

# FCC Third Report and Order Q&A

## What is the FCC Third Report and Order?

The FCC released its Declaratory Ruling and Third Report and Order (“Order”) in September 2018. While focused on speeding the deployment of Small Wireless Facilities, the Order also makes changes that will impact all sites.

- For **all sites**, it clarifies the standard for determining what constitutes an effective prohibition under the federal Communications Act, codifies existing shot clocks and confirms that both fee and non-fee provisions can materially inhibit service.
- For **small cells**, it provides guidelines for fees (including establishing presumptively reasonable levels), creates new shot clocks, and provides specific guidance on non-fee provisions in the small cell context.

The Order can be found at: <https://docs.fcc.gov/public/attachments/FCC-18-133A1.pdf> and the new rules in the [Federal Register](#).

## When did the Order go into effect?

The Order went into effect on January 14, 2019.

## What is the Effective Prohibition Test?

The FCC clarified that violations of both Sections 332 and 253 of the Communications Act should be evaluated using the “materially inhibit or limit” standard from the [California Payphone](#) decision rather than the various other standards certain courts had been employing.

- A local siting decision or requirement has the effect of prohibiting service **if it materially inhibits or limits the ability to compete in a fair and balanced regulatory environment. The test is not limited to Small Wireless Facilities but applies to all deployments.**
  - Rejected other tests requiring “significant gap” and least intrusive/no feasible alternatives as incorrect tests. (¶40, n.94, n.97)
  - A locality may violate Section 253 or 332 by materially inhibiting or limiting a provider’s ability to “engage in any of a variety of activities related to its provision of a covered service... not only when filling a coverage gap.” (¶37). **It applies to coverage sites, capacity sites, densification activities, or the provision of new services or improvement of existing services.**
- **What is a material inhibition?**
  - To be a material inhibition, a requirement need not be “insurmountable.” (¶35)
  - It is any limitation or restriction that limits a carrier’s ability to deploy the facilities, technologies or services that the carrier deems appropriate based on its performance characteristics and technical performance standards. (¶37, n.87)
    - “Local jurisdictions do not have the authority to require that providers offer certain type or levels of service, *or to dictate the design of a provider’s network.*” (¶36 n.84)
  - A city cannot deny a site based solely on allegations there may be alternative locations, particularly if the proposed alternative does not provide the same performance.

## Can fees be considered an **effective prohibition**?

**Yes.** The FCC reaffirmed that fees can effectively prohibit service.

- Not only that, but the FCC explained that the prohibitive impact of fees can be based on their cumulative impact based on what would happen if replicated across the region, state, or country and not just limited to the impact in a specific municipality. (¶¶43, 60, 62)

## Can aesthetic requirements be considered an **effective prohibition**?

**Yes.** Aesthetic regulations that are unreasonable, not objective, or not imposed on all other infrastructure deployments can be an effective prohibition. (¶¶85-88, 90, 91)

## What is considered a **Small Wireless Facility** for purposes of the Order?

- **Antenna size limit:** Each antenna associated with the deployment – excluding the associated equipment – is no more than 3 cubic feet in volume (no cumulative limits on number of antennas)
- **Associated wireless equipment limit:** All other wireless equipment associated with the structure – including equipment associated with the antenna and any pre-existing equipment from the provider on the structure – is no more than 28 cubic feet in volume
- **Height limit:** The facilities are mounted on new or existing structures 50 feet or less in height (including their antennas) or no more than 10 percent taller than other adjacent structures (whichever is greater).

## How does the Order **impact fees that can be charged for small cells specifically**?

- Fees must represent a “reasonable approximation” of the local government’s objectively reasonable costs “specifically related to and caused by the deployment.” (¶ 50, n.131.)
  - Gross revenue fees are per se impermissible because they are not cost-based. (¶ 70)
  - Cities may use third party contractors, but any fees passed through/tasks performed must be reasonable. (¶ 70)
    - Excessive and arbitrary consulting fees are not recoverable as fair and reasonable compensation (¶76)
- Must be non-discriminatory amongst all telecom providers—and lower fees for non-telecom ROW users may be evidence that costs are lower. (¶¶ 47, 86-87)
- To assist with implementation, the Order identified presumptively reasonable fee levels (i.e., levels at or below which no showing of costs by a municipality would be required). (¶79)
  - **One-time Fees:**
    - \$500 for a single up-front application that includes up to 5 Small Wireless Facilities, with an additional \$100 for each Small Wireless Facility beyond 5.
    - \$1,000 for non-recurring fees for a new pole (i.e., not a collocation) intended to support one or more Small Wireless Facilities.
  - **Recurring:**
    - \$270 per Small Wireless Facility per year for all recurring fees, including ROW access fee.
    - \$270 is fee for attachment to municipally-owned structures in the ROW.

