



INTERGOVERNMENTAL ADVISORY COMMITTEE

TO THE

FEDERAL COMMUNICATIONS COMMISSION

ADVISORY RECOMMENDATION NUMBER 2014 - 1

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 AND ADDITIONS TO PRIOR IAC RECOMMENDATION

The Intergovernmental Advisory Committee ("IAC") to the Federal Communications Commissions ("Commission") submits this Advisory Recommendation in connection with WT Docket No.13-238. As the previous IAC noted in its Recommendation 2013-13, dated December 2, 2013, we appreciate that the Commission has recognized that any action it takes 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."¹ In Recommendation 2013-13, the prior IAC urged the Commission to focus on seven areas noted in italics below. The current IAC agrees with this focus on those recommendations and provides further detail and direction that we hope the Commission will heed.

1. *The Commission's primary efforts should be focused on working with government and industry to collaborate on best practices and education regarding deployment of wireless communications facilities in a manner that meets the legitimate needs and interests of all parties and all Americans.*

2. *Where the Commission needs to adopt specific rules to clarify the intent of Congress, it should do so in the narrowest possible fashion, and refrain from expanding federal preemption in areas of traditional local, state, and tribal government authority.* We additionally suggest that in adopting rules, the Commission should respect state and tribal rules that also address wireless facilities siting. Where state legislatures or tribal governments have enacted siting-related legislation then state laws should prevail.

3. *The Commission should confirm its initial proposal to adopt (NPRM, Para. 129) the IAC's earlier recommendation that Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 is properly construed only to apply to zoning and similar land use regulation decisions regarding use of private property, and is not applicable to actions of state, local and tribal governments with respect to their own property, when such governments are acting as landlord or otherwise in a proprietary rather than regulatory capacity.*² The IAC also notes that state, local and tribal governments should not use their land use regulatory authority to deny siting applications, with the intent that such action will cause an applicant to seek a more expensive alternative by leasing government owned property. This particular issue can be best addressed through education, developing and promoting best practices, and where necessary through judicial proceedings. At the same time, there is often merit in governmental entities steering applicants to government property when it will assist in siting wireless facilities in difficult areas. For example, schools, fire and police stations, city facilities and city/county parks can provide excellent coverage, particularly in residential areas, and not have impacts locating on private property would have in such areas. Further, state laws that recognize expressly local authority to create such siting hierarchies should be respected.³

4. *The Commission should not adopt any rules that waive or minimize the application of environmental or historic preservation laws on the siting of wireless communications facilities.* The IAC also suggests that the Commission consider in a future proceeding whether DAS and

¹ *In re Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies. et al.*, Notice of Proposed Rulemaking, FCC13-122, WT Dkt. No. 13-238, WC Dkt. No. 11-59, RM-11688 (terminated), WT Dkt. 13-32, (rel. Sept. 26, 2013), at ¶3 ("NPRM").

² State statutes recognize expressly that such statutes applicable to local governments' regulation of wireless communications facilities apply to local governments as a regulatory body and do not apply to local governments' action as a property or structure owner. *See, e.g., Florida Statutes*, Section 365.172(13). The Commission should not adopt an unsupported suggestion made in reply comments in this matter by a wireless trade group (Reply Comments of PCIA, the Wireless Infrastructure Association and the Hetnet Forum, at page 22) that municipally owned property be split into two categories, one subject to 6409(a) and one not. The same considerations that apply to municipally-owned land and buildings apply with at least the same force to properties such as traffic lights, street lights, and street signs.

³ *See Florida Statutes*, Section 365.172(13)(b)(J)(1)(recognizing local authority to create land use based location priorities).

small cell equipment deployed in urban areas should be categorized and considered a utility for the purpose of environmental and historic preservation laws to facilitate timely deployment of these facilities. DAS nodes that are similar in size to utility equipment should be considered for similar treatment under these laws. The Commission might additionally consider whether states are imposing requirements beyond those contained in federal environmental and historic preservation laws, and if so, how such state requirements should be addressed.

5. *Any challenges to local government action, claiming a violation of Commission rules, should be addressed in local state courts and local federal courts. Localities should not be required to incur the expense of retaining legal counsel in Washington, D.C. and traveling long distances to defend local zoning actions.* State and federal courts should be encouraged to expeditiously adjudicate all claims, and to the extent such proceedings are also governed by Section 704 of the Telecommunications Act of 1996, the Commission can note that per 47 U.S.C. § 332 (c)(7)(B)(v), the court shall hear and decide such action on an expedited basis.

6. *With the limited exception of making any definitional rules applicable to the Commission's "shot clock" decision in WC Docket No. 11-59, the Commission should refrain from revisiting and expanding its findings and rules adopted in connection with that Docket.* We clarify that the Recommendations made today are intended to respond directly to the issues raised in this Docket. In the future, as the Commission continues to address issues related to wireless technology and network deployment, the IAC stands ready to continue its collaborative work with the Commission to address these issues and provide state, local and tribal perspectives.

