

# Sophie Geguchadze, Telecom Attorney

#### Experience

- Worked on the cell tower builder side
- Worked on the wireless carrier side
- Now works for municipal/private clients

#### Member

 Washington State Bar, Oregon Bar, and Pennsylvania Bar
 WSBA Administrative Law Section

(Member At-Large)

- Washington State Association of Municipal Attorneys (Associate Member)
- Northwest Wireless Association (Member)

#### **Education**

J.D., University of Pittsburgh School of Law Managing Editor, Pittsburgh Tax Review Executive Board, Moot Court Board



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# Michael Johnston



**Michael Johnston** 

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- admitted to practice in CA, Ninth Circuit and Tenth Circuit
- practice areas include:
  - federal, state and local regulation of wireless/wireline infrastructure
  - small cell license agreements
  - fiber/conduit license agreements
- represented League of Oregon Cities in Portland v. USA (FCC Small Cell Order case)
- disclaimer:
  - presentation for informational purposes only
  - no attorney-client relationship is formed by your participation in this presentation, or by your review and/or use of these materials

Jonathan L. Kramer, Esq., J.D., LL.M, LP.D

#### **Experience**

- Licensed by FCC since early 70s (holds six licenses/certs)
- 35+ years in telecom engineering/safety reviews
   (RF, broadband, fiber, outside plant safety, code compliance, RF safety)
- 33 years consulting on telecom matters > 1,000 governments/firms;
   25 years of wireless siting and planning >2,000 cases/matters
- Expert witness/trial advisor in 40+ wireless, wired telecom cases
- Co-author, Co-editor of FCC's "A Local Government Official's Guide to Transmitting Antenna RF Emission Safety: Rules, Procedures, and Practical Guidance"

#### **Teaches**

Doctoral, Masters level Instructor; Regulatory Law and Policy, Northeastern University; Boston and Seattle

#### Member

Admitted to practice law in California and New Mexico IMLA (Attorney Member)
NATOA (Twice Member of the Year)
FCBA (Member)
Society of Broadcast Engineers (Senior Member)
SCTE (UK) (Fellow Member); SCTE (US) (Senior Member)

#### **Education**

Doctor of Law and Policy, Northeastern Univ., Boston (LP.D)
Master of Law with honors, Strathclyde University School of Law,
Glasgow (I.T. & Telecom Law) (LL.M)
Juris Doctor cum laude, Abraham Lincoln School of Law, Los
Angeles (JD)



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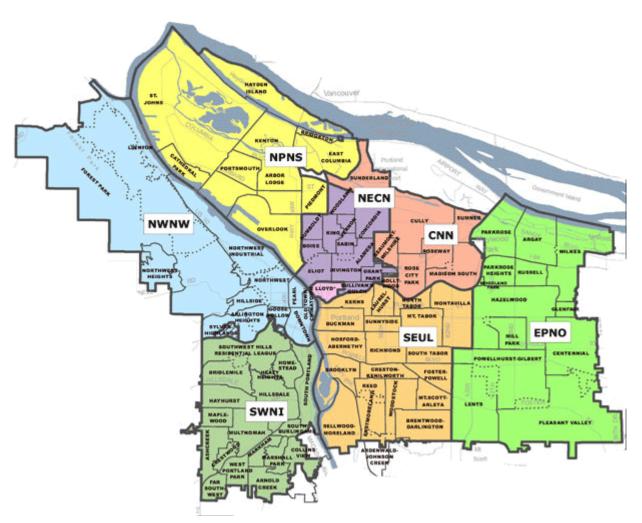




Section 0

# WHY SHOULD YOU CARE ABOUT SMALL CELLS IN THE PROW?

# Small Cells: Why You *Should* Care



#### **Industry estimates:**

**10 to 60** small cells per sq. mile, per carrier

3ish carriers: VzW, AT&T,

**T-Mobile** 

City of Portland: 133.42 sq. miles (land)

The New (Conservative) Math:

Assume:

x Only 3 carriers

x Only 20 SWFers per sq. mi.

x Only 80 sq. mi.

= ~4,800ish new SWFers over the next 3 to 5 years, mostly in the PROW, but also some (hundreds) likely on private property.

