

FCC ADOPTS WIRELESS INFRASTRUCTURE ITEM AMID COMPLAINTS ABOUT DETAILS

The FCC unanimously approved a notice of proposed rulemaking and notice of inquiry today exploring ways to streamline the siting of wireless infrastructure by identifying and removing regulatory barriers, including those imposed by state and local governments and the FCC's historic preservation and environmental rules and procedures. The Commission said the action will help accelerate the deployment of 5G wireless broadband services.

Today's action drew praise from the wireless industry and other industry entities but criticism from some tribal entities and representatives of localities.

The Advisory Council on Historic Preservation (ACHP) has called the wireless infrastructure item premature and asked the Commission to defer action on it until it has consulted with key stakeholders (TR Daily, April 14), while several tribal entities have urged the FCC to abandon the NPRM altogether. Other parties, including the National Conference of State Historic Preservation Officers and cultural and heritage groups, also have taken issue with provisions in the draft item.

"The Notice of Proposed Rulemaking (NPRM) begins an examination of how state and local processes affect the speed and cost of infrastructure deployment, and asks for comment on improving state and local infrastructure reviews, such as zoning requests," the FCC noted in a news release on the item, which was adopted at today's monthly meeting in WT dockets 17-79 and 15-180. "Among other things, the NPRM seeks comment on whether siting applications that are not acted on by state or local governments within a reasonable period of time should be 'deemed granted' by Commission rules."

The FCC also solicits comments on the use and impact of siting moratoria by state and local governments.

"The NPRM also examines FCC rules and procedures for complying with the National Historic Preservation Act and National Environmental Policy Act. The Commission seeks input on the costs and benefits inherent in the historic preservation and environmental review processes as currently structured and asks what changes could be made to minimize costs and delays," the news release added.

Among other things, the item seeks views on whether state and tribal historic preservation officer reviews cause delays in projects getting approved and add costs; whether some deployments, including certain collocations, can be excluded from review; and how the agency should address "twilight towers" to enable collocations. "In the Notice of Inquiry adopted today, the Commission asks for comment on two provisions of the Communications Act, Sections 253 and 332, that acknowledge the importance of state and local regulation, but also protect against regulations that impose barriers to entry or are otherwise unreasonable," the news release added.

Also at today's meeting, the FCC also adopted an NPRM, NOI, and request for comment proposing to remove barriers to wireline broadband deployment (see separate story).

FCC Chairman Ajit Pai said he has "heard time and time again how current rules and procedures impede the timely, cost-effective deployment of wireless infrastructure. This will only become a bigger problem as our wireless networks evolve. A key feature of the transition from 4G to 5G is a change in network architecture. The future of wireless will evolve from large, macro-cell towers to include thousands of densely-deployed small cells, operating at lower power. As networks evolve, our rules should too.

"Historic preservation and environmental review regulations designed for large macro-cell towers just don't make sense for small cells that can be the size of a pizza box," Mr. Pai added. "And cities shouldn't impose unreasonable demands or moratoria on wireless siting requests. This simply penalizes their own constituents who want better mobile service. To address these issues, we are seeking ideas for updating state, local, and Tribal infrastructure review to meet the realities of the modern marketplace."

Mr. Pai continued, "If we do our job—if we can make the deployment of wireless infrastructure easier, consistent with the public interest—then we can help close the digital divide in our country. This is especially true for low-

income and minority communities, which disproportionately rely on wireless service as their primary or sole on-ramp to the Internet. Working with our partners at the federal, state, local, and Tribal levels, I hope we can take another meaningful step towards bringing high-speed Internet access to all Americans and maintaining our nation's global leadership in the wireless space."

During a news conference after today's meeting, Mr. Pai was asked about the calls of ACHP and tribal groups to delay consideration of the item adopted today or abandon it altogether.

He said the FCC adopted the "proposals precisely because we want to create [a] formal framework for engaging in conversations with tribal governments and with all other interested stakeholders to figure out the best way to square the circle," stressing the need to deploy advanced wireless services while protecting "the legitimate interests of tribal governments."

"We have an open door and an open mind as to how to proceed," Mr. Pai added, saying he has met with tribes in the past. "We view this as a dialogue, a respectful dialogue, in which the FCC wants to work cooperatively with them to try to figure out the best way to improve the lives of tribal members. That's what this is all about at the end of the day."

