

## Wireless Facilities Deployment:

### Federal Regulation in the Middle Class Tax Relief and Job Creation Act of 2012

#### Explanation and Implementation

Section 4225 of the Middle Class Tax Relief and Job Creation Act of 2012<sup>1</sup> mandates that State and local governments must approve an eligible facilities request for the modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station. The Act was signed into law on February 22, 2012. The section mandating streamlined modification and collocation approval ensures the timely deployment of wireless services.

The Act applies to eligible facilities requests for modification of existing wireless towers and base stations:

- ☛ The Act defines "eligible facilities request" as any request for modification of an existing wireless tower or base station that involves:
  - Collocation of new transmission equipment;
  - Removal of transmission equipment; or
  - Replacement of transmission equipment.
- ☛ The Federal Communications Commission ("FCC") defines "collocation" as "the mounting or installation of an antenna on an existing tower, building or structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes."<sup>ii</sup>
- ☛ The FCC defines a "substantial change" as:
  - The mounting of a proposed antenna on the tower that would increase the existing 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, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to avoid interference with existing antennas; or
  - The mounting of a proposed antenna that would involve adding an appurtenance to the body of the tower that would protrude from the edge of the tower more than twenty feet, or more than the width of the tower structure at the level of the appurtenance, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to shelter the antenna from inclement weather or to connect the antenna to the tower via cable.<sup>iii</sup>
- ☛ The FCC defines a "tower" as "any structure built for the sole or primary purpose of supporting FCC-licensed antennas and their associated facilities."<sup>iv</sup>
- ☛ The federal regulations define a "base station" as "A station at a specified site authorized to communicate with mobile stations;" or "A land station in the land mobile service."<sup>v</sup>

The Act requires approval for all eligible facilities requests that do not substantially change the physical dimensions of such tower or base station and:

- ☛ Applies despite section 704 of the Telecommunications Act of 1996, which preserves the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and *modification* of personal wireless service facilities;<sup>vi</sup>
- ☛ Preempts zoning review and/or conditional approvals of eligible facilities requests;<sup>vii</sup>
- ☛ Requires eligible facilities requests only be subject to administrative review processes and not discretionary review processes that allow a State or local government to deny or condition an eligible facilities request; and
- ☛ Requires that eligible facilities requests for the modification of legal, non-conforming towers must be approved.

The FCC's Wireless Facility Siting "Shot Clock" applies to eligible facilities request for collocation:

- ☛ State and local governments have 90 days to act on an application to collocate wireless facilities on existing structures.<sup>viii</sup>
- ☛ Under the Act, State and local governments *must* approve within 90 days any eligible facilities requests for collocation or replacement of transmission equipment on existing towers that do not substantially change the physical dimensions of such tower.

<sup>1</sup> For the text of the Act, <http://www.gpo.gov/fdsys/pkg/BILLS-112hr3630enr/pdf/BILLS-112hr3630enr.pdf>

<sup>ii</sup> Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (2001), available at 47 C.F.R. Part I, Appendix B ("Collocation Agreement"). See also *Petition for Declaratory Ruling To Clarify Provisions of Section 332(C)(7)(B) To Ensure Timely Siting Review and To Preempt Under Section 253 State and Local Ordinances That Classify All Wireless Siting Proposals as Requiring a Variance*, Declaratory Ruling, 24 FCC Rcd 13994, 14021 ¶ 71 (2009) ("*Shot Clock Ruling*"), recon. denied, 25 FCC Rcd 11157 (2010), *aff'd*, City of Arlington, Tex., et al. v. FCC, 2012 U.S. App. LEXIS 1252 (5th Cir. 2012).

<sup>iii</sup> Collocation Agreement.

<sup>iv</sup> *Id.*

<sup>v</sup> See, e.g., 47 C.F.R. §§24.5, 90.7.

<sup>vi</sup> 47 U.S.C. §332(c)(7)(A). The Telecommunications Act of 1996 defines "personal wireless service facilities" as facilities for the provision of personal wireless services, including commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services. 47 U.S.C. §332(c)(7)(C).

<sup>vii</sup> Zoning review and/or conditional approvals of eligible facilities request can have the effect of denying such requests as a conditional approval is not an approval *per se*; therefore it is a denial and a violation of the Act.

<sup>viii</sup> *Shot Clock Ruling*.

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(c) UNLICENSED USE IN GUARD BANDS.—The Commission may permit the use of such guard bands for unlicensed use.

(d) DATABASE.—Unlicensed use shall rely on a database or subsequent methodology as determined by the Commission.

