PCIA
The Wireless Infrastructure Association

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California Wireless Association

Wireless Infrastructure Industry Policy Position Points: Middle Class Tax Relief and Job Creation Act of 2012

Section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012 ("MCTRA")[i] 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 wireless infrastructure industry believes that the most important policy positions regarding the MCTRA to be agreed upon and set into practice by this working group are as follows:

The terms "eligible facilities requests", "wireless tower", "base station" and "substantial change" are defined by Federal Communications Commission regulations and should be applied consistent with those regulations:

- MCTRA defines "eligible facilities request" as any request for modification of an existing wireless tower or base station that involves:
  - Collocation of new 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."[ii]
  - Removal of transmission equipment; or
  - Replacement of transmission equipment.
- The FCC defines a "substantial change" as:
  - The mounting of the proposed antenna on the tower 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 the proposed antenna would involve the installation of more than the standard number of new equipment cabinets for the technology involved, not to exceed four, or more than one new equipment shelter; or
  - The mounting of the proposed antenna 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; or
  - The mounting of the proposed antenna would involve excavation outside the current tower site, defined as the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site.[iii]
- The FCC defines a "tower" as "any structure built for the sole or primary purpose of supporting FCC-licensed antennas and their associated facilities."[iv]
- 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,"[v] which may include antennas located on rooftops, utility poles, or any other structure that is designed to or capable of supporting wireless communications equipment or in an existing equipment compound given common industry understanding.[vi]

The FCC's Wireless Facility Siting "Shot Clock" applies to eligible facilities requests under the MCTRA:

- State and local governments have 90 days to act on an application to collocate wireless facilities on existing structures.[vii]
- Under MCTRA, 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.

MCTRA requires unconditional 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;[viii]
- Preempts zoning review and conditional approvals of eligible facilities requests;[ix]
- Requires eligible facilities requests only be subject to administrative review processes and not discretionary review processes that allow a local government to deny or condition an eligible facilities request. In short, by requiring that a local jurisdiction must approve and cannot deny an eligible facilities request, section 6409 removes the discretionary component of the wireless facility modification application review process. This does not, however, exempt jurisdictions from requiring compliance with building codes and structural standards.

MCTRA requires that eligible facilities requests for the modification of legal, non-conforming towers be approved:

- Existing requirements for the underlying tower are still enforceable, but a jurisdiction may not predicate the approval of the collocation application upon the compliance with requirements that did not exist at the time that the underlying facility was approved.
- An approval conditioned on anything outside of the structural concerns or compliance with requirements on the underlying structure is not an approval per se and would amount to a denial counter to the MCTRA.

The California Permit Streamlining Act ("PSA") applies to eligible facilities requests and requires public agencies to follow standardized time limits and procedures for eligible facilities requests:

- The timelines in the PSA begin when an application is submitted, and end when accepted as complete and the environmental review ("CEQA") process begins, and begins again after the CEQA determination has been made.[x]
- Upon receipt of a project application containing a statement identifying the application as being for a "development permit," an agency has 30 calendar days to notify the applicant, in writing, of whether or not the project application is complete enough for processing. When rejected as incomplete, the agency must identify where deficiencies exist and how they can be remedied. The resubmittal of the application begins a new 30-day review period. If the agency fails to notify the applicant of completeness within either of the 30-day periods, the application is deemed to be complete. If rejected as incomplete a second time, the applicant may appeal the decision to jurisdiction's hearing body who must make a final written determination within 60 calendar days. Again, failure to meet this time period constitutes acceptance of the application as complete.[xi]
- When a project is found to be exempt from CEQA or a negative declaration is adopted for a project, the public agency shall approve or deny the project within 60 days from the date of the determination or adoption.[xii]
- An application can only be deemed approved as a result of failure to act if the requirements for public notice and review have been satisfied.[xiii]

[i] For the full text of the Act and its legislative history, *see* Middle Class Tax Relief and Job Creation Act of 2012 ("the Act"), Pub. L. No. 112-96, §6409 (2012), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-112hr3630enr/pdf/BILLS-112hr3630enr.pdf; *see also* H.R. Rep. No. 112-399 at 132-33 (2012) (Conf. Rep.), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt399/pdf/CRPT-112hrpt399.pdf. *See also* Jeffery Steinberg, Deputy Chief, Spectrum & Competition Pol'y Division, Wireless Telecommunications Bureau, Fed. Commc'ns Comm'n, FCC Presentation: The Legal Framework at the FCC Workshop: Promoting Mobile Broadband in your Community by Collocating Wireless Antennas on Communications Towers and other Structures (May 1, 2012), *available at* http://www.fcc.gov/events/collocation-workshop ("Collocation Workshop Statement") (directly referencing the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (2001), 47 C.F.R. Part I, Appendix B, *available at* http://wireless.fcc.gov/releases/da010691a.pdf ("Collocation Agreement"), as a source for defining the terms within the Act).

[ii] 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), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-99A1_Rcd.pdf; *see also Wireless Telecommunications Bureau & Mass Media Bureau Announce the Release of a Fact sheet Regarding the March 16, 2001 Antenna Collocation Programmatic Agreement*, Public Notice, 17 FCC Rcd 508 (2002), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-02-28A1.pdf .

[iii] Collocation Agreement. *See also* Collocation Workshop Statement (directly referencing the Collocation Agreement as the source of the definition of "substantial change").

[iv] *Id*.

[v] *See*, *e.g.*, 47 C.F.R. §§24.5, 90.7.

[vi] *See, e.g.,* Harry Newton, Newton's Telecom Dictionary (25th ed., 2009); Pinney v. Nokia, Inc., 402 F.3d 430 (4th Cir. 2005); Farina v. Nokia, Inc., 625 F.3d 97 (3rd Cir. 2010); NextG v. Scottsdale, Deposition of David Marcel Cutrer, p. 11.

[vii] *Shot Clock Ruling*.

[viii] 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).

[ix] *See* 158 CONG. REC. E237-239 (daily ed. Feb. 24, 2012) (statement of Rep. Upton), *available at* http://www.gpo.gov/fdsys/pkg/CREC-2012-02-24/pdf/CREC-2012-02-24-pt1-PgE237-5.pdf. 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.

[x] California Permit Streamlining Act §65950.

[xi] California Permit Streamlining Act §65943; Orsi v. City Council (1990) 219 Cal. App. 3d 1576.

[xii] California Permit Streamlining Act §65950 and Public Resources Code §21151.5.

[xiii] California Permit Streamlining Act §65965.