



Jenny Leinen <leinen@monterey.org>

## Summary of FCC rule

1 message

Joseph Van Eaton <~~XXXXXXXXXXXXXXXXXXXX~~> Thu, Sep 6, 2018 at 9:08 AM  
To: "davi@monterey.org" <davi@monterey.org>, "Elizabeth Caraker (caraker@monterey.org)" <caraker@monterey.org>, Jenny Leinen <leinen@monterey.org>

Please feel free to distribute this to the members of the Committee.

Joseph Van Eaton

Partner



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**BEST BEST & KRIEGER**  
**ATTORNEYS AT LAW**

**To:** BB&K Clients  
**From:** Telecommunications Practice  
**Date:** September 6, 2018  
**Re:** *FCC Issues Draft Order Establishing” Small Cell” Rules, Limiting Fees And Rents To Cost; Imposing New Shot Clocks, and Eliminating Proprietary/Regulatory Distinction.*

*This document summarizes a draft FCC Declaratory Ruling and Order released yesterday regarding wireless facilities deployments. The item is expected to be adopted on September 26, 2018, and would become effective 30 days after Federal Register publication. Any comments on the draft should be filed no later than September 18.*

**What Constitutes “Effective Prohibition” Standard?**

- Adopts the “materially inhibit” standard used by the 1st, 2nd, and 10th Circuits, for evaluating whether a state or local government action “prohibits or has the effect of prohibiting” provision of wireless service. The Commission thus implicitly rejects standards used in 4th and 9th Circuits, to the extent those differ (¶10).
  - “a state or local legal requirement constitutes an effective prohibition if it ‘materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.’” (¶34)
- Applies to densification, new services, or improvements to service, not just new deployments. (¶36)
  - Expressly rejects “coverage gap” standards. (¶39)
- Localities act solely in their regulatory capacity in authorizing or setting terms for any wireless deployment in public rights-of-way. (¶88)

**Applications, Rights-of-Way Rent, and Use of Municipal Infrastructure Rent Limited to Cost--**

- Applies Sections 253 and 332(c)(7) to municipal fees related to small cell wireless deployment, including application fees, charges to access the rights-of-way, and fees to attach to municipally-owned infrastructure (i.e. street and traffic lights.) (¶¶48, 66)
- Fees presumptively violates Sections 253 and 332(c)(7) unless they are: (1) a reasonable approximation of costs, (2) factor in only objectively reasonable costs, and (3) are no higher than the fees charged to “similarly-situated competitors in similar situations.” (¶48)
  - Fees based on gross revenues for small cells, where not based on costs of use, are preempted. (¶67)
  - Costs for third-party contractors or consultants must be reasonable, and “excessive” charges may not be passed on through fees. (¶67)
- Section 253(c)’s protection of “fair and reasonable compensation” only extends to fees that are a “reasonable approximation of a state or local government’s objectively reasonable costs of, respectively, maintaining the ROW, maintaining a structure within the ROW, or processing an application or permit.” (¶69)
- Presumptively reasonable fees:
  - \$500 for up-front application covering up to five sites; \$100 for each site after the fifth;
  - \$270 per site per year for all recurring fees, including rights-of-way access and facilities attachment. (¶76) May defend higher fees by showing they meet the test described above. (¶76)

**Pre-existing Aesthetic Requirements Applicable to Wireless Facilities**

- Aesthetic requirements not preempted, provided they are “(1) reasonable; (2) no more burdensome than those applied to other types of infrastructure deployments; and (3) published in advance.” (¶84)
- Minimum spacing “evaluated under the same standards as other aesthetic requirements.” (¶87)



**BEST BEST & KRIEGER**  
**ATTORNEYS AT LAW**

- Undergrounding provisions are not directly preempted, but “a requirement that all wireless facilities be deployed underground would amount to an effective prohibition” and “can amount to effective prohibitions by materially inhibiting the deployment of wireless service.” (§86)

