

Broadband Deployment: Legal Issues for the Siting of Wireless Communications Facilities and Amendments to the Pole Attachment Rule

Kathleen Ann Ruane
Legislative Attorney

April 11, 2013

Congressional Research Service
7-5700
www.crs.gov
RS20783

CRS Report for Congress
Prepared for Members and Committees of Congress
c11173008

Summary

One of the primary tasks of the Federal Communications Commission (FCC) is to encourage the deployment of broadband throughout the United States. Broadband technology is now available over a wide array of delivery systems including cable, wireless, telephone, and fiber optic networks. The FCC moved, in recent years, to ease some of the regulatory burdens inherent in erecting new broadband facilities within the current legal framework. Congress has also taken steps to encourage the deployment of wireless facilities. This report will discuss some of the important legal developments related to broadband deployment.

The siting of wireless communications facilities has been a topic of controversy in communities all over the United States. Telecommunications carriers need to place towers in areas where coverage is insufficient or lacking to provide better service to consumers, while local governing boards and community groups often oppose the siting of towers in residential neighborhoods and scenic areas. The Telecommunications Act of 1996 governs federal, state, and local regulation of the siting of communications towers by placing certain limitations on local zoning authority without totally preempting state and local law. This report provides an overview of the federal, state, and local laws governing the siting of wireless communications facilities, including recent amendments to federal law governing tower siting contained in the Middle Class Tax Relief and Job Creation Act of 2012.

This report will also discuss the Federal Communications Commission's (FCC's or Commission's) recent actions related to streamlining the tower siting application process at the state and local level. As corporations that won recent spectrum auctions begin to build out new facilities, new towers may need to be constructed. These industry participants expressed concern to the Commission over the length of time frequently taken for action on tower siting applications. On November 18, 2009, the FCC issued a declaratory ruling to clarify certain portions of Section 332 of the Communications Act. This decision was intended to streamline the tower siting application process across the country.

The FCC has also amended regulations for pole attachments to currently existing poles owned by utilities. The amendments were intended to increase the number of pole attachments, thereby increasing broadband availability. The utility companies challenged the FCC's interpretation of the statute granting it the authority to regulate pole attachments. The D.C. Circuit upheld the FCC's rules.

Contents

Introduction 1
Federal Law Governing the Placement of Wireless Telecommunications Facilities 1
The FCC's November 2009 Declaratory Ruling: What Constitutes Unreasonable Delay? 4
State Statutory Provisions 7
Local (Municipal or County) Law 8
Pole Attachment Rule Amendments 9

Contacts

Author Contact Information 10

Introduction

One of the primary tasks of the Federal Communications Commission (FCC) is to encourage the deployment of broadband throughout the United States. Broadband technology is now available over a wide array of delivery systems including cable, wireless, telephone, and fiber optic networks. The FCC moved, in recent years, to ease some of the regulatory burdens inherent in erecting new broadband facilities within the current legal framework. Congress has also taken steps to encourage the deployment of wireless facilities. This report will discuss some of the important legal developments related to broadband facilities deployment.

Federal Law Governing the Placement of Wireless Telecommunications Facilities

Section 704 of the Telecommunications Act of 1996 governs federal, state, and local regulation of the siting of "personal wireless service facilities" or cellular communication towers.[1] Under the 1996 act, state and local governments are prohibited from unreasonably discriminating among "providers of functionally equivalent services."[2] This prohibition has been interpreted to provide state and local governments with the "flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning requirements even if those facilities provide functionally equivalent services."[3] However, state and local governments cannot adopt policies that prohibit or have the effect of prohibiting the provision of personal wireless services.[4] This provision not only applies to outright bans on tower siting, but also to situations where a state or local government's "criteria or their administration effectively preclude towers no matter what the carrier does."[5] In these cases, the carrier must show "not just that this application has been rejected but that further reasonable efforts are so likely to be fruitless that it is a waste of time even to try."[6]

The act also prescribes certain procedures that a state or local government must follow when reviewing a request to place, construct, or modify personal wireless service facilities. The state or

[1] Codified at 47 U.S.C. §332(c)(7).

[2] 47 U.S.C. §332(c)(7)(B)(i)(I).

