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April 9, 2001

By Hand Delivery

Zoning Commission
441 4th Street, NW
2nd Floor
Washington, DC 20002

Re: Antenna Roundtable (ZC 01-02R) Comments of Verizon Wireless

Dear Members of the Zoning Commission:

This letter on behalf of Verizon Wireless responds to a number of issues raised at the March 5 and March 19, 2001 roundtables and correspondence filed in the record of that case.

1. Overview of Existing Antenna Regulations

The existing antenna regulations were adopted by the Zoning Commission in Order No. 587 (February 24, 1989) (ZC Case No. 84-10). The current regulations permit certain antennas as a matter-of-right and others as a matter-of-right subject to Office of Planning review. All other antennas require Board of Zoning Adjustment (BZA) special exception approval. As detailed in our February 5, 2001 statement to the Zoning Commission (attached as Exhibit A), the current regulations have worked effectively for wireless providers such as Verizon Wireless. Telecommunication needs are increasing, and with that there is an ongoing need for infrastructure in the District of Columbia. In the vast majority of cases, Verizon Wireless' antenna systems have been established on the roof of existing buildings or other existing structures. As detailed below, such siting is encouraged by the current regulations, and should be in any future regulations.

Verizon Wireless' antenna systems have been approved throughout the City through the Department of Consumer and Regulatory Affairs (DCRA) building permit process, with referral to the Office of Planning as specified in the current regulations. Where applicable, the antenna systems have also been approved by other appropriate review agencies, including the DC Historic Preservation Review Board, the Old

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Georgetown Board, the Commission of Fine Arts, and for sites subject to the Pennsylvania Avenue Development Plan, the National Capital Planning Commission. While there are concerns about the time delay in processing permits, the process established under the current Zoning Regulations has worked effectively.

In situations where an antenna system cannot feasibly be located on an existing building or other structure, the current regulations allow applicants to apply for a special exception from the Board of Zoning Adjustment (BZA). Therefore, the current Zoning Regulations provide an excellent framework for considering revisions to the Zoning Regulations, if any, particularly in terms of wireless providers.

2. Important Aspects of the Current Zoning Regulations

- A. Current Zoning Regulations allow antenna systems to be established on existing buildings and structures as a matter of right (with Office of Planning review).

The existing regulations recognize that existing buildings and other structures are prime locations for placing antennas, with minimal aesthetic intrusion. The existing regulations permit in all zones multiple antennas to be mounted on rooftops (201.5 and 201.7) or existing broadcast towers (§ 201.6 and 201.7), subject to review by the Office of Planning. This policy minimizes aesthetic intrusions, while meeting the timing needs of the wireless industry to provide acceptable coverage without unnecessary reviews. This policy also eliminates the need to construct new facilities to support the antennas. This policy should be continued.

- B. Existing Zoning Regulations Distinguish Between Radio/TV Commercial Broadcast Antennas and Antennas for Wireless Facilities.

The current regulations make a number of distinctions between radio/TV antennas for commercial broadcast and other non-commercial broadcast antennas - see section 211 (Antenna, Commercial Broadcast) and Section 212 (Antenna, Other than Commercial

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Broadcast Antenna). To a large degree, these distinctions are still valid and should be reflected in any new regulatory scheme.

First, antennas for TV/radio commercial broadcast are generally located on towers, typically several hundred feet in height. Antennas for wireless providers can be installed on towers (at a relatively low height), existing buildings or other structures, or monopoles where there are no other available existing buildings or structures. Monopoles will generally require approval from the Board of Zoning Adjustment (BZA) in situations where they exceed the permitted height. To date, we are aware of only one (1) BZA Order (Order No. 12555) approving a monopole in DC. In contrast to towers, monopoles are substantially shorter than a TV/radio antenna tower, and typically well under 200 feet. No guy wires or other supporting structures are required. Therefore, set back and related restrictions are also minimized.

In addition to the above, antennas for commercial broadcast utilize very high power transmitters compared with low-power antennas (with relatively low coverage) used for wireless facilities. (These distinctions were also made by Neil B. Feldman at the March 19, 2001 Roundtable). (Exhibit B provides a general example of the vast difference in power between wireless antennas and those needed for commercial broadcast).

Therefore, the current distinction between commercial broadcast and non-commercial broadcast antenna remains relevant, and should be incorporated into any new regulations. As noted above, any proposed regulations should continue to allow antennas for wireless facilities to be established on existing buildings or other structures as a matter-of-right.