"I have heard some argue that there should be more outreach to stakeholders before taking today's step, but I must respectfully disagree," Commissioner Mike O'Rielly said. "While conversations can be productive, the Commission, in an open and transparent fashion, should obtain all the facts and ask the difficult questions to holistically consider any barriers placed before wireless infrastructure siting. The Commission cannot continuously hear accounts of deployment hurdles and sit idly by. If this generates the need for preemption, I have no hesitation to use authority provided by Congress to get new wireless services deployed.

"Take, for instance, the tortured history of twilight towers, the resolution of which I have been urging since I came to the Commission and which has been outstanding since 2005," Mr. O'Rielly continued. "Twelve years later, there has been a lot of talk, but no action. It makes no sense to have towers upon which no collocations can occur. Facilities are needed as industry participants build out newly available bands and densify their systems. This issue must be resolved once and for all, and immediately."

He also said he has "met with many people about the delays and expense of seeking the necessary local permitting and tribal approvals. This has been especially problematic for small cell systems, which should not require the same review and fees as a macro tower. Many localities and tribes are, undoubtedly, acting in good faith, and I thank them for their cooperation in approving the deployments necessary to provide Americans with the wireless services they demand, but bad actors are ruining it for everyone. Infrastructure siting is not a means to increase revenues; and delaying application reviews, imposing de facto moratoria, preventing densification and upgrades of networks, among other tactics, is not acceptable."

Mr. O'Rielly added that he is "interested in hearing the suggestions of all interested parties and, as always, I will consider all views before making a final decision. I will review with particular interest submissions regarding our statutory authority to impose a deemed granted remedy under section 332. While I like the idea, the wording of the statute may complicate our ability to bypass the judicial system. Further, I have concerns about one petitioner's suggestion that the Commission set a fee schedule or resolve disputes with tribes. I generally do not believe this is the Commission's role."

He also said he appreciated "that the Chairman incorporated my requested edits, such as providing additional information about alternative twilight tower solutions, adding a statement that twilight towers should not be subject to any type of enforcement action or penalties, discussing potential improvements that we can make to the Commission's Tower Construction Notification System and our internal processes, seeking comment on whether the current Commission forms are sufficient to provide all the required upfront information for tribal review, and exploring whether specific types of collocations, such as those on existing structures with no ground disturbance or indoors, should be exempt from historic preservation and environmental reviews, amongst others."

"As I have said before, approving applications to site antennas and other infrastructure, are difficult policy challenges for local governments," Commissioner Mignon L. Clyburn said in her statement for today's meeting. "Many are overwhelmed by the increased volume of siting and permitting applications in a 4G and 5G world. Indeed, the localities considering siting applications vary immensely from geographic and demographic

differences, to financial considerations, to differences in local law. They are on the front lines addressing the challenges of cost, complexity, and time faced by siting applicants, while answering and addressing the never ending questions, concerns and needs, of their communities.

“We cannot afford to deal with any of these elements in a vacuum. Local officials and industry must work together to identify challenges, engage in coordinated efforts to update outdated regulations, and brainstorm deployment plans that are minimally disruptive to communities, and they must do so in an efficient and timely way,” the Commissioner added. “A collaborative local process and open dialogue between the public and private sector will minimize conflict, introduce predictability, and create incentives for information sharing and transparency.”

Ms. Clyburn said she has “met with industry representatives, as well as local governments, and I understand each of their grievances. Some localities charge fees that applicants view as excessive for permit applications, access to rights-of-way, and public structures, while others find themselves economically underwater after the negotiations are complete. And while it is important that municipalities are properly compensated for use of their rights-of-way and public structures, a balanced and equitable system would ensure that those fees paid by the companies are both fair and reasonable. Siting applicants have themselves been criticized for submitting incomplete applications, which some localities point to as a source of the delay in processing permits. That must be appropriately addressed.”

“I think it is important to acknowledge that there are actions that can be taken on both sides of the aisle, and I thank my colleagues for agreeing to my requests to seek comment on actions applicants can take to help streamline the process, as well as to seek comment on the ‘deemed granted’ approach, rather than proposing it outright,” Ms. Clyburn said. “The NPRM also proposes to take a ‘fresh’ look at our rules implementing the National Environmental Policy Act (NEPA), and the National Historic Preservation Act (NHPA), and while I am not opposed to reviewing our rules, we must be careful not subvert statutory intent, as we update our rules to reflect the evolving wireless landscape.”

