

August 4, 2021

To: Mayor and Members of City Council

From: Paula Boggs Muething, City Manager

**202102462**

**Subject: 5G NETWORKS SAFETY; CITY ABILITY TO REGULATE**

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### **REFERENCE DOCUMENT #202101145**

On March 24, 2021, the following item was referred for a report:

MOTION, submitted by Councilmember Goodin, Vice Mayor Smitherman, and Councilmembers Sundermann, Kearney, and Keating, New 5G mobile communications technology has necessitated the deployment of thousands of small cell system towers throughout the United States. Such towers are now being deployed in Cincinnati neighborhoods. Accordingly, WE MOVE that the Administrative advise Council regarding all potential methods of regulating 5G small cell system towers under the City's Municipal Code, Administrative Code and Zoning Code.

#### **Summary**

State and federal law grant telecom providers broad rights to locate their small cell facilities in the public right-of-way, including on City-owned poles. The rules establish "shot clocks" that require cities to approve small cell facilities within statutory time limits that are, in some cases, as short as 30 days. State and federal law also limit the fees and permit conditions that may be placed on small cell facilities. And, lastly, cities have no authority whatsoever to regulate small cells on the basis of health or environmental concerns. In its limited authority, the City has the ability to issue design guidelines for small cell facilities and to regulate placement based on right-of-way management principles.

#### **Background & Analysis**

5G is the fifth generation of digital cellular network technology, which utilizes a higher-frequency band of the wireless spectrum. Among other things, this technology allows for faster internet streaming and enhanced functionality of cell phones. However, 5G wave signals do not travel as far as signals generated by earlier technology, and thus the development of 5G networks requires many more (although smaller) antennae spaced closer together than previous networks. Many of these antennae are mounted on poles in the right-

of-way, typically in the same general locations that other utility poles are found. These pole-mounted facilities are commonly referred to as “small cells.”

As wireless cellular telecommunication providers have begun to build out their 5G networks within the city, questions have arisen concerning the extent to which the City may prohibit or regulate the small cell facilities that comprise those networks. This report, which the Administration has developed in consultation with the Law Department, addresses the City’s authority to specifically regulate small cell facilities’ radiofrequency (“RF”) emissions and the City’s general regulatory authority over those facilities. The limits of City authority are detailed below. Generally, however, federal and state law expressly prohibit the City from regulating RF emissions, and the City is preempted to a significant degree by state and federal law in how it may otherwise regulate small cell facilities.

### **Preemption of Local Authority**

The City’s ability to regulate small cell facilities is limited by state and federal regulations. State and federal laws were enacted to streamline the rollout of 5G networks and for the express purpose of restricting the ability of local communities to prevent installation of 5G infrastructure. These regulations are primarily found in Ohio Revised Code Chapter 4939, 47 U.S.C. §§ 253(a) and 332(c)(7)), and related FCC rules and regulations. Together, these rules give telecom providers broad rights to locate their facilities in the public right-of-way, including on City-owned poles. The rules establish “shot clocks” that require cities to approve small cell facilities within statutory time limits. And, finally, the rules limit the fees and conditions that may be placed on small cell facilities. Cities have a general ability to issue design guidelines for small cell facilities and to regulate placement based on right of way management principles.

Federal law and 47 U.S.C. 332(c)(7) in particular sharply limit the City’s ability to discriminate among wireless service providers or to adopt regulations that would have the effect of prohibiting wireless services. In practice, these limitations mean that the City cannot prohibit the construction of small cell facilities in the right-of-way. Federal law further requires the City to respond to requests to construct small cells in a timely manner and denials must be in writing with supporting evidence. Finally, federal regulations specifically prohibit the City from regulating on the basis of the environmental effects of RF transmissions that are authorized by FCC regulations.

The FCC’s small cell mandates were expanded in the fall of 2018 to further limit local governments’ ability to regulate 5G infrastructure. A new order reaffirmed the FCC’s position that 5G RF emissions remain subject to the FCC’s exclusive jurisdiction.<sup>1</sup> A number of cities sued the FCC challenging this action and its earlier small cell orders, but the Ninth Circuit upheld the FCC’s orders and left undisturbed the FCC’s preemption of local authority.<sup>2</sup>

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<sup>1</sup> FCC 18-133, Declaratory Ruling and Third Report and Order, September 226, 2018 (effective January 15, 2019), Article III, Paragraph 33, p. 17, and fn. 72.

<sup>2</sup> *City of Portland v. United States*, 969 F.3d 1020, (9th Cir.2020).

In 2018, the Ohio General Assembly also updated Ohio Revised Code Chapter 4939, “Use of Municipal Right of Way,” to place further restrictions on local governments’ ability to prohibit or regulate the placement of small cell facilities in the right of way. HB 478 not only confirmed that local governments must comply with federal requirements, it placed more stringent limits on their ability to regulate wireless providers. To this end, the bill established shorter timing requirements (the “shot clock”) for the approval of small cell facilities and further narrowed the scope of local governments’ ability to regulate them.

Notably, the General Assembly made these changes after the City and several other Ohio municipalities sued the State of Ohio to invalidate an earlier bill (SB 331) that imposed even greater restrictions on cities’ ability to regulate small cell facilities. Though the City and other municipalities were successful in obtaining injunctions to block those earlier restrictions, it did not prevent the state from adopting HB 478, which did not suffer from the same legal infirmities as the one that was enjoined. Still, the City Solicitor’s Office was a leader in negotiations with the telecom industry and helped to win significant concessions compared to SB 331.

### **Local Regulations**

Notwithstanding the state and federal law that limit the City’s regulation of small cell facilities, the City does retain the authority to regulate certain aspects of small cell facilities. The City may still address aesthetics and pedestrian/traffic circulation management concerns. It may also require compliance with general right-of-way management policies.

The City currently regulates small cell facilities through Cincinnati Municipal Code Chapter 719 and related small cell design guidelines.<sup>3</sup> These regulations were developed in 2016 following an intensive public review process that was assisted by expert legal counsel retained by the City and involved a number of industry stakeholders. The resulting regulations are intended to maximize the City’s regulatory authority consistent with state and federal law and also to ensure that wireless providers have fair and reasonable access to the City right-of-way. In addition to these regulations, there are certain regulations found in the City’s zoning code that regulate the installation of wireless facilities on private property.<sup>4</sup>

Finally, the Administration, in consultation with the Law Department, has developed amendments to these regulations to ensure they are consistent with current state and federal requirements without relinquishing any of the City’s regulatory authority. A proposed ordinance containing these amendments has been transmitted in connection with this report, and the Administration recommends its passage.

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<sup>3</sup> Interim Detailed Design Guidelines for Wireless Communications Facilities in the Right of Way, approved by City Council September 28, 2016, modified by DOTE July 31, 2018.

<sup>4</sup> CMC 1419-33.