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Legal Opinion 2020-020

TO: Mayor John Engen, City Council, Dale Bickell, Jeremy Keene, Aaron Bowman, Ginny Merriam, Laval Means, Ben Brewer, Kevin Slovarp, Troy Monroe, Ida Sajor, Marty Rehbein, Kirsten Hands, Eran Pehan, Marcy McCrea, Brian Hensel, Rick Larson, Chad Pancake.

CC: Department Attorney

FROM: Jim Nugent, City Attorney

DATE December 30, 2020

RE: Recent United States Ninth Circuit Court of Appeals decision pertaining to 5G wireless technology

FACTS:

During 2019 there were multiple communications between Verizon Wireless representatives from out of state and city staffs pertaining to locating 5G technology facilities in the City of Missoula, including discussion of proposed city ordinance language, if necessary; if current city Missoula Municipal Code provisions do not adequately address locations for 5G facilities. However, the COVID-19 pandemic apparently has temporarily delayed Verizon's interest. It is important that everyone be alerted to the potential that 5G facilities are likely coming to Missoula; because the Federal Communications Commission (FCC) has established "shot clocks", time periods within which applications for permits must be processed. In addition, since those Verizon discussions with city staffs occurred, the United States Court of Appeals for the Ninth Circuit has issued an important Ninth Circuit decision in *City of Portland v. United States*, 969 F 3d 1020(2020), addressing 5G technology and 5G facilities that applies to the City of Missoula; since Montana is located in the United States Court of appeals Ninth Circuit.

This legal opinion is intended to identify for City of Missoula officials some of the important conclusions, dicta or holdings by the United States Ninth Circuit Court of Appeals recent decision in the appellate court case entitled *City of Portland v. United States*, 969 F 3d 1020 (2020). There actually were dozens of municipalities as well as some public utilities with utility poles located in the public rights-of-way all located within the boundaries of the United States Ninth Circuit that were active named plaintiff petitioners in the complete title in the court case entitled *City of Portland v. United States*.

The plaintiff petitioners were challenging aspects of the Federal Communications Commission's (FCC's) statutory authority for limiting local regulation of the deployment of 5G wireless technology facilities that are contained in federal law in United States Code, U. S. C. S. sections 253(a) and 332(c)(7) of the United States Telecommunications Act. These provisions of the United States Telecommunications Act authorize the FCC to preempt any state or local requirements that either prohibit or have the effect of prohibiting any entity from providing telecommunications services. City of Portland, *supra*, Ninth Circuit headnotes. City of Portland, *supra*, pages 4-5.

The Ninth Circuit holdings in City of Portland included some holdings for the plaintiff/petitioners as well as some holdings for the Federal Communications Commission (FCC).

The Ninth Circuit holdings in City of Portland that favored plaintiff petitioners were (1) "to the extent that the FCC's Small Cell Order required small cell facilities to be treated in the same manner as other types of communications services, the regulation was contrary to 47 U.S. C. section 332(c)(7)(B)(i)(1) which allowed different regulatory treatment among types of providers, so long as such treatment did not unreasonably discriminate among providers of functionally equivalent services."; and (2) the FCC's requirement that all aesthetic criteria must be 'objective' lacked a reasoned explanation." See Ninth Circuit holdings overview for City of Portland v. United States, *supra*, pages 4 and 36.

The Ninth Circuit holdings in City of Portland that were against the local governments and in favor of the Federal Communications Commission (FCC); held that: (1) Reduction of the shot clock limitations for local authorities to act on applications to deploy wireless facilities was reasonable; and (2) 47 U. S.C.S., section 332(c)(7)(B)(i)(1) could reasonably be interpreted to authorize the application of shot clocks to building and construction permits, as well as zoning permits. See Ninth Circuit holdings overview for City of Portland v. United States., *supra*, pages 4 and 24.

This litigation arose out of what is described as the "wireless revolution" that has occurred since the original adoption in 1996 of the United States Telecommunications Act. Pursuant to this "wireless revolution", cellular technology has prevailed over nearly everything in the telecommunications services. "The newest generation of wireless broadband technology is known as 5G and requires the installation of thousands of 'small cell' wireless facilities" 5G technology necessitates a proliferation of 5G transmission facilities. Ninth Circuit "INTRODUCTION in City of Portland v. United States, *supra* page 20..