During a news conference after the meeting, Ms. Clyburn said that she doesn’t “come from a posture of going straight from zero to 60 when it comes to preempting communities. I think there is a lot of mileage, a lot of roadway, that we can go before we get to that point.” She added that she opposes “a one-size-fits-all approach when it comes to regulation.”

The wireless industry and others commended the FCC for adopting today’s wireless infrastructure item, as well as other items, while tribal groups and locality representatives criticized the wireless action.

“This marks an historic day for the deployment of wireless infrastructure and the mobile economy on which it relies,” said Jonathan Adelstein, president and chief executive officer of the Wireless Infrastructure Association. “The FCC is moving quickly on an extraordinarily aggressive agenda that puts every major broadband deployment issue on the table. The FCC’s comprehensive review of regulations that govern the deployment of wireless infrastructure will speed the ability of the wireless industry to deliver the mobile networks needed to support public safety, encourage economic development, and improve the quality of life of Americans.

“Specifically, the wireless infrastructure NPRM and NOI aim to remove unnecessary obstacles that stand in the way of the efficient and responsible deployment of wireless infrastructure. Removing these barriers will help industry meet burgeoning demand today, and is key to the rollout of 5G mobile networks that will provide the foundation on which so much of our future will be built,” Mr. Adelstein added.

“We are especially encouraged by the goals set out in the NPRM. In encouraging economic growth and national leadership, the FCC must thoughtfully intervene when state, local, and tribal processes for siting applications for wireless facilities are harming the people and businesses that rely on robust mobile networks,” Mr. Adelstein said. “WIA works closely with state and local governments, and many increasingly recognize the need to facilitate broadband deployment, and we support the FCC’s effort to address those municipalities that present unreasonable barriers to delivering greater wireless coverage and capacity to the public.”

“CTIA is pleased that Chairman Pai and his fellow commissioners are moving forward to evaluate ways to modernize 5G wireless infrastructure deployment,” said Scott Bergmann, the trade group’s vice president-regulatory affairs. “The FCC has a clear path to remove regulatory barriers to new wireless infrastructure

deployment, drive significant investment and job growth, and help deliver greater wireless connectivity for consumers and businesses.”

“Today, the FCC takes bold steps toward speeding the deployment of small cell technologies, setting the stage for 5G innovation and deployment,” said Joan Marsh, senior vice president-federal regulatory for AT&T, Inc. “The notice of proposed rulemaking adopted today asks critical questions about how to remove excessive regulatory burdens when deploying small cell equipment in public rights-of-way. The NPRM seeks to explore impediments at the federal, local and tribal levels, including excessive delays and costs associated with regulatory and tribal review and excessive costs to access public rights-of-way. Action on the issues addressed in the NPRM will help facilitate denser network builds that will, in turn, drive faster network speeds, speed the deployment of new technologies and result in better service for all Americans.”

Kathy Grillo, Verizon Communications, Inc.’s SVP and deputy general counsel-public policy and government affairs, said, “We are very encouraged by the FCC’s efforts to promote infrastructure investment. Next generation technologies will require massive fiber deployments and dense wireless networks to ensure that the United States continues to lead the world in broadband. Chairman Pai has demonstrated that he is committed to policies that enable this investment and that attack unnecessary regulatory barriers. As we announced this week in a \$1 billion fiber optic cable deal with Corning, Verizon intends to lead the way in 5G and in fiber deployment, and smart infrastructure policies will help us get there.”

The Internet Innovation Alliance said, “We are encouraged by FCC actions to provide an environment that invites further infrastructure investment in the U.S. at a time when it is critically needed. There are more steps to take to strengthen the American economy and broadband to fuel economic growth, and we expect future FCC action to benefit consumers and businesses. We congratulate the FCC on its leadership so early in a new Administration and look forward to working with them to advance a bright future for broadband.”

NCTA said “that today’s deregulatory actions regarding business data services and wired and wireless infrastructure will further speed the deployment of broadband networks so that all consumers can enjoy the transformative benefits of the internet.”

But National Congress of American Indians (NCAI) Executive Director Jacqueline Pata said her organization “has concerns with the FCC’s decision to move forward with a Notice of Proposed Rulemaking that could lessen the protections afforded tribal governments on infrastructure development that impacts sacred and cultural sites. We want to remind the Commission that the trust and treaty obligation of the FCC extends to tribal governments and not to industry. While Indian Country is firmly in support of wireless deployment on, or near, tribal lands, we must ensure it is done in partnership with tribal governments and not without their consent.”

