Telecommunications Law UPDATES

AUGUST 15, 2001

WIRELESS TOWER SITINGS DEVELOPMENTS: ENVIRONMENTAL AND HISTORIC PRESERVATION

There have been a number of important developments on the wireless facilities siting front since we last covered these issues ("Current Wireless Facilities Siting and Infrastructure Issues," April 13, 2001). Wireless carriers have contested the validity of recently promulgated siting approval procedures of the FCC and the Advisory Council on Historic Preservation ("ACHP"), while environmental interest groups appear to be mounting a concerted campaign to force the FCC to revamp the entire environmental review process for proposed tower sites. These actions demonstrate the conflicting concerns of those interested in speedy wireless deployment and those who have identified the problems associated with wireless tower sitings -- the so-called "pincushion" problem.

Sprint PCS has sought reconsideration from the FCC of its recent Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (the "Programmatic Agreement"). The Programmatic Agreement, which was finalized on April 2, 2001 by the FCC, the ACHP, and the National Conference of State Historic Preservation Officers, announced a new review process for antenna collocation proposals, in an effort to make collocation a more attractive option to carriers than constructing new towers. The FCC based its authority to enter into the agreement on section 106 of the National Historic Preservation Act ("NHPA"), which requires federal agencies to consider the effects of their undertakings on historic properties and affords the ACHP a reasonable opportunity to comment on proposed agency actions. The Programmatic Agreement also is based on ACHP's own regulations, which allow for programmatic agreements to tailor the Section 106 review process.

In its petition for reconsideration, Sprint PCS challenges the FCC's authority to enter into an agreement that subjects tower sites to the historic preservation review process. Sprint PCS argues that Congress specifically limited the FCC's authority over the construction and design of wireless service facilities in the 1996 Telecommunications Act; consequently, it contends, the FCC cannot enter into an agreement that prescribes rules for tower sites. Furthermore, Sprint PCS argues that section 106 of NHPA does not apply to tower sites since it applies only to federal or federally assisted undertakings. Because towers are private endeavors reviewed by local governments, Sprint PCS argues that they are simply not federal undertakings. Finally, Sprint PCS challenges the Programmatic Agreement's definition of historic property as overly broad, and argues that the only properties that may be considered are those that are included in or eligible for inclusion in the National Register.

CTIA, meanwhile, is attacking the current historic preservation review process in federal court. CTIA argues that final rules promulgated by the ACHP regarding environmental review of tower proposals impermissibly grant the ACHP, rather than the FCC or another federal agency, the power to determine when a federal agency's regulations may substitute for the ACHP's regulations. CTIA argues that the ACHP's rules strip federal agencies of the power conferred upon them by Congress to pursue their own policies within the guidelines of section 106 of the NHPA. Specifically, CTIA argues that the FCC's obligation to promote deployment of a nationwide, competitive wireless telecommunications infrastructure is impeded by the ACHP's rules. A successful CTIA challenge could overturn the historic preservation review process mandated by the ACHP regulations.

In addition to these carrier challenges to historic preservation review procedures, environmental interest groups have recently embarked upon a concerted challenge to the FCC's environmental review procedures. Over the past three months Friends of the Earth and the Forest Conservation Council have filed challenges to over thirty tower proposals. Although these challenges target specific tower siting proposals, the organizations argue in their petitions that "[t]he FCC must complete an environmental impact statement addressing the direct, indirect and cumulative effects of its Antennae Structure Licensing Program before issuing any additional licenses." In addition, they urge that the specific antenna applications be denied based on a lack of adequate documentation of environmental impact. The organizations point to the requirements of the National Environmental Policy Act, environmental quality rules, and the FCC's environmental review procedures, and argue that the targeted applications provide vague information on the potential effects on wilderness areas, historic areas, exposure to RF emissions, endangered species, and migratory birds. These challenges reflect the first nationwide, coordinated campaign intended to highlight environmental concerns in the context of particular wireless siting proposals. Resolution of this controversy may have a substantial effect on the deployment schedule for wireless services that are becoming increasingly popular.

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