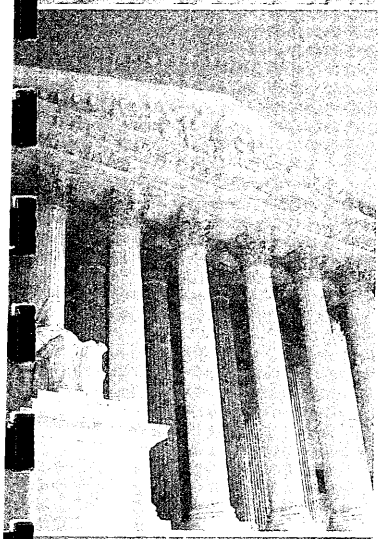

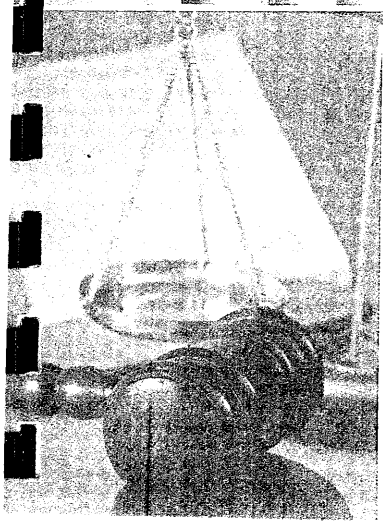

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FCC Issues 2014 Report, Order and Rules Governing Wireless Communication Collocation

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Introduction

It usually makes sense to allow and encourage multiple wireless communications companies to collocate their antennas and related equipment on existing towers and structures, when it is technically feasible. Collocation reduces the need to build new towers. This helps the wireless industry by keeping construction costs down, and helps municipalities by reducing the number of tall unsightly towers. Collocation has therefore been encouraged by Congress and the Federal Communications Commission (the "FCC"). [2]

In 2012, Congress enacted section 6409 of the federal Middle Class Tax Relief Act of 2012 (the "Collocation Act") [3], The Collocation Act provides 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 dimensions of such tower or base station."

An "eligible facilities request" is defined by the Collocation Act as any request that involves "(A) collocation of new transmission equipment; (B) removal of transmission equipment; or (C)

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[2] In fact, some municipalities have ordinances that provide that cellular antennas attached to existing towers and/or structures in non-residential zones are principal permitted uses and structures. See, e.g., Clinton Township (Hunterdon County) ordinance section 165-113.B.(1); Montgomery Township (Somerset County) ordinance section 16-6.1.p.6.

[3] 47 *U.S.C.* 1455.

replacement of transmission equipment." The Act did not define the meaning of "substantial change." [4]

Since the adoption of Collocation Act, there has been widespread disagreement over the role of local land use boards in the process when telecommunications providers seek to collocate antennas. The wireless industry has argued that, because the Collocation Act mandates the approval of an eligible facilities request, it preempts the local board from exercising discretionary review function and instead subjects eligible facilities requests only to a non-discretionary "administrative" review by local zoning officers and construction officials. [5] Many local government attorneys, on the other hand, take the position that the "substantial change" standard contained in the Collocation Act calls for a case-by-case analysis to determine whether a particular proposal must be approved – a function which local land use boards are best equipped to undertake. There has also been disagreement over the definition of "substantial change."

With this in mind, the FCC on October 17, 2014 issued a Report and Order (the "2014 Report and Order" or "Order") which, among other things, adopts new collocation rules intended to clarify and implement section 6409 of the Collocation Act [6], and to establish timeframes within which State and local government agencies must act on "eligible facilities" applications submitted under that act. In addition the Order clarifies and/modifies the timeframes within which local

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[4] 47 *U.S.C.* 1455.

[5] See for example *McKay Brothers v. Zoning Board of Adjustment, Township of Randolph,* 2013 *WL* 1621360 (Unpub. D.N.J. 2013) in which an applicant for collocation sought immediate injunctive relief for what it contended was an "as of right" collocation, citing the Collocation Act, rather than applying to the board of adjustment for discretionary review. The court dismissed the complaint as premature.