The United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) said it “is disappointed that the FCC approved this Notice of Proposed Rulemaking without engaging in meaningful consultation with Tribal Nations. Over a decade ago, USET collaborated with the FCC to develop a set of voluntary best practices that address a majority of concerns expressed by the wireless industry, including timelines for review and the assessment of fees for professional services. These best practices continue to be a viable model to ensure both the protection of Tribal cultural resources and the necessary deployment of wireless infrastructure in Indian Country and beyond. We encourage the FCC to consult with Tribal Nations on their national adoption. With regard to bad actors, it is the FCC’s responsibility to consult directly with the Tribal Nations in question on an individual basis, rather than propose a sweeping, radical change in policy that undermines its trust relationship with and obligations to all Tribal Nations.”

Bambi Kraus, president of the National Association of Tribal Historic Preservation Officers (NATHPO), told TR Daily that “one thing that jumps out at me is the success stories of what the tribes have been able to do in working with industry [aren’t] reported at all.” She added that tribes are not able to validate the industry complaints about tribal reviews.

“I’m hoping that the [FCC’s] process will show that tribes and industry consultants have been working fairly well together,” she added. She also commended Ms. Clyburn for calling for more collaboration among stakeholders.

This week, NCAI, USET SPF, and NATHPO submitted a joint filing at the FCC calling on the agency to abandon the NPRM (TR Daily, April 19).

In response to a request for comment on the FCC's action today, Matt Spangler, a spokesman for ACHP, referred TR Daily to the organization's filing at the FCC last week asking the agency to defer action on the item until it consults with key stakeholders.

"It's unfortunate that the Commission has decided to undertake further actions that could adversely affect local government control and authority of the public rights-of way," said Steve Traylor, executive director of the National Association of Telecommunications Officers and Advisors (NATOA). "The Commission should have first waited to determine whether a sufficient factual basis for taking any further siting action has been established in the still-pending Streamlining Deployment of Small Cell Infrastructure proceeding.

"Perhaps in its haste to do away with 'regulatory underbrush,' the Commission swept away its own stated goal to engage in fact-based, data-driven decision-making," Mr. Traylor added. "For example, there is simply no reason to believe that a 'deemed granted' remedy for the failure of a locality to act on a siting application within a prescribed time frame (if, indeed, the Commission even has the authority to impose such) would result in speeding up the application process. What we see here is not an effort to streamline the siting process by engaging in a collaborative effort with all stakeholders, but rather a blatant effort to improve industry's bottom line at the expense of local governments and taxpayers."

Mr. Traylor continued, "We have a Commission that says it dislikes federal preemption, but once again it seeks to preempt local government siting ordinances on a wholesale basis. We have a Commission that says it wants to cut regulatory red tape, but once again it seeks to impose myriad siting regulations on local governments. We have a Commission that says its actions will increase competition and lower consumer prices, but once again those actions will only benefit industry players. In a tip of the Mad Hatter's hat to Chairman Pai, we believe the Commission's descent into the rabbit hole only gets 'curiouser and curiouser.'"

Angelina Panettieri, principal associate-technology and communications for the National League of Cities, said, "NLC looks forward to reading the full proposals once they are released by the FCC. While we are disappointed that the Commission is proceeding with the two new proposed wireline and wireless rulemakings, we appreciate and share Commissioner Clyburn's concerns about preemption of local authority over telecommunications infrastructure within their own communities. We agree that a collaborative process with industry, rather than a federal preemptive mandate, is the right way to ensure that all Americans have access to affordable, reliable high-speed internet, whether wired or wireless."

Gerard Lederer, an attorney for Best, Best & Krieger LLP who is counsel to local governments, said, "There appear to be significant changes in the draft, so local government needs to reserve judgment until we have read the item. We are grateful to Commissioner Clyburn for her artful defense of local governments' constitutionally and congressionally recognized rights to manage our communities. We were also pleased to hear Commissioner O'Rielly recognize the statutory limitations on the FCC's ability to preemptively site wireless infrastructure, also known as 'deemed granted.' Finally, we welcome Chairman Pai's description of the proceeding during his press conference as a formal way to commence the conversation on how all levels of government might work cooperatively to ensure all our citizens have access to the most robust of broadband services. Local government is fully committed to meeting the wireline and wireless needs of our constituents." —Paul Kirby, paul.kirby@wolterskluwer.com

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