

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: July 19, 2019
TO: Honorable Mayor and Councilmembers
FROM: City Attorney
SUBJECT: Federal Telecommunications Policy: Legal Issues

INTRODUCTION

On October 15, 2018, the Federal Communications Commission (FCC) published its Declaratory Ruling and Third Report and Order in the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, 83 Fed. Reg. 51,867 (2018) (Report and Order). The Report and Order establishes new rules affecting local governments' ability to regulate and charge telecommunication carriers (Carriers)¹ for their use of the public right-of-way. It also establishes new time periods for processing applications for small wireless facilities, and clarifies that these time periods apply to all municipal approvals related to a Carrier's use of the right-of-way. The San Diego City Council (Council) President asked this Office to address the questions below related to the City of San Diego's (City) ability to regulate wireless communication facilities in the right-of-way.

QUESTIONS PRESENTED

1. Can the City require Carriers to create small cell discretionary master plans² for impacted communities?

¹ For the purposes of this memorandum, the term "telecommunication carriers" means "any provider of telecommunications services." 47 U.S.C. § 153 (2010). "Telecommunications service" means "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." *Id.* The Office of the City Attorney previously provided a general overview of the Telecommunications Act of 1996, including these definitions. *See* 2001 City Att'y MOL 307 (2001-23; Nov. 9, 2001).

² In the planning context, "master plan" generally refers to a plan that provides a framework to guide development or redevelopment of large parcels of land with various proposed uses that will be phased in over a long period of time. Examples of master plans include port district master plans, campus master plans for the various local universities, park master plans, and the Sea World Master Plan. These planning efforts typically involve significant public participation to address community concerns and desires throughout the process, and frequently take years to complete. This is the context in which this Office evaluates this question.

2. In communities that have undergone undergrounding, can specific design and placement requirements be put in place to limit additional aboveground infrastructure?

3. Can the City require Carriers to collocate³ equipment in order to minimize the visual impacts?

4. Can the City require Carriers to provide the City with an annual inventory by community of infrastructure?

SHORT ANSWER

1. No. The City may not require Carriers to create small cell master plan for impacted communities. It may only impose aesthetic requirements that are reasonable, no more burdensome than regulations for other infrastructure deployments, objective, and published in advance. Requiring Carriers to create a small cell master plan would likely be viewed by a court as unreasonable because the City does not require that of other infrastructure deployments, and therefore it would be more burdensome. Further, development of a master plan is a lengthy process involving significant community input, which is not restricted to objective criteria or regulations that are published in advance.

2. Yes, subject to certain limitations, the City may impose design and placement requirements to limit additional aboveground infrastructure. The City may impose undergrounding requirements, if the regulations are not an effective prohibition on the deployment of wireless communication facilities, they are reasonable, no more burdensome than regulations for other infrastructure deployments, objective, and published in advance.

3. Yes, subject to certain limitations, the City may impose regulations that require Carriers to collocate equipment. As with undergrounding, the City may impose collocation requirements that are not an effective prohibition on deployment of wireless communication facilities, and that comply with the Report and Order's rules relating to regulating aesthetics.

4. Yes. The City may require Carriers to provide an annual inventory of wireless communication facilities that is organized by community. In fact, San Diego Municipal Code (Municipal Code or SDMC) section 141.0420(b)(3) requires Carriers to annually provide a list of all wireless communication facilities within the City. City staff has proposed amendments to this section as part of the 12th Update of the Land Development Code (12th Code Update) requiring the list to be organized by community plan area.

BACKGROUND

Local governments' ability to regulate the siting and placement of wireless communication facilities continues to be an ever-changing landscape. While the regulations established in the Report and Order became effective on January 14, 2019, the Report and Order has been appealed

³ Collocation generally refers to installations of wireless communication facilities on an existing structure. For applications submitted under section 47 U.S.C. § 1455 (2018) (commonly referred to as the Spectrum Act, or section 6409), collocation also requires that transmission equipment is present on the existing structure.

to the United States Court of Appeals for the Ninth Circuit, and a Petition for Reconsideration was filed with the FCC. Additionally, the Accelerating Broadband by Empowering Local Communities Act of 2019, H.R. 530, 116th Congress, was introduced by Representative Eshoo stating that the Report and Order shall have no force or effect. Senator Feinstein introduced the Restoring Local Control Over Public Infrastructure Act of 2019, S. 2012, 116th Congress, which is a companion bill to H.R. 530, that also states that the Report and Order shall have no force or effect.