> Get ready, get set, ....get swamped



Section 1

# **LEGAL STUFF (FEDERAL LEVEL)**

### 2018 FCC Orders

#### **Moratorium Order**

- prohibits "express" and "de facto" moratoria
- jurisdictions must accept applications

#### Small Cell Order

- creates a new regulatory classification for small wireless facilities
- establishes a national standard for an effective prohibition with new presumptions and remedies
- adopts new, faster shot clocks for processing applications
- limits pole attachment fees and local aesthetic regulations

# Moratorium Order: Street cut exception(?)

"There may be situations in which states or localities impose limitations on deployment, but allow for *alternative means of deployment* in a manner that is reasonably comparable in cost and ease. Providers sometimes inaccurately characterize these limitations as moratoria, but we find that characterization to be inapt where the limitations do not foreclose deployments and carriers' ability to build the facilities they need to provide service." ¶ 152 (emphasis added).

Example: street cut moratoria are valid (as long as there is a alternative available) – Existing u/g conduit? Aerial strand? Edge to edge resurfacing? Exceptions for emergency?

# FCC's 2018 Small Cell Order: What is a small cell?

- (l) Small wireless facilities, consistent with section 1.1312(e)(2), are facilities that meet each of 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 to 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).





A 28 cubic foot box can be very slimming

# FCC's 2018 Small Cell Order: What is a small cell?

- **No LIMIT** to the number of 3 cubic foot antennas
- antennas are <u>NOT</u> counted in the 28 cubic foot 'small wireless facility' volume calculation
- typical <u>6' tall panel antennas</u> likely to be
   3 cubic feet in volume or less

8' tall panels? Not so likely

# FCC's 2018 Small Cell Order: What are the Rules?

- (1) restricts the fees and other compensation state and local governments may receive from applicants;
- (2) requires all aesthetic regulations to be reasonable, no more burdensome than those applied to other infrastructure deployments, objective and and published in advance (City of Portland v. United States, 969 F.3d 1020 (9th Cir. 2020).
- (3) mandates that local officials negotiate access agreements, review permit applications and conduct any appeals within significantly shorter timeframes; and
- (4) creates new much lower evidentiary presumptions that make it more difficult for local governments to deny and then successfully defend themselves if an action or failure to act is challenged in court.

### FCC's 2018 Small Cell Order: Fees

FCC's view of 'Reasonable Permitting Cost':

- \$500 for up to the first five bundled applications are presumed to be reasonable (1, or 2, or 3, or 4, or 5 a total of \$500)
- \$100 for each additional application in the bundle are presumed to be reasonable (6 per bundle = \$600; 9 per bundle = \$900)
- Includes all costs: Zoning; Building & Safety; Permits, etc.

But...FCC also says that all *reasonable* costs can be passed on (permit review, external review, permit issuance, inspections, etc.)

#### Portland v. United States

969 F.3d 1020 (9th Cir. 2020)

- Challenged the 2018 FCC Orders
- Mixed Result
  - upheld Moratorium Order, shot clock rules and costbased fee restrictions
  - invalidated certain aesthetic restrictions
  - local aesthetic rules must be reasonable and published in advance
- No Further Appeals Left
  - Ninth Circuit denied petition for rehearing
  - U.S. Supreme Court denied petition for certiorari

### 6409 Declaratory Ruling

35 FCC Rcd. 5977 (Jun. 10, 2020)

#### Reinterprets FCC's Section 6409 Rules

- shot clock commencement
- reduced protections for existing concealment elements on "non-stealth" facilities
- preempts prior COAs on aesthetics if in conflict with thresholds for increased height, width, cabinets, area
- excludes equipment boxes from per-modification limit on new equipment cabinets

#### Legal Challenges Pending

- League of Cal. Cities, et al. v. FCC, No. 20-71765

# Eugene v. FCC

998 F. 3d 701 (6th Cir. 2021)

- Third Challenge Resolving FCC Cable Franchising Rules
- Another Mixed Result
  - upheld most in-kind franchise obligations counting against
     5% gross revenues franchise fee
  - all costs imposed by the franchisor count against except customer service standards and build-out requirements
  - marginal cost in providing non-cash exactions not FMV
  - overturned "mixed-use" rule, but invalidated Eugene's telecom license fee