[3] Sprint Spectrum, L.P. v. Willoth, 176 F.3d 630, 639 (2nd Cir. 1999).

[4] 47 U.S.C. §332(c)(7)(B)(i)(II). Under this provision, wireless providers may have a claim that some state or local regulations have prevented the wireless providers from filling a "significant gap" in their coverage, thereby effectively prohibiting the provision of wireless services in that geographic area. Second Generation Properties v. Pelham, 313 F.3d 620, 630 (1st Cir. 2002). There are two sets of circumstances that may be classified as effective prohibitions. The first occurs when local governments enact regulations that are impossible to meet. The second occurs when the plan or site proposed by the applicant is the only feasible plan; denial then may amount to an effective prohibition of wireless services depending upon the surrounding circumstances. *Id*. *See also*, T-Mobile USA, Inc. v. City of Anacortes, 572 F.3d 987 (9th Cir. 2009) (finding that while the district court was correct in holding that there was substantial evidence to deny a tower siting application under the relevant municipal code, T-Mobile had shown that their proposal was the least intrusive means to fill a significant gap in coverage and, absent a showing by the city of a feasible alternative, the denial of the application amounted to a prohibition on the provision of wireless service).

[5] Town of Amherst, New Hampshire v. Omnipoint Communications Enterprises, Inc., 173 F.3d 9, 14 (1st Cir. 1999).

[6] *Id.*

local government must "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."[7] If the state or local government denies the request, the denial must be in writing and supported by "substantial evidence contained in a written record."[8] Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[9]

Recently, Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 contained a provision that appears intended to streamline the local approval process by easing restrictions on what is known as "collocation."[10] State and local governments now must grant the requests for modifications of existing wireless towers or base stations if the request would not substantially change the physical dimensions of the tower or base station. No definition is provided in the statute for the terms "tower" or "base station." Furthermore, no definition is provided for what it might mean to "substantially change the physical dimensions" of a tower. These ambiguities may cause difficulty in applying the new provision to future collocation requests. However, ambiguities may be resolved either by federal courts or by the FCC in a rulemaking to define the terms.

Assuming that the new exception does not apply to an application to site a new tower, courts have found that aesthetics may constitute a valid basis for the denial of a wireless permit so long as there is substantial evidence of the adverse visual impact of the proposed tower.[11] In fact, according to one court, "nothing in the Telecommunications Act forbids local authorities from applying general and nondiscriminatory standards derived from their zoning codes, and ... aesthetic harmony is a prominent goal underlying almost every such code."[12] Federal courts therefore have routinely upheld the denials of applications to construct wireless towers where the decisions of local entities were in writing and based on evidence that the tower would diminish property values, reduce the ability of property owners in the vicinity of the proposed tower to enjoy their property, or damage the scenic qualities of the proposed location.[13] However,

---

[7] U.S.C. §332(c)(7)(B)(ii).

[8] U.S.C. §332(c)(7)(B)(iii).

[9] Nextel Partners of Upstate New York, Inc. v. Town of Canaan, 62 F.Supp.2d 691, 695 (N.D. N.Y. 1999), citing Universal Camera v. NLRB, 340 U.S. 474, 477 (1951).

[10] P.L. 112-96, §6409(a). "Collocation" is the term used by the wireless industry and government authorities to describe when a wireless carrier seeks to add a wireless antenna to a tower or structure that already exists and supports a wireless antenna of a different wireless carrier. See In the Matter of 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, WT Docket No. 08-165, FCC 09-99, released November 18, 2009. However, it should be noted that P.L. 112-96 does not define the term "collocation."

[11] *See e.g.*, Preferred Sites, LLC v. Troup County, 296 F.3d 1210 (11th Cir. 2002), Southwestern Bell Mobile Sys. v. Todd, 244 F.3d 51 (1st Cir. 2001), Omnipoint Corp. v. Zoning Board, 181 F.3d 403 (3d Cir. 1999), AT&T Wireless PCS, Inc. v. Winston-Salem Bd. of Adjustment, 172 F.3d 307 (4th Cir. 1999).

[12] Aegerter v. City of Delafield, 174 F.3d 886, 891 (7th Cir. 1999).

