New FCC Rules May Threaten Local Authority

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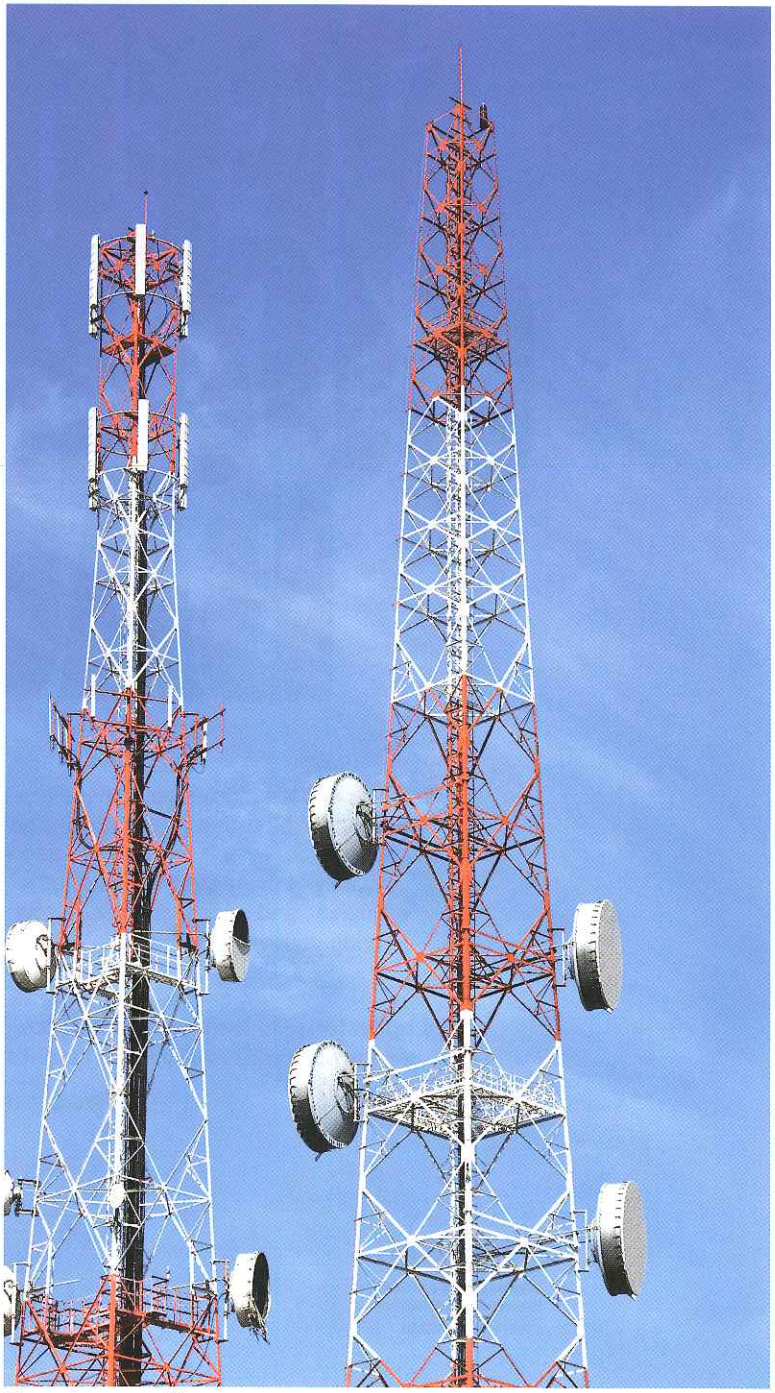
New rules regarding the siting of wireless communications facilities (WCF) could potentially eviscerate local land use authority over where antennas and other equipment can be placed. The rules may affect equipment on towers, as well as other structures such as light poles, water tanks, and even buildings.

As New Jersey's state chapter of the National Association of Telecommunications Officers and Advisors (NATOA) , the Jersey Access Group (JAG) wants to make all New Jersey municipalities aware of the September 26, 2013 Federal Communications Commission (FCC) Notice of Proposed Rulemaking (NPRM). New Jersey municipalities should familiarize themselves with the NPRM, and advocate at the FCC in favor of local control.

Eighty-six pages long, the NPRM addresses four major issues:

1. Whether and how the FCC should interpret Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, by defining terms and providing interpretations related to Congress' direction that applications for co-locating WCFs be approved in most cases;
2. Whether and how the FCC should interpret a number of issues related to its prior "shot clock" order which requires local governments to act on applications for certain WCFs in a specific period of time;
3. Whether the FCC should modify historic preservation and environmental regulations for installations of distributed antenna systems and small cell facilities, in order to promote the deployment of these technologies; and
4. Whether the FCC should exempt "temporary" WCFs from the public notice and comment requirements of environmental regulations.