**Two New Rebuttable Presumption Shot Clocks for Small Wireless Facilities**

- New 60-day shot clock, running from application submission, for collocations of Small Wireless Facilities on existing structures, and a 90-day clock, running from submission, for applications to construct new small wireless facilities. (§101) Existing shot clocks are codified
- Uses NEPA/NHPA Order in March 2018 definition of Small Wireless Facility (28 cu ft. + 3 cubic ft. antennae(s)).<sup>1</sup> (§110)
- Large Batches – No extensions for large batch applications but if a mixture of collocation and non-collocation applications are submitted as a batch, the longer shot clock governs. (§110)
- NO DEEMED GRANTED, but if a Small Wireless Facilities shot clock expires without action, inaction will be deemed an effective prohibition, violating Sections 253 and 332(c)(7), and locality is expected “to issue all necessary permits without further delay.” (§114)
- Applicants can still sue & Commission expects injunctive relief to be common, but locality may rebut the presumption of violation by showing that the shot clock was not reasonable. (§115)

**Modifications to the Existing Shot Clock Regime**

- Applies shot clocks to “all authorizations necessary for the deployment of personal wireless services infrastructure” including “license or franchise agreements to access ROW, building permits, public notices and meetings, lease negotiations, electric permits, road closure permits, aesthetic approvals, and other authorizations needed for deployment” (§136) including “pre application procedures. (§140)
- Unclear whether one shot clock applies overall (i.e. all permits within 60 days) or shot clock governs each separate permit application (i.e. separate clocks for zoning, then building, etc.)
- “attachment of facilities to existing structures constitutes collocation, regardless whether the structure or the location has previously been zoned for wireless facilities.” (§136)
- Mandatory pre-application procedures do not toll shot clocks, & an application is “duly filed” when it is proffered to the locality, even if a locality refuses to accept it.

**NO GRANDFATHER CLAUSE --**

- Draft does not exempt existing agreements between cities and providers.

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<sup>1</sup> Small wireless facility, consistent with Section 1.1312(e)(2), is a facility that meets each of the following conditions:

(1) The structure on which antenna facilities are mounted—

(i) Is 50 feet or less in height, or

(ii) Is no more than 10 percent taller than other adjacent structures, or

(iii) Is not extended to a height of more than 10 percent above its preexisting height as a result of the collocation of new antenna facilities; and

(2) Each antenna (excluding associated antenna equipment) is no more than three cubic feet in volume; and

(3) All antenna equipment associated with the facility (excluding antennas) are cumulatively no more than 28 cubic feet in volume; and

(4) The facility does not require antenna structure registration under part 17 of this chapter;

(5) The facility is not located on Tribal lands, as defined under 36 C.F.R. § 800.16(x); and

(6) The facility does not result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified in Rule 1.1307(b)



Jenny Leinen <leinen@monterey.org>

**Fwd: Please forward this to the Wireless Subcommittee**

**Ann Packer** <XXXXXXXXXXXXXXX>  
To: Jenny Leinen <leinen@monterey.org>

Wed, Sep 5, 2018 at 3:47 PM

Re-sending as my first attempt did not go through...

Begin forwarded message:

**From:** Ann Packer <XXXXXXXXXXXXXXX>  
**Subject:** Please forward this to the Wireless Subcommittee  
**Date:** September 5, 2018 at 3:39:26 PM PDT  
**To:** [jleinen@monterey.org](mailto:jleinen@monterey.org)

Hi Jenny,  
Please forward this to the Wireless Subcommittee that is considering the ordinance:

As a concerned Monte Vista neighborhood resident, I would ask the subcommittee to please consider adopting the ordinance proposals from our neighborhood group. It appears that Mr. Van Eaton's recommendations did not, for the most part, incorporate the residents' concerns and suggestions into his draft ordinance. His draft in some ways weakens the City's ordinance and does not provide the protections that we are asking for in our Monterey neighborhoods. We have reviewed up to date wireless ordinances from other California cities to see what they have done. We ask that the city require processing of all wireless applications in a way that is beneficial to residential, commercial and industrial areas.