[13] *See* USCOC of Greater Iowa, Inc. v. Zoning Bd. of Adjustment, 465 F.3d 817 (8th Cir. 2006) (upholding the denial of a permit to construct a tower based in part upon the fact that the tower would obstruct the view from the window of nearby residential property), Omnipoint Commc'n v. City of White Plains, 430 F.3d 529 (2nd Cir. 2005) (concluding that the zoning board was entitled to rely on aesthetic objections raised by members of the community that are familiar with the area); Voicestream Minneapolis, Inc. v. St. Croix County, 342 F.3d 818 (7th Cir. 2003) (holding that the county's denial of a wireless tower permit was supported by substantial evidence that the proposed tower would mar an especially scenic stretch of land).

generalized aesthetic concerns will not be considered "substantial evidence" to support the denial of a permit.[14] For example, the Seventh Circuit upheld the reversal of a denial of a petition based on aesthetic concerns where the only evidence that the proposed tower would be unsightly was the testimony of a few residents that they did not like poles in general, and those residents admitted that they had no objection to flagpoles, the proposed disguise for the wireless tower.[15] Blanket opposition to poles could not constitute "substantial evidence," in the opinion of the court.[16]

Many community groups also oppose the siting of towers based on health and environmental concerns.[17] However, the Telecommunications Act of 1996 prohibits state and local governments from regulating the placement of personal wireless service facilities on the basis of the effects of radio frequency emissions if the facility in question complies with the Federal Communications Commission's regulations concerning such emissions.[18] "As written, the purpose of the requirement is to prevent telecommunications siting decisions from being based upon unscientific or irrational fears that emissions from the telecommunications sites may cause undesirable health effects."[19] Courts have enforced this provision of the act and have noted that "concerns of health risks due to the emissions may not constitute substantial evidence in support of denial."[20] The FCC announced that it would be reviewing its regulations concerning radio frequency emissions in the coming months.[21]

The act also provides for the appeal of a state or local government's denial of a request to place, construct, or modify a facility.[22]

Section 704(c) of the Telecommunications Act provided that within 180 days of the enactment of the act, "the President or his designee shall prescribe procedures by which Federal departments and agencies may make available on a fair, reasonable, and nondiscriminatory basis, property, rights-of-way, and easements under their control for the placement of new telecommunications services."[23] President Clinton issued a memorandum on August 10, 1995, directing the Administrator of General Services, "in consultation with the Secretaries of Agriculture, Interior, Defense, and the heads of such other agencies as the Administrator may determine, to develop procedures necessary to facilitate appropriate access to Federal property for the siting of mobile services antennas."[24] The General Services Administration published procedures for the

[14] New Par v. City of Saginaw, 301 F.3d 390, 398 (6th Cir. 2002).

[15] Prime Co Personal Commc'n v. City of Mequon, 352 F.3d 1147, 1151 (7th Cir. 2003).

[16] *Id.*

[17] Malcolm J. Tuesley, *Not in My Back Yard: The Siting of Wireless Communications Facilities*, 51 Fed. Comm. L. J. 887, 902.

[18] 47 U.S.C. §332(c)(7)(B)(iv). Cellular Phone Task Force challenged the FCC's RF radiation guidelines. Cellular Phone Task Force v. FCC, 205 F.3d 82 (2nd Cir. 2000). The Court upheld the FCC's radiation guidelines, finding that they were not arbitrary and capricious under the circumstances. *Id*. at 96.

[19] 51 Fed. Comm. L. J. at 902.

[20] Telespectrum, Inc. v. Public Service Commission of Kentucky, 227 F.3d 414 (6th Cir. 2000). *See also* Illinois RSA No. 3, Inc. v. County of Peoria, 963 F.Supp. 732, 745 (C.D. Ill. 1997).

[21] FCC, In the Matter of Reassessment of the Federal Communications Commissions' Radiofrequency Exposure Limits and Policies, E.T. Docket No 13-84 (March 29, 2013) available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db0329/FCC-13-39A1.pdf.

[22] 47 U.S.C. §332(c)(7)(B)(v).

[23] P.L. 104-104, §704(c).