7. *The Commission should respect and heed the advice of government commenters in this Docket regarding the Tenth Amendment to the United States Constitution and the role of federalism in connection with this proceeding.*

II. RECOMMENDATIONS

1. Prior IAC Recommendations. The IAC urges the Commission to act in this docket consistent with the two Recommendations submitted by the prior IAC in 2013.⁴

2. Rules Must be Narrowly Tailored to Address Specific Issues Based Upon the Record in this Docket. Any rules adopted by the Commission must reflect a balance between the Commission's attempt to clarify and define what Congress meant in its legislative mandates, while at the same time recognizing and respecting local and state land use authority. The Commission should not take any action to preempt areas of traditional local and state authority unless (1) the direction to do so is clearly authorized in the statute, and (2) the record reflects a significant national problem occurring on a regular basis in a wide variety of jurisdictions throughout the United States. Unless the record in this docket demonstrates a problem of this scope and magnitude, the Commission should refrain from imposing one-size-fits-all rules, as opposed to allowing courts to address alleged violations on a case-by-case basis. Based upon the evidence submitted in this docket, the IAC does not believe there is a showing of a widespread national problem with local jurisdictions delaying broadband deployment in the United States.

⁴ See IAC Advisory Recommendation No. 2013-9 (July 31, 2013), Response to WTB's Guidance on Interpretation of Section 6409 (a) of the Middle Class Tax Relief and Job Creation Act of 2012. [Recommendations](#), and IAC Advisory Recommendation No. 2013-13 (December 2, 2013), Recommendation regarding NPRM on "Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies (WT Docket No. 13-238)." [Recommendation](#).

3. Definitional Terms. The crux of this proceeding is to identify and where deemed appropriate, provide definitions for the key terms appearing in Section 6409, so that all interested parties have a clear understanding of what is and is not covered, and where in the collocation siting process federal, state, tribal and local laws govern. These terms include "Wireless Tower," "Base Station," "Substantially Change the Physical Dimensions," "Collocation," and "Transmission Equipment." We agree with the prior IAC that these terms should be defined narrowly, in the context that they are commonly understood. As an example, the manner in which the Commission defines "wireless tower" will have a significant impact on the number of sites that may be available for wireless facilities and in particular, small cell facilities. For certain government owned assets such as streetlight poles governments are considering making these facilities available for small cell technologies. In some communities these assets are already made available for siting. If the Commission defines wireless tower to include these kinds of facilities, some local governments that might otherwise allow siting on these assets will refrain from allowing any attachments to avoid mandatory collocation, so as to avoid possible future conflicts with visual impacts, safety code requirements and other land use issues that might be implicated by continual, non-discretionary collocation.

We especially note that clear, logical and common sense definitions have been proposed by the National Association of Telecommunications Officers and Advisors, the National League of Cities, the National Association of Counties as well as multiple individual local jurisdictions.⁵

a. It is critically important to ensure that any rules adopted by the Commission acknowledge that any change to an existing wireless tower or base station that is inconsistent with federal, state or local law or regulation should be considered a "substantial change," and therefore not subject to the mandatory collocation requirements of Section 6409. For example, a "substantial change" should include a change in the physical dimensions of a site that would cause the site to no longer be compliant with Federal Aviation Administration regulations, this Commission's regulations concerning radio frequency emissions, state and local building and safety codes, conditions of the original land use approval for a specific site, or environmental and historic preservation laws.

b. We cannot underestimate the importance of recognizing a regulatory authority's ability to consider "substantial change in physical dimension" in the context of the specific application. For example, a 15 foot increase to a 150 foot tower may be insubstantial, while a 15 foot increase to a 35 foot tower will likely be very substantial. An additional antenna array on a tower in an industrial zone that already has two antenna arrays on the tower may be viewed as insubstantial. An additional antenna array on a camouflaged site that is being used as a flag pole in a town park or a facility modification that results in a fully screened facility becoming partially unscreened may be quite substantial. Regulatory entities need authority to determine

⁵ WT 13-238 Ex Parte filings of Colorado Communications and Utility Alliance, Rainier Communications Commission, City of Tacoma, WA, City of Seattle, WA, King County, WA, Colorado Municipal League, Washington Association of Cities, National Association of Telecommunications Officers and Advisors, National League of Cities, National Association of Counties, July 17, 2014; WT 13-238 Ex Parte filings of City of Alexandria, VA, City of Arlington, TX, City of Bellevue, WA, City of Boston, MA, City of Davis, CA, City of Los Angeles, CA, City of McAllen, TX, City of Ontario, CA, City of Palm Beach, FL, City of Portland, OR, City of San Jose, CA, City of Tallahassee, FL, American Planning Association, Fairfax County, VA, Georgia Municipal League, International Municipal Lawyers Association, Los Angeles County, CA, Montgomery County, MD, Redwood City, CA, Texas Coalition of Cities for Utility Issues, Village of Scarsdale, NY, July 18 and July 21, 2014.

