



Legislative UPDATE

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FCC Small Cell Update: Litigation Begins

Last week, TML joined a nationwide coalition in a [lawsuit](#) to overturn the federal communications commission's preemptive "small cell" order. The order, discussed in a [previous article](#), would federalize municipal right-of-way authority and compensation. Coalition members include, among dozens of others, the National League of Cities, the U.S. Conference of Mayors, the National Association of Telecommunications Officers and Advisors (NATOA), the Texas Coalition of Cities for Utilities Issues, and the Cities of Dallas and Plano.

In support of the lawsuit, the coalition also filed a "[motion for stay](#)" at the FCC. The motion will provide evidence that the coalition has first sought relief at the FCC by seeking to delay the implementation of the order until substantive legal issues can be litigated. The key arguments against the order are as follows:

- **Tenth Amendment:** The order violates the Tenth Amendment to the U.S. Constitution., which reserves to the states powers not given to the federal government. The argument is particularly poignant in this case because the FCC isn't merely preempting state laws. Rather, the federal government is actually appropriating state property (municipal rights-of-way and facilities) for private use by cell phone providers. According to one court, the order is nothing less than "[a] forced transfer of property that is in principle no different from a 'congressionally compelled subsidy from state governments'" to cell phone companies.
- **Fifth Amendment:** The order caps rental fees at \$270 per small cell node annually. That artificially low cap means that the order actually works an uncompensated taking on the city's residents in violation of the Fifth Amendment to the U.S. Constitution. (Texas

law also caps annual rental fees, and the League is also participating in a [state court lawsuit](#) to overturn that cap.)

- **Proprietary Rights:** The federal government can't deprive a state (and its cities) from its authority as a proprietor (i.e., owner) of property. In other words, cities aren't acting as regulators over companies that want to place their facilities on city equipment. Instead, the city is an *owner* of that equipment. As such, the FCC has no power to tell a city how to use it.
- **Other Arguments:** The order: (1) violates a city's due process rights by imposing unreasonable "shot clocks" within which installations must be approved; (2) goes beyond the authority granted to the FCC by the federal Telecommunications Act; and (3) ignores evidence in the record submitted by local governments, including evidence related to fair market value of public rights-of-way (TML has submitted comments in this and other FCC proceedings explaining that the Texas Constitution requires fair market value rent for municipal rights-of-way).

Two other local government lawsuits have also been filed. In addition, Sprint and AT&T have filed lawsuits claiming that the order doesn't go far enough. Industry is generally arguing that their applications should be automatically granted if a city fails to comply with the mandates in the order. Because the appeals have been filed in various federal courts, federal rules provide that they will soon be consolidated in one of the courts.

The order has been officially [published in federal register](#), which means that it will be effective on January 14, 2019. In spite of the motion for stay and the lawsuit, city officials should consider reviewing their procedures in light of the upcoming effective date. NATOA has made available a [free webinar](#) that reviews the order's mandates.

Cities that expect small cell installations should consider participating in the coalition. To do so, contact Gerard "Gerry" Lederer, partner at *Best Best and Krieger LLP* in Washington, D.C. by email at Gerard.lederer@bbklaw.com.

FCC Onslaught Continues: Cable Franchise Fees in Crosshairs

If your city operates a public, educational, and/or governmental (PEG) channel, your cable franchise fees are in the Federal Communications Commission's crosshairs. The FCC has released a [Second Further Notice of Proposed Rulemaking](#) proposing to allow cable companies to deduct the fair market value of a wide range of franchise obligations, including PEG channel capacity and other PEG-related franchise requirements, from their existing franchise fee payments. If the FCC's proposed new rules are adopted, cities that operate PEG channels will see reductions in franchise fee payments from cable operators.

The League is participating in a coalition of cities that will be filing comments on the proposal. Individual cities with PEG channels should consider filing their own comments (due November 14, 2018, with reply comments being due December 14, 2018) with the FCC and/or participating

in the coalition. The National Association of Telecommunications Officers and Advisors has prepared a [summary](#) of the proposal and an [example comment template](#). To file comments, go to the FCC's [electronic filing page](#). (Use Proceeding No. 05-311.)

To participate in the coalition, contact Gerard “Gerry” Lederer, partner at *Best Best and Krieger LLP* in Washington, D.C. by email at Gerard.lederer@bbklaw.com.

U.S. Supreme Court: **Federal Age Discrimination Law Applies to All Cities**

In [*Mount Lemmon Fire District v. Guido et al.*](#), the U.S. Supreme Court held this week that the federal Age Discrimination in Employment Act (ADEA) applies to all state and local governments, regardless of size. This case arose from a claim that the Mount Lemmon Fire District, a political subdivision, violated the ADEA when it laid off its two oldest firefighters. The District argued that, because it had less than 20 employees, it was too small to qualify as an employer subject to the ADEA.

The ADEA defines the term “employer” as a “person engaged in an industry affecting commerce who has 20 or more employees.” However, the definition further provides that “[t]he term *also means* (1) any agent of such person, and (2) a State or political subdivision of a State.” The Court clarified that the term “also means” adds a new category to the definition of employer that contains no size limitation. As a result, state and local governments (including cities) are subject to being sued under the ADEA, regardless of the number of individuals employed by such entity.

The Texas age discrimination law (Chapter 21 of the Texas Labor Code), which mirrors the provisions of the ADEA, has applied to cities for years. Thus, the Mount Lemmon opinion may not have as much of an impact in Texas as it will in other states. In every case, city officials should always consult with legal counsel prior to making employment decisions.

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