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ALERT

FCC Releases Draft "5G Upgrade Order"; Declaratory Ruling and NPRM Will Facilitate Wireless Infrastructure Upgrades

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On May 19, 2020, the Federal Communications Commission (FCC or Commission) released a public draft of what the agency has dubbed the "5G Upgrade Order," a Declaratory Ruling and Notice of Proposed Rulemaking (NPRM) in the Accelerating Deployment of 5G Wireless Infrastructure docket. The draft, which comes in response to petitions filed by CTIA and the Wireless Infrastructure Association (WIA), clarifies several key interpretations of Section 6409 of the Spectrum Act of 2012 (Section 6409), a provision that requires states and localities to approve certain wireless infrastructure siting requests. The draft will be on the FCC's agenda for a vote at its next open meeting on June 9, 2020.

This draft item is part of a broader initiative by the Commission to clarify the scope of federal provisions that limit the authority of states and localities to restrict wireless infrastructure siting, in the interest of promoting the deployment of fifth generation (5G) wireless networks. Three orders released in 2018 focused on Sections 253 and 332 of the Communications Act, which preempt state and local actions that have the effect of prohibiting the provision of service, as well as the application of historic and environmental review requirements to small cell facilities. The FCC has not revised its interpretation of Section 6409 since 2014.

Consistent with the petitions filed by CTIA and WIA in September of last year, the draft Declaratory Ruling offers several clarifications of the statute related to the following: (i) when the 60-day shot clock imposed on governments reviewing siting applications begins to run; and (ii) the meaning of several terms used in FCC rules to determine

Authors

Joshua S. Turner
Partner
202.719.4807
jturner@wiley.law

Sara M. Baxenberg
Partner
202.719.3755
sbaxenberg@wiley.law

Boyd Garriott
Associate
202.719.4487
bgarriott@wiley.law

Practice Areas

Telecom, Media & Technology

when a siting request constitutes a "substantial change" to existing facilities and therefore is not entitled to expedited treatment under Section 6409, including (a) the distance of separation between antennas, (b) the meaning of the term "equipment cabinets," (c) what constitutes a "concealment element," (d) what it means to "defeat" a concealment element, and (e) the meaning of the phrase "conditions associated with the siting approval." The draft Declaratory Ruling also offers additional clarification as to when an applicant must complete an environmental assessment, and the NPRM portion of the draft item seeks comment on the meaning of "current site" as used in the FCC's Section 6409 implementing regulations.

Draft Declaratory Ruling: Section 6409 Clarifications

The draft Declaratory Ruling—when finalized—will make six key clarifications to its interpretations of Section 6409, which provides that "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." The FCC previously interpreted Section 6409 in its 2014 Infrastructure Order, which defined key terms like "eligible facilities request" (EFR) and "substantial change." The draft Declaratory Ruling would expand upon these interpretations in response to petitions filed by CTIA and WIA.

First, the draft Declaratory Ruling provides that Section 6409's 60-day shot clock begins to run when an applicant (i) takes "the first procedural step" that is objectively verifiable and within its control in a state or local application process, and (ii) submits "written documentation" showing that a proposed modification is an EFR. (¶ 16). The Commission's Section 6409 rules currently require state and local governments to approve applications "[w]ithin 60 days[.]" The Commission explains that its clarifications are designed to prevent local jurisdictions from defeating this rule "by treating applications as incomplete unless applicants have complied with time-consuming requirements." (¶ 15).

Second, the draft Declaratory Ruling explains how it calculates the distances between antennas for purposes of determining whether a change is "substantial." (¶¶ 24–28). The Commission's regulations provide that a change is "substantial" if it "increases the 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." On the latter prong, the FCC explains that the distance between antennas is calculated by the "separation" distance and thus does not include size/height of the antenna itself. (¶ 25).

