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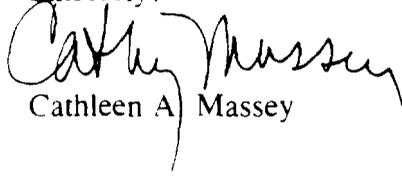
**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY**

RE: Ex Parte Presentation  
Guidelines for Evaluating the Environmental Effects of Radiofrequency  
Radiation -- ET Docket 93-62

Dear Steve:

I understand that you have been given the daunting task of acting as a liaison between the Commission and state and local governments on issues related to cell siting and newly enacted Section 704 of the Telecommunications Act. I have enclosed an overview of the relevant provisions of the Act that we have developed in the hope that it might be of some use to you.

Sincerely,

  
Cathleen A. Massey

cc: Secretary's Office

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OFFICE OF SECRETARY

The Telecommunications Act of 1996 (P.L. 104-104)  
Section 704-Siting Wireless Facilities

Overview

Section 704 - Siting of Wireless Facilities - of the Telecommunications Act of 1996 (Telecommunications Act, Act) does four things

1. Establishes the principle that wireless communications service must be available throughout all areas of any community.
2. Upholds local government's right to impose reasonable conditions on when, where and how wireless facilities are sited.
3. Encourages cellular, personal communications services (PCS) and other wireless service providers to work closely with local government to insure that siting of needed facilities takes place in manner that is both reasonable and sensitive to the needs of the public.
4. Preempts state and local governments from regulating cell sites on the basis of the environmental effects of radio frequency ("RF") emissions.

Read as a whole, the legislation's ban on prohibiting the provision of wireless services; its mandate requiring permits to be processed in a reasonable period of time; the directive that wireless providers generally be regulated in a like fashion; and its preemption of the regulation of RF emissions associated with cell sites, clearly shows the intent of Congress to make wireless service readily available to all citizens. The legislation also encourages industry-public sector collaboration. It preserves most local zoning authority while providing mechanisms to encourage the speedy, efficient and fair processing of permits. Making the best use of these mechanisms will come through joint private-public sector effort.

Below are the major principles stemming from the Telecommunications Act. The relevant language is identified, followed by an explanatory statement.

**Local government cannot use siting laws to TOTALLY exclude wireless service from all or part of the community.**

**Applicable language-**"The regulation of the placement, construction and modification of personal wireless services ...shall not prohibit or have the effect of prohibiting the provision of personal wireless services" *Section 704 [a][7][B][i][III]*

"It is the intent of this section that bans or policies that have the effect of banning personal wireless services or facilities not be allowed and that decisions be made on a case-by-case basis"

These provisions bar jurisdictions from using land use rules and regulations to totally exclude the provision of wireless service from all or a significant portion of a city or town. Cellular and PCS service must be accessible to all residents in all areas of a community. Where local action such as moratoria; setback requirements or zoning exclusions make it physically impossible or extremely impracticable to provide such blanket service, the federal law is violated.

Examples. A city which passes a law simply disallowing the placement of wireless facilities within its limits has violated the federal act. Should a local government ban certain types of structures (e.g. no poles or towers over sixty feet in height) and if that ban prevents the blanket provision of cellular or PCS service the act is again violated.

When a city or town bans permit processing for a fixed period of time a moratorium is created. Moratoria are illegal.

**Permit requests must be processed within a “reasonable” time period and any denial has to be in writing and supported by substantial evidence.**

**Applicable language-**“A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless services facilities within a reasonable period of time... taking into account the nature and scope of such request.”

“Any decision by a State or local government ...to deny a request to place, construct or modify personal wireless services facilities shall be in writing and supported by substantial evidence contained in a written record.” *Section 704 [a][7][B][ii] and [iii]*

“If a request for placement of a personal wireless service facility involves a zoning variance or a public hearing or a comment process, the time period for rendering such a decision will be the usual period under such circumstances. It is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests or to subject their requests to any but the generally applicable time frames for zoning decision.” *Conference Report p. 208*

Delays in permit processing must be reasonable or they violate the Telecommunications Act. The provisions quoted above allow local government to employ normal review procedures. Industry may take legal action when a permit application takes an unreasonable period of time.

Three factors determine whether delay is being improperly used to discourage site acquisition.

