Differing Treatment of Collocations and New Builds in Federal Law and Application to the Rights of Way

Federal law and policy generally requires competitively neutral treatment of competing communications providers by state and local authorities. *See, e.g.,* 47 USC § 253(c) (permitting local management of rights of way on a competitively neutral basis); 47 USC § 332(c)(7)(B)(i)(I) (regulation of the placement of wireless facilities shall not discriminate amongst providers of functionally equivalent services).[1]

Nevertheless, federal law also recognizes that requests for collocation can—and in some cases, must—be treated differently than requests for the placement of wholly new facilities. Below please find some examples of this differentiation in treatment.

47 U.S.C. § 1455 (applies only to collocations)

Section 6409(a) of the Spectrum Act, codified at 47 U.S.C. § 1455, establishes review timeframes and approval obligations that apply *only* to collocations and modifications of existing facilities (including facilities in the rights-of-way).

> For purposes of this subsection, the term "eligible facilities request" means any request for modification of an existing wireless tower or base station that involves--
> (A) **collocation of new transmission equipment;**
> (B) removal of transmission equipment; or
> (C) replacement of transmission equipment.

FCC Orders

The FCC, interpreting various sections of the U.S. Code, has made clear both that federal limitations apply to facilities located in the rights-of-way and that collocations may be treated differently than new builds in appropriate circumstances.

In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, 29 F.C.C. Rcd. 12865, ¶ 195 (2014) ("Infrastructure Order"). Section 6409 of the Spectrum Act applies to non-substantial requests involving either "towers" or non-tower structures, which the Act calls "base stations." In the Infrastructure Order, the Commission established differing levels of substantiality for the two categories, and determined that public

[1] Section 332(c)(7) is entitled "Preservation of Local Zoning Authority," and is most typically applied in cases involving zoning regulations, rather than rights-of-way management. However, it is black letter law that "the title of a statute and the heading of a section cannot limit the plain meaning of the text." *Bhd. of R. R. Trainmen v. Baltimore & O. R. Co.*, 331 U.S. 519, 528–29 (1947). Section 332(c)(7) is broadly written, and nothing in the text of the statute exempts rights-of-way from its statutory commands. "The *regulation of the placement, construction, and modification* of personal wireless service facilities by any State or local government or instrumentality thereof—
(I) shall not unreasonably discriminate among providers of functionally equivalent services; and
(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B) (emphasis added).

utility structures in the rights-of-way would not be treated as subject to the "non-tower structure" provisions of Section 6409. Thus, the agency has left no doubt that Section 6409 does in fact apply to structures in the rights-of-way.

In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332©(7)(b) to Ensure Timely Siting Review & to Preempt Under Section 253 State & Local Ordinances That Classify All Wireless Siting Proposals As Requiring A Variance, 24 F.C.C. Rcd. 13994, 14010–11 (2009) ("The Shot Clock Order") (adopting different review timelines under Section 332(c)(7) for collocations and new builds).

- ¶ 45: "Based on our review of the record as a whole, **we find 90 days to be a generally reasonable timeframe for processing collocation applications and 150 days to be a generally reasonable timeframe for processing applications other than collocations.** Thus, a lack of a decision within these timeframes presumptively constitutes a failure to act under Section 332©(7)(B)(v). At least one wireless provider, U.S. Cellular, suggests that such 90-day and 150-day timeframes are sufficient for State and local governments to process applications."
- ¶ 46: "We find that collocation applications can reasonably be processed within 90 days. **Collocation applications are easier to process than other types of applications as they do not implicate the effects upon the community that may result from new construction.** In particular, the addition of an antenna to an existing tower or other structure is unlikely to have a significant visual impact on the community. Therefore, many jurisdictions do not require public notice or hearings for collocations."

In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, 28 F.C.C. Rcd. 14238, 14274 (2013).

- "As the Commission noted in the *Sixteenth Competition Report*, collocation on existing structures is often the most efficient and economical solution for mobile wireless service providers that need new cell sites, either to expand their existing coverage area, increase their capacity, or deploy new advanced services. **Therefore, the Commission has taken several significant steps to facilitate collocations, including tailoring environmental review of collocations through the Collocation Agreement, adopting a time frame for local review of collocations in the *2009 Declaratory Ruling*, and adopting comprehensive rules to streamline the pole attachment process in the *Pole Attachment Order*. Collocation is also commonly encouraged by zoning authorities to reduce the number of new communications towers.** In addition, collocations on existing towers will be critical to deployment and ongoing operation of the nationwide PSBN mandated by the Spectrum Act."

Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, 47 CFR pt. 1, App. B

The FCC and the Advisory Council on Historic Preservation and the National Conference of State Historic Preservation Officers entered into a Nationwide Programmatic Agreement that provides guidelines and procedures for the construction of new towers and facilities on historic properties under Section 106 of the National Historical Preservation Act of 1966. The procedures adopted under the Agreement require different treatment for the construction of new towers than for collocations.

In the Matter of Nationwide Programmatic Agreement Regarding the Section 106 Nat'l Historic Pres. Act Review Process, 20 F.C.C. Rcd. 1073 (2004).

