

Ninth Circuit Decision on FCC “5G” Orders Is a Mixed Bag for Local Agencies

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The Ninth Circuit has vacated limits the Federal Communications Commission (“FCC”) imposed on local aesthetic control of small wireless facilities, but otherwise broadly upheld a trio of FCC orders intended to accelerate deployment of 5G broadband wireless technology.

At issue in *City of Portland v. Federal Communications Commission* was whether three orders the FCC issued in 2018 – the “Small Cell Order,” the “Moratoria Order,” and the “One Touch Make-Ready Order” – were consistent with the Telecommunications Act of 1996 (“Act”). The first two orders limited the authority of local governments to regulate wireless telecommunication facilities and providers. The third limited the ability of owners or operators of utility poles to deny 5G and broadband service providers access to utility poles.

An array of local agencies, led by the City of Portland, Oregon, and utility companies challenged the FCC orders as being outside the scope of the congressional direction set forth in the Act. Wireless providers argued to the contrary that the FCC should have gone further in restricting state and local authority.

The Ninth Circuit relied on the deference typically given to regulatory agencies to rule the FCC orders were generally in accord with the Act and were not otherwise arbitrary, capricious, or contrary to law. With respect to the Small Cell Order, however, the Court held that requiring small cell facilities to be treated in the same manner as other types of communications services was contrary to the Act, which permits regulations to discriminate between different types of providers so long as they do not unreasonably discriminate between providers of functionally equivalent services. The Court also vacated the requirement of the Small Cell Order that all aesthetic criteria for small wireless facilities be “objective” because the FCC failed to provide a reasoned explanation for the rule.

If you have any questions, or would like more information about how this decision may affect your agency, please contact **Steven Flower** or **Isra Shah**.