Despite the pending appeals and bills, the City is currently required to comply with the Report and Order. While the Report and Order applies to more than small cell technology, which involves low-powered radio access nodes that can be installed on streetlights, utility poles, traffic signals, and other vertical infrastructure within the right-of-way,⁴ the greatest impact of the regulations for the City is on deployment of small cell wireless communication facilities. Carriers are installing these facilities in large numbers to densify existing networks and provide more capacity to allow end users of the networks to download data faster. These types of facilities are considered integral to transitioning to the next generation of wireless services, commonly referred to as 5G.

To comply with the Report and Order, the 12th Code Update that is scheduled to be heard by Council on July 23, 2019, includes proposed amendments to Municipal Code section 141.0420, Wireless Communication Facilities.⁵ These amendments include allowing small cell wireless communication facilities that are installed in the right-of-way and meet certain size and aesthetic requirements to be processed as a ministerial action. Wireless communication facilities installed in the right-of-way that do not meet those requirements would be processed through a discretionary action, even if they employ small cell technology.

City staff has also updated the City of San Diego Wireless Communication Facilities Guidelines (Guidelines) to provide objective aesthetic requirements. The Guidelines will be brought to Council for inclusion in the Land Development Manual at the same time the 12th Code Update is heard. Additionally, City staff developed Information Bulletin 545, Submittal Requirements and Procedures for Small Cell Wireless Communication Facilities, to streamline the process⁶ and assist City staff in meeting the new FCC shot-clocks.⁷

⁴ These types of installations are not new. Carriers have been installing antennas and associated equipment on streetlights within the City since at least 2007. Although many of these installations use a different type of technology, they look very similar. However, due to 5G technology and increased demands for highspeed data, Carriers now indicate they need significantly more of these types of installations.

⁵ Not all of the proposed amendments to Municipal Code section 141.0420 are related to compliance with the Report and Order. Some of the proposed amendments are related to previous changes in federal and state law, and other revisions are non-substantive modifications to the use tables, formatting, and clarification.

⁶ Carriers must submit a Master Structural Plan that includes construction documents for installation of all proposed types of small cell wireless communication facilities within the City's right-of-way. This is a ministerial process that allows staff to review and approve specific equipment and design for specific types of poles one time, rather than requiring individual review for each application. This is not to be confused with the small cell master plan for each community discussed in this memorandum, which would be discretionary in nature.

⁷ "Shot-clock" is a term of art that refers to the period of time that the FCC has determined is reasonable for a local government to review and approve or deny an application for a wireless communication facility.

ANALYSIS

I. REQUIRING CARRIERS TO CREATE A SMALL CELL MASTER PLAN IS NOT CONSISTENT WITH THE REPORT AND ORDER'S RULE FOR A LOCAL GOVERNMENT'S AESTHETIC REQUIREMENTS

The Report and Order states that a local government's "aesthetic requirements are not preempted if they are (1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments, and (3) objective and published in advance." 83 Fed. Reg. 51,867, 51,871 (2018). Requiring Carriers to submit a small cell master plan subject to a discretionary process, approval of which is dependent upon a community's desires that are only identified after the application is filed, is inconsistent with this standard.

To be "reasonable," an aesthetic requirement must be technically feasible and directed at avoiding or remedying the intangible harm of unsightly or out-of-character deployments. *Id.* The feasibility of this requirement likely hinges on what information is required to be included in the master plan.⁸ Even if it is technically feasible, the FCC stated that if an aesthetic requirement is more burdensome than those imposed on other similar infrastructure deployments, it does not meet this test. *Id.* The City does not require other utilities to provide a discretionary master plan for communities impacted by other utilities' infrastructure deployments.⁹ Imposing this requirement on small cell wireless communication facilities is likely to be viewed as more burdensome, meaning that a requirement would fail to meet both the first and second prongs of the FCC's test.