#### What Next?

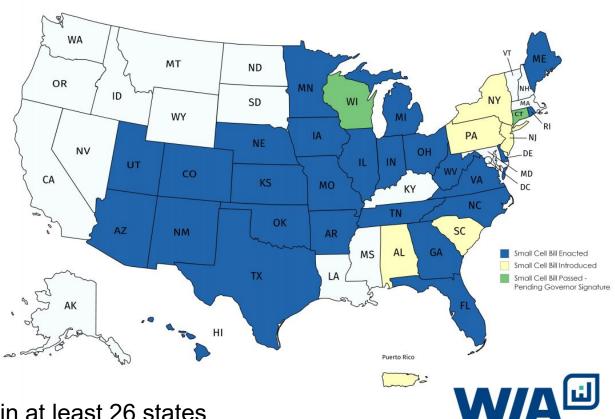
- expect cable franchisees to seek offsets for in-kind consideration and shift revenues to non-cable services
- Sixth Circuit denied petition for rehearing



Section 2

# **LEGAL STUFF (STATE LEVEL)**

# State Small Cell Bills



- adopted in at least 26 states
- most somewhat similar to FCC rules
- almost all worse than FCC rules in one respect or another
- check with legal counsel; reconcile any differences
- What about Oregon?



### House Bill 2654 - Passed

 "HB 2654 allows an electric utility to expand the use of its electric easement for the provision of broadband services. This bill was brought forth by the rural cooperatives and has been passed in many states around the U.S. As introduced, HB 2654 was broader than original intent and could have unintended consequences on city rights-of-way."

League of Oregon Cities

Does <u>not</u> apply to easement that are granted by municipalities to electric utilities.



