FCC Adopts 5G Upgrade Order To Clarify Collocation Requirements

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On June 9th the Federal Communications Commission ("FCC") took another step on its path to streamline local government review of wireless technology siting by adopting its 5G Upgrade Order[i] which further refines and clarifies its previous rulings related to Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 ("TRA").[ii] Section 6409(a) was enacted to expedite State and local government review of requests to modify existing wireless communications facilities. Section 6409(a) 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." 47 U.S.C. § 1455(a)(1). The FCC adopted its 2014 Infrastructure Order[iii] to provide its interpretation of §6409(a) and to establish rules to guide its implementation. In the 5G Upgrade Order, the FCC addressed certain ambiguities that remained with the implementation of §6409(a).

Substantial Changes. The term "eligible facilities request" is defined as "[a]ny request for modification of an existing tower or base station that does not substantially change the physical dimensions of such tower or base station, involving: (i) Collocation of new transmission equipment; (ii) Removal of transmission equipment; or (iii) Replacement of transmission equipment." 47 CFR § 1.6100(b)(3). In 2014, the FCC had set relatively clear quantitative standards as to what would be considered a "substantial change" under Section 6409(a). For example, the FCC stated that a modification of a tower outside of the public rights-of-way would cause a substantial change if it "increases the height of the tower by more than 10% or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater."47 C.F.R. § 1.40001(b)(7)(i). With respect to equipment, the 2014 Infrastructure Order states that substantial change would exist where "it involves installation of more than the standard number of new equipment cabinets for the technology involved, but not to exceed four cabinets; or, for towers in the public rights-of-way, it involves the installation of any new equipment cabinets on the ground if there are no pre-existing ground cabinets associated with the structure, or involves the installation of ground cabinets that are more than 10% larger in height or overall volume than any other ground cabinets associated with the structure; or entails any excavation or deployment outside the current site." 47 C.F.R. § 1.40001(b)(7)(iv). In addition, a substantial change would occur if the installation would "defeat the concealment elements of the eligible support structure" or "it does not comply with conditions associated with the siting approval of the construction or modification of the eligible support structure or base station equipment, provided however that this limitation does not apply to any modification that is noncompliant only in a manner that would not exceed the thresholds identified" in the Order. 47 C.F.R. § 1.40001(b)(7)(v)-(vi).

Since the issuance of the 2014 Infrastructure Order, questions have consistently been raised with respect to the definition of "substantial change." Specifically, many municipalities have been confused as to how to calculate the height increases of a tower pursuant to 47 C.F.R. § 1.40001(b)(7)(i), and whether and how to include small ancillary equipment, like remote radio heads and amplifiers into the volume and numerical limitations for cabinets. There has been similar confusion over what type of modification would "defeat the concealment elements of the support structure" and/or fail to comply with the conditions of approval resulting in a substantial change.

Required Documentation. In the 2014 Infrastructure Order, the FCC circumscribed the information and documentation that a municipality could require in connection with an application under

§6409(a). The Order provides that when an applicant asserts in writing that a request for modification is covered by Section 6409(a), a State or local government may require the applicant to provide documentation or information only to the extent reasonably related to determining whether the request meets the requirements of this section. *See* 2014 Infrastructure Order at ⁋ 214. A State or local government may not require an applicant to submit any other documentation, including but not limited to documentation intended to illustrate the need for such wireless facilities or to justify the business decision to modify such wireless facilities. Id. This provision has been the subject of some debate among practitioners as many municipalities have been unwilling to simply provide necessary building permits upon request. Instead, some municipalities have required that any proposed modification to an existing facility be justified by the submission of zoning applications, supporting documents and detailed site plans, followed by an appearance before a land use board. The question arises as to whether the shot clock starts upon the initial request or upon the filing of these formal documents required by the locality.

5G Upgrade Order. The FCC answered many of these questions in the 5G Upgrade Order. Specifically, the 5G Upgrade Order:

- Clarified that the 60-day shot clock commences when the applicant takes the first procedural step required by the local jurisdiction and submits documentation showing that the proposal is an eligible facilities request in that it complies with Section 6409(a) and the 2014 Infrastructure Order;
- Clarified the definition of a "substantial change; and
- Issued a Notice of Proposed Rulemaking seeking comment regarding excavation or deployment outside the boundaries of an existing tower site.

Commencement of the Shot Clock. The 2014 Infrastructure Order stated that the 60-day shot clock begins "on the date on which an applicant submits [an eligible facilities request] seeking review," but did not define the date upon which an applicant is deemed to have submitted the request leading to confusion over when the shot clock commences. In clarifying the rule, the FCC sought to strike a balance that requires the applicant to comply with the local government's procedural rules, while requiring that action be taken quickly. As a result, the 5G Upgrade Order clarified that the shot clock is triggered when (1) the applicant takes the first procedural step that the local jurisdiction requires, and (2) the applicant submits written documentation addressing the applicable criteria that demonstrates the proposal's compliance with the same.

The FCC also explained that a local government may not delay the triggering of the shot clock by establishing a "first step" that is outside of the applicant's control or by defining the "first step" as a combination or sequencing of steps. 5G Upgrade Order, ⁋19. Moreover, the order reiterates that a local government may not delay the start of the shot clock by requiring an applicant to submit documentation *other than* the documentation required under the FCC rules. Id. at 20. "For example, if a locality requires as the first step in its section 6409(a) process that an applicant meet with a local zoning board, that applicant would not need to submit local zoning documentation as well in order to trigger the shot clock." Id. Although a local government may use standard zoning authorizations such as conditional use permits and variances in connection with its consideration of an eligible facilities request, the requirements to obtain such authorizations may not be used to delay the start of the shot clock or the decision on the request. As stated by the FCC, the shot clock would begin once the applicant takes the first step in whatever process the local government uses in connection with reviewing applications subject to section 6409(a) and submits all documentation required under our rules. Subsequently, if the locality rejects the applicant's request to modify wireless facilities as incomplete based on requirements relating to such permits, variances or similar

authorizations, the shot clock would not be tolled and the application would be deemed granted after 60 days if the application constitutes an eligible facilities request under our rules." Id. at ⁋21.

