



# ARKANSAS MUNICIPAL LEAGUE

## 85<sup>TH</sup> ANNUAL CONVENTION

### ACT 999 of 2019: Small Wireless Facilities Deployment Act (SWiFDA)

C. Jason Carter  
Statehouse Convention Center  
June 13, 2019

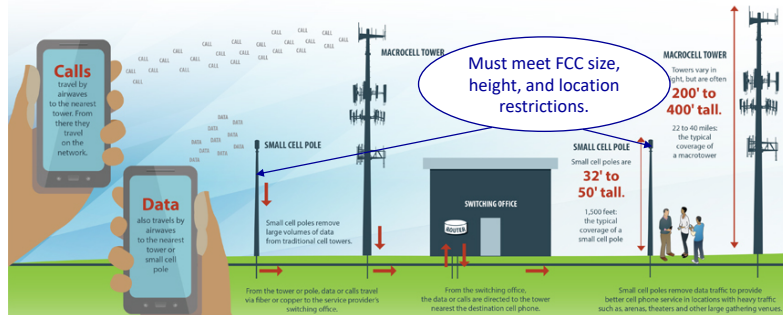
*GREAT CITIES MAKE A GREAT STATE*

## What is small cell?

Small cell technology is touted as the solution to cell phone connectivity and the next step toward 5G:

- Better connectivity
- Faster speeds (20x)
- Less latency

**Many people view cities as the primary impediment to small cell deployment.**



Infographic from SDN Communications



## *FCC Orders: Introduction*

1. The deployment of small cell technology will require the installation of hundreds of thousand of antennas scattered throughout the United States over the next ten years.
2. In August of 2018, the FCC issued an order that prohibited moratoriums on the deployment of small cell technology.
3. In September of 2018, the FCC issued a sweeping order that preempted local regulation and control of small cell deployments, even on property owned by the local government.
4. The FCC's orders are being challenged. However, today they should be treated as controlling law.



## *FCC Orders: Contents*

*1 of 2*

1. No moratoriums
2. No prohibitions on installations in ROW or on public property in ROW.
3. Exclusive arrangements are prohibited.
4. Aesthetic rules must be:
  - a) Reasonable (technically feasible and based on valid public interest)
  - b) No more burdensome than applied to other infrastructure
  - c) Objective and published in advance
5. Aesthetic rules may include
  - a) Undergrounding requirements, if required of all utilities
  - b) Spacing requirements for new poles



## FCC Orders: Contents

2 of 2

6. Permits must be timely awarded
  - a) 60-day shot clock for collocation
  - b) 90-day shot clock for new poles
  - c) Batched applications are not afforded longer times
  - d) Shot clock for incomplete permits can be reset in first ten days
  - e) After first ten days, an incomplete permit tolls the shot clock
  - f) Shot clock can be tolled by agreement to settle disputes
7. Fees must be cost-based, although safe harbor limits apply:
  - a) Application fee for attachments: \$500 for 5, plus \$100 per each additional
  - b) Application fee for new poles: \$1,000 each
  - c) Recurring fees for ROW/attachment: NTE \$270/year total



## Status of FCC Conflicts

- **In Court:** Multi-district litigation has been consolidated in the Ninth Circuit Court of Appeals. The parties have requested the court to stay enforcement of the FCC order, but the court has not yet ruled on that motion. *Amicus briefs are due by June 17<sup>th</sup>.*
- **Congress:** H.R 530 (Rep. Eshoo (D-CA)) would overturn the FCC's small cell orders. It currently has 46 co-sponsors - all are Democrats. It is unlikely that this bill will be adopted. Conversely, Senators Thune (R-SD) and Schatz (D-HI) have reintroduced the STREAMLINE Act that would codify the FCC's Order into the Federal Communication Act.
- **At the FCC:** Ten municipal entities, including the Arkansas Municipal League, petitioned the FCC to reconsider its small cell order. The FCC has acknowledged receipt of the petition but taken no action in response. The FCC requested to stay court proceedings to reconsider its order but was denied.



