



Response to Notice of Proposed Rulemaking
Adopted and Released September 26, 2013

In the Matter of:

Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies (WT Docket No. 13-238);

Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting (WC Docket No. 11-59);

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 (RM-11688 (terminated)); and

2012 Biennial Review of Telecommunications Regulations (WT Docket No. 13-32)

I. INTRODUCTION

The City of Tucson (COT) appreciates the opportunity to submit the below comments in response to the FCC's Notice of Proposed Rulemaking¹ (NPRM) regarding acceleration of broadband deployment by improving wireless facilities siting policies. The FCC recognizes in the NPRM that any proposed action on its part must ensure that "infrastructure is deployed in a manner that appropriately protects the Nation's environmental and historic resources, and that is consistent with local community needs, interests, and values,"² and also addressed potential measures to expedite the environmental and historic preservation review of new wireless facilities, as well as proposed rules to implement statutory provisions governing state and local review of wireless siting proposals.

The NPRM sought comment on several topics, including, but not limited to:

- Streamlining the environmental and historic preservation review processes for evolving and newer technologies, including small cells and distributed antenna systems (DAS),
- Implementation of, and definition of certain terms used in, 47 USC 1455(a) the Middle Class Tax Relief and Job Creation Act of 2012 which states 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 dimension of such tower or base station," and,
- Implementation of 47 USC § 332(C)(7), including what remedies should be available to enforce in cases of failure to act or decisions adverse to the applicant, and Clarification of issues addressed in the FCC's "shot clock" order setting time limits for state and local review of wireless siting applications.

As a local government representing our residents who are directly affected by the wireless industries' continued development of infrastructure for wireless services in our community, we offer the following comments to the NPRM for the FCC's consideration in carting rules associated with the topic areas.

II. EXPEDITED ENVIRONMENTAL AND HISTORIC PRESERVATION REVIEW FOR DAS AND SMALL CELL TECHNOLOGIES

Historical preservation ¶6:

Comment is sought on the suggestion of "expediting the environmental review process, including review for effect on historic properties, in connection with proposed deployments

¹ *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies (FCC 13-122)*, WT Dkt. No. 13-238, WC Dkt. No. 11-59, RM-11688 (terminated), et al; Released September 26, 2013.

² *Id.*

of small cells, DAS, and other small-scale wireless technologies that may have minimal effects on the environment.” The COT objects to the “categorical exclusion” approach. The effect of such an expedited review would be to categorically exclude the deployment of DAS and small cell infrastructure from local historic preservation reviews where there is no “adverse effect” or the environmental preservations goals are deemed “de minimis.”

Separate from the inherent difficulties in defining precisely what constitutes an “adverse” or “de minimis” effect, is the issue of the City’s already well-established historic districts/designations and design review processes. A process designed to address the particular nuances of any historic district and to protect those characteristics. An across the board review would be limited in its ability to address the concerns of the divergent historic neighbors. Tucson, has enacted historic preservation ordinances to maintain the unique characteristics of these individual neighborhoods/properties. The City agrees with the Intergovernmental Advisory Committee (IAC) comments that, within these historic districts, Tucson has “created rules and procedures for original construction and modification of existing structures so that local boards review applications to ensure both public safety of the proposed construction and its appropriateness to the other structures or features of the district.” As noted by the IAC in its comments, these districts do help drive local tourism and support local economic development, especially in a city such as Tucson with such a diverse and rich history. As proposed the expedited review process for DAS and small cell infrastructure in historic districts would exceed zoning laws with regard to height, weight, and size. By categorically exempting these technologies, the City would be forced to approve applications and placement of DAS and small cell technologies without the benefit of engaging the public “in balancing the community’s needs for modern communications capabilities with its historic preservation efforts.” (IAC comments, pg.8)

The COT recommends that the FCC refrain from implementing any proposed rule that would limit local governments from enforcing historical preservation ordinances, or that would categorically exclude any specific technologies, including DAS and small cell, from historic preservation reviews and approval processes.

