

Circuit Court small cell ruling won't impact Wisconsin



By Julia Potter
Boardman & Clark

In September of 2018, the Federal Communications Commission (FCC) issued an order—*Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment* (the Small Cell Order) — that limits a municipality's ability to regulate the placement of small wireless facilities and on municipally owned structures located within public rights-of-way, including streetlights, traffic poles, and electric distribution poles. The legality of the Small Cell Order was immediately challenged by a group of local governments, municipal utilities, and municipal organizations, including the American Public Power Association. They argued that various provisions of the order exceeded the scope of the FCC's regulatory authority.

In a recent decision, *City of Portland v. United States*,

969 F.3d 1020 (9th Cir. 2020), the Ninth Circuit Court of Appeals ruled on the merits of that challenge, largely upholding the Small Cell Order. In response to a broad attack on many elements of the Small Cell Order, the court struck down only two provisions, both relating to aesthetics. The court concluded that the FCC's mandates that local aesthetic regulations of small wireless facilities be "objective" and "no more burdensome than those applied to other types of infrastructure deployments" exceeded the scope of the FCC's authority and are therefore unenforceable. In the same decision, the court also upheld two related FCC orders dealing with one-touch make-ready rules and moratoria on small cell deployment.

While the outcome of this case will have some significance for local governments and municipal utilities in other states, it has no practical impact in Wisconsin. This is because, while the challenge to the FCC's Small Cell Order was pending before the Ninth Circuit, the

Wisconsin legislature enacted small cell legislation at the state level (Small Wireless Statute), Wis. Stat. § 66.0414.

Attorneys Anita Gallucci and Julia Potter of Boardman & Clark LLP, MEUW's legal counsel, worked with a group of MEUW members¹ to prepare a [Model Ordinance for Regulation of Wireless Telecommunications Facilities in Public Right-of-Way and a Model Wireless Pole Attachment Agreement](#) based on Wisconsin's new Small Wireless Statute for use by MEUW member utilities. As discussed in greater detail in the explanatory memos accompanying these model documents, Wisconsin's Small Wireless Statute, including its new requirement that municipal electric utilities follow the federal rules and regulations regarding make-ready work, is in most instances stricter than the FCC's Small Cell Order.

Thus, the Ninth Circuit's ruling, which focused on the FCC's regulatory authority rather than the authority of state governments, did not invalidate

any of the provisions of Wisconsin's Small Wireless Statute, including those related to aesthetic regulations and make-ready work. Therefore, Wisconsin municipalities and municipal utilities may continue to rely on MEUW's Model Ordinance and Model Pole Attachment Agreement and must continue to comply with the provisions of Wisconsin's Small Wireless Statute as written, including its aesthetic regulations and make-ready requirements. ●

¹ Members of the ad hoc 5G Task Force formed by the MEUW Board of Directors were Nick Kumm (Marshfield), Eric Miller (Kaukauna), Joe Pickart (Oconomowoc), Chad Renly (Evansville), and Rick Wicklund (Sun Prairie)



Julia Potter assists individuals, businesses, and municipalities with a wide range of

legal issues involving real estate, land use, and municipal law. She is a graduate of the University of Michigan Law School and joined Madison-based Boardman & Clark in 2015. She was named to the Wisconsin Law Journal's "Up and Coming Lawyers" in 2018.