order, which "does not preempt necessary and customary restrictions on construction."

Other Legal Challenges. Local government petitioners raised a host of other legal arguments in the interest of invalidating one or both of the orders impacting small cells. The court rejected all of them.

- *Regulatory/Proprietary Distinction.* Local government and power company petitioners argued that the FCC lacked authority to extend its conclusions to circumstances surrounding siting of facilities on municipal-owned structures and property, because in that context municipalities are acting in a "proprietary" capacity rather than a "regulatory" capacity. The court rejected this claim, and found flatly that "[m]unicipalities do not regulate rights-of-way in a proprietary capacity."
- *The Interaction of Sections 253 and 224*. Public power company petitioners argued that the FCC's interpretations of effective prohibitions under Section 253 cannot apply to utility poles owned by public utilities because Section 224 of the Communications Act regulates utility pole attachment rates and contains an express exclusion for government-owned utilities. The court found that "[t]he FCC responded appropriately when it said, 'nothing in Section 253 suggests such a limited reading, nor does Section 224 indicate that other provisions of the Act do not apply."
- *RF Exposure*. Montgomery County, Maryland appealed the Small Cell Order on the grounds that the FCC never completed a 2013 proceeding on reassessing the agency's standards related to radiofrequency exposure. The court dismissed this challenge as moot because the FCC adopted an order after the Small Cell Order that considered radiofrequency exposure risks of 5G services. The court further found that "[t]here is no merit to Montgomery County's further suggestion that [the court] should penalize the FCC for what the County calls evasive litigation tactics in not acting earlier," citing *Massachusetts v. EPA* for the proposition that agencies have "significant latitude as to the manner, timing, content, and coordination of their regulations."
- *Constitutional Challenges*. Local government petitioners asserted that the Small Cell Order effects a physical taking in violation of the Fifth Amendment because it requires localities to grant access to rights-of-way, citing *Loretto v. Teleprompter Manhattan*. The court found *Loretto* was distinguishable; whereas the challenged state law there required landlords to permit cable installation on their property, the September Order merely prohibits unreasonable fees and "continues to allow municipalities to deny access to property for a number of reasons," and thus does not compel access to property. The court similarly rejected the argument that the order effects a regulatory taking by limiting cost recovery, given that the order permits localities to recoup their costs related to siting applications. Local governments also asserted that the orders unlawfully require states and localities to enforce federal law in violation of the Tenth Amendment. To that, the court responded, "[n]othing like that is

happening here."

B. One-Touch Make-Ready Order

The One-Touch Make-Ready Order established a new streamlined process to expedite deployment on utility poles and took other action to reduce costs and accelerate deployment on utility poles. The new one-touch make-ready process was not challenged on appeal. Electric utility petitioners unsuccessfully challenged four other aspects of the One-Touch Make-Ready Order.

<u>ILEC Rate Rule</u>. The court upheld the Commission's presumption that ILECs are entitled to the same new telecom pole attachment rate guaranteed to competitive local exchange carriers (CLECs) and cable companies providing telecommunications services. The court found the presumption is consistent with the FCC's obligation to ensure "just and reasonable" rates for ILECs under 47 U.S.C. § 224(b)(1) and supported by record evidence. The court also upheld the Commission's decision to set the old telecom pole attachment rate as the maximum rate where an electric utility rebuts the presumption with clear and convincing evidence, explaining that the old telecom rate "is higher than both CLEC and cable operator rates, and the FCC had previously determined those rates were just, reasonable, and allowed full cost recovery."

<u>Self-Help Rule</u>. The court upheld the Commission's decision to expand its self-help remedy to allow a communications attacher to hire a contractor pre-approved by the utility pole owner to complete work above the communications space—and not just in the communications space—when the Commission's required make-ready deadlines are not met. The court held that the Commission had statutory authority to expand the self-help remedy, found it reasonably included "a number of provisions designed to mitigate increased safety risks" alleged by electric utilities, and that it was not arbitrary or capricious to conclude it would improve efficiency in deployment of 5G technology—a matter which "[t]he FCC reasonably views . . . [as] of 'national importance,' justifying extension of the self-help rule to promote timely installations."

<u>Overlashing Rule</u>. The court upheld the Commission's codification of its overlashing precedent, which prohibits utility pole owners from requiring attachers to obtain pre-approval before overlashing their existing facilities. The court also upheld the Commission's clarification that utility pole owners cannot impose quasi-pre-approval requirements prior to overlashing, such as requiring engineering studies or imposing the cost for them.

<u>Preexisting Violation Rule</u>. The court upheld the Commission's rule prohibiting utility pole owners from denying pole access to a new attacher because of a preexisting safety violation that the attacher did not cause. The court found the rule reasonable, noting that denying access in such circumstances would "have the effect of forcing an innocent would-be attacher to fix the violation" and "pass[ ] the costs off on entities that did not cause the safety problem in the first place."

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