Ann Packer  
Resident of Skyline Ridge Estates



Jenny Leinen <leinen@monterey.org>

### For the record -- possible agenda topics

1 message

David Breedlove <dbreedlove@monterey.org> Tue, Sep 4, 2018 at 3:20 PM  
 To: Duane Peterson <duane@monterey.org>, Susan Nine <snine@monterey.org>, Hebard Olsen <holsen@monterey.org>, Mike Dawson <mdawson@monterey.org>, Mike <mm@monterey.org>, Jenny Leinen <leinen@monterey.org>, Elizabeth Caraker <caraker@monterey.org>

- SB 649 (vetoed by governor 9/17) would have added California's support to the FCC's wireless-industry-sponsored restrictions against cities resisting small-cell/5G:
  - Both Senator Monning and Assemblyman Mark Stone **VOTED AGAINST**,
  - The League of California Cities, with 110 California Cities including Carmel, Pacific Grove, Del Rey Oaks, and Seaside were **OPPOSED**. City of Monterey took no position..
  - I don't see anything on the web about **Congressman Panetta's** position on the **FCC, wireless, small-cell/5G, etc.**
  - I suggest that this subcommittee go on record urging the City Council to **add its voice** -- by resolution and by letters and personal contact -- with our State and Federal legislators **BEFORE** these wireless issues again rise to the level of action.
- From my reading, small-cell and 5G are still mainly targeted at a few large cities, to be activated over the next year or two. We have time to get this right. Especially regarding **RF impacts on health**, we should be raising our voices demanding that the **science be settled by scientists, not by lobbyists**.. Where is the EPA? Where is the Surgeon General? Tobacco, Global warming, deja vue all over again.

David Breedlove  
 XXXXXXXXXX



Jenny Leinen <leinen@monterey.org>

**twelve feet required between electric line and tree for safety!**

1 message

**HEBARD OLSEN** <XXXXXXXXXXXXXXXXXXXX> Sun, Sep 2, 2018 at 12:11 PM  
Reply-To: **HEBARD OLSEN** <XXXXXXXXXXXXXXXXXXXX>  
To: **XXXXXXXXXXXXXXXXXXXX**, leinen@monterey.org, davi@monterey.org  
Cc: Nina Beety <XXXXXXXXXXXXXXXXXXXX>, **XXXXXXXXXXXXXXXXXXXX**, Kimberly Cole <cole@monterey.org>

<https://www.pressdemocrat.com/opinion/7836888-181/pd-editorial-after-the-fires?sba=AAS>

supposed to be completer in 6 months. has not started at 720 Woodcrest lane.

<https://www.pressdemocrat.com/news/8413929-181/cal-fire-pge-equipment-caused>

<https://www.edhat.com/news/pge-to-shut-off-power-in-wind-and-fire-danger>

<http://www.govtech.com/public-safety/Facing-Blame-for-Fires-Utility-Plans-247-Prediction-and-Response-Center-in-California.html>

<https://calcoastnews.com/tag/pacific-gas-electric>



Jenny Leinen <leinen@monterey.org>

**I have found articles on horizontal forces allowed on telephone poles & force of wind. Will ask wireless company to insure!**

1 message

HEBARD OLSEN <XXXXXXXXXXXXXX>  
Reply-To: HEBARD OLSEN <XXXXXXXXXXXXXX>  
To: Nina Beety <XXXXXXXXXXXXXX>, leinen@monterey.org

Sat, Sep 1, 2018 at 9:20 AM

I have found articles on horizontal forces allowed on telephone poles & force of wind. Will ask wireless company to insure!

[https://www.engineeringtoolbox.com/wind-load-d\\_1775.html](https://www.engineeringtoolbox.com/wind-load-d_1775.html) force of wind!  
<http://www.ru-bee.com/Provison/Pole/20090302073357/index.html> 2000 lb for brand new pole divided by 4 for safety! at top!

Will ask for insurance to be updated after every wind storm for all damages causes by pole failure! Want city to research cost and availability of such insurance. I suspect PG&E already uses almost all of the 500 lb allowable? I world like city to check on that!

Hebard