## *Act 999 of 2019: Highlights*

- Tracks the various requirements within the FCC orders
- Provides fail-safe protections for cities that don't adopt an ordinance
- Separates aesthetic authority from collocation authority
- Lists information required for a permit
- Clarifies role of Ark. Dept. of Transportation over state ROW
- Provides remedies and protections for noncompliance
- IMPORTANT:
  - Authority to regulate aesthetics is limited.
  - Fee caps are similar to, but not the same as, federal safe harbor
  - Shot-clock has a deemed-approved provision after notice + 10 days
  - Micro-wireless facilities are exempt from permitting



## *Definitions (§ 23-17-503)*

There are 34 defined terms, some of which require careful attention:

- “**Applicable codes**” includes standard construction codes, electric reliability codes, and local ordinances of general application that are consistent with the state law.
- “**Rate**” is a recurring charge, while a “**fee**” is a one-time charge.
- “**Right-of-way**” means an area on, below, or above a public utility easement, roadway, highway, street, sidewalk, alley or similar property where a deployment is legally entitled to be.
- “**Technically feasible**” means that the device works without material reduction in the functionality of the small wireless facility.
- “**Wireless support structure**” is any structure in the ROW. The FCC order regulates collocation on publicly-owned structures. The state law regulates collocation on publicly-owned poles, but not structures. It's different.
- A “**wireless provider**” or “**wireless infrastructure provider**” can be any person.



## Fail-Safe Rules (§§ 23-17-504 --507)

These rules apply, even when a city lacks a small cell ordinance:

- Cities may not adopt moratoriums, prohibitions, or exclusive arrangements on small cell devices.
- Providers may not hinder the safe and normal use of the ROW by pedestrians, vehicles, and utilities.
- Height limited to 50' or 10% taller than the tallest pole within 300' in the ROW.
- Historic Districts are still protected by certificate of appropriateness requirements.
- Replacements for decorative poles must reasonably conform to the original design.
- Wireless providers are also prohibited from:
  - Damaging the ROW without restoring it to previous functional and aesthetic equivalence.
  - Abandoning poles and facilities without removing them.
  - Interfering with traffic control equipment.
  - Interfering with sight lines and transportation zones for vehicles and pedestrians
  - Interfering with ADA compliance
  - Failing to comply with applicable codes

*If no permit is issued, many of these rules may be enforced through a notice and self-help process.*



## Aesthetics (§ 23-17-508)

- Before regulating aesthetics, the local government must: (a) have a planning commission; and (b) create a small cell permitting process.
- Aesthetic standards must not have the effect of a small cell moratorium, prohibition, or exclusive arrangement.
- Aesthetic standards must be:
  - a) Reasonable; meaning, technically feasible and directed to prevent unsightly or out-of-character deployments
  - b) No more burdensome than those on other utilities and communication infrastructure
  - c) Objective and published 90 days in advance of an application.
- Aesthetic standards may impose reasonable spacing for new poles.
- Aesthetic standards may require all utilities to be moved underground.
- Aesthetic standards may include a preference for collocation.
- Problems with aesthetic standards may be resolved by the board of zoning adjustments.



## Collocation (§ 23-17-509)

- Collocation standards must not have the effect of a small cell moratorium, prohibition, or exclusive arrangement – and may not prohibit the collocation of small wireless facilities on poles owned by local government.
- Collocation standards may require wireless providers to submit make-ready design drawings for approval. Local government may:
  - Only require make ready as required by applicable codes or industry standards.
  - Only charge make-ready fees that are fair and commercially reasonable.
  - Charge the actual cost of an Arkansas-based engineer to review make-ready.
  - Amend the drawings to conform with applicable codes.
  - Require the replacement of a pole that is not safe for collocation.
  - Elect to perform the make-ready work at the cost of the wireless provider (WITHIN 60 DAYS).
- The local government may take ownership of any replaced pole.
- The local government may reserve space on a pole (but it's not a prohibition).