III. IMPLEMENTATION OF § 6409(A) OF THE MIDDLE CLASS TAX RELIEF AND JOB CREATION ACT (47 US § 1455(A)) AND DEFINITION OF TERMS

Uniformity in administrative practices among communities ¶132:

The fundamental question was posed by the Commission in the last sentence of ¶ 132, specifically, “[A]re administrative practices sufficiently uniform among communities that any rules could be meaningful?” The overriding answer is a resounding “no” for height and bulk standards associated with wireless facilities, and a cautious “potentially” with regard to shot clock provisions and definitions. City zoning code provisions are arguably the most important and far-reaching “health, safety and welfare” powers of the local government derived through case law and state constitutional provisions. Federal intrusion through micro-management of structure heights and sizes of a single use would begin to seriously erode these powers, and create distortions in local land use management. Such an intrusion would effectively begin to evolve the Commission from a body regulating the telecommunications

industry to that of an industry sponsor acting as a “national zoning board”. Considering there is no Federal urban policy in the United States, there is no federalism principal to support such an intrusion into local land use authority.

Zoning provisions, including those regulating collocations of wireless facilities, are established through public processes and are steeped in local customs, history, geography, scale of development, vegetation, etc. There is no real potential for a successful “one-size-fits-all” federal approach to regulating height and bulk of collocated facilities. However, establishing definitions for terms used in Section 6409(A) in a manner that recognizes the significant differences in community regulations across the country, and respects the public processes and purposes for these regulations can implement Congress’ intent to speed the processing and approvals of collocating facilities. To that end, the COT offers the following comments.

Collocation ¶113:

The definition of the term collocation is critical to a local jurisdictions’ ability to properly regulate and mitigate potential impacts of a facility. The definition proposed in ¶113 is too broad in its scope. The definition includes placing transmission equipment on “...any existing tower, building or structure...” The definition should be narrowed to include only those existing towers, buildings or structures that have been approved for such transmission equipment. The equipment approved initially does not have to be in place, but the approval process should be completed. The initial approval process should provide for future collocations. Without this initial approval process the placement of transmission equipment on an existing tower, building or structure is not a collocation – but is, in fact, the establishment of a new site. The very basis of the term collocation is to mix, which requires the initial approval for transmission equipment before the second set of such equipment can be collocated at that site.

The use of the term “transmission equipment,” as proposed, crosses into the definitions of “tower” and “base station”. From a local land use perspective such vague definitions are problematic. The totality of a wireless site will include the tower or other structure on which the antennas are mounted, as well as what is often referred to as the ground equipment (including primary and backup power supply, equipment shelters and other supporting equipment such as air conditioning units, electrical boxes, etc., within a defined ground lease area). The ground equipment should be the foundation for the definition of the “base station”. The tower and this “ground equipment” (base station) are often treated differently in zoning codes because the tower is the unique structure and the ground equipment is generally accommodated by traditional zoning regulations. The overlapping of the definitions may have the unintended consequence of forcing more regulation than is needed on the base station because it is not distinguished from the tower.

The City proposes separate definitions for towers, transmission equipment and base stations. Considering the potential under § 6409(A) for actions that may change (even if not substantially) the physical dimensions of a tower or base station, the approach to creating definitions should be to clarify the distinct components of the entire facility.

Transmission Equipment ¶¶104/105:

The proposed definition of transmission equipment in ¶¶104/105 should not include the backup power generator. That should be part of the base station (see proposed definition below). There should be a clear distinction between the transmission equipment and the structures on which such equipment is mounted. Typically, equipment change outs or upgrades can be reviewed and permitted more quickly and easily than changes to structures.

Tower ¶104:

The definition of tower in the Collocation Agreement and the NPA, as referenced, are too broad for local zoning purposes. The recommended definition is a modified version of the NPA definition: *Any structure approved by the jurisdiction and built for the sole or primary purpose of supporting Commission-licensed or authorized antennas, including wiring, cabling, amplification units, GPS devices and appurtenances used to attach said equipment to the structure.* The COT disagree with the Bureau's suggestion in ¶108. The term "tower" should not include a structure which has been authorized for human occupation. An "eligible facilities request" should not permit changes in height or footprint of a building certified for human occupancy. The proposed definition would permit changes to antennas, transmission equipment, and appurtenances on the structure certified for human occupancy but would not permit physical changes to the structure, itself.

Base Station ¶109:

The Intergovernmental Advisory Committee (IAC) argument regarding the definition of "base station" is reasonable. A distinction still needs to be made between base station, tower and transmission equipment. The IAC-recommended definition should be expanded to include primary and backup power components, equipment shelters and other supporting equipment such as air conditioning units, electrical boxes, etc., within a defined lease area needed to support a tower and/or transmission equipment. If the base station shelter is a structure certified for human occupancy, the definition of base station should exclude that structure. This would permit changes to the equipment, but physical changes to the base station would not include physical changes to a building certified for human occupancy without a separate review of zoning and building code requirements.