[24] *Facilitating Access to Federal Property for the Siting of Mobile Services Antennas*, 31 Weekly Comp. Pres. Doc. (continued...)

placement of commercial antennas on federal property in the Federal Register on March 29, 1996.[25] On March 14, 2007, the General Services Administration published updated procedures for the placement of commercial antennas on federal property in the Federal Register.[26] The agency also declared that these replacement procedures should remain in effect indefinitely.[27]

However, in 2012, Congress required the Administrator of General Services to refine the process for granting easements for wireless infrastructure on federal property. Section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012 contained provisions intended to standardize and facilitate the placement of towers on federal property.[28] First Section 6409(b) granted the authority for placing towers on buildings controlled by federal agencies to the agencies controlling that building or property. The Administrator of General Services is required to develop a standard application for easements related to siting wireless towers on federally controlled property, which can be used for submission to the agency that controls that property and will be in charge of granting the easement. The General Services Administration is also required by Section 6409(c) to develop master contracts for wireless facilities siting. The contracts will govern the placement of wireless antenna structures on buildings and other property owned by the federal government. In developing the contracts, the GSA is required to standardize the treatment of the placement of wireless antennae on federal property, among other considerations.

The FCC's November 2009 Declaratory Ruling: What Constitutes Unreasonable Delay?

In 2008, The Wireless Association (CTIA) asked the FCC to issue a declaratory ruling to define the length of time that local authorities had, under federal law, to permit or to deny an application to site a new wireless tower. To that end, CTIA filed a petition with the Commission requesting a declaratory ruling clarifying the provisions of the Communications Act that apply to the siting of wireless facilities, particularly 47 U.S.C. §332(c)(7).[29] CTIA, and other commenters in the proceeding, expressed concern that when applying to construct wireless facilities wireless services providers were encountering unreasonably long delays, some that stretched beyond two years.[30]

The Communications Act grants applicants seeking to construct wireless facilities the right to file suit in court when a state or local government authority fails to act upon a tower siting application.[31] CTIA argued that, without guidance on the subject from the FCC, it was unclear

(...continued)

1424 (August 10, 1995).

[25] 61 Fed. Reg. 14,100 (1996).

[26] 72 Fed. Reg. 11,881 (2007).

[27] 72 Fed. Reg. 11,881 (2007).

[28] P.L. 112-96, §6409.

[29] In the Matter of 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, WT Docket No. 08-165, filed July 11, 2008.

[30] Declaratory Ruling, *supra* note 33, at para. 33.

[31] 47 U.S.C. §332(c)(7)(B)(v).

when a state or local authority had failed to act.[32] CTIA further alleged that some states and localities were denying applications to place towers in certain areas solely on the basis of the presence of another wireless service provider in that area. CTIA asked the FCC to declare that such denials were the equivalent of an effective prohibition on the provision of personal wireless services in violation of the Communications Act.

As corporations that won recent large spectrum auctions begin to build out new facilities, new towers may need to be constructed. These industry participants expressed concern to the Commission over the length of time frequently taken for action on tower siting applications. On November 18, 2009, the FCC issued a declaratory ruling to clarify certain portions of Section 332 of the Communications Act.[33] This decision may be significant because it could streamline the tower siting application process across the country. The ruling defines a reasonable time period in which state and local governments should act upon tower siting requests as 90 days for the review of collocation applications and 150 days for the review of applications other than those for collocation.[34] Also, the FCC held that the denial of a tower siting application solely because "one or more carriers serve a given geographic market" is an action that prohibits or has the effect of prohibiting the provision of personal wireless services and is a violation of the Communications Act.[35]

The FCC found that the evidence in the record supported CTIA's allegations that there were unreasonable delays in the review and final action upon applications for the siting of wireless facilities.[36] In the FCC's estimation, these delays are inhibiting the deployment of next generation wireless technologies to an unacceptable degree.[37] Consequently, the Commission adopted the presumption that state and local governments should act on applications for collocation within 90 days, and that applications other than those for collocation should be acted upon within 150 days.[38] The rule applying to collocation requests may be affected by Section 6409 of the Middle Class Tax Relief Act discussed in the previous section. As mentioned, Section 6409 requires local authorities to grant applications for collocations if the collocation would not substantially change the physical dimensions of a tower. The FCC may wish to clarify what types of applications would qualify for this required approval.