## Permitting (§ 23-17-510)

1 of 5

### **IN GENERAL**

- The permitting process is four pages of legislation. No kidding.
- Small cell permits may only be issued for locations in the ROW.
- The authority to approve siting along a state highway is with ArDOT.
- Contributions of services from wireless providers may not be required.
- Approval of permits may not be conditioned on:
  - Collocation on a specific pole or categories of poles.
  - Pole sharing.
  - Specific pole types or configurations.
  - Underground placement of equipment designated for above-ground use.
  - Spacing between collocation.
- Approval of permits may be conditioned on an attestation by the applicant that the facility will be operational within one year.



## Permitting (§ 23-17-510)

2 of 5

### **PERMIT APPLICATION CONTENTS:**

1. Identity of the applicant
2. A map or description of the location
3. An illustration showing final appearance
4. Engineering drawings to be installed, with required make-ready
5. Electrical load calculations
6. Pole loading calculations
7. Worker safety information
8. Evidence of bonding
9. Evidence of insurance
10. Required application fees



## Permitting (§ 23-17-510)

3 of 5

### **SHOT CLOCKS**

- The processing time of an application is very important.
- Applications must be processed in 60 days for collocation and 90 days for new poles.
- Within ten (10) days of receiving an application, it may be returned as incomplete and the shot clock will reset. After ten (10) days, an application returned as incomplete will toll the shot clock but not reset it. The shot clock may also be tolled by agreement of the parties.
- If the shot clock is missed, the wireless provider may provide notice to the local government. After notice, the local government must take action in 10 days or the application will be deemed approved.
- Batched applications may be submitted without slowing the shot clocks. An incomplete application submitted as part of a batch must be returned as incomplete individually because the shot clock on the remainder continues to run.



## Permitting (§ 23-17-510)

4 of 5

### **DENIALS**

Local government must provide the reasons for denying a permit in writing.

A permit may be denied for:

- Interfering with traffic control equipment.
- Interfering with sight lines and transportation zones for vehicles and pedestrians
- Interfering with ADA compliance
- Failing to comply with applicable codes
- Failing to comply with aesthetic or historic district standards

Along state highways, permits for collocation on a local government pole may not be denied based upon transportation, sight lines, or ADA compliance. If the pole is not owned by the local government, a permit also cannot be denied for interference with a traffic control equipment.



## Fees (§ 23-17-511)

**Fees listed in statute are the only fees authorized.**

- Maximum application fees:
  - \$100 per small wireless facility
  - \$250 per pole + small wireless facility
- Maximum rates:
  - \$30.00 per year per small wireless facility for ROW fee
  - \$240.00 per year per attachment to a local government pole
- Micro-wireless facilities are exempt from fees.





## *Protections (§ 23-17-516)*

**A small cell ordinance may impose reasonable indemnification, insurance and bonding obligations on wireless providers.**

- May require indemnity of local government, as well officers, agents and employees of the local government, for negligence of wireless provider or those acting on behalf of the wireless provider.
- May **not** require the city to be named as an additional insured.
- Insurance obligations must be related to indemnity obligation. Entities with over \$500M in assets may self-insure.
- Bonding obligations cannot exceed \$1,000 per small wireless facility or \$10,000 in total, whichever is less. Bond is available to:
  - Remove abandoned, unsafe, or improperly maintained small wireless facilities
  - Recoup unpaid fees



## *Ordinance Adoption (§ 23-17-514)*

### **TIMING IS IMPORTANT!**

- Act 999 is effective September 1, 2019.
- Aesthetic standards must be adopted and published 90 days before an application is received.
- A provision of an ordinance or agreement adopted BEFORE September 1, 2019 that does not fully comply with Act 999 is only valid as applied to small wireless facilities and poles installed before September 1, 2019 and will be invalid and unenforceable after 180 days.
- An ordinance or agreement adopted AFTER September 1, 2019 that does not fully comply with Act 999 is void. The whole thing.



## *Keys to Success*

- Multiple offices must communicate to timely process permits:
  - A single office should be designated to interface with the wireless provider
  - Planning departments must review applications for aesthetic compliance
  - City engineers, public works, or utility departments must review permit applications for collocation on local government poles
  - Finance must set up billing for recurring fees.
- Communicate with wireless providers to understand the technical capabilities of their equipment and facilitate workable aesthetic regulations.
- Share lessons learned with other communities. The more we act alike, the better the whole process will work.



# QUESTIONS?