First, the type, size and makeup of the requested facility will determine what is a reasonable review period. Second, past history (how quickly the jurisdiction has previously handled requests like this) is a yardstick to be used in determining reasonableness. Third, intent plays a major role-- is the time being taken to truly analyze the application or is it possible that a lengthy analysis is simply for purposes of delay?

The new law requires documented reasons for permit denial and such denials must be supported by substantial evidence. This provision raises the standard cities and towns are expected to meet when turning down a permit request. Should a denial not be supported by the record and/or should that support be anything less than significant, the Telecommunications Act allows industry to respond with a legal challenge.

**All wireless service providers are to be regulated in the same fashion--the use of different rules for different types of providers is only allowed on a strong showing of good cause.**

**Applicable language**--"The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government... shall not unreasonably discriminate among providers of functionally equivalent services." *Section 704[a][7][B][i][I]*

"The intent of the conferees is to insure that a State or local government does not in making a decision regarding the placement, construction and modification of facilities of personal wireless services... unreasonably favor one competitor over another." *Conference Report p. 208*

Local governments cannot (absent a strong showing) regulate cellular, PCS or other wireless services in a dissimilar manner. Attempts to impose laws regulating only one type of wireless provider and not others is banned by federal law, unless the state or local government can prove that the distinction is rooted in characteristics that are unique to service.

**Local governments can no longer use the issues associated with radio frequency emissions as grounds for determining whether or not to issue permits for wireless facilities.**

**Applicable language**--"No State or local government... may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions." *Section 704[a][7][B][iv]*

"Within 180 days after the enactment of this Act, the Commission shall ... prescribe and make effective rules regarding the environmental effects of radio frequency emissions." *Section 704[b]*

"The conferees intend... to prevent a State or local government... from basing the regulation of the placement, construction or modification of CMS facilities directly or indirectly on the environmental effects of radio frequency emissions if those facilities comply with the Commission's regulations adopted pursuant to section 704 (b) concerning such emissions"

As of February 8, 1996, local government can no longer use issues associated with radiofrequency emissions as yardstick to determine whether or not to grant a permit application. In short, the emissions issue is now the exclusive province of the Federal Communications Commission (the "Commission"). Two important points:

First, the Commission already has rules in place to regulate the safety of RF emissions. In 1985 the Commission adopted the American National Standards Institute's (ANSI), 1982 RF guidelines to assess the safety of Commission licensed cellular facilities. In 1994, the Commission adopted the 1992 ANSI exposure guidelines to regulate the safety of PCS antennae, facilities and equipment. These FCC rules currently in place preempt local and state involvement with the safety of RF emissions.

Second, local government cannot burden the wireless industry with additional RF monitoring, measurement, signage or other requirements associated with RF emissions that are not otherwise required by the Commission's regulations.

**Wireless service providers are to be given the opportunity to locate facilities on federally owned property speedily and at reasonable rental rates.**

**Applicable language-**"Within 180 days of the enactment of this Act, the President or his designee shall prescribe procedures by which Federal departments and agencies may make available on a fair, reasonable, and nondiscriminatory basis property... under their control for the placement of new telecommunications services... These procedures may establish a presumption that requests for the use of property... should be granted absent direct conflict with the department or agency's mission, or the current or planned use of property, rights of way or easements in question. Reasonable fees may be charged to providers of such telecommunications services for the use of such property....." *Section 704 [c]*

Federally owned property is to be made available to the wireless industry for use as sites. The President has been directed to arrange for and have in place access procedures outlining how a carrier can place a site on federally owned land and buildings. Congress has placed the burden of proof on federal agencies to show why a facility request should not be granted. In addition, the Commission is to supply "technical assistance" (a term the act does not define) to assist states in making their property, rights of way and easements available to wireless service providers.

**Where permit requests have been denied for reasons that conflict with the federal act, licensees may bring a lawsuit in state or federal court to enforce their rights. If the denial is based on reasons associated with RF emissions, licensees may petition the Commission for relief.**

**Applicable language-**"Any person adversely effected by any final action or failure to act by a

State or local government....that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. . . . Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) [regarding RF emissions] may petition the Commission for relief.”

*Section 704[a][7][B][v]*

The new law provides a remedy when local governments unfairly (in violation of the Telecommunications Act) deny or unreasonably delay permit issuance. Licensees may commence an action within 30 days in a court of competent jurisdiction. In addition, if the denial is based on issues associated with RF emissions, licensees may petition the Commission for relief.