CTIA also had requested that, if state or local governments failed to act within the time delineated by the FCC, the application to site the wireless facility be deemed granted. The FCC declined to issue that form of relief. Rather, upon the expiration of the applicable period of time, the applicant may file suit alleging violation of Section 332 in the appropriate federal court.[39] If more time is needed to process the application, the parties may consent to extend the review period or the state

[32] Declaratory Ruling, *supra* note 33, at para. 27.

[33] In the Matter of 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, WT Docket No. 08-165, FCC 09-99, released November 18, 2009 ("Declaratory Ruling").

[34] *Id*. at para. 27-53.

[35] *Id*. at para. 54-67.

[36] *Id.*, at para. 33.

[37] *Id.*, at para. 34 - 35.

[38] *Id*., at para. 46; 48.

[39] *Id*. at para. 49.

or locality may argue in court that the length of time for processing the particular application was reasonable under the circumstances.

The FCC also determined that "a State or local government that denies an application for personal wireless service facilities siting solely because 'one or more carriers serve a given geographic market' has engaged in unlawful regulation that 'prohibits or ha[s] the effect of prohibiting the provision of personal wireless services.'"[40] This determination adds the FCC's voice to a split in the circuits regarding whether denying applications to serve an area amounts to the effective prohibition of wireless services if the denial occurs solely because another company already provides the area with wireless services. The First Circuit, for example, had observed that "a straight forward reading is that 'services' refers to more than one carrier."[41] Consequently, the presence of another carrier serving an area does not necessarily mean that an effective prohibition on the provision of wireless services is not occurring. Whereas, the Fourth Circuit has found that the statute limits localities from prohibiting *all* personal wireless services, not from preventing any one company from serving that particular area.[42] Under this reasoning, if one carrier is serving an area, then wireless services are not being effectively prohibited.

The FCC determined that the better reading of the statute was to apply the provision to all carriers seeking to enter a particular wireless market, adopting the reasoning of the First Circuit.[43] Therefore, if a carrier is effectively prohibited from serving a particular area by the denial to site its facilities, then the Communications Act may have been violated even if wireless services are available in that area from another carrier. The agency found that the word "services" in the statute applied to multiple wireless carriers. Furthermore, a first entrant into a market may not provide services to the entire area. Therefore, the presence of one carrier in an area does not necessarily mean that wireless services have not been effectively prohibited for others, according to the Commission's reasoning. The Commission also reasoned that its interpretation of the statute was more consistent with the broader goals of the Communications Act, in that it could allow for increased competition among wireless providers, and decrease gaps in wireless service coverage across the country.

Opponents to the declaratory ruling raised questions about the FCC's authority to interpret this particular provision, on the grounds that the provision is judicially enforced and the meaning of the words were meant to be interpreted by the courts.[44] The Commission disagreed, finding that it did have the authority to interpret the provision, even though the agency does not actively enforce the provision. To support its contention, the FCC cited the Sixth Circuit's decision upholding the FCC's authority to issue its order interpreting Section 621 of the Communications Act, also known as the Local Franchising Order. The Local Franchising Order provided guidance for interpreting the statutory phrase "unreasonably refus[ing] to award" cable franchises, the granting of which is traditionally determined by local franchising authorities. The Sixth Circuit found that the FCC possessed "clear jurisdictional authority to formulate rules and regulations interpreting the contours of section 621."[45] The FCC argued that the Sixth Circuit decision applies similarly to this order because Section 332's silence on the FCC's rulemaking authority "does not divest the

[40] *Id.* at para. 56.

[41] Second Generation Properties, L.P. v. Town of Pelham, 313 F.3d 620, 634 (1st Cir. 2002).

[42] AT&T Wireless PCS v. City Council of Va. Beach, 155 F.3d 423, 428 (4th Cir. 1998).

[43] Declaratory Ruling, *supra* note 33, at para. 58-62.

[44] *Id*. at para. 20-26.