3. Federal Preemption over RF Emissions for Wireless Facilities

We believe that the federal preemption over RF emissions from wireless facilities is clear. The Zoning Commission must defer to the Federal Communications Commission (FCC). Congress gave the FCC preemptive authority over the environmental effects of RF emissions. Section 704(a)(7)(B)(iv) of the Telecommunications Act of 1996 specifically provides that "No state or local

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government or instrumentality thereof may regulate the placement, construction, and modification of personnel wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions." The relevant portion of the Act and the Conference Report providing legislative history are attached as Exhibit C. Once a wireless provider has shown compliance with the FCC standard, there is no role for the Zoning Commission in this matter.

Contrary to the testimony of Anne Hume Loikow of the Cleveland Park Citizens Association at the March 5th roundtable, and by subsequent filing dated March 6, 2001, the Zoning Commission is subject to the specific RF preemption established by the Telecommunications Act of 1996. Mrs. Loikow, in discussing the prior Zoning Commission action on antennas embodied in Order No. 587 (ZC Case No. 84-10), stated that the Office of Corporation Counsel addressed the federal FCC preemption issue, and determined that the FCC regulatory preemption authority did not apply to the Zoning Commission. First, even if true, the Zoning Commission's original antenna proceeding ended seven (7) years before the Telecommunications Act of 1996. An opinion ruling on the FCC's regulatory authority in the prior case would not be controlling on a subsequent statute (the Telecommunications Act of 1996).

More importantly, the Office of Corporation Counsel's opinion, dated August 30, 1988 (Exhibit D) stated that:

"[t]he issue of whether the FCC federal preemption applies to a congressionally created commission that is statutorily mandated to consider the federal interest has been reserved". (emphasis supplied).

For whatever reason, Mrs. Loikow in her testimony and March 6th submission referenced a transmittal from the Zoning Commission to the Office of Corporation Counsel. This transmission contains the Executive Director of the Zoning Commission's views (which are not a legal opinion). Mrs. Loikow did not address the actual Corporation Counsel opinion.

We therefore believe that the FCC's authority is clear, and the Zoning Commission must defer to the FCC.

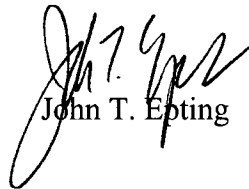
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Conclusion

We appreciate this opportunity to comment and look forward to working with the Commission's Advisory Committee to prepare new Zoning Regulations.

Sincerely,



John T. Epting

Enclosures

cc: Andrew Altman
Ellen McCarthy
Jennifer Steingasser
Jim Golden

Document #: 1091881 v.1

A

February 5, 2001

By Hand Delivery

Mr. Anthony Hood, Chair
District of Columbia
Zoning Commission
441 4th Street, NW
Suite
Washington, DC 20001

Re: Zoning Commission Case No. 00-29TA
(Development Standards for Antenna Towers)

Dear Members of the Zoning Commission:

On behalf of Verizon Wireless we are presenting our comments on the proposed revisions to the Zoning Regulations regarding antenna towers. In the District of Columbia, in the large majority of cases, Verizon Wireless' antenna systems have been placed on the roof of existing buildings. These antennas are situated on gravity mounts located on the main roof of the building. The antennas are normally 24 – 52 inches tall (9 – 14 inches wide) with a total mounted height of approximately 6 - 8 feet. These antenna systems are important for ensuring effective wireless communication in the District of Columbia. These Verizon Wireless facilities are not antenna towers.

Verizon Wireless' antenna systems have been approved throughout the City through the building permit process, with referral to the Office of Planning for review. Where applicable, the antenna systems have also been approved by other appropriate review agencies, including the DC Historic Preservation Review Board, the Old Georgetown Board, the Commission of Fine Arts, and for sites subject to the Pennsylvania Avenue Development Plan, the National Capitol Planning Commission. While there are concerns about the time required to process such permits, the building permit process (including the zoning review) has worked.

We understand that these proposed regulations were conceptually designed to govern antenna towers for commercial broadcast facilities and similar structures, in response to the proposed antenna tower in Tenley Circle. Generally, the proposed regulations would limit the height of antenna towers to the height permitted in the applicable zone district. Thus, Board of Zoning Adjustment (BZA) approval would be

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required to place an antenna tower on the roof of a building built to its permitted zoning height, or to construct a ground mounted antenna tower above the matter-of-right zoning height. The definition of "antenna tower" in Section 199 of the proposed regulations, however, raises concerns in terms of possible unintended impacts on antennas, such as Verizon Wireless' antenna systems.

Section 199 of the proposed text revises the definition for an antenna and an antenna tower. "Antenna" is defined as "a device used to transmit or receive communication signals. This term encompasses transmitting and receiving elements, and immediate related support and stabilizing elements and rotating or other directional mechanism". That definition appears fine.

