

Client Advisory: The FCC Initiates Close Look at Wireless Infrastructure Deployment and Investment Issues

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At its April 20, 2017 Open Meeting, the Federal Communications Commission (“Commission” or “FCC”) initiated two proceedings to review ways in which the Commission might alleviate obstacles wireless providers face at the state, local, and Tribal levels when trying to install new or upgrade existing wireless infrastructure. FCC Chairman Ajit Pai welcomed new ideas for “updating state, local, and Tribal infrastructure review to meet the realities of the modern marketplace.” The Commission’s release, a combined [notice of proposed rulemaking \(“NPRM”\) and notice of inquiry \(“NOI”\)](#),¹ explains that wireless providers need to be able to deploy many wireless cell sites across the country in response to growing demand for wireless broadband to support high-bandwidth applications and the growth of the Internet of Things. The NPRM and NOI on wireless infrastructure deployment complement a second pair of proceedings that will be looking at wireline infrastructure, also adopted at the FCC’s Open Meeting. A blog and advisory on the wireline counterpart is forthcoming.

We review the highlights of the wireless infrastructure NPRM and NOI below. In our companion [client advisory](#), we explore in depth the proposed modifications and areas sought for comment in the NPRM and NOI.

Comments will be due 30 days after publication in the Federal Register and reply comments 60 days after publication.

I. NPRM

The FCC’s NPRM focuses on the process affecting wireless facility deployment applications that are conducted by State and local regulatory agencies, the subject of Section 332 of the Communications Act. Section 332, while recognizing state and local authority over antenna siting review, also places a limitation on this authority by requiring decisions on applications be made within “a reasonable period of time” so as to limit impediments to deployment of wireless facilities. The Commission solicits comment on the effectiveness of the Commission’s efforts to date implementing Section 332 – principally a 90 or 150-day shot clock, depending on the circumstances, which creates a presumption that a state or local government has failed to act within a reasonable period of time – and additional measures or clarifications that might further expedite Section 332 review processes. The FCC proposes

- Ways to craft and implement a “deemed granted” remedy when state and local agencies fail to

act on antenna siting applications within a reasonable time – not just a presumption that the delay is unreasonable;

- Adopting shorter review time periods for facility deployment reviews under Section 332; and
- Issuing an order or adopting other regulatory measures clarifying the status of local moratoria that have the effect of slowing down or suspending wireless application processing.

Additionally, the NPRM examines the FCC rules implementing the National Environmental Policy Act (“NEPA”) and the National Historic Preservation Act (“NHPA”) which require reviews of the impact on the environment or historic properties of proposed construction of wireless communications facilities. The NPRM also investigates the financial and time costs as well benefits of the review process under NEPA and the NHPA as implemented in the FCC’s rules, including costs and benefits related to Tribal involvement in historic preservation review. The Commission also seeks comment on costs associated with deployment of a typical small facility compared with those for tower construction projects under NEPA and/or state historic preservation office (SHPO) review; and whether SHPO review duplicates historic preservation review done at the local level.

II. NOI

In the NOI, the Commission focuses on Sections 253 and 332(c)(7) of the Act. Section 253 states that “[n]o State or local statute or regulation or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” Section 332(c)(7) preserves the authority of State and local entities to make decisions about antenna facilities in their communities but imposes certain constraints and require action in a reasonable time. The NPRM states that these two statutory provisions were intended to balance the desire to streamline regulations that could slow down the deployment of broadband facilities with the ability of localities to retain an appropriate measure of control over land use decisions.

The FCC explores the scope of each provision and how it should be interpreted in relation to the other to further the goal of facilitating wireless broadband deployment.

If you are interested in learning more about the NPRM and/or NOI, or would like to get involved in this proceeding, please contact the authors of this post or your regular Kelley Drye attorney at any time.