## What about **existing small cell agreements with substantially higher fees**?

- Existing agreements can be revisited subject to the standards articulated by the FCC. (¶66)
  - While the Order does not exempt existing agreements, it does not automatically preempt them either. Such agreements will have to be evaluated based “upon all the facts and circumstances of that specific case.” (¶66)

## What **other types of regulations** were addressed in the small cell context?

**Aesthetics, undergrounding, and minimum spacing** regulations are only permissible if they are: (§§85-88, 90, 91)

- **Reasonable** (§85)
  - If a requirement is technologically infeasible then it is not reasonable (§87)
- **No more burdensome than those applied to other types of infrastructure deployments** (§86)
  - This is all infrastructure, not just other wireless
- **Objective** (§88)
  - Standards must be clearly defined and ascertainable i.e., Applicants should not have to guess whether their application will comply
- **Published in advance.** (§88)

## What if **current aesthetic or spacing requirements** are already in place?

- FCC gave jurisdictions until **April 15, 2019** to update or adopt compliant standards
- Review existing standards to ensure that they do not violate the Act as clarified by the Order.
- Although there is time to create compliant standards, a local government might risk violating Section 253 under the [Moratoria Declaratory Ruling](#) if they refuse to act on an application until new standards are adopted.
- Spacing requirements that prevent new equipment on preexisting facilities would not be lawful. (§91)

## What is a **collocation**?

The FCC clarified that “Collocation” means any attachment to any existing structure, regardless of whether or not such structure has a permit to hold wireless equipment. (§140)

## What changes were made to the **shot clock**?

The Order made changes that applied to all shot clocks and established new ones for small cells.

- All shot clocks
  - **What types of permits are included in the shot clock timeframe?** A jurisdiction must provide **all necessary permits** and reviews within the shot clock obligations including franchises agreements, building permits, public notices, hearings, electric permits, road closure permits, aesthetic approvals, and third-party reviews. (§132)
  - “Collocations” are not limited to existing wireless facilities (see above) for purposes of timeframes. (§140)
  - Clock starts when **application is submitted** not when deemed complete.
    - For non-Small Wireless Facilities, locality may pause within 30 days if it gives written notice that application incomplete; subsequent pauses may only be within 10 days of receipt of supplemental information and may only be based on information identified in original notice. (§141)
    - Mandatory preapplications meetings cannot be used to circumvent the shot clock. (§145)
- Eligible Facilities under Section 6409 of the Spectrum Act (NO CHANGE)
- Small Wireless Facility Shot Clocks
  - The order establishes a **60-day** shot clock for Small Wireless Facilities **collocated to any existing structure** and **90 days for new poles** for Small Wireless Facilities (note this is not limited to the ROW). (§105)
  - The jurisdiction has **10 days** to determine whether an application is complete.

- If the application is found to be incomplete, the jurisdiction must specify the source of the submission requirement in the published regulations that must be completed.
- Shot clock resets once missing information submitted (different from macro clocks). (¶143)
- **What about batched applications?**
  - Batched applications are covered by the same **60/90-day** shot clock, but the **90-day** clock will be imposed on batched applications that contain both collocations and new pole applications. (¶114)
- **What happens if the shot clock is not met?**
  - The remedy for a jurisdiction's failure to act within a shot clock is a "presumptive prohibition" designed to give the applicant a "straightforward case for obtaining expedited relief in court" (¶ 118-121)
  - Remember that state law may impose separate limitations on processing timeframes, which could be tighter and subject to different remedies (e.g., deemed grant). Those remain in effect.

### How does the Order affect **government-owned property**?

- In contrast to Section 6409, the FCC affirmed that Section 253 does not differentiate between "proprietary" and "regulatory" interests and the Order clarified this with respect to the public ROW (¶94, n. 265)
- As a result, all the Order's provisions apply to public ROW and attachment to government-owned property within the ROW, such as "new, existing and replacement light poles, traffic lights, utility poles and similar property suitable for hosting Small Wireless Facilities" (¶92)

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