It is also unclear how such a process could meet the objective and published-in-advance requirements. Prior to designing their project, Carriers must be able to ascertain the aesthetic requirements they will be obligated to satisfy to obtain approval of their application for any given location. *Id.* By their nature, discretionary master plans are an open-ended process that involve potential changes in response to community input rather than application of published objective aesthetic requirements. Moreover, it is unclear how such a requirement would assist the City in avoiding unsightly or out-of-character deployments beyond the current process or the processes proposed in the 12th Code Update.¹⁰

⁸ For example, it would not be feasible to require a Carrier to identify specific locations for all potential future sites of small cell wireless communication facilities in a particular community, because it is unlikely a Carrier would secure access to a specific location until after the small cell master plan was approved.

⁹ In discussing this issue, the FCC referred to "aesthetic requirements that are more burdensome than those the state or locality applie[d] to similar infrastructure deployments;" however, they did not define or provide any examples of what may constitute "similar infrastructure deployment," and the word "similar" did not appear in the initial statement of the rule. *Id.* Arguably, if the City can distinguish these deployments from other types of infrastructure deployments, the City may impose different requirements on them. This Office interprets this language to mean other types of utilities installing similar equipment in the right-of-way.

¹⁰ The City could not require that providers offer certain levels of service or dictate the overall design of a Carrier's network as part of a small cell master plan. 83 Fed. Reg. 51,867, 51,868 n.84 (2018); *see also Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983, 988 (2002). The proposed amendments to Municipal Code section 141.0420 relating to small cell wireless communication facilities require a discretionary approval for wireless communication facilities installed in the right-of-way that are (1) larger than a specific size, or (2) are not being installed on a

Further, in imposing any new procedural requirements, the City must consider whether the requirements can be completed within the time period established by the FCC. The applicable time period depends on the type of wireless communication facility being installed, and whether that facility is being installed on an existing structure. The wireless communication facilities being installed in the right-of-way usually meet the FCC's newly defined small wireless facility definition. *See* 47 C.F.R. § 1.6002(l) (2019). The FCC established a 60-day shot-clock for processing applications if the small wireless facility is installed on existing infrastructure, and a 90-day shot-clock if the provider is building a new structure in the right-of-way. 47 C.F.R. § 1.6003(e) (2019). If the City requires a discretionary master plan, that plan and all other municipal approvals required for the deployment would need to be reviewed in the applicable time frame.

While a small cell master plan subject to a discretionary approval may not comply with the FCC's requirements, the City may still potentially establish aesthetic requirements for specific communities based on community input. If a community believes that there are specific aesthetic requirements that are necessary to avoid unsightly or out-of-character small cell wireless communication facilities within their community, they can provide those proposed requirements to the City. This will allow the appropriate City staff to review the proposed aesthetic requirements under the FCC's test to determine if they can be implemented. If City staff determines that the requirements can and should be imposed, those requirements may be incorporated into the appropriate City document to meet the "published in advance" requirement.¹¹

II. A LOCAL GOVERNMENT MAY ESTABLISH UNDERGROUNDING REQUIREMENTS IF THE REQUIREMENTS DO NOT EFFECTIVELY PROHIBIT DEPLOYMENT OF WIRELESS COMMUNICATION FACILITIES

The Report and Order does not prohibit local governments from imposing requirements related to undergrounding programs, if the restrictions imposed by the undergrounding requirements do not effectively prohibit on deployment of wireless communication facilities. 83 Fed. Reg. 51,867, 51,872 (2018). For example, requirements that all wireless facilities be deployed underground, including the antennas, effectively prohibit deployment because the antennas cannot function properly underground. The FCC's rule for undergrounding requirements is the same as the rule for aesthetics. Undergrounding requirements are not preempted if they are (1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments, and (3) objective and published in advance. *Id.*

standard light pole for the area, or (3) are not completely concealed within a pole that is consistent with the other light poles in the immediate area and meets certain size requirements.