[6] 47 *U.S.C.* 1455.

governments must act on other facility siting applications under the federal Telecommunications Act of 1996 (the "TCA"). [7]

The 2014 Report and Order was published in the Federal Register on January 8, 2015. [8] Some of the new rules become effective on February 9, 2015. However, those rules set forth in section 1.40001 become effective on April 8, 2015. Significantly, three subsections of those latter rules will not become effective until approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, [9] and those rules govern the time periods within which state and local governments have to decide various collocation applications.[10] The FCC will subsequently publish a document in the Federal Register announcing OMB approval and the relevant effective date of those rules.

This article focuses primarily on the new collocation rules for applications under the Collocation Act, but also examines the new timeframes for other "facilities siting" applications. It recommends that municipalities develop new application forms that will ensure that wireless communication applicants provide all of the information necessary for local land use board staff to determine if the application is one for an "eligible facility" -- which must be mandatorily approved -- or if it involves a "substantial change' -- which requires board approval. In addition, it recommends that municipalities adopt special completeness checklists relating to wireless communication applications so that local land use boards can review applications consistent with the new timeframes and will not inadvertently fail to act in a timely manner, thus resulting in applications being "deemed approved."

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[7] 47 *U.S.C.* 332(c)(7).

[8] http://www.gpo.gov/fdsys/pkg/FR-2015-01-08/pdf/2014-28897.pdf (last checked January 13, 2015)

[9] 44 U.S.C. 3501-3520.

[10] See the discussions of those provisions in the text accompanying notes 18 to 21 *infra*.

The 2014 Report and Order, as well as a multi-document appendix which includes the collocation rules, is contained in a 155-page single-spaced document. [11] This article provides a summary of the rules which the author believes to be of particular interest to local government entities and their advisors. However, there is no substitute for reading the report and the rule amendments in their entirety.

Summary [12] of "Collocation Rules

The 2014 Report and Order settles the argument between the wireless industry and local government as to whether a local land use board may act as the reviewing authority as to eligible facilities requests under the Collocation Act. The FCC ruled in paragraph 211 of the Order that State or local governments may require parties asserting the right to mandatory approval under the Collocation Act to file applications and that such local municipal review authorities may review the applications to determine whether the proposal actually constitute a covered "eligible facilities" request. As the FCC explained, "the statutory provision requiring a State or local government to approve an eligible facilities request implies that the relevant government entity may require an applicant to file a request for approval." Further, the FCC ruled that only requests that do in fact meet the criteria of an eligible facilities request are entitled to mandatory approval.

The 2014 Report and Order add a new subpart [13] to existing FCC Rules that, among other things, defines what constitutes a "substantial change":a. This subpart provides that the

[11] The 2014 Report and Order can be accessed and downloaded from: http://www.fcc.gov/document/wireless-infrastructure-report-and-order (last checked January 13, 2015). The report component of the document contains an excellent explanation of the arguments for and against the rulings and the rule amendments as well as the reasons for the FCC's decision on each ruling and rule amendment. The rule amendments themselves are contained in Appendix B to the 2014 Report and Order.

[12] The summary provided in this article is taken in large part from the executive summary contained in paragraphs 21 through 25 of the 2014 Report and Order.

[13] 47 *C.F.R.* Part 1, Subpart CC, 1.400001

Collocation Act applies to support structures and to transmission equipment used in connection with any FCC licensed or authorized wireless transmission. This includes not merely wireless telecommunications facilities involving panel or multimodal antennas, but also "small cell" systems, including exterior and interior distributed antenna systems (DAS), as well as wireless transmissions such as microwave transmission via large "dish" antennas.

b. It defines "transmission equipment" to encompass antennas and other equipment associated with and necessary to their operation, including power supply cables and backup power equipment.

c. It defines "tower" to include any structures built for the sole or primary purpose of supporting any FCC licensed or authorized antennas and their associated facilities.