Third, the draft Declaratory Ruling provides two key clarifications regarding the term "equipment cabinets" in the FCC's implementing regulations to Section 6409. (¶¶ 29–30). Those regulations provide that a proposed modification to a support structure constitutes a substantial change if "it involves installation of more than the standard number of new equipment cabinets for the technology involved, but not to exceed four cabinets." The Commission first clarifies that the term "equipment cabinets" does not include "small pieces of equipment such as remote radio heads/remote radio units, amplifiers, transceivers mounted behind antennas, and similar devices . . . if they are not used as physical containers for smaller, distinct devices." (¶ 29). It next clarifies that the four-cabinet limit applies on a per-EFR basis, not a cumulative basis. (¶ 30).

Fourth, the draft Declaratory Ruling clarifies that a "concealment element" is an element intended to make a facility look like something other than a wireless facility and that was part of a prior approval. (¶ 33). The FCC notes that this term is "narrowly defined" and rejects localities' arguments "that any attribute that minimizes the visual impact of a facility, such as a specific location on a rooftop site or placement behind a tree line or fence, can be a concealment element." (¶ 34). The FCC further explains that the concealment element must predate the EFR in order to avoid "giv[ing] local governments discretion to require new concealment elements," which would be inconsistent with Section 6409. (¶ 37).

Fifth, the draft Declaratory Ruling explains that a proposed modification "defeats" a concealment element only if it causes a reasonable person to view a structure's intended stealth design as no longer effective. (¶ 38). As examples, the FCC explains that localities run afoul of this interpretation if they prohibit "any change to the color of a stealth tower or structure as defeating concealment" or contend that a structure's current size is *per se* a concealment element. (¶ 39).

Sixth, the draft Declaratory Ruling clarifies the phrase "conditions associated with the siting approval," as used in the FCC's implementing regulations. (¶¶ 40–43). Those regulations provide that a proposed modification is a substantial change if it "does not comply with conditions associated with the siting approval" of the relevant structure. The FCC clarifies that these preexisting conditions may include aesthetic conditions so long as (i) a condition does not prevent modifications explicitly allowed elsewhere in the regulations, and (ii) there is evidence that, at the time of approval, the locality required the feature and conditioned approval on its continued existence. (¶¶ 41–42).

On the first prong, the FCC further explains that a "condition[] associated with the siting approval" is not enforceable if an applicant cannot "reasonably comply" with the condition, and the condition would be otherwise-authorized by the Commission's Section 6409 regulations. (¶¶ 41–43). As an example, it notes that a jurisdiction could not impose a specific size condition on an EFR with which an applicant could not "reasonably comply" because another regulation specifically provides that certain size changes constitute EFRs. (¶ 41).

Draft Declaratory Ruling: Environmental Assessments

The draft Declaratory Ruling would also clarify that facilities applicants need not prepare environmental assessments if (i) the FCC and the applicants have executed a memorandum of agreement to mitigate effects of a proposed undertaking on historic properties, and (ii) such effects are the only basis for the preparation of an environmental assessment. (¶¶ 44–49) The Commission explains that, in this situation, the environmental assessment would be redundant. (¶ 48).

NPRM

Finally, the public draft contains an NPRM that would ask for public comment on additional changes related to the term "current site." (¶¶ 50–54). That term is used in the FCC's Section 6409 implementing regulations, which provide that "[a] modification substantially changes the physical dimensions of an eligible support

structure if . . . [i]t entails any excavation or deployment outside the *current site*[.]"

The FCC asks for public comment on WIA's request that the Commission clarify that "current site" is the "*currently* leased or owned compound area." (¶¶ 51, 54). The Commission explains that some local governments interpret the phrase as the *original* site, thereby removing many modifications from the scope of the definition of EFR. (¶ 51). The FCC also asks for public comment on WIA's request for the Commission to amend its rules to provide that a modification is not "a 'substantial change' if it entails excavation or facility deployments at locations of up to 30 feet in any direction outside the boundaries of a macro tower compound." (¶¶ 52, 54). The FCC notes that industry commenters argued that such a change is necessary to facilitate rapid modifications to macro towers. (¶ 54).

Conclusion

If approved in its current form, the Declaratory Ruling would provide a number of clarifications to the Commission's regulations aimed at facilitating faster communications infrastructure deployment. Additionally, the NPRM would provide stakeholders with an opportunity to weigh in on other key interpretations that could further fuel 5G deployments. The draft is subject to revision prior to the vote at the June open meeting.