¹¹ For example, City staff invited all of the chairs of the community planning groups to discuss the proposed amendments to the current wireless communication facility regulations and to review the revised Guidelines on May 23, 2019. As a result of this meeting, and a meeting with Save Our Heritage Organisation, staff is now requesting that the Guidelines be added to the Land Development Manual, and added language to the proposed amendments clarifying that all wireless communication facilities in a designated historical district, or in a historical district identified in a historical resources survey completed by the City, are required to comply with the Historical Resource Regulations and the U.S. Secretary of Interiors Standards and Guidelines.

III. A LOCAL GOVERNMENT MAY ESTABLISH REGULATIONS REQUIRING COLLOCATION IF THE REGULATIONS DO NOT EFFECTIVELY PROHIBIT DEPLOYMENT OF WIRELESS COMMUNICATION FACILITIES

Similar to the undergrounding standard, the Report and Order does not preempt a local government from requiring Carriers to collocate their equipment. However, regulations requiring collocation may not effectively prohibit the deployment of wireless communication facilities. 47 U.S.C. § 332(c)(7)(B)(i)(II) (2018). This Office recommends that any regulations requiring collocation provide for an exception to the requirement if collocation is not technically feasible, or if a factor outside of a Carrier's control prevents the Carrier from collocating.¹² Additionally, the regulations must define collocation so that it is clear if transmission equipment must be present, or if installing the wireless communication facility on an existing structure is sufficient. Any regulations must meet the FCC's test for aesthetic regulations as set forth above.

The proposed amendments to the wireless communication facilities regulations do not require collocation for small cell wireless communication facilities, however, they do encourage collocation on existing structures by allowing many of these applications to be reviewed through a ministerial process. This strategy is consistent with the City's current regulations for all wireless communication facilities. For example, wireless communication facilities in industrial and commercial zones are allowed as a Process One in most instances, while wireless communication facilities, with limited exceptions, in dedicated parkland, residential zones, and open space zones require a conditional use permit reviewed under Process Four. *See* SDMC § 141.0420. City staff has stated that Carriers usually choose a lower process level if it is technically feasible to do so.

IV. THE CITY MAY REQUIRE CARRIERS TO PROVIDE AN ANNUAL INVENTORY ORGANIZED BY COMMUNITIES

Current law does not prohibit the City from requiring Carriers to provide an annual inventory of the Carrier's wireless communication facilities within the City organized by communities if the information serves a governmental purpose. In fact, Municipal Code section 141.0420(b)(3) currently requires service providers to provide documentation, satisfactory to the City Manager, identifying the location of each wireless communication facility in its City network prior to January 31st of each year. The documentation must include wireless communication facilities that are approved but not yet built, wireless communication facilities that are currently operating, and locations containing non-operating wireless communication facilities. The proposed amendments to Municipal Code section 141.0420 include adding a requirement that the list be organized by community plan area to assist in responding to public inquiries regarding the locations of wireless communication facilities.

¹² For example, in order to collocate their wireless communication facilities, Carriers must be able to obtain the permission of the landowner/asset owner. The City cannot require that landowners or asset owners allow a Carrier to install the wireless communication facility on their property or asset. As a result, it may not always be possible for a Carrier to collocate on a preferred site.

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CONCLUSION

The Report and Order established new regulations relating to a local government's ability to regulate wireless communication facilities, including new shot-clocks for certain types of applications. While requiring a small cell master plan subject to a discretionary approval process is unlikely to meet the FCC requirements, communities can provide input to the City that can be evaluated for inclusion in the appropriate City documents and application to future wireless communication facilities. The City can also establish undergrounding requirements and require collocation, subject to certain limitations. Finally, the City can require Carriers to provide an annual inventory organized by community as proposed in 12th Code Update. The regulation of wireless communication facilities continues to be an ever-changing landscape, and this Office will provide additional updates as significant changes occur.

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cc: Andrea Tevlin, Independent Budget Analyst