(e) PROTECTIONS AGAINST HARMFUL INTERFERENCE.—The Commission may not permit any use of a guard band that the Commission determines would cause harmful interference to licensed services.

**SEC. 6408. STUDY ON RECEIVER PERFORMANCE AND SPECTRUM EFFICIENCY.**

(a) IN GENERAL.—The Comptroller General of the United States shall conduct a study to consider efforts to ensure that each transmission system is designed and operated so that reasonable use of adjacent spectrum does not excessively impair the functioning of such system.

(b) REQUIRED CONSIDERATIONS.—In conducting the study required by subsection (a), the Comptroller General shall consider—

(1) the value of—

(A) improving receiver performance as it relates to increasing spectral efficiency;

(B) improving the operation of services that are located in adjacent spectrum; and

(C) narrowing the guard bands between adjacent spectrum use;

(2) the role of manufacturers, commercial licensees, and government users with respect to their transmission systems and the use of adjacent spectrum;

(3) the feasibility of industry self-compliance with respect to the design and operational requirements of transmission systems and the reasonable use of adjacent spectrum; and

(4) the value of action by the Commission and the Assistant Secretary to establish, by rule, technical requirements or standards for non-Federal and Federal use, respectively, with respect to the reasonable use of portions of the radio spectrum that are adjacent to each other.

(c) REPORT.—Not later than 1 year after the date of the enactment of this Act, the Comptroller General shall submit a report on the results of the study required by subsection (a) to the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate.

(d) TRANSMISSION SYSTEM DEFINED.—In this section, the term “transmission system” means any telecommunications, broadcast, satellite, commercial mobile service, or other communications system that employs radio spectrum.

**SEC. 6409. WIRELESS FACILITIES DEPLOYMENT.**

(a) FACILITY MODIFICATIONS.—

(1) IN GENERAL.—Notwithstanding section 704 of the Telecommunications Act of 1996 (Public Law 104–104) or any other provision of law, 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.

(2) ELIGIBLE FACILITIES REQUEST.—For purposes of this subsection, the term “eligible facilities request” means any



request for modification of an existing wireless tower or base station that involves—

- (A) collocation of new transmission equipment;
- (B) removal of transmission equipment; or
- (C) replacement of transmission equipment.

(3) APPLICABILITY OF ENVIRONMENTAL LAWS.—Nothing in paragraph (1) shall be construed to relieve the Commission from the requirements of the National Historic Preservation Act or the National Environmental Policy Act of 1969.

(b) FEDERAL EASEMENTS AND RIGHTS-OF-WAY.—

(1) GRANT.—If an executive agency, a State, a political subdivision or agency of a State, or a person, firm, or organization applies for the grant of an easement or right-of-way to, in, over, or on a building or other property owned by the Federal Government for the right to install, construct, and maintain wireless service antenna structures and equipment and backhaul transmission equipment, the executive agency having control of the building or other property may grant to the applicant, on behalf of the Federal Government, an easement or right-of-way to perform such installation, construction, and maintenance.

(2) APPLICATION.—The Administrator of General Services shall develop a common form for applications for easements and rights-of-way under paragraph (1) for all executive agencies that shall be used by applicants with respect to the buildings or other property of each such agency.

(3) FEE.—

(A) IN GENERAL.—Notwithstanding any other provision of law, the Administrator of General Services shall establish a fee for the grant of an easement or right-of-way pursuant to paragraph (1) that is based on direct cost recovery.

(B) EXCEPTIONS.—The Administrator of General Services may establish exceptions to the fee amount required under subparagraph (A)—

- (i) in consideration of the public benefit provided by a grant of an easement or right-of-way; and
- (ii) in the interest of expanding wireless and broadband coverage.

(4) USE OF FEES COLLECTED.—Any fee amounts collected by an executive agency pursuant to paragraph (3) may be made available, as provided in appropriations Acts, to such agency to cover the costs of granting the easement or right-of-way.

(c) MASTER CONTRACTS FOR WIRELESS FACILITY SITINGS.—

(1) IN GENERAL.—Notwithstanding section 704 of the Telecommunications Act of 1996 or any other provision of law, and not later than 60 days after the date of the enactment of this Act, the Administrator of General Services shall—

(A) develop 1 or more master contracts that shall govern the placement of wireless service antenna structures on buildings and other property owned by the Federal Government; and

(B) in developing the master contract or contracts, standardize the treatment of the placement of wireless service antenna structures on building rooftops or facades, the placement of wireless service antenna equipment on