



## THE FCC'S DECLARATORY RULING AND THIRD REPORT AND ORDER ON BROADBAND INFRASTRUCTURE DEPLOYMENT: PREEMPTION OF LOCAL AUTHORITY OVER SMALL WIRELESS DEPLOYMENTS

On September 27, 2018, the FCC released a [Declaratory Ruling and Third Report and Order](#) that significantly limits state and local management of small wireless infrastructure deployment and associated fees for use of the rights of way and public property in the rights of way. The Ruling and Order will take effect **90 days** after notice is published in the Federal Register.

The Ruling and Order:

- **Caps all fees** related to small wireless facilities (SWF) at “a reasonable approximation of the state or local governments’ actual and reasonable costs.”
  - Caps apply to application/review or similar fees for SWF inside and outside the rights of way; right of way use fees; and fees for use of municipal property in the rights of way.
  - The following fees are presumed to meet the standard:
    - **Non-Recurring Fees:** \$500, including a single up-front application that includes up to five SWF, with an additional \$100 for each SWF beyond five, or \$1,000 for non-recurring fees for a new pole to support SWF.
    - **Recurring Fees:** \$270 per SWF per year for all recurring fees, including any ROW access fee or fee for attachment to municipally-owned structures in the ROW.
  - Local governments can charge higher fees than those set forth above if they can show the fees are:
    - A reasonable approximation of costs;
    - Those costs themselves are reasonable; and
    - They are non-discriminatory.
- **Preempts aesthetics requirements** for SWF unless they are (1) reasonable; (2) no more burdensome than those applied to other types of infrastructure deployments; (3) objective; and (4) published in advance.
  - Under this standard, requirements that all wireless facilities be deployed underground are preempted, as is any undergrounding requirement that “materially inhibits wireless service.”
  - Implies that minimum spacing requirements likely could not meet this standard.

- **Imposes shot clocks** of 60 days for SWF added to existing structures (regardless of whether the structure already supports a SWF) and 90 days for SWF using a new structure.
  - Existing shot clocks for non-SWF deployments remain in place: 90 days for collocation on an existing structure; 150 days for deployment on a new structure.
  - Both the new and existing shot clocks apply to “any approval that a siting authority must issue under applicable law prior to deployment.” This includes zoning approvals and building permits, and may also include license or franchise agreements to access the rights of way, leases for use of municipal poles or property in the rights of way, electric permits and road closure permits, among others.
  - For SWF, shot clocks are reset, not just tolled, if the siting authority notifies the applicant within 10 days after submission that the application is incomplete. For subsequent determinations of incompleteness, the shot clock would toll—not reset—if the siting authority provides written notice within 10 days that the supplemental submission did not provide the requested information.
  - For non-SWF, shot clocks begin to run when an application is first submitted, and can be paused—not reset—if the siting authority notifies the applicant within 30 days that the application is incomplete. For subsequent determinations of incompleteness, the process is the same as described above for SWF.
  - Failure to act within the new SWF shot clock constitutes a presumptive violation of the Communications Act and applicants may seek expedited injunctive relief in court within 30 days of a local government missing a shot clock deadline. There is no “deemed granted” remedy.
- **Defines SWF** as, among other things:
  - Facilities
    - mounted on structures 50 feet or less in height including their antennas; or
    - mounted on structures no more than 10 percent taller than other adjacent structures; or
    - that 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.
  - Each antenna associated with the deployment, excluding associated antenna equipment, is no more than 3 cubic feet in volume;
  - 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.
- **Does not grandfather** existing agreements or state small cell bills or other state laws, which may be preempted to the extent they conflict with the Ruling and Order.