d. The subpart defines the term "base station" to include structures other than towers that support or house an antenna, transceiver, or other associated equipment that constitutes part of a "base station" at the time the relevant application is filed with the State or municipal authorities, even if the structure had not been built for the sole or primary purpose of providing such support. The "base station" does not include structures that do not at that time of the request support or house base station components. If, at the time of application, a roof of a building does not support or house an antenna, transceiver, or other associated equipment that constitutes part of a base station then, such application does not constitute an eligible facilities request and the board would be within its rights to require such application to proceed via a site plan application and all necessary variances if required in the zone district at issue. Conversely, if a wireless company has previously obtained approval to place antennas on a building, water tower, light pole, or other structure that is not a "tower," the structure is considered a "base station" and subject to the mandatory collocation rules.

e. The subpart defines the term "substantial change" to the physical dimensions of a tower or base station as meeting the following criteria, and is measured by the dimensions of the tower or base station as of the day prior to the adoption of the Collocation Act on February 22, 2012:

(1) Increase in Height: An increase in the height of a tower constitutes a substantial change (A) for towers outside public rights-of-way, if the proposed increase in height is more than 20 feet or 10%, whichever is greater, and (B) for towers in rights-of-way and for all base stations, the proposed increase in height is more than 10% or 10 feet, whichever is greater;

(2) Increase in Width: An increase in the width of a tower constitutes a substantial change (A) for towers outside public rights-of-way, if the increase protrudes from the edge of the tower more than 20 feet, or more than the width of the tower structure at the level of the new appurtenance, whichever is greater; and (B) for towers in rights-of-ways and for all base stations, if the increase protrudes from the edge of the structure more than six feet;

(3) Increase in Equipment Cabinets: The addition of equipment cabinets constitutes a substantial change if it involves installation of more than the standard number of new equipment cabinets for the technology involved, or more than four cabinets, whichever is less;

(4) Excavation or Deployment Outside Current Site: Excavation or deployment of equipment outside the current site of the tower or base station constitutes a substantial change when required for a proposed collocation;

(5) Defeat of Existing Concealment Elements: If existing concealment elements of the tower or base station would be defeated by the proposed collocation, the proposed collocation constitutes a substantial change. For example, if the proposed collocation would result in an extension of a camouflaged tree tower which would result in the tower no longer looking like a tree, the proposed collocation would constitute a substantial change of the tree tower); or

(6) Failure to Comply with Prior Conditions. A substantial change occurs if the proposed collocation fails to comply with conditions associated with the prior approval of the tower or base station, unless such non-compliance is due to an increase in height, increase in width, addition of cabinets, or new excavation that does not exceed the corresponding "substantial change" thresholds described above.

This new Subpart also makes it clear that that State and local governments may enforce existing conditions – or impose new conditions –requiring the facility comply with generally applicable building, structural, electrical, and safety codes and with "other laws" codifying objective standards reasonably related to health and safety. For example, if a "fall zone" -- requiring a tower to be set back from existing structures a minimum of the tower's height, --has been included in an ordinance, the local determination as to whether a proposed collation is an "eligible facility" could take that into account in determining eligibility.

The Subpart also sets forth the process and procedures for reviewing an "eligible facilities" request under the Collocation Act. It provides that:

(1) A State or local government may require applicants to provide only documentation that is reasonably related to determining whether an eligible facilities request meets the requirements of the Collocation Act;

(2) A State or local government shall approve an application within 60 days of the date of submission (subject to tolling for completeness), if it meets all the criteria established in the Collocation Act; [14] as clarified by the Order;

(3) The running of the 60-day timeframe for approval may be tolled by mutual agreement or upon a timely notice in writing that the application is incomplete. [15]

(4) An application for an eligible facilities request is deemed approved if a State or local government fails to act on it within the requisite timeframe.

Disputes under the Collocation Act may be brought in State or federal court, but not to the FCC. Any such claims must be filed within 30 days of the date of the relevant event -- the date of the denial of the application or the date of the notification by the applicant to the State or local authority of a deemed approval in accordance with the new rules. [16]

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[14] This conflicts with and preempts the Municipal Land Use Law (the "MLUL") which provides that the time within which to act on an application does not begin to run until after the application is deemed to be complete. See, N.J.S.A. 40:55D-10.3. See further discussion *infra* at the text accompanying notes 24 to 28.

