

## **Clyburn, Other Dems Seek Delay on Wireless Infrastructure Item**

FCC Commissioner Mignon L. Clyburn and Democrats in the House and Senate urged the FCC today to delay consideration of the draft wireless infrastructure order that it plans to consider at its meeting tomorrow, citing opposition to the item of tribal entities, municipalities, environmental protection advocates, and others. However, an FCC spokesperson indicated that FCC Chairman Ajit Pai would not pull the item from the agenda.

The draft second report and order would clarify that the deployment of small cells by private parties doesn't constitute a "federal undertaking" under the National Historic Preservation Act (NHPA) or a "major federal action" under the National Environmental Protection Act (NEPA).

For traditional, large-cell deployments, the order would clarify the industry-tribal engagement process under NHPA, including the time for tribal review, and would rule that companies are not required to pay tribes upfront fees for reviewing projects.

The order also would remove the requirement that applicants submit environmental assessments (EAs) because a proposed facility is in a floodplain if the facility is at least one foot above the base flood elevation. It also would adopt a shot clock for the FCC's processing of EAs.

A plethora of stakeholders, including federal officials, state and tribal historic preservation officers, localities, and environmental advocates have expressed concerns with the draft order.

Critics have argued, among other things, that the item would exceed the FCC's authority, fails to acknowledge the positive role that tribes and others play in the review of wireless infrastructure, and understates the potential impact of small cells. States, localities, tribes, and others also have complained that the Commission has failed to adequately consult with them on the issues.

"Expediting the deployment of next generation wireless services to all Americans must remain a top priority for the FCC. While I strongly support this goal, in recent weeks I have made clear that the approach proposed by the current Order to streamline the deployment of wireless infrastructure raises many concerns," Ms. Clyburn said in a statement released this afternoon.

"It was my hope that through discussions and negotiations that these concerns could be addressed. However, after a full review of the record (and multiple conversations with numerous stakeholders) about the concerns raised by Tribal Nations, environmental protection advocates, and local government representatives, it is clear to me that the best course for all parties at this juncture is to delay tomorrow's vote on this Order until the potential adverse impact of these proposed rules on Tribal Nations, historic sites, and the natural environment are fully addressed," Ms. Clyburn added.

A letter to the FCC today from Sens. Tom Udall (D., N.M.), Maria Cantwell (D., Wash.), and Tina Smith (D., Minn.), and Rep. Ben Ray Lujan (D., N.M.) asked the Commission "to delay finalizing the rule until a truly meaningful consultation with Indian Tribes occurs.

"We have heard from tribal stakeholders that this draft order confuses streamlining with steamrolling, potentially limiting the resources available to Tribes and their Tribal Historic Preservation Officers at an important juncture when the telecommunications industry continues its expansion of infrastructure into tribal areas of religious, historical, and cultural importance," the lawmakers continued. "Given these potentially sweeping changes to the agency's tribal consultation process within the National Historic Preservation Act (NHPA), we ask the FCC to delay its vote on this measure while it conducts another round of tribal consultation."

In a letter to the FCC yesterday, Reps. Frank Pallone Jr. (D., N.J.), ranking member of the House Energy and Commerce Committee, and Anna G. Eshoo (D., Calif.), and Raul Ruiz (D., Calif.), members of the communications and technology subcommittee, also expressed concern about the draft order.

“We urge you to reconsider your proposed order that would short-circuit the safeguards for tribal lands set forth in the National Historic Preservation Act (NHPA),” they said. “While we are enthusiastic supporters of efforts to deploy more wireless broadband, including new 5G technologies, we do not believe the Federal Communications Commission (FCC) should set up this false choice between broadband deployment and respect for tribal sovereignty. Your proposal would undermine the foundations of tribal protection and consultation set forth by Congress in the NHPA, while doing nothing to secure a single enforceable commitment that broadband providers will actually build more infrastructure.”

The lawmakers complained that “[i]f the FCC were to carve out small wireless facilities from NHPA, the Commission could be subjecting culturally significant sites to death by hundreds of thousands of small-cell cuts.”

They also said that the item “shifts the burdens away from the corporations that benefit from the order and onto often cash-strapped tribes who receive nothing in return. The existing system ensures that these communities can afford to perform an adequate review to protect their sacred land by allowing them to collect a fee from the carriers that benefit from the deployment.”

The House members also said they “are dismayed that this most recent Order more broadly reflects the culture of this Commission’s majority to act always at the behest of industry again and again at the expense of consumers, localities, and otherwise marginalized and disenfranchised communities who are in the most need of their government to look out for them.”