- **¶ 37:** "The draft Nationwide Agreement excludes certain enhancements to towers from NHPA review. Specifically, it excludes the 'Modification of a tower and any associated excavation that does not involve a collocation and does not substantially increase the size of the existing tower, as defined in the Collocation Agreement.' A substantial increase in size, in turn, is defined in the Collocation Agreement by reference to the extent of any increase in the tower's height, the installation of new equipment cabinets or shelters, the extent of any new protrusion from the tower, and excavation outside the current tower site and any access or utility easements. **Enhancements to towers that involve collocations and do not result in a substantial increase in size are excluded from review under the Collocation Agreement**."

- **¶ 63:** "We do, however, adopt a limited exclusion, consistent with a proposal offered by Sprint, for certain construction in or near communications and utility rights-of-way. Due to the increasing usage of wireless services and advances in technology, providers of certain types of service are increasingly finding it feasible to utilize antennas mounted on short structures, often 50 feet or less in height, that resemble telephone or utility poles. Where such structures will be located near existing similar poles, we find that the likelihood of an incremental adverse impact on historic properties is minimal. Moreover, it promotes historic preservation to encourage construction of such minimally intrusive facilities rather than larger, potentially more damaging structures. **Therefore, the Nationwide Agreement excludes from Section 106 review facilities located in or within 50 feet of a right-of-way designated for communications towers or above-ground utility transmission or distribution lines, where the facility would not constitute a substantial increase in size over existing structures in the right-of-way in the vicinity of the proposed construction**."

Wireless Telecommunications Bureau Announces Execution of First Amendment to the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, DA16-900, 2016 WL 4195718 (OHMSV Aug. 8, 2016).

The FCC amended the Nationwide Programmatic Agreement in August 2016 to provide guidelines and procedures for small wireless antennas and small cell facilities. This first amendment excludes the following from the Section 106 review process:

- **Collocation of small wireless antennas** and associated equipment on buildings **and non-tower structures** if they are outside of historic districts and are not historic properties;
- **Collocation of small or minimally visible wireless antennas** and associated equipment on structures in historic districts or on historic properties;
- **Replacements of small wireless antennas** and associated equipment; and
- **Collocations** in the interior of a building.

Federal Court Opinions

Federal courts have generally recognized that collocation and new build applications may be treated differently in appropriate circumstances.

City of Arlington, Tex. V. FCC, 133 S. Ct. 1863, 1874–75 (2013) (upholding the Shot Clock Order).

- "Where Congress has established a clear line, the agency cannot go beyond it; and where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow. But in rigorously applying the latter rule, a court need not pause to puzzle over whether the interpretive question presented is 'jurisdictional.' **If 'the agency's answer is based on a permissible construction of the statute,' that is the end of the matter.**"

Montgomery Cty., Md. v. FCC, 811 F.3d 121, 131 (4th Cir. 2015) (upholding the Infrastructure Order, which interprets Section 6409).

- "[T]he FCC's standards do incorporate considerations of context, even though they do not permit municipalities to conduct a contextual review of each facility**. For example, under the FCC's rules, the threshold for substantiality is lower for modifications that occur in public rights-of-way. The Order also applies different standards to base stations than it does to towers (which are usually in more remote locations)**."

New Cingular Wireless PCS, LLC v. Town of Stoddard, N.H., 853 F. Supp. 2d 198, 203 (D.N.H. 2012) (applying Shot Clock Order).

- "A collocation application involves 'the addition of an antenna to an existing tower or other structure.' Shot Clock Ruling, 24 FCC Rcd. At 14012, ¶ 46. **Applications other than collocations would involve the construction of new facilities or major modifications to existing facilities**. *Id.* at 14011, ¶ 43. New Cingular's application, which seeks approval to construct a new facility, falls into the latter category."

CONCLUSION

A variety of federal laws and regulations impose limitations on local management of rights-of-way as it relates to the siting of wireless facilities, including Sections 253 and 332 of the Communications Act and Section 6409 of the Spectrum Act.

Federal regulations also make clear that while localities must manage the rights-of-way in a competitively neutral fashion, this competitive neutrality requirement does *not* mean that all requests must be treated the same way. To the contrary—in a variety of contexts, federal law as interpreted by the FCC and the courts recognizes that collocations do not require the same level of review as new builds.

Field Preemption of Local Regulation of Wireless Interference

Local jurisdictions may not regulate the operation of wireless facilities, and in particular are barred from regulating radiofrequency interference ("RFI"). "The [Federal Communications Commission] and the federal courts have consistently found that the Commission's authority in the area of RFI is exclusive and any attempt by State or local governments to regulate in the area of RFI is preempted." Petition of Cingular Wireless L.L.C. for Declaratory Ruling that Provisions of Anne Arundel County Zoning Ordinance are Preempted, Memorandum Opinion and Order, 18 F.C.C.R. 13126, 13132, ¶ 13 (2003).

Because this is a field that has been fully occupied by federal law, local jurisdictions may not base any wireless siting decisions on issues related to RFI. *Id.* This prohibition extends beyond simply barring local jurisdictions from establishing their own technical standards; local jurisdictions are also prohibited from attempting to enforce the standards set by the FCC. *Id.* at 13136, ¶ 19 (holding that "[a]lthough the County does not purport to prescribe particular technical parameters, however, the fact remains that by asserting authority to prohibit operation that it determines causes public safety interference, the County is effectively regulating federally licensed operation," which is preempted).