Antenna ¶106:

The following portion of the NPA definition of "antenna" would appear to properly separate the antenna from the tower and the base station. *An apparatus designed for the purpose of emitting radio frequency ('RF') radiation, to be operated or operating from a fixed location pursuant to Commission authorization, for the transmission of writing, signs, signals, data, images, pictures, and sounds of all kinds, including the transmitting device.*

Transmission Facility ¶106:

The suggested NPA definition in ¶106 can serve as the definition of “transmission facility”. *An apparatus designed for the purpose of emitting radio frequency (‘RF’) radiation, to be operated or operating from a fixed location pursuant to Commission authorization, for the transmission of writing, signs, signals, data, images, pictures, and sounds of all kinds, including the transmitting device and any on-site equipment, switches, wiring, cabling, power sources, shelters or cabinets associated with that antenna and added to a Tower, structure, or building as part of the original installation of the antenna.*

Existing ¶111:

We disagree with Verizon’s argument based on the *Collocation Agreement*. The term “existing,” for the purpose of collocation, should require the structure be previously constructed at the time of collocation and previously approved for a transmission facility as defined above. The previously approved facility does not have to be constructed, but until the previous approval expires or is abandoned by the previous applicant, the previous facility must be accommodated as part of the collocation.

Economic Costs and Benefits ¶112:

Establishing a distinction between the types of support structures need not require additional costs or processing time. Congress’ intent can be met without federal intrusion into the local land use process. For example, in the COT, a transmission facility can be established on a developed property with antennas mounted on an existing building, and the base station located in the structure or elsewhere on the lot as an administrative review. This, however, is considered under the local code to be a new transmission facility and not a collocation (which requires a previously approved site). A second transmission facility could also be approved for the same site through the same administrative process as the initial site, even though the second site would fall under our proposed definition of collocation.

Modification of Wireless Tower or Base Station ¶114:

The COT supports this proposal and, in addition, would also include replacing or hardening of the tower (¶115) only if the definition of collocation, as proposed above is adopted. Without the requirement for an existing, or approved transmission facility at the site, the suggested modification would actually be the establishment of a new facility and should not be governed by § 6409(A).

Substantially Change the Physical Dimensions ¶116-119:

The COT strongly disagrees with the provisions of the four-prong test for determining “substantial increase in size of a tower” as established in the *Collocation Agreement*. Furthermore, we just as strongly concur with the Intergovernmental Advisory Committee (IAC) argument in ¶122 which states, “[t]he question of substantiality...cannot be resolved by the adoption of mechanical percentages or numerical rules applicable anywhere and

everywhere in the United States, but rather must be evaluated in the context of specific installations and a particular community's land use requirements and decisions.”

The four-prong test violates this notion of local authority over local land use decisions. Prong 1 removes all local authority to regulate the height of a tower because the standard is based on adding additional antennas relative to the existing antennas and sets no limits on the overall height. This test does not consider the context of the facility and could easily result in tower heights that are completely out of scale with the surrounding community character. It does not appear that the *Collocation Agreement* considered an urban context for this prong of the test. Any definition of “substantial increase in size” should be a percentage increase in the previously approved height of the existing tower, and not based solely on adding additional antennas, and by extension tower height, by right. The City urges that *any* increase in size that would exceed existing zoning regulations, such as the height limit of a zone, are “substantial,” and that currently additions are limited to a percentage expansion of the original structure by all subsequent additions.

Prong 2, with the proper definitions of tower, base station and transmission equipment, as recommended above, would be acceptable.

Prong 3 meets with the same objections as Prong 1 – it removes all reasonable local authority to regulate structure size and has no consideration for the urban scale. Consider that a tower fitted with appurtenances that extend up to 20 feet from the tower would create an array with a 40’ diameter. In the urban context, such a tower located in the right-of-way of a local urban street could easily extend completely across the front yard setback of an adjacent residential property and more than one-half the way across the adjacent right-of-way. Considering our proposed definition of collocation, above, no appurtenance should extend beyond the original approval for the initial facility without an opportunity for local review and possible negotiation.

The COT concurs with Prong 4.