While each issue has some impact on local control, given space limitations, this article will focus on the first issue, which arguably poses the greatest threat to local control.



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The FCC Rulemaking Process For those not familiar with the process, in an NPRM the FCC will identify issues and pose questions about certain topics, and often will make tentative conclusions as to how it believes the issues should be addressed. National local government associations like the NATOA, the National League of Cities, the National Association of Counties and the U.S. Conference of Mayors, often advocate on behalf of local governments at the FCC. However, when serious threats to local authority emerge like this NPRM, it is important that individual local governments and state municipal leagues also file comments and advocate on behalf of local control. In this NPRM, while the FCC has asked a number of questions and has even suggested a few statutory interpretations that would protect local government interests, there are many questions posed where the answers have the potential to significantly limit local land use authority over the siting of WCFs.

Effects of the Middle Class Tax Relief and Job Creation Act of 2012 While the purpose of the Act was ostensibly tax relief and job creation, half of its text relates to spectrum auctions and the creation of a nationwide, interoperable public safety communications network. Within that portion of the Act sits Section 6409, which requires local and state government to approve applications for co-location of WCFs in many cases. Specifically, Section 6409(a) says:

> Notwithstanding ... 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. 47 U.S.C. §1455(a)(1)(2013).

To understand the scope and applicability of this statutory language, one must understand the meaning of the key terms. What is an eligible facilities request? An existing wireless tower? A base station? A modification? What does it mean to "substantially change the physical dimensions" of a tower or a base station? Unfortunately, other than "eligible facilities request," Congress did not define these terms. Moreover, there is not a whit of legislative history indicating Congress' intent as to their meaning.

We need to remind the FCC that local land use decisions should not be dictated from Washington.

How to best summarize the literally hundreds of questions and legal issues posed by the FCC in the NPRM? Without getting into extensive detail, it is important to note that if the FCC adopts some of the rules suggested by its questions (and you can be sure that the wireless industry will file many comments advocating that position) those rules could result in:

- A determination that "wireless towers" and "base stations" mean any structure

capable of supporting WCFs, *regardless of whether the primary purpose of the structure was intended for WCFs*. In other words, an office building or a single family home could be considered a "tower."

- A determination that a "modification" of an "existing" tower or base station includes a structure with a potential to hold WCFs, *even if none have yet been applied for or approved*. In other words the FCC asks in this NPRM whether it should find that an application for co-location includes an application to locate facilities on a tower (however they end up defining that term), even where there has been no prior application or land use approval given to locate on that structure. The FCC might end up considering a first application to locate WCFs on an "existing" structure to be a co-location, requiring mandatory approval.
- A determination that a "substantial change" in the "physical dimensions" is limited to an increase in height of some amount, and that it is calculated not on the original size of the tower or base station, but on the height at the time of application for co-location. So a replacement of antennas resulting in no increase in height must be approved, even if the increase in weight or bulk would cause the tower to be structurally unsound or otherwise violate building or safety codes. Or, if your town approved siting of a camouflaged site that looks like a tree, you may be required to approve a co-location that adds 10 feet or more to that facility and defeats the camouflage effect.
- Of equal concern is that subsequent applications for co-location might require continual approvals of incremental height increases. For example, a 50-foot imitation tree approved in 2012 could be changed to a 100-foot-tall eyesore, without any public process or action by the governing body, in 2016.

Comment Timelines NPRM Comments and Reply Comments are due 60 and 90 days respectively after publication in the Federal Register. As of October 24 the NPRM had not yet been published. Publication will likely occur in early November, which will make Comments due sometime around the first of the year. Local governments are encouraged to file Comments, explain how WFC siting works in a timely and effective manner in your community, and how municipalities are encouraging wireless broadband deployment. Municipalities should consider raising important Tenth Amendment issues and question where Congress or the FCC have legal authority under U.S. Constitution to dictate local land use decisions in this manner.

New Jersey municipalities are encouraged to coordinate with JAG and the League of Municipalities, as well as with NATOA. Collectively, we need to remind the FCC that local land use decisions should not be dictated from Washington. As this NPRM will likely still be open next spring, look for JAG to provide updates at the 2014 Power of Partners conference, (www.powerofpartners.org), May 7-9, 2014 in New Brunswick. ▲

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