Section 3

### **SMALL CELLS IN THE WILD**

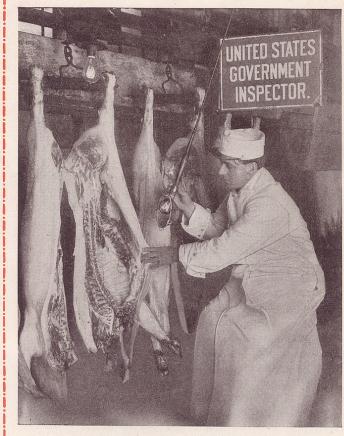










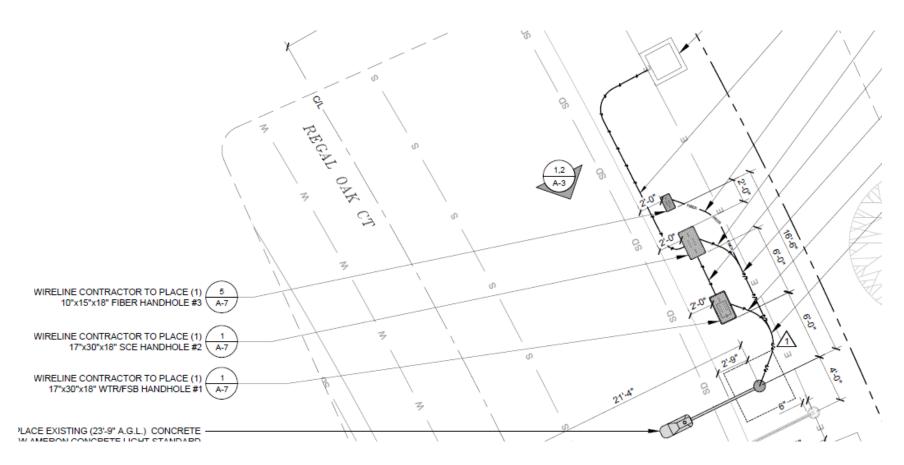


Section 4

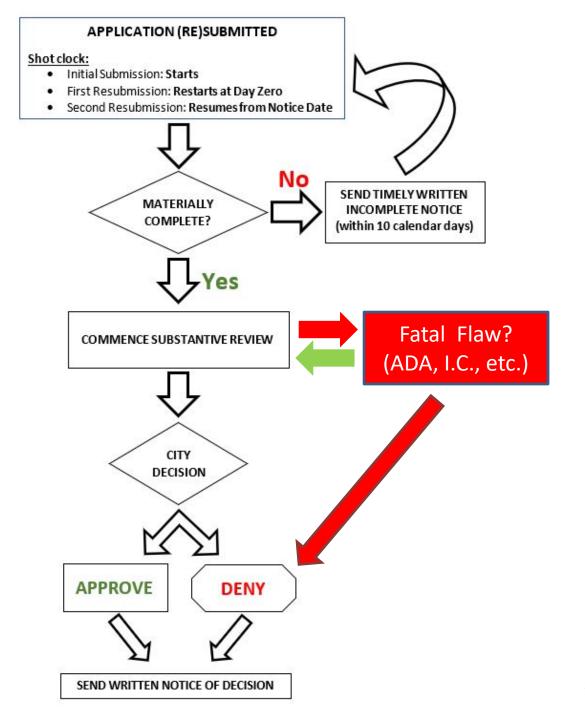
U. S. Government Inspector Making Inspection

# MAINTAINING YOUR SANITY PROCESSING SMALL CELL APPLICATIONS

## Fiber and Power: 1 app or 2 apps?

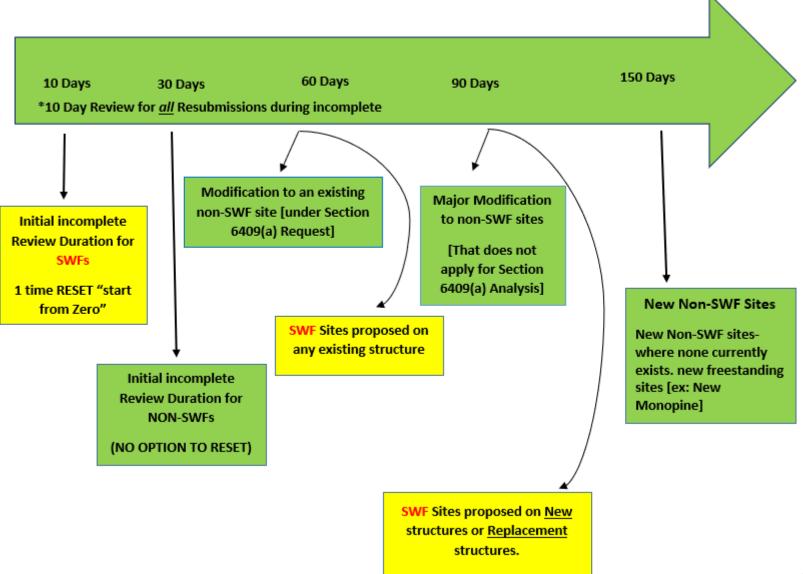


Aim for as much 'flush' as you can; minimize street furniture; Avoid piecemealing projects

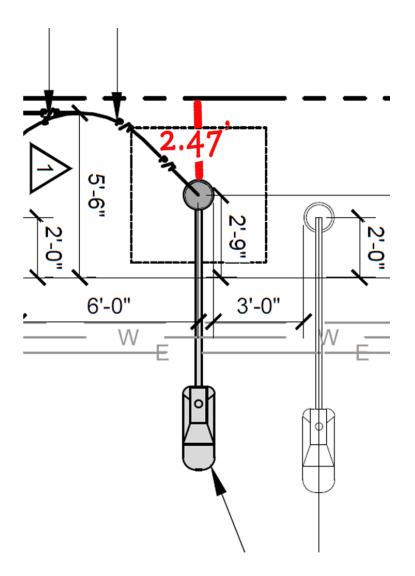


#### The New Shot Clock Rules

(Includes <u>all</u> processing, appeals, <u>and</u> permit issuance)



### 'It's never-gonna-happen'



Accept the application and fees; process by looking for ADA violations.

If found then DENY the application without prejudice within the shot clock period.



### 'It's never-gonna-happen'

Accept the application and fees; process by looking for inverse condemnations. If found then DENY the application without prejudice within the shot clock period.