[15] This notice must be provided in accordance with the deadlines and requirements imposed by the TCA, which are discussed below and which also conflict with and preempt the MLUL. See discussion *infra* at the text accompanying notes 24 to 28.

[16] In the initial Notice of Proposed Rulemaking the FCC suggested that challenges to local government action under the Collocation Act could be heard in courts of competent jurisdiction or before the FCC. Many comments from local government were submitted to the effect that it would be unfair to require local governments to incur the costs of obtaining counsel in Washington, DC and traveling to Washington to defend local land use decisions. Local governments prevailed on this point in the final rules. As explained in paragraph 235 of the 2014 Report and Order, adjudication before the FCC would "impose significant burdens on localities, many of whom are small entities with no representation in Washington, DC and no experience before the [FCC]."

The Subpart also clarifies that the Collocation Act applies to State and local governments acting in their roles as land use regulators and does not apply to such entities acting in their proprietary capacities. [17]

Time Periods for Collocation Eligibility Determinations of Facilities Siting Applications under the TCA.

The TCA was adopted on February 8, 1996. Section 332(c)(7) of the TCA, titled "Preservation of local zoning authority," states that, "except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." [18] The statute then establishes four limitations and a remedies provision, among which is "...(2) A State or local government "shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government." To implement that statutory provision, the FCC originally issued a ruling in 2009, the "FCC 2009 Declaratory Ruling" [19] establishing "presumptively reasonable" timeframes within which a State or local government must act on facilities siting applications under the TCA [20] The FCC 2009 Declaratory Ruling established the following timeframes or "shot clocks" (as the FCC terms them) as the

[17] As explained by the FCC in paragraph 239 of the 2014 Report and Order: "Like private property owners, local governments enter into lease and license agreements to allow parties to place antennas and other wireless service facilities on local government property, and we find no basis for applying [the Collocation Act] in those circumstances. We find that this conclusion is consistent with judicial decisions holding that [the TCA] does not preempt non-regulatory decisions of a state or locality acting in its proprietary capacity."

[18] 47 *U.S.C.* 332(c)(7).

[19] The FCC 2009 Declaratory Ruling can be accessed and downloaded from: https://apps.fcc.gov/edocs_public/attachmatch/FCC-09-99A1.pdf (last checked January 13, 2015).

[20] See, paragraphs 4, 47 and 48 of the 2009 Declaratory Ruling.

presumptively reasonable timeframes within which a State or municipality must act on the following two types of facility siting applications: (1) 90 days for the review of collocation applications; and (2) 150 days for the review of siting applications other than collocations. The 2014 Report and Order modifies the 2009 Declaratory Ruling by adding a third type of facility siting application-- a collocation application which involves an "eligible facility request," in which case the reviewing authority has 60 days from the submission of the application to review and approve the application. :

The 2014 Report and Order intends to clarify the 2009 Declaratory Ruling in several particulars related to the "shot clock" provision allowing a municipality to toll the running of the clock if it notifies the applicant within 30 days of submission of the application that the application is incomplete. [21]

(1) The shot clock begins to run when an application is first submitted, not when the application is deemed to be complete by the reviewing authority;

(2) An incompleteness determination tolls the shot clock only if the State or local government provides written notice to the applicant within 30 days of the submission of the application, and that written notice specifically delineates all missing information, specifying the code provision, ordinance, application instruction, or otherwise publicly-stated procedures that require that the information at issue be submitted;

[21] Most of the below provisions conflict with, and preempt, the MLUL's provisions governing application completeness and when the clock begins to run on a land use board's time within which to act on an application. *See*, *N.J.S.A.* 40:55D-10.3, which provides that (a) the reviewing authority has 45 days within which to notify an applicant in writing that an application is incomplete, (b) the 45 day time period begins anew upon a subsequent submission, and (c) the time within which a land use board has to act on the application does not begin to run until after the application is deemed to be complete.