"What we know as 5G technology is so named because it is the fifth generation of cellular wireless technology. It is seen as transformational because it provides increased bandwidth, allows more devices to be connected at the same time, and is so fast that connected devices receive near instantaneous responses from servers." Although 5G transmits data at exceptionally fast speeds, it does so over relatively short distances. For this reason, wireless providers must use smaller power-base stations in more locations, as opposed to the fewer, more powerful base sensors used for 4G data transmission. These smaller base stations, known as 'small cells' are required in such numbers that 5G technology is currently being deployed on a city-by-city basis"

see Ninth Circuit City of Portland v. United States “II STATUTORY AND INTERPRETATIVE FRAMEWORK AND BACKGROUND., supra 21.

LEGAL DISCUSSION:

IDENTIFYING SOME IMPORTANT CONCLUSIONS, DICTA OR HOLDINGS IN CITY OF PORTLAND V. UNITED STATES, NINTH CIRCUIT 969 f 3D 1020(2020)..

- (1) Section 253 of the Act, entitled “REMOVAL OF BARRIERS TO ENTRY”, sets forth Congressional intent to encourage expansion of telecommunications service. By providing that no state or local regulation “may prohibit or have the effect of prohibiting...telecommunication service.” 47 U. S. C. section 253(a); City of Portland, supra at pages 21-22.
- (2) United States Code, (U.S.C.) section 332(c)(7) preserves local zoning authority while recognizing some specific limitations on traditional authority to regulate wireless facilities. 47 U. S. C. section 332(c)(7) “imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of...facilities.” City of Portland, supra at page 22.
- (3) “The placement, construction, and modification of personal wireless service facilities by any state or local government...shall not prohibit or have the effect of prohibiting the provision of personal wireless services.” City of Portland, supra, page 22.
- (4) “The other major limitation on local authority relates to ensuring the fair treatment of different services. See 47 U.S.C. section 332(c)(7)(B)(i)(1). Under that limitation on local authority local governments ‘shall not unreasonably discriminate among providers of functionally equivalent services.’ Section 332(c)(7) further requires that state or local governments act on requests for placement of personal wireless service facilities ‘within a reasonable period of time.’ 47 U. S. C. section 332(c)(7)(B)(ii).” City of Portland, supra, at page 22.
- (5) The 2018 Small Cell Order broadens the application of the shot clock time periods to include all telecommunication permit applications, not just zoning permit applications and also shortens the time period for shot clocks to process the applications for processing permit applications City of Portland, supra at pages 23- 24.
- (6) For small wireless facilities the relevant shot clocks are sixty days for collocation, which utilizes existing infrastructure and ninety days for other applications, which require new construction, unless the parties agree to toll the shot clocks. City of Portland, supra, pages 24 and 29. Also, see ExteNet Sys. V. City of Cambridge, Massachusetts, 2020 U. S. District Court LEXIS 153 (2020) (District Mass.).
- (7) Local governments can still manage public rights-of-way and require reasonable compensation for their use; 47 U. S. C. section 253(c). The FCC limited the fees that a state or local government can assess, above a safe harbor amount, to the government’s approximate costs. Specifically, the fee is permissible only if it is a ‘reasonable approximation of the state or local government’s costs’ of processing applications and managing the rights-of-way. The FCC established safe harbor for fees is fees are presumptively lawful if, for each wireless facility application, fees are

less than \$500, and recurring fees are less than \$270 per year. City of Portland, supra, pages 23 and 24.