# **Surviving Shot Clocks**

- Your APPLICATIONS are critical (require they provide last approved permits to catch unpermitted modifications)
- Incompleteness Review under the FCC's One-Bite Rule
- The shot clock starts sooner than you think!
- Application appointments (Mondays, Tuesdays)
- Ministerial approvals where reasonable
- Automatic withdrawal rule to kill zombies (60 days?)
- No 'complete letter' or 'incomplete letter' at the counter
- Don't mindlessly sign tolling agreements
- Standard conditions of approval attach to every site and by operation of law
- Obligations to provide prior permits: 'Missing' permits are no permits

Section 5

# CODE UPDATE DO'S AND DON'TS



# Choose the Right Approach for the Subject

#### Flexible Policies vs Static Codes

- administrative policies allow more nimble response to changes in law, technology and local preferences
- code provision to delegate authority may be needed

#### Differentiate b/w Regulatory Classifications

- similar facilities sometimes fall into different classifications,
   with different rules
- best practice: separate sections/chapters for each classification (small cells, 6409 mods, macro cells)
- update street cut/dig once policies?

#### Consider Interdepartmental Coordination

- larger role for public works depts. as deployment shifts from private property to ROW
- who takes lead role on ROW applications?

# **Aesthetic Regulations**

#### DO

- exercise your discretionary authority
- consider the difference between "stealth" and "concealed" for Section 6409 purposes; require "stealth" in aesthetically sensitive areas
- use both subjective and objective standards
- incentivize preferred locations and designs with more streamlined review processes
- delegate some authority to staff to develop more detailed design standards
- consult with stakeholders and planning staff!

#### DON'T

- require or prohibit specific technologies
- omit standards for disfavored designs/locations

# Findings and COAs

#### DO

- put the burden of proof on the applicant
- include subjective findings traditionally found in zoning ordinances
- include a finding that the proposed facility meets your design and location standards
- include a finding that the facility demonstrates planned compliance with RF exposure rules
- develop detailed, standardized conditions for all approved (and deemed-approved) facilities
- authorize additional/modified conditions

# Focus on Applications and Submittal Process

#### DO

- prepare detailed, written application forms
- use checklists that double as incomplete notices
- delegate control over application content and intake procedures to department staff
- expressly list the application fee as a completeness item
- shift admin burdens to the applicant as much as possible (e.g. require notice rosters and pre-addressed/stuffed notices)
- require applicants to "self select" as much as possible (regulatory classification, shot clock, etc.)

#### DON'T

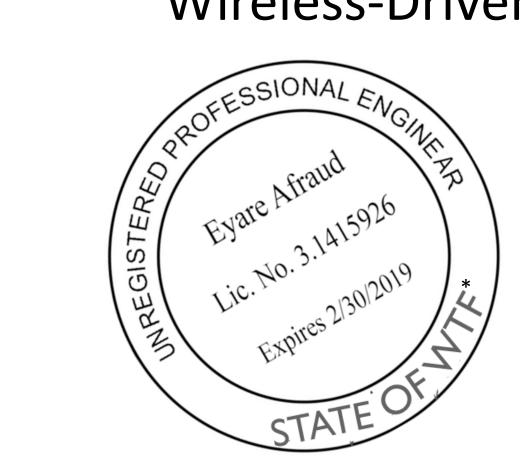
- wait for the code amendment process; application requirements need not be codified
- leave any ambiguities about the first procedural step in the submittal process
- reject incomplete applications at the counter; take them in and send a timely incomplete notice

Before initial sign offs, and before any permit amendments or modifications, staff needs to go look at the site. Bring along a measuring tape <u>and</u> a camera.





# A Very Disturbing New SWF Wireless-Driven Problem...



We are <u>already</u> seeing multiple instances of the unauthorized use of P.E. stamps and signatures...

...and the apparent selling of stamps and signatures on safety plans and forms.

Includes...so far...site plans and RF safety reports



# Questions? Ask now or call or email us later.

We would love to hear from you!

#### Resources

Telecom Law Firm, P.C. web site: http://TelecomLawFirm.com/

Jonathan Kramer's Wireless Blog: http://Wireless.Blog.Law

~3,000 Cell Site Example Photographs: http://www.CellTowerPhotos.com



STEAL THESE SLIDES: http://TelecomLawFirm.com/apwaor2021

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