The FCC Aims to Remove Barriers for Expanding Wireless Infrastructure

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On September 26, 2013, the Federal Communications Commission ("FCC" or "Commission") released a Notice of Proposed Rulemaking ("*NPRM*") to address and update its rules and policies relating to wireless infrastructure builds.[1] The *NPRM* makes numerous proposals and suggests areas where the Commission seeks to remove barriers to the expansion of wireless infrastructure, including:

- streamlining environmental and historic preservation review procedures;
- revising the environmental notification exemption for registration of temporary towers;
- suggesting proposals to clarify the mandate in the Middle Class Tax Relief and Job Creation Act of 2012 ("Spectrum Act") for State and local government to approve modifications to existing wireless towers and base stations, including collocation; and
- addressing certain matters that have arisen regarding implementation of Section 332(c)(7)'s preservation of State and local authority relating to wireless siting.

The rulemaking has the potential to affect significantly the interaction between the wireless industry and State and local governments, and to enhance the wireless industry's ability to quickly deploy new technologies such as distributed antenna systems ("DAS") and small cell locations. While the *NPRM*'s proposals are many and the areas in which it seeks comment are numerous, below is a high-level description of the primary changes proposed in the *NPRM*. Industry and other interested parties are invited to comment on the *NPRM* proposals to the Commission. This advisory does not provide an exhaustive treatment of the issues on which the *NPRM* seeks comment.

Comments will be due 60 days after publication in the Federal Register and replies due 90 days after publication. In light of the federal government shutdown, the Federal Register is publishing only articles related to protecting against imminent threats to the safety of human life or protection of property. Publication of the *NPRM* will be delayed until sometime after normal government operations resume.

Proposals to Streamline Environmental Review and Historic Preservation Review

The Commission will consider changes to its rules implementing the environmental review process for wireless siting under National Environmental Policy Act of 1969 ("NEPA")[2] and the historic

preservation review procedures under Section 106 of the National Historic Preservation Act ("NHPA[3] The *NPRM* proposes, among other things, to include explicit language making it easier to deploy DAS and small cell solutions.

As to NEPA, the Commission proposes to revise Note 1 to Section 1.1306 of the FCC's Rules ("Note 1"), which currently excludes from environmental assessments antennas to be mounted on existing buildings and antenna towers in many cases. (The effects on historic properties and the effects of human exposure to RF emissions are not excluded where antennas are mounted on existing towers and buildings.) The *NPRM* proposes to revise Note 1 to have it extend to antennas mounted on "existing structures other than buildings and antenna towers," including structures on which equipment associated with emerging technologies such as where DAS facilities is sited, including utility poles and water towers. The *NPRM* proposes to change the phrase "existing building or antenna tower" to "existing building, antenna tower, or other structure." In addition, the Commission invites a variety of comments on other aspects of this question, including whether to include language clarifying that the collocation exclusion applies to installations in the interior of buildings and/or to the sides of buildings. The *NPRM* also seeks comment on whether the Commission should further tailor the NEPA review process for DAS and small cell collocations by expressly providing for exclusions for them from the need to file environmental assessments in all or a limited set of circumstances (other than for compliance with RF exposure limits, which would still apply).

With respect to the historic preservation review requirements under Section 106 of the NHPA, the *NPRM* asks whether the Commission should tailor the review procedure in the context of DAS, small cells, and other similar facilities, such as by adopting a categorical exclusion or finding that DAS and small cell deployments are not "undertakings" under Section 106 of the NHPA. The Commission also takes aim at two developing problems that the carriers are likely to increasingly face. First, there are concerns that the model Collocation Agreement[4] (which exempts from Section 106 review existing buildings or other non-tower structures that are over 45 years old) will soon no longer be as effective because a significant and growing percentage of utility poles are 45 years old or older. Second, the *NPRM* highlights a disparity within the NPA,[5] which currently provides a partial exclusion for deployments in or near utility rights-of-way (including for new poles) but excepts deployments within rights-of-way corridors that fall within the boundaries of an historic property. The Commission is poised to address these concerns with respect to the deployment of DAS and small cells and seeks comment how best to do so.