- (8) The FCC found that municipal actions that halt 5G deployment violate section 253(a) of the Telecommunications Act when they effectively prohibit the deployment of 5G technology. City of Portland, supra, page 24.
- (9) “We conclude that the FCC’s fee limitation does not violate section 253(c) of the Act, which ensures that cities receive ‘fair’ and ‘reasonable’ compensation for the use of their rights-of-way. The FCC explained that the calculation of actual direct costs is a well-accepted method of determining reasonable compensation. The statute requires that compensation be ‘fair and reasonable’ this does not mean that state and local governments should be permitted to make a profit by charging fees above costs.” City of Portland, supra at page 26.
- (10) “Because it (FCC) recognized that state and local governments often have legitimate aesthetic reasons for accepting some deployments and rejecting others, Congress preempted only regulations that unreasonably discriminate among providers, 47 U. S. C. section 332(c)(7)(B)(i)(1). Because there were differences among providers, those who crafted section 332(c) sought to preserve state and local governments’ flexibility to treat facilities that create different aesthetic...concerns differently...even if those facilities provide functionally equivalent services.” City of Portland, supra at page 26.
- (11) “Congress prohibited unreasonable discrimination, but permitted state and local governments to differentiate in the regulation of functionally equivalent providers with very different physical infrastructure...We therefore conclude that the requirement in Paragraph 86 of the Small Cell Order, that limitations on small cells be ‘no more burdensome’ than those applied to other technologies must be vacated.” City of Portland, supra, at page 27.
- (12) “We conclude that the FCC’s requirement that all aesthetic regulations be ‘objective’ is arbitrary and capricious...The FCC requirement that local aesthetic regulations be ‘objective’ is neither adequately defined, nor its purpose adequately explained. On its face, it preempts too broadly. We therefore hold those provisions of paragraph 86 of the small Cell Order must be vacated.” City of Portland, supra, at page 28.
- (13) “The Telecommunications Act itself supports the expansion of shot clocks to all permitting decisions. Section 332(c)(7)(B)(ii) requires a decision to be made within a reasonable period of time and applies both to applications ‘to place’ wireless facilities as well as requests to construct or modify such facilities. 47 U. S. C. section 332(c)(7)(B)(ii),...The FCC acted well within its authority, and in accordance with the purpose of the Act, when it broadened the application of the shot clocks to encompass all permits in order to prevent unreasonable delays.” City of Portland, supra, page 29.
- (14) “The rights-of-way, and manner in which the municipal exercise of control over them, serve a public purpose and they are regulated in the public interest.” City of Portland, supra page 30.
- (15) “In the Telecommunications Act, Congress preempted, all municipal regulation of radiofrequency emissions to the extent such facilities comply with federal emission standards. 47 U.S. C. section 332(b)(7)(B)(iv). City of Portland, supra at page 31.

(16)After petitioner’s petition was filed, “the FCC adopted a new order examining radiofrequency exposure in the 5G environment, and concluded that it did not warrant changes to its 1996 standards. Challenges to the FCC’s failure to perform updated frequency analysis, as contemplated by the 2013 docket are therefore moot. City of Portland, supra at page 31.

(17)“The (FCC Moratoria) Order provides a new definition of Section 253’s exemption for local regulations that protect ‘the public safety and welfare.’ The Order permits what it describes as ‘emergency bans’ on the construction of 5G facilities to protect the public safety and welfare, but only where those laws are (1) ‘competitively neutral’, (2) necessary to address the emergency, disaster or related public needs, and (3) target only those geographic areas affected by the disaster or emergency.” City of Portland, supra at page 32

(18)Pursuant to the FCC’s ONE TOUCH MAKE READY ORDER; “the FCC intended to make it faster and cheaper for broadband providers to attach to already-existing utility poles...Previously, only the pole owners could perform the preparatory work necessary for attachment. The main purpose of the Order is to create a new process, called one-touch make-ready that allow new attachers themselves to do all the preparations.” City of Portland, supra, at page 34.

(19)“Overlashing is the process by which attachers affix additional cables or other wires to ones already attached to the pole. The (FCC) overlashing rule prohibits a utility from requiring overlashers to conduct pre-overlashing engineering studies or to pay the utility’s cost of conducting such studies...We conclude that the overlashing rule does not impede a utility’s exercise of its statutory authority to deny access to poles.. The rule authorizes utilities to require that overlashers give fifteen days’ notice to utilities prior to overlashing so that safety concerns can be addressed...The overlashing rule is thus a reasonable attempt by the FCC to prevent unnecessary costs for attachers.” City of Portland, supra, at page 34.

The above quoted conclusions, dicta and holdings from the recent Ninth Circuit decision in City of Portland v. United States, 969 F 3d 1020(2020) provide some legal points for legal guidance to city officials with respect to the likely future installation of 5G wireless facilities within the city, primarily within public rights-of-way located within the city limits.

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/s/ Jim Nugent

Jim Nugent, City Attorney

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