[45] Alliance for Community Media v. FCC, 529 F. 3d 763, 773-74 (6th Cir. 2008).

agency of its express authority [elsewhere in the Communications Act] to prescribe rules interpreting" the act, as the Sixth Circuit found to be the case for Section 621. This issue may be raised in subsequent litigation by state and local governments facing lawsuits for failing to grant applications within the time period described by the FCC. In January of 2012, the Fifth Circuit Court of Appeals agreed with the FCC and upheld the FCC's authority to issue this declaratory order.[46]

State Statutory Provisions

Apart from the specific limitations set forth in the Telecommunications Act of 1996, federal law does not appear to affect state or local zoning authority with regard to the placement of wireless communications towers.[47] Most states delegate zoning authority to local bodies. However, some states offer guidance on what factors should be considered by the local entities when considering applications for permits to construct wireless communications facilities. For example, the state of New Hampshire has enacted a law concerning the visual effects of tall wireless antennas.[48] The law does not alter any municipal zoning ordinance or preempt the Telecommunications Act of 1996.[49] It does, however, recognize that the visual effects of tall antennas "may go well beyond the physical borders between municipalities," and in doing so it encourages local governing bodies to address the issue "so as to require that all affected parties have the opportunity to be heard."[50] The statute also provides that carriers wishing to build personal wireless service facilities should consider commercially available alternatives to the tall towers, such as lower antenna mounts, disguised or camouflaged towers, and custom-designed facilities to minimize the visual impact on the surrounding area.[51]

An Illinois law sets forth guidelines for telecommunications carriers to consider when choosing a location for and designing a facility.[52] The law specifically states that it does "not abridge any rights created by or authority confirmed in the federal Telecommunications Act of 1996."[53] Rather, the law offers a list of locations—from "most desirable" to "least desirable"—for the siting of telecommunications facilities, with non-residentially zoned lots as the most desirable and residentially zoned lots that are less than 2 acres in size and used for residential purposes as the least desirable.[54] The guidelines set forth for designing a facility include preserving trees in the area or replacing trees removed during construction, landscaping around the facility, and designing facilities that are compatible with the residential character of the area.[55]

In addition to the alternatives listed above, states can encourage the use of existing infrastructure as opposed to the construction of new facilities in order to reduce the total number of towers in an area. For example, in Kentucky, state law allows the local planning commission to require the

[46] City of Arlington v. FCC, 668 F. 3d 229 (5th Cir. 2012).

[47] 47 U.S.C. §332(c)(7)(A).

[48] R.S.A. 12-K:1, effective August 7, 2000.

[49] R.S.A. 12-K:1(I) and (VI).

[50] R.S.A. 12-K:1(II).

[51] R.S.A. 12-K:1(III).

[52] 55 ILCS 5/5-12001.1.

[53] 55 ILCS 5/5-12001.1(b).

[54] 55 ILCS 5/5-12001.1(d).

[55] 55 ILCS 5/5-12001.1(e).

company applying for the construction permit "to make a reasonable attempt to co-locate" its equipment on existing towers if space is available and the co-location does not interfere with the structural integrity of the tower or require substantial alterations to the tower.[56] The statute gives the planning commission the authority to deny an application for construction based on the company's unwillingness to attempt to co-locate.[57] Connecticut has also enacted a law which allows local entities to require the sharing of towers whenever it is "technically, legally, environmentally and economically feasible, and whenever such sharing meets public safety concerns."[58]

Local (Municipal or County) Law

Many local governments, through the use of their zoning authority, attempt to limit the impact cellular towers have on the surrounding environment. One county in Georgia enacted a "Telecommunications Tower and Antenna Ordinance," which set up a new permit system for the construction of cellular towers in an effort to encourage construction in nonresidential areas.[59] In commercial or light industrial areas, a wireless service provider can build a tower without review by the County Board of Commissioners as long as a certain set of specifications are met.[60] However, if a service provider wants to construct a tower in a residential area, a hearing is held on the matter, and construction permits are subject to denial if a set of nine criteria is not met.[61] In an effort to reduce the number of facilities in the area, the City of Bloomington, MN, enacted an ordinance that requires wireless facilities to be designed to accommodate multiple users.[62]

In direct response to the limitations set forth in the Telecommunications Act of 1996, several communities enacted moratoria on permits for cellular towers in an effort to prevent or delay the construction of cellular communications towers.[63] Under the act, local governments cannot act to prohibit or have the effect of prohibiting wireless communication services in their communities.[64] Local governments justify the imposition of moratoria by claiming that they need time to study the problems with tower siting and how they should change their zoning ordinances to accommodate construction.[65] Courts have upheld moratoria that have a fixed length, such as six

[56] K.R.S. §100.987(6). Under federal law, utilities are required to provide telecommunications carriers "with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by [the utility]." 47 U.S.C. §224(f)(1).