Proposals to Revise the Environmental Notification Exemption for Registration of Temporary Towers

The *NPRM* proposes to change the FCC's rules to codify the interim waiver granted in May 2013 of the environmental notification process for certain preconstruction temporary towers from its *Waiver Order,*[6] for towers that require antenna structure registrations. The *Waiver Order* exempts an antenna structure from the notification requirements if it:

- Will be in use for 60 days or less;
- Requires notice of construction to the FAA;
- Does not require marking or lighting pursuant to FAA regulations;
- Will be less than 200 feet in height; and

- Will involve minimal or no excavation.

The *NPRM* observes that temporary antenna structures rarely have generated public comment regarding potentially significant environmental effects and rarely have been determined to require further environmental processing. The Commission seeks comment whether it should limit the exemption only to certain facilities and, if so, which ones. In addition, the Commission solicits public input on a number of procedural issues related to its proposal, including whether to require post-construction environmental notice of temporary towers that qualify for the exemption. However, the Commission makes clear that temporary towers exempted from environmental notice would still be required to comply with the Commission's NEPA, as applicable, which includes a public notice period where an Environmental Assessment is required.

Proposals to Clarify the Spectrum Act

The *NPRM* also proposes to adopt rules to clarify the requirements of Section 6409(a) of the Spectrum Act.[7] That section provides that "a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station," including requests to "collocat[e] new transmission equipment." The *NPRM* systematically examines the terminology of Section 6409(a) and proposes expansive definitions. Of particular note, the *NPRM* examines what it means to "substantially change the physical dimensions" of a wireless tower or base station which is crux of much of the ambiguity around Section 6409(a). In this context, the *NPRM* cites to the Collocation Agreement's four-prong test to determine whether a collocation will affect a "substantial increase in the size of a tower" for purposes of Section 6409(a), but then notes that this could mean successive 10% increases in the size of tower which could theoretically increase a tower's size by double over time. Further, the *NPRM* notes that the four-prong test in the Collocation Agreement only applies to "towers," which would put its applicability to DAS and small cell deployments in some doubt. The *NPRM* inquires whether the FCC should codify this four-prong test.

The Commission seeks comment on other proposed definitions for terms used in Section 6409(a). These include "collocation," "transmission equipment," "collocation," and "wireless."

The *NPRM* also examines Section 6409(a)'s mandate on State or local governments. The *NPRM* asks whether Congress imposed an absolute requirement that a State or local government approve *all* applications which do not result in a substantial change in the dimension of the facility, or whether there are special circumstances which would permit denial of an application that otherwise satisfies the statute's requirements. The *NPRM* also asks whether a State or local government can condition their approval on alterations to the request, adherence to State or local building codes and land use laws, or other conditions. The Commission poses the issue of whether 6409(a) applies to State and local governments in their role as property owners.

With respect to a time limit for processing of local government requests under Section 6409(a), the *NPRM* notes that Section 6409(a) establishes 90 days as a presumptively reasonable period of time to process collocation applications under Section 332(c)(7). The FCC seeks comments on whether to adopt an identical standard for Section 6409(a). (The *NPRM* also requests comment on the relationship between Section 6409(a) and Section 332(c)(7) of the Communications Act, preserving certain State and local authority in the antenna siting application process. *See* below.)

Finally, with respect to remedies and enforcement, the Commission seeks comments on what remedies should be available to enforce Section 6409(a) in cases of failure to act or decisions adverse to the applicant. The Commission asks whether a covered request should be "deemed granted" by operation of law if a State or local government fails to act within a specified period of time. The FCC also seeks comment whether to adopt a transition period for State and local governments to implement any new regulations into their laws, ordinances, and procedures.