Increase in Height of Towers. A modification of a tower outside of the public rights-of-way would cause a substantial change if it "increases the height of the tower by more than 10% or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater." 47 C.F.R. § 1.40001(b)(7)(i), To resolve any confusion as to how the 20-foot distance is measured, the 5G Upgrade Order defines the phrase "separation from the nearest existing antenna" to means "the distance from the top of the highest existing antenna on the tower to the *bottom* of the proposed new antenna to be deployed above it." ⁋25. Thus, when determining whether an application satisfies the criteria for an eligible facilities request, localities should not measure this separation from the top of the existing antenna to the *top* of the new antenna, because the height of the new antenna itself should not be included when calculating the allowable height increase. Rather, under the FCC's interpretation, the word "separation" refers to the distance from the top of the existing antenna to the bottom of the proposed antenna.

Equipment Cabinets. To help expedite the "upgrade to 5G and for other technological and capacity improvements," the FCC held that the term "equipment cabinet does not include small pieces of equipment such as remote radio heads/remote radio units, amplifiers, transceivers mounted behind antennas, and similar devices" if they are not used as physical containers for smaller, distinct devices. 5G Upgrade Order, ⁋ 29-30. In addition, it stated that the maximum number of additional equipment cabinets that can be added is measured for each separate eligible facilities request and is not a cumulative limit. Id.

Concealment. Concealment elements are part of the design of the facility that are intended to make the facility look like something other than a wireless facility. According to the 2014 Infrastructure Order, an installation that defeats the concealment elements of an existing facility would be a substantial change. 47 C.F.R. § 1.40001(b)(7)(v). The 5G Upgrade Order clarifies that "in order to be considered a concealment element, it must have been part of the facility that was approved in the locality's prior review" and not part of a condition associated with siting approval. ⁋ 35. To "defeat concealment," the proposed modification must "cause a reasonable person to view the structure's intended stealth design as no longer effective after modification." Id. at ⁋ 38. For instance, a small increase in the height of a stealth monopine (within the 6409(a) height allowance), would not defeat concealment if it would not cause a reasonable person to view the structure's intended stealth design (i.e., the design of the wireless facility to resemble a pine tree) as no longer effective after the modification. Id. at ⁋ 39. In addition, if the prior approval required that the monopine must be hidden behind a tree line, a proposed modification that would make it visible above the tree line would be permitted if it was within the height threshold of 6409(a) because the location of the monopine was a condition of approval, and not part of the concealment element . Id.

Conditions Associated with the Siting Approval. The 2014 Infrastructure Order states that a modification is a substantial increase if "it does not comply with conditions associated with the siting approval" provided this limitation does not apply to any modification that is non-compliant only in a manner that would not exceed the thresholds identified in the rules. 47 C.F.R. 1.6100(b)(7)(vi). The 5G Upgrade Order confirms that (1) the condition must have been an expressed condition of approval and (2) that it cannot be used to prevent modifications specifically allowed and not deemed to be substantial under the rules. ⁋ 41 "In other words, when a proposed modification otherwise permissible under sections 1.6100(b)(7)(i)-(iv) cannot reasonably comply with conditions under section 1.6100(b)(7)(vi), the conflict should be resolved in favor of permitting the modifications. For

example, a local government's condition of approval that requires a specifically sized shroud around an antenna could limit an increase in antenna size that is otherwise permissible under section 1.6100(b)(7)(i)" and "the size limit of the shroud would not be enforceable if it purported to prevent a modification to add a larger antenna, but a local government could enforce its shrouding condition if the provider reasonably could install a larger shroud to cover the larger antenna and thus meet the purpose of the condition." Id. at ¶ 43.

The 5G Upgrade Order also provides that walls or fences are not concealment elements, but are conditions of approval so if new equipment would be visible over the wall or fence, "the locality may require a provider to make a reasonable effort to extend the wall or fence to maintain the covering of the equipment," but could not deny the modification request. Id.

Notice of Proposed Rulemaking. The Order also includes a Notice of Proposed Rulemaking and seeks comments with respect to what constitutes "excavation or deployment outside of the current site" for purposes of determining a substantial change to a facility. 5G Upgrade Order, ¶50-54. Industry commentators wish for the FCC to broaden its definition of "current site" to any leased or owned areas. The purpose of this change would, obviously, make it easier for carriers to place more equipment such as backup generators and edge data centers on the ground at a tower site and still not be considered a "substantial change." Municipalities take an opposite, more narrow approach to the "current site." The FCC is expected to issue a further order on this issue later this summer.

Conclusion. The message from the FCC is clear – requests to modify an existing communications facility should be expedited and liberally construed in favor of allowing the modification.

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[i] *Declaratory Ruling and Notice of Proposed Rulemaking,* In the Matter of Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012 –WT Docket No. 19-250 and RM-11849.

[ii] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, title VI (Spectrum Act of 2012), § 6409(a), 126 Stat. 156 (Feb. 22, 2012) (codified as 47 U.S.C. § 1455(a)).

[iii] 47 CFR § 1.6100; *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket No. 13-238 and 13-32, WC Docket No. 11-59, Report and Order, 29 FCC Rcd 12865, 12922-66, paras. 135-241 (2014) (*2014 Infrastructure Order*), *aff'd*, *Montgomery Cty. v. FCC*, 811 F.3d 121 (4th Cir. 2015).