(3) Following an applicant's submission in response to an incompleteness determination, the State or local government may reach subsequent incompleteness determinations, but such subsequent determinations are limited solely to the applicant's failure to supply the specific information that was requested within the first 30 days; and

(4) The shot clock begins to run again when the applicant makes its supplemental submission; however, the shot clock may again be tolled only if the State or local government notifies that applicant within 10 days that the supplemental submission did not provide the specific information identified in the original notice of incompleteness.

The 2014 Report and Order also makes it clear that siting applications for exterior or in-building DAS or other small-cell facilities (including third party facilities such as neutral host DAS deployments) are subject to the FCC 2009 Declaratory Ruling and its presumptive reasonable timeframes.

Conclusion

The FCC's 2014 Report and Order provides clarification of the mandatory collocation provisions of the Collocation Act, and confirms that local land use boards retain some oversight and control of the wireless facility siting and collocation process, which the wireless industry has been unwilling to acknowledge. The new rules, however, also preempt local land use regulations that would otherwise allow a local land use board to deny certain collocation applications because the rules now specify the parameters to be taken into account when determining what constitutes a "substantial change" under the Collocation Act. In addition the rules establish stringent deadlines

for making rulings and completeness determinations which conflict with, and preempt the process and timing regulations of the Municipal Land Use Law, ("MLUL") N.J.S.A. 40:55D-1 et. seq.

The MLUL allows the municipality 45 days from the submission of the application for a determination of completeness. [22] It provides for automatic approval only if (a) a minor site plan or a site plan involving less than 10 acres and less than ten dwelling units has not been approved within 45 days from the date of completeness [23] or (b) an application requiring variances has not been approved within 120 days of completeness of the application. [24] After a decision is rendered, there is a 45-day period for memorialization. [25]

In contrast to the MLUL, the timeframes or "shot clocks" for acting on wireless facility siting applications, as established in the FCC 2009 Declaratory Ruling and as now clarified or modified by the 2014 Report and Order, are as follows: (1) 60 days from the date of submission for review and approval of a collocation application which qualifies as an eligible facilities request; (2) 90 days from the date of submission for review and decision of a collocation application which does not qualify as an eligible facility request; and (3) 150 days from the date of submission for review and decision of a wireless siting application other than a collocation application. The "shot clock" for those approvals begins when an application is submitted and stops only if the State or local government provides written notice to the applicant within 30 days of the submission of the application. That written notice must specifically delineate all missing information, specifying the code provision, ordinance, application instruction, or otherwise publicly-stated procedures that require that the information at issue be submitted. The shot clock can again be stopped if an

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[22] *N.J.S.A.* 40:55D-10.3.

[23] *N.J.S.A.* 40:55D-46.1.

[24] *N.J.S.A.* 40:55D-73.

[25] *N.J.S.A.* 40:55D-10(g)(2).

applicant's subsequent submission fails to comply with the first timely written notice of incompleteness but only if notice of that continued incompleteness is given within 10 days of the submission of the additional materials and the incompleteness relates only to materials specified in the first notice of incompleteness.

New Jersey courts are reluctant to authorize automatic approvals under the customary time provisions of the MLUL. [26] However, the same reluctance may not apply to the mandatory requirements of federal law and regulations.

Therefore, municipalities should develop new application forms that will ensure that wireless communication applicants provide all of the information necessary for local land use board staff to determine if the application is one for an "eligible facility"-- which must be mandatorily approved-- or if it involves a "substantial change' --which requires board approval. In addition municipalities should adopt special completeness checklists relating to wireless communication applications so that local land use boards can review applications consistent with the new timeframes and will not inadvertently fail to act in a timely manner, thus resulting in applications being "deemed approved." The date that these new "shot clocks" will come into effect is somewhat uncertain because of the requirement that the OMB approve them, but municipalities would be well advised to take action and be prepared for the date that they go into effect.

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[26] Cox and Koenig, *New Jersey Zoning and Land Use Administration* (Gann 2014), Section 26-3 (citing *Fallone Prop. v. Bethlehem Planning Board*, 369 *N.J.Super*. 552, 568-569 (App. Div. 2009)).