Proposals to Clarify the Requirements of Section 332(c)(7)

Lastly, the *NPRM* provides six "discrete" proposals intended to clarify the *2009 Declaratory Ruling's* interpreting 47 U.S.C. §332(c)(7).[8] Section 332(c)(7), expressly preserved local zoning authority but bars local and state regulations that discriminate or have the effect of prohibiting the deployment of "personal wireless services." The Commission now asks:

1. Whether the "substantial increase in size" test for collocations should be interpreted in the same manner for Section 332(c)(7) as under Section 6409(a) for a substantial change in physical dimensions;[9]
2. What constitutes a "complete" application under the statute which commences a State or local government's review of an application and starts the timeframe for action on an application;
3. Whether to toll the statute's timeframes as interpreted in the *2009 Declaratory Ruling* in the event of local moratoria;
4. Whether the presumptively reasonable timeframes adopted in the *2009 Declaratory Ruling* should extend to DAS and small cell facilities;[10]
5. Whether ordinances establishing preferences for the placement of wireless facilities on municipal properly are unreasonably discriminatory under 47 USC § 332(c)(7)(B)(i)(I); and
6. Whether to reconsider the 2009 *Declaratory Ruling*'s rejection of a "Deemed Granted" remedy and finding that a court should review a State or local jurisdiction's failure to act within a reasonable timeframe on an expedited basis.

The scope of the *NRPM* is comprehensive and this advisory does not address all of the issues that the Commission put out for comment. If the Commission adopts the *NPRM's* proposals, the wireless industry should encounter a vastly improved terrain for expanding wireless infrastructure.

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[1] *In re Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, et al.*, Notice of Proposed Rulemaking, FCC 13-122, WT Dkt. No. 13-238, WC Dkt. No. 11-59, RM-11688 (terminated), WT Dkt. 13-32, (rel. Sept. 26, 2013).

[2] 42 U.S.C. § 4321 *et seq.*

[3] 16 U.S.C. § 470f.

[4] 47 C.F.R. Part 1, App. B, Nationwide Programmatic Agreement for the Collocation of Wireless Antennas ("Collocation Agreement").

[5] 47 C.F.R. Part 1, App. C, Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process ("NPA").

[6] Amendment of Parts 1 and 17 of the Commission's Rules Regarding Public Notice Procedures for Processing Antenna Structure Registration Applications for Certain Temporary Towers; 2012 Biennial Review of Telecommunications Regulations, RM-11688, WT Docket No. 13-32, *Order*, 28 FCC Rcd 7758 (2013) ("*Waiver Order*").

[7] *See* Title VI – Public Safety Communications and Electromagnetic Spectrum Auctions, Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6409(a), 126 Stat. 156 (2012) (codified at 47 U.S.C. § 1455(a)).

[8] Petition for Declaratory Ruling To Clarify Provisions of Section 332(C)(7)(B) To Ensure Timely Siting Review and To Preempt Under Section 253 State and Local Ordinances That Classify All Wireless Siting Proposals as Requiring a Variance, WT Docket No. 08-165, *Declaratory Ruling*, 24 FCC Rcd 13994 (2009), *recon. denied*, 25 FCC Rcd 11157 (2010), *aff'd sub nom. City of Arlington, Texas v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S.Ct. 1863 (2013) ("2009 Declaratory Ruling").

[9] In its *2009 Declaratory Ruling*, the Commission held that the addition of an antenna to an existing tower or other structure was a collocation for purposes of Section 332(c)(7), so long as the addition did not involve a "substantial increase in the size of the tower," as defined in the Collocation Agreement.

[10] The Commission found that 90 days is generally a "reasonable period of time" for processing applications to collocate antennas on existing structures, and that 150 days is generally a reasonable timeframe for processing applications other than collocations. The Commission further determined that failure to meet these timeframes presumptively constitutes a failure to act under Section 332(c)(7)(B)(v), enabling an applicant to pursue judicial relief within the next 30 days.