In another letter to the FCC today, Rep. Debbie Dingell (D., Mich.) asked Commissioner Brendan Carr, who is the FCC’s point person on wireless infrastructure issues, to reconsider the draft order, which she said “would eviscerate the critical environmental and transparency protections created by the National Environmental Policy Act (NEPA).”

“The justification for your proposed order’s attack on NEPA is lacking,” the congresswoman added. “I am particularly puzzled by the dearth of serious discussion in the record regarding the impact of gutting NEPA on local communities, businesses, and the environment. In addition, the NEPA process also provides an opportunity for input to improve project design and public acceptance. As a Member of Congress, I am committed to pursuing high-speed, universal broadband access, but I believe it foolish to sacrifice public transparency and thoughtful environmental considerations to do so. Without much thought, your proposed order weakens NEPA’s transparency framework in the name of efficiency, yet does not include a single enforceable commitment to ensure that broadband providers will actually build more infrastructure.”

An FCC spokesperson defended the item this afternoon and indicated that Mr. Pai does not plan to delay its consideration.

“This item is critical for American leadership in 5G, and the Chairman looks forward to supporting it tomorrow,” the spokesperson said. “We need to modernize our outdated wireless infrastructure rules so that Americans will be able to benefit from next-generation wireless services. It’s important to note that the draft decision wouldn’t change the Commission’s approach for deployments on tribal lands. And for all other deployments, the draft has benefitted greatly from consultations with Tribes, and focuses our review process on those deployments most likely to impact historic and cultural interests.”

In his own statement, Mr. Carr focused on entities that have expressed support for the order rather than those who oppose it.

“It’s heartening to see the broad base of support for ensuring that the U.S. wins the global race to 5G and gets more broadband to more Americans. Our decision is the product of discussions spanning three years, and it has benefitted greatly from extensive consultations,” Mr. Carr said. “I’m glad that a broad coalition supports these efforts, including tech advocates like INCOMPAS, CCIA, and CTA, voices from underserved communities like LULAC and LGBT Tech, job creators like the Small Business & Entrepreneurship Council and the U.S. Chamber, and other organizations including the Progressive Policy Institute.”

Critics of the item commended Ms. Clyburn for calling on the FCC to delay a vote on it.

The United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) said it “is pleased that in response to the strong objections of Tribal Nations, as well as concerns from federal agencies, the historic preservation community, localities, Congress, and numerous other stakeholders, Commissioner Clyburn is correctly recommending that tomorrow’s scheduled Commission vote on its draft Report and Order be delayed. As it is currently written, the draft Report and Order has devastating implications for the protection of sacred Tribal cultural property and historic preservation, and was developed without anything approaching adequate Tribal consultation. Furthermore, its overbroad and unjustified reimagining of the National Historic Preservation Act and the National Environmental Policy Act is unlawful.”

USET SPF added, “We continue to be deeply concerned that the draft Report and Order relies on a handful of unverified industry examples, as it proposes to upend a largely successful process and jeopardize existing legal protections and obligations to Indian Country. Yet again, USET SPF calls upon the entire Commission to withdraw the draft Report and Order and instead, consult with Tribal Nations on a set of best practices we developed in collaboration with the FCC over a decade ago. These best practices contemplate and address a majority of concerns expressed by the wireless industry and 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. USET SPF again commits itself to open dialogue and true consultation on a path forward that protects sacred Tribal cultural property while addressing any legitimate concerns raised by the telecommunications industry.”

“We are grateful to Commissioner Clyburn for her leadership on this issue and endorse her efforts to address concerns raised by Tribal Nations, environmental protection advocates, and local government,” said Mike Lynch, president of the National Association of Telecommunications Officers and Advisors (NATOA), which has joined other municipal groups in expressing concern about the order (TR Daily, March 16). “A modest delay in considering the draft order seems both appropriate and in keeping with Commission practice.”

“In exempting ‘small’ wireless deployments from review under the National Historic Preservation Act and the National Environmental Policy Act, we believe the draft order sacrifices local communities’ interests without a full and fair assessment of the ramifications of this proposed action,” Mr. Lynch added. “When viewed in the context of existing preemptions of local authority over wireless facilities, it is clear the proposed draft order paves the way for dramatic changes in our communities with limited or, in many cases, no opportunity for local review.”

“Once again the nation is indebted to Commissioner Clyburn for her practical leadership skills at the Commission,” Gerry Lederer, an attorney for Best, Best & Krieger LLP who represents local governments, told TR Daily. “The rewrite of the nation’s NHPA/NEPA rules to exclude small cells, misrepresented as just the Wi-Fi like antenna, were not outlined in the Commission’s proposal in the 17-79 docket. How could it hurt to spend more than 21 days to better understand the intended and unintended consequences of the proposed rewrite of the nation’s NHPA/NEPA rules? My local government clients hope that Commissioner Clyburn is successful in her efforts and stand ready to participate in any dialogue she seeks to identify and avoid at least the unintended consequences of the order.”