Buildings and Utility Poles as “Towers” ¶121:

In ¶121 the question is asked whether the definition of “tower” should include buildings and utility poles. We recommend the definition of “tower” not include buildings or any structure that may be certified for human occupation, such as a building. This exclusion would not necessarily prevent the use of a building for mounting antennas and other transmission equipment, but due to the inherent complexities of changing the physical dimensions of a building, these types of structures deserve separate consideration. Stealth structures should also consider separate consideration if the proposed changes in physical dimensions defeat or are inconsistent with the stealth characteristics.

May Not Deny and Shall Approve ¶ 124:

The definition of an eligible request certainly should not include the use of a structure deemed to be deficient according to the local-adopted building code. There is nothing in §

6409(A) from which the Commission can construe that Congress' intent was to advance wireless broadband service in a manner that jeopardized the safety of the individuals in local communities through the use of structurally unsound buildings or towers.

Regarding modification of a non-conforming tower, most local codes contain a provision that would allow a modification of a non-conforming tower if the modification does not increase the non-conforming component of the tower. A tower that has been previously approved for a transmission facility that does not meet the conditions of the previous approval is not, under standard zoning construction a non-conforming tower, but may be found to be in violation of the zoning code. In such a situation, it would be unconscionable for a federal commission to force the local jurisdiction to violate its own code to serve the needs of a corporate entity.

Local Government as Landlord and Regulator ¶129:

An attempt is made in ¶129 to draw the distinction between a local government acting in its role as a landlord of its own property versus a local government acting in its capacity as a regulatory body. The COT does lease property to wireless providers for the purpose of establishing a transmission facility. Additionally, the City requires application of its codes, including zoning to its own projects and projects on City-owned land. The IAC example in this paragraph is too narrow. Private projects (projects not undertaken by a government entity for a government purpose) on county-owned property located within the COT zoning jurisdiction are subject to the City's zoning authority. Because the City's zoning code encourages the location of antennas on existing structures on public land, the antennas on the courthouse from the IAC example would be processed through an administrative review. To subvert this review process and let the county set the rules through its contract or lease of the county facility for antennas would effectively shift the City's zoning authority to the county. Clearly there is no federalism principal for such an intrusion into local government land use regulatory authority.

Expedited Procedures/Limited Documentation for Applications ¶131:

In ¶131 the Commission asks if it should "find that § 6409(A) warrants specific expedited procedures or limits on the documentation that may be required with an application." The overwhelming response should be, "not without investigation and documentation of wide-spread systematic abuse of the local processes by jurisdictions across the United States." Unsubstantiated, and potentially exaggerated and politically motivated complaints by wireless providers should not constitute the basis for such intrusion into the local land use authority of thousands of jurisdictions representing, effectively, the entire population of the country. Until the Commission has investigated numerous (such as 1000 or more) complaints and found wide-spread local regulatory efforts to slow or the advancement of wireless broadband service, the Commission should give deference to the local jurisdictions. The driving factor should be the shot clock. The required application, supplemental information and to a large extent fees, are nearly irrelevant if the process timing is federally controlled.

Federal Time Limits on Review ¶134:

In ¶134 it is noted that the Bureau, citing the *2009 Declaratory Ruling* "...established 90 days as a presumptively reasonable period of time to process collocation applications...". We feel that time line is inadequate for a national standard. Local jurisdictions vary greatly in their resources to process applications, and such a short time line penalizes those jurisdictions who may support the proposed collocation but do not have the resources to complete the process in 90 days. Our recommendation is 120 days to complete the processing, with a required written notification within 30 days of application receipt that an application is incomplete and specifies what is needed to complete the application. We support the extension of the processing time by mutual agreement between the applicant and the jurisdiction.

Distinctions Between Differing Application Types ¶136:

In ¶136 the question asked is should distinctions be made, for purposes of expedited processing, between different types of application requests? The COT supports the potential for expedited reviews for equipment replacement when proposed new equipment falls within narrowly construed standards that may allow for somewhat larger antennas, additional amplifiers or other equipment, and possibly larger appurtenance extensions. Typically those increases should be 10% or less than what was originally approved for the facility to receive an expedited review. Expedited reviews should not be available to any proposal for a stealth site where the proposal defeats or compromises the stealth application.

IV. IMPLEMENTATION OF 47 USC § 332(C)(7); REMEDIES/ENFORCEMENT AND THE "SHOT CLOCK"

Remedies and Enforcement ¶¶137-143:

Initially, the City of Tucson notes that it agrees with the recommendations of the Intergovernmental Advisory Committee To The Federal Communications Commission (IAC) regarding any proposed revision of a definition(s) which would define a 'complete application' or create a 'deemed granted remedy'.³ As a general comment applicable to all of the Commissions specific requests for comment, the City Of Tucson urges the Commission to first and foremost consider the intent of 47 USC §332(c)(7) to preserve local land use regulation and respect the unique characteristics of each community in size demographics, terrain and population which demand local as opposed to generalized, federal control of land use.