what would be a "substantial" change.

c. The record in this docket does not support a finding that we have a national problem with local governments delaying broadband deployment. At best, the record in this proceeding demonstrates only a limited number of bad actors that may be acting unreasonably in connection with wireless applications that lead to delay. Given the total number of local governments with land use authority, the filings in this docket alleging examples of problems amount to less than one-tenth of one percent of the nation's local governments. The record also reflects that often the industry is to blame for delays in siting wireless facilities, by failing to provide complete information, withdrawing applications or requesting to hold applications in abeyance because of changes in the industry and reassessing siting needs. The record also reflects that there have been thousands of sites approved with no problems or complaints from either side. There may very well be a handful of both government and industry bad actors, and these entities' actions can be adequately addressed in judicial proceedings. There is no evidentiary record demonstrating the kind of national problem that requires a one-size-fits-all rule preempting traditional areas of local and state authority.

4. No "Deemed Granted" Remedy. The Commission notes in the NPRM that it does not intend to become the "National Zoning Board."⁶ Any Commission rules adopted in this proceeding should be limited to defining terms that help implement the statute. The Commission should not create new remedies that are best left to state and local governments, and local courts. The IAC notes that there is nothing in Section 6409 that affords the Commission authority to make land use decisions that are traditionally made by local and state governmental entities.

5. Alleged Violations of Rules to be Heard in Local Courts. We emphasize our support of the prior IAC's Recommendation that any proceedings brought to enforce the rules that may be adopted in this docket be enforced through judicial action in local courts. The IAC notes that we should strive to avoid hardship to both regulatory bodies and collocation applicants in addressing enforcement of rules. Commission rules should not indirectly incent local jurisdictions to unreasonably delay siting applications knowing that the applicant would be left with costly methods to address any disputes. Similarly, local governments should not be prejudiced. It would create significant hardship and unreasonable costs for such parties to hire Washington, D.C. counsel to defend local actions in Commission proceedings. Further, there may be other persons with standing to appeal local government siting decisions. Federal and state courts in local jurisdictions are well equipped to handle any alleged violations of applicable law. Any Commission rule can direct courts to act quickly, similar to the directive given to the courts to handle Section 332 claims on wireless siting. Further, the Commission is not equipped to handle numerous appeals of local action, even if it made good policy sense to do so. The Commission has many pending dockets where no decisions have been made for many years. A requirement to appeal such actions to the Commission would certainly be unduly burdensome for many parties. Pursuing a judicial remedy in local courts puts all parties on the same level. Directing courts to act expeditiously on these claims should address any concerns with unreasonable delay that parties seek to avoid.

⁶ NPRM, at ¶99.

6. Except for Definitions, Do Not Expand Findings and Rules in the Shot Clock Docket. In the NPRM, the Commission states that it is not “revisiting or seeking comment in this proceeding on any of the matters decided by the 2009 Declaratory Ruling.”⁷ To do otherwise in any rules the Commission may adopt here, would violate principles of due process and fundamental fairness to advise the public, including local and state governments, that there was no intent to revisit the shot clock ruling and then, in response to industry comments, do the opposite. We note that the 2009 Declaratory Ruling was challenged, and the Commission’s authority and its rules were upheld by the United States Supreme Court. Those rules must be followed, and when violated, there are procedures in place to enforce them. It is not however, appropriate to expand those rules in this proceeding, given the Commission’s representation in the NPRM that it had no intent to do so.

III. CONCLUSION

The IAC appreciates the opportunity to comment on this matter. We believe that any rules adopted by the Commission must be narrowly tailored to address specific ends directed by Congress, and we encourage the Commission to consider the common sense definitions filed in this docket.⁸ It cannot be credibly asserted that most or even many State, tribal and local governments strive to act as barriers to broadband deployment. To the contrary, these officials understand the benefit that broadband brings to their communities and the need for affordable, reliable high speed connectivity to compete in a global economy. These officials are also tasked with balancing the communications needs of a community with all other activities within the scope of their responsibilities. America’s states, localities and Tribal nations are as diverse as the individual siting applications that come before them. Any rules adopted by the Commission should respect the continued authority and prerogative of these officials to make decisions in the best interests of their respective communities.

Approved on this ___ day of September, 2014.

INTERGOVERNMENTAL ADVISORY COMMITTEE



Gary Resnick, Chair

⁷ NPRM at ¶¶ 152, 162.

⁸ See Note 4, supra.