Asked by TR Daily to comment today, Charlene Dwin Vaughn, assistant director of the Advisory Council on Historic Preservation’s Office of Federal Agency Programs, noted that ACHP, in a filing with the FCC last week (TR Daily, March 16), “called for the agency to have further consultation with stakeholders. Accordingly, we assumed that FCC would delay the ... vote scheduled for March 22, 2018, until this action had occurred.”

Also today, the FCC’s Intergovernmental Advisory Committee (IAC) released an advisory recommendation that stressed that “State, local, and Tribal governments are committed to working as partners with industry and all stakeholders to accelerate 5G deployment into our communities.”

“Despite the weight of evidence to the contrary, there are some who assert that state, Tribal, and local governments create widespread harmful and unnecessary barriers to the deployment of wireless infrastructure.

Those holding this misguided view would have the federal government preempt and limit local control over wireless infrastructure siting decisions and impose federal one-size-fits-all rules emanating from Washington, D.C.,” it added.

The IAC said it “strongly recommends against preemption or other limits of local control over wireless infrastructure siting decisions. Past practice, as well as the evidence in this record[,] suggests that preemption is unnecessary, will produce unintended consequences, and fundamentally runs afoul of the careful balance struck by Congress between federal and local authority.”

“The current process for siting wireless infrastructure is not fundamentally broken,” the IAC added. “By and large, local, state, and Tribal governments’ balanced approach has not prohibited or had the effect of prohibiting carriers’ ability to provide service. Nevertheless, the IAC recognizes that many communities’ regulatory regimes were built for an era dominated by large macro-cell towers. Technology has changed and so should state, local, and Tribal governments’ approach to it. Indeed, many state, local, and Tribal governments are already undertaking this effort, and we can learn a great deal from their successes and challenges.”

The IAC included examples of successful local government ordinances as well as “examples of how some industry members themselves generated barriers to deployment and how local governments responded.”

The IAC made seven recommendations, including calling on the FCC to act in its RF standards proceeding; give localities the necessary time to consider siting decisions and give new state laws time to work; “ensure equitable treatment between federal, State, Tribal, and local governments”; and “consider the unintended consequences of adopting rules that further preempt State, local, and Tribal control related to siting of wireless infrastructure.”

For their part, industry entities and their allies continued to praise the draft FCC order today.

“The FCC is exactly right to update the process for siting small cells and has worked for over two years to find the right balanced solution to modernize these procedures,” a CTIA spokesperson said. “The FCC’s action is targeted and long overdue and modernizing the process will help deliver faster wireless broadband deployment across the country while still safeguarding areas of importance to Tribal Nations.”

“We urge the FCC to vote in support of [the] infrastructure modernization proposals because they will help drive greater investment and ensure more Americans benefit from 5G,” CTIA President and Chief Executive Officer Meredith Attwell Baker said in a commentary for Fox Business. “We need a similar focus on local zoning challenges – from every level of government – to really jumpstart investment. New Mexico’s governor recently signed legislation doing just that, and Congress agreed to reform making siting easier on federal lands.”

“We appreciate Commissioner Carr’s leadership on this issue and urge his fellow Commissioners to adopt the Order at their upcoming Open Meeting. The Draft Order’s approach is a common sense solution to small cell deployment – eliminating unnecessary reviews and streamlining the process when applicable, while balancing legitimate concerns about historical and cultural preservation,” said Incompas CEO Chip Pickering. “Next generation 5G networks are critical to our nation’s security and we should be making all efforts to speed their deployment. It’s predicted this Order would save Americans \$1.56 billion in burdensome red tape while creating 17,000 new jobs. There’s no denying this Order is good for America’s economy and our national security as we work to maintain our global leadership in wireless networks.”

“The bottom line is that this one vote would lead to massive amounts of capital being freed up to spur investment, the enabling of more innovation, more broadband and leaving more money in the pockets of Americans,” said Bartlett Cleland, managing director of Madery Bridge Associates LLC, a public strategy firm. “But such a move is not easy as large investments in infrastructure are needed and so eliminating unfit regulation is a critical, and smart, move. In this way, the FCC is pursuing infrastructure reform, moving now to spur real infrastructure spending on the infrastructure of today, and tomorrow.” —Paul Kirby, [paul.kirby@wolterskluwer.com](mailto:paul.kirby@wolterskluwer.com)