We note that the City Of Tucson has a detailed application submission policy, process and specific requirements which serve to define a 'complete' application. Furthermore, the Laws of the State of Arizona require an elaborate process by which municipalities are required to provide time limited review periods for administrative completeness, as well as substantive and overall review time frames for 'licensing' applications and notice to applicants of necessary application requirements, which would encompass some wireless communication

³ IAC Advisory Recommendation No. 2013-13, adopted September 26, 2013, p. 8 at par. 6.
{A0062910.DOC/2}WT Docket No. 13-238
City of Tucson Comments
Page 9 of 11

development applications.⁴ Intervention by the commission in the local zoning process for the purpose of defining a ‘complete’ application is unwarranted and will interfere with the City Of Tucson’s ability to provide for the health, welfare and safety of its citizens in the regulation and permitting of wireless communication facilities. The City Of Tucson urges the Commission to avoid further regulation in this area and heed the warning of the IAC that it risks a level of involvement in local zoning which would transform it into a ‘National Zoning Appeal Board’ which would constitute an apparent violation of The Tenth Amendment.

The City Of Tucson also encourages the Commission to forebear from the imposition of a ‘deemed granted’ remedy where a governmental entity does not act upon an application within the previously established ‘shot clock’ time frames under Section 332 (c)(7) or applications subject to Section 6409(a). The mere fact that Section 6409(a) provides that a governmental body ‘shall approve’ an application does not require nor justify the imposition of this remedy. The decision that a governmental entity has failed to act upon an application governed by Section 6409(a) will require careful, fact specific analysis of the application, including any reasons for delay or denial. The decisions as to whether an application was complete, properly submitted and improperly denied are best left to local courts without the imposition of a ‘deemed granted’ remedy imposed by law.

The City Of Tucson is in agreement with the comments prepared by City Scape Consultants, Inc. stating, that a ‘deemed granted’ remedy, “...would be inconsistent with traditional notions of federal/state jurisdiction.”⁵ The City Of Tucson respectfully suggests that there is an adequate mechanism for remedy of violations under 47 USC §332(c)(7) which could be adopted and which is workable, does not disadvantage governmental bodies, unfairly require government bodies to travel great distances to defend their local regulation nor threaten a violation of the Tenth Amendment.

The Commission also seeks comments on any alternative or additional remedies to a ‘deemed approved’ remedy. The City Of Tucson agrees that a determination by the Commission deeming an application ‘granted’ may not resolve all issues necessary for a provider to site a facility. The idea that the Commission would also require a local jurisdiction to issue a building permit flies in the face of the Commission’s Tenth Amendment rationalization that, “...such a rule would not appear to compel the States to administer and enact a Federal Regulatory program.”⁶ Surely, if the Commission creates a rule which deems an application complete, and forces a local authority to administer a building permit it has indeed become a ‘National Zoning Appeals Board’, usurped the traditional function of the federal courts in deciding controversies and issuing injunctive relief as well as offended the intent of the Tenth Amendment.

V. CONCLUSION

In conclusion, we again refer to sage advice offered the Commission by the IAC, “...it is the essence of local land use and safety regulation that a balance must be struck between

⁴ Arizona Revised Statutes §9-832, et.seq.

⁵ <http://cityscapegov.wordpress.com>, last visited January 28, 2014

⁶ Notice of Proposed Rulemaking, WT Docket No. 13-32 par. 138, (September 26, 2013)

{A0062910.DOC/2} WT Docket No. 13-238

City of Tucson Comments

Page 10 of 11

communication-based priorities and other important public priorities on which the Commission has no special expertise; indeed, given that such priorities may in these matters require an evaluation of uniquely local conditions the Commission may be particularly unqualified to make such evaluations... whenever any doubt exists as to whether the commission or its staff should exert substantive or procedural authority over individual land use, regulatory and safety decisions, the Commission should refrain from doing so, and defer to the local authority of the applicable local bodies and authorities, subject to review by courts with local jurisdiction”

The City of Tucson thanks you for the opportunity to comment on the Notice of Proposed Rulemaking.

Dated: January 31, 2014

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