[57] K.R.S. §100.987(7).

[58] Conn. Gen. Stat. §16-50aa.

[59] Robert Long, *Allocating the Aesthetic Costs of Cellular Tower Expansion: A Workable Regulatory Regime*, 19 Stan. Envtl. L. J. 373, 378. The full text of the ordinance is available at http://www.gwinnettcounty.com/departments/planning/pdf/tower.pdf.

[60] *Id.*

[61] *Id.* The ordinance states that towers built in residential areas must comply with certain requirements, such as topography, height, setback, access driveways or easements, parking, fencing, landscaping, and adjacent uses. *Id.* at n. 35.

[62] 51 Fed. Comm. L. J. at 909, citing Bloomington, Mn., Code 19.63.05(a)(1)-(4)(1996).

[63] David W. Hughes, *When NIMBY's Attack: The Heights to Which Communities Will Climb to Prevent the Siting of Wireless Towers*, 23 Iowa J. Corp. L. 469, 488.

[64] 47 U.S.C. §332(c)(7)(B)(i).

[65] 23 Iowa J. Corp. L. at 488.

months.[66] However, they are less likely to uphold those that are for long periods of time or indefinite.[67]

Pole Attachment Rule Amendments

Similar to the FCC's efforts to increase the deployment of wireless facilities across the country, the agency launched a similar effort to streamline the process of collocation of equipment on existing poles owned by utility companies. Section 224 of the Communications Act grants the Commission the authority to regulate the rates, terms, and conditions for pole attachments, which are defined by the statute as "any attachment by a cable television system or provider of a telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility."[68] In 2011, the FCC issued an order revising its interpretation of Section 224 to allow incumbent local exchange carriers (ILECs) for the first time to share some of the benefits of Section 224; reformulate (i.e., lower) the rates utilities could charge telecommunications carriers bringing those rates closer to the rates charged to cable providers; and reformulate the timing of the calculation of refunds when attachers are overcharged.[69]

Utility companies challenged the FCC's authority to make these changes, claiming that ILECs were excluded from the definition of telecommunications service providers under Section 224 and could not be eligible for pole attachment rights under Section 224 as a result. The Court of Appeals for the D.C. Circuit disagreed, upholding the FCC's interpretation of the statute.[70] The Court found, that while Section 224 did exclude ILECs from the definition of telecommunications carriers, that exclusion only applied to Section 224(e) which permits the FCC to regulate charges for pole attachments to telecommunications carriers when the parties fail to resolve a dispute regarding those charges.[71] The FCC was permitted to interpret Section 224(a), which allows the Commission to regulate pole attachments for providers of telecommunications services more generally, to apply to ILECs.

The utility companies also challenged the FCC's decision to adopt telecom rates that were substantially equivalent to cable rates for pole attachments and the amendments to the calculation of the so-called "refund period." The court accorded deference to the FCC's interpretation of Section 224 in both of those instances, as well, and denied the utility companies' petition to review the FCC's order amending its regulations under Section 224 in full.

[66] *See* Sprint Spectrum L.P. v. City of Medina, 924 F. Supp. 1036 (W.D. Wash. 1996).

[67] *See e.g.* Spring Spectrum L.P. v. Jefferson County, 968 F. Supp. 1457 (N.D. Ala. 1997).

[68] 47 U.S.C. §224.

[69] In the Matter of the Implementation of Section 224 of the Act, Report and Order and Order on Reconsideration, 26 FCC Rcd. 5240 (April 7, 2011).

[70] American Electric Power Service Corp. v. Federal Communications Commission, 2013 U.S. App. LEXIS 3924 (D.C. Circuit, 2013).

[71] 47 U.S.C. §224(e).

Author Contact Information

Kathleen Ann Ruane
Legislative Attorney
kruane@crs.loc.gov, 7-9135