

FCC Explores Opportunities to Expedite Deployment of Wireless Broadband Facilities

October 14, 2013 | Advisory | By [Russell H. Fox](#), Megan Capasso

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On September 27, 2013, the Federal Communications Commission ("FCC") issued a *Notice of Proposed Rulemaking* ("Notice") directed at expediting the deployment of wireless broadband facilities.¹ Currently, parties seeking to deploy wireless infrastructure must obtain different types of federal, state and local approvals prior to construction and the *Notice* examines ways to streamline those processes. The *Notice* is prompted by the FCC's recognition that America's increasing demand for bandwidth and reliance on advanced wireless services are driving a need for additional infrastructure deployment that may be unnecessarily slowed or prevented by current requirements. To promote and ensure increased deployment of wireless broadband facilities, the FCC proposed changes in four areas, summarized below. Comments are due 60 days, and reply comments are due 90 days, after publication of the *Notice* in the Federal Register, which has not yet occurred.

Expediting the FCC's Environmental Review Process for Distributed Antenna Systems ("DAS") and Small Cells

The bulk of the FCC's environmental review rules² were written prior to the advent of DAS and small cell technologies and treat all antennas the same, regardless of size and placement. The FCC observes that because deployments on poles and rooftops are less visible than macrocells on tower structures, DAS and small cell technologies — which can be deployed on top of shorter structures like rooftops and utility poles — "may be particularly desirable for addressing capacity or coverage needs in areas with stringent siting regulations, such as historic districts." Therefore, the FCC seeks comment on ways to expedite or tailor its environmental review process, including its review of effects on historic properties, for proposed deployments of small cells, DAS, and other small-scale wireless technologies that may have minimal effects on the environment.

In particular, the FCC seeks comment on updating the NEPA exclusion for collocations and adopting a new categorical exclusion from NEPA review for DAS/small cell deployments. The FCC also invites commenters to discuss the potential effects of DAS and small cell systems on historic properties, in order to assist the Commission in assessing whether to depart from the ordinary historical preservation review under Section 106 of the NHPA for those technologies.

Environmental Notification Exemption for Temporary Towers

In response to a petition filed by CTIA-The Wireless Association, the FCC proposes to adopt a narrow exemption from its pre-construction environmental notification requirements for certain temporary towers used for special events such as races and concerts. Under the current notification requirements, before a party can register a proposed communications tower with the FCC (and therefore begin construction of the tower in question) it must complete a process of local and national notice. Temporary towers are often needed with very little advance warning, making the notification process impracticable.

The FCC's proposed exemption requires eligible towers to meet specified criteria, including (1) very short duration; (2) height limits; (3) minimal or no associated excavation; and (4) absence of need for warning lighting. The FCC believes these requirements should minimize the potential for significant environmental effects, and finds that the proposed exemption would enable providers to timely deploy temporary towers in response to unanticipated short-term needs without undermining the purpose of the environmental notification process.

Implementation of Section 6409(a) of the Spectrum Act

The FCC solicits comment on rules to clarify and implement the requirements of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 ("Spectrum Act") which specifies 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.”³ Eligible facilities requests include collocation requests, as well as requests for removal or replacement of existing equipment. The FCC notes that collocation — which involves placing wireless equipment on pre-existing structures rather than constructing new support structures — is often the most efficient, rapid, and economical means of expanding wireless coverage and capacity, and also reduces the environmental and other impacts of new wireless facilities deployment.

The FCC proposes clarifications of key terms in Section 6409(a) (*i.e.*, “transmission equipment,” “wireless,” “existing wireless tower or base station,” “collocation,” “removal,” “replacement,” and “substantially change the physical dimensions”) that could affect local oversight and authority over the deployment of wireless equipment on existing facilities and structures.

The FCC also seeks comment on the remedies that should be available to enforce Section 6409(a) in cases where state or local governments fail to act on, or reach decisions adverse to, an applicant’s request to deploy wireless facilities. The FCC suggests that a “deemed granted” remedy could be imposed where a local government fails to act within a specified period of time. In instances where a local government has failed to act on, or impermissibly denied, a covered request, the FCC proposes to permit the filing of declaratory ruling petitions with it.

Implementation of Section 332(c)(7) of the Communications Act

The FCC seeks comment on whether to address certain disputes or questions that have arisen about how to apply the Commission’s *2009 Declaratory Ruling* implementing Section 332(c)(7) of the Communications Act.⁴ The FCC specifically seeks to resolve whether the terms “collocation” and “substantial increase in size” should be construed under Section 332(c)(7)⁵ in a manner similar to Section 6409(a) and seeks comment on whether to clarify when a siting application is considered complete for the purpose of triggering the *2009 Declaratory Ruling* time frame⁶ and, if so, how completeness should be determined.

The FCC observes that neither Section 332(c)(7) nor any Commission decision interpreting Section 332(c)(7) makes any distinction among personal wireless service facilities based on technology, and proposes to clarify that to the extent DAS or small cell facilities will be used for the provision of personal wireless services, they are subject to the same presumptively reasonable time frames and requirements as other personal wireless service facilities. The FCC further notes that applicants and municipalities can agree to extensions of time in appropriate cases and seeks comment on whether there is any reason DAS or small cell facilities should be subject to different time frames or other requirements. The FCC also seeks comment on whether ordinances establishing preferences for the placement of wireless facilities on municipal property are unreasonably discriminatory under Section 332(c)(7).

Endnotes

¹ *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Notice of Proposed Rulemaking, WT Docket No. 13-238, WC Docket No. 11-59, RM-11688 (terminated), and WT Docket No.13-32, FCC 13-122 (rel. Sept. 27, 2013).

² The National Environmental Policy Act of 1969 (“NEPA”) requires agencies of the Federal government, like the FCC, to identify and evaluate environmental effects of proposed “major Federal actions significantly affecting the quality of the human environment.” The FCC has generally found that its grant or approval of an application that will result in construction of a significant wireless communications facility qualifies as a major federal action, thereby subjecting the constructed facility to NEPA procedures. Similarly, Section 106 of the National Historic Preservation Act (“NHPA”) requires federal agencies to take into account the effects of their “undertakings” on historic properties listed or eligible for listing in the National Register. To fulfill its responsibilities under Section 106, the FCC has incorporated the requirements of the NHPA into its environmental rules.

³ See 47 U.S.C. § 1455(a).

⁴ *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*, Declaratory Ruling, 24 FCC Rcd 13994 (2009) (“*2009 Declaratory Ruling*”). Section 332(c)(7)(A) of the Communications Act expressly preserves “the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.” See 47 U.S.C. § 332(c)(7)(A). Section 332(c)(7)(B) of the Communications Act imposes certain limitations on this authority, including that siting decisions may not “unreasonably discriminate among providers of functionally equivalent services” and may not “prohibit or have the effect of prohibiting the provision of personal wireless services.” See 47 U.S.C. § 332(c)(7)(B).

⁵ See 47 U.S.C. § 332(c)(7). In the *2009 Declaratory Ruling*, the Commission held that the addition of an antenna to an existing tower or other structure constitutes a collocation for purposes of Section 332(c)(7) if it does not involve a “substantial increase in the size of a tower” as defined in the Collocation Agreement.

⁶ In implementing Section 332, the FCC established time limitations of 90 days to process siting applications requesting collocations and 150 days for all other applications. The *2009 Declaratory Ruling* held that a state or local government's period for acting on an application is tolled until the applicant completes its application in response to a request for additional information made within the first 30 days, but did not attempt to define when a siting application should be considered “complete” for this purpose. Wireless entities assert that some jurisdictions delay processing by repeatedly requesting additional information.

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