

What MEUW Members Should Know about the FCC’s Small Cell Order and Its Impact on Municipal Electric Poles

1. The Federal Communications Commission’s Small Cell Order¹ (“Order”) will become effective on January 14, 2019. The central purpose of the 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 state and local public property, including municipal electric poles.
2. The Order limits the authority of both state and local governments with respect to regulating the placement of Small Wireless Facilities (which include poles, towers, antennas, and pedestals used for wireless broadband services) in local rights-of-way (“ROW”) and on state and municipally owned structures in the ROW, including light poles, traffic poles, and municipally owned utility poles.
3. The Order describes “**Small Wireless Facilities** as “encompass[ing] facilities that meet the following conditions:”
 - (1) The facilities—
 - (i) are mounted on structures 50 feet or less in height including their antennas as defined in section 1.1320(d), or
 - (ii) are mounted on structures no more than 10 percent taller than other adjacent structures, or
 - (iii) do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater;
 - (2) Each antenna associated with the deployment, excluding associated antenna equipment (as defined in the definition of antenna in section 1.1320(d)), is no more than three cubic feet in volume;
 - (3) All other wireless equipment associated with the structure, including the wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than 28 cubic feet in volume;
 - (4) The facilities do not require antenna structure registration under part 17 of this chapter;
 - (5) The facilities are not located on Tribal lands, as defined under 36 CFR 800.16(x); and
 - (6) The facilities do not result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified in section 1.1307(b).²

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, 2018 WL 4678555, (rel. September 27, 2018).

² Order at p. 4, fn. 9.

4. Because the Order preempts both state and local governmental authority, the Public Service Commission of Wisconsin (“PSC”) will have no authority to make decisions or adopt rules that would be contrary to the Order, nor will the PSC have authority to resolve disputes over the rates an MEUW Member may charge for small cell attachments on the member’s electric poles. The FCC would be the proper legal forum for resolving such rate disputes.
5. The Order declares that ROW access fees and fees charged for the use of government property in the ROW (including utility poles) are unlawful unless the following three conditions are met:
 - (1) the fees are a reasonable approximation of the state or local government’s costs, (2) only objectively reasonable costs are factored into those fees, and (3) the fees are no higher than the fees charged to similarly-situated competitors in similar situations.³
6. The fees and charges that are subject to these conditions include recurring annual attachment fees and as well as one-time permit application fees. The Order sets out fee levels the FCC **presumes** would meet the three conditions:

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

\$270 per SWF, per year, for all recurring fees (including “any possible ROW access fee or fee for attachment to municipally-owned structures in the ROW”).⁴

In order to justify charging more than these fees, MEUW Members should be prepared to document the costs of reviewing permit applications and granting permits and the costs associated with hosting Small Wireless Facilities on their electric utility poles.

Regarding permit application fees, consider: (1) the costs of reviewing applications for completeness and compliance with NESC standards and the utility’s own standards and (2) the costs of field inspections before and after a permit is granted.

Regarding annual attachment fees, consider: (1) the nature of the wireless equipment and what a reasonable allocation of the utility’s pole maintenance and repair costs would be and (2) any unique costs imposed on the utility because of the nature of the wireless equipment and its location on the pole.

If your utility currently has a pole attachment agreement with a wireless carrier, the Order preempts such agreements. That means that if the fees being charged are greater than the

³ Order at ¶ 50.

⁴ Order at ¶ 79.

fees the FCC presumes are reasonable, the wireless carrier may be within its rights to pay the lower fees, unless the utility can adequately justify the higher fees.

7. Since the Order mandates access to municipally owned poles, MEUW Members should consider developing defensible standards for pole access that will help preserve space on the pole for electric and other essential public functions.
8. While it is expected that some municipal organizations will appeal the Order, it is unlikely that any such appeals will result in any significant changes in the Order and equally unlikely that a court would postpone the effective date of the Order while any such litigation is pending.