However, "antenna tower" is defined as "a tower structure and any immediately related support and stabilizing elements, used for elevating and supporting antennas or for broadcasting radio and television signals" (emphasis supplied). This definition is in the alternative:

1. A tower structure to elevate/support antennas; or
2. A tower structure for TV radio broadcasting.

If the definition of antenna tower was construed to include the structural supports for the small cellular antennas systems, such as those used by Verizon Wireless, the proposed regulations (§§ 212.1, 712.1, 735.1, 745.1 and 753.3) would appear to limit the height of those structures to the matter-of-right building height, unless approved by the BZA. That is, if the building was built to its matter-of-right zoning height, no cellular antenna systems would be allowed on the roof, absent BZA approval.

The Office of Planning in its final report (dated January 18, 200[1]; filed January 26, 2001) recommends a revised definition of antenna tower. The Office of Planning report recommends that "antenna tower" be defined as "a tower structure or monopole, and any immediately related support and stabilizing elements, the primary purpose of which is to elevate and support antennas. The term 'antenna towers' shall not refer to ancillary and stabilizing elements for individual antennas." (OP Report, p.1). This definition is greatly improved. We do note, however, that our systems always have multiple antennas, typically three - five per sector, with three sectors (for a total of nine-fifteen). Each set of three antennas is mounted on a gravity mount, with a single support for each antenna. Our suggested revision to the definition of antenna tower, as submitted to the Office of Planning, designed to distinguish between antennas (with ancillary

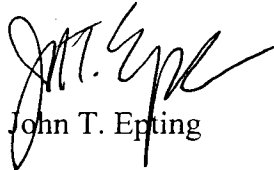
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Planning, designed to distinguish between antennas (with ancillary support structure) such as used by Verizon Wireless and true "antenna towers" is attached as Exhibit A.

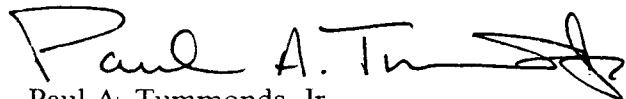
The other issue, which we want to briefly discuss, is the relationship between the Height Act of 1910 and the Zoning Regulations, particularly with regard to roof-mounted antenna systems. We note that the proposed regulations revise §§ 530.3, 630.3 and 770.3. The Office of Planning report has added § 930.20. Those sections provide that "spires, towers, domes, pinnacles ... roof-mounted antennas, chimneys ... may be erected to a height in excess of that which this section otherwise authorizes, but may not exceed the heights permitted by the Act of June 1, 1910 (36 Stat. 452). This section does not apply to antenna towers." (emphasis original). We believe that the underlined language, added by the proposed regulations "but may not exceed the heights permitted by the Act of June 1, 1910" is unnecessary and confusing. The 1910 Height Act, copy attached as Exhibit B, allows such unoccupied, fire proof structures above the roof to exceed both the permitted zoning height and the overall height limits imposed by the Act for buildings. The Mayor (or his designee) has the authority to allow these exceptions to the Height Act. The Zoning Commission cannot impose restrictions on the exceptions permitted by the Height Act.

In conclusion, we support the Office of Planning's revised definition of antenna tower. We are concerned, however, about the interpretation of the Height Act in the regulations. We appreciate the opportunity to comment and look forward to publication of the final regulations.

Sincerely,



John T. Epling



Paul A. Tummonds, Jr.

Enclosures

EXHIBIT A

Proposed text change:

“Antenna” is defined as “a device used to transmit or receive communication signals. This term encompasses transmitting and receiving elements, immediate related support and stabilizing elements, and rotating or other directional mechanism.”

“Antenna tower” is defined as “a tower structure and any immediately related support and stabilizing elements, **the sole function of which to elevate and support an antenna or multiple antennas. Antenna towers shall not include ancillary support and stabilizing elements for individual or multiple [non-commercial broadcast] antennas**

Document #: 1071824 v.1

B

Appendix E—Summary of Maximum Building Heights as Limited by the Act to Regulate the Height of Buildings, June 1, 1910

As required by the Act to Regulate the Height of Buildings, approved June 1, 1910 (36 Stat. 452), as amended (see Appendix F below), the height of a building or structure erected in the District of Columbia is limited as follows:

1. For residence districts:
 - (a) On streets over 65 feet wide—the width of the street less 10 feet, with a maximum of 90 feet.
 - (b) On streets 60 to 65 feet wide—60 feet.
 - (c) On streets less than 60 feet wide—the width of the street.
2. For all other districts—height equal to width of street increased by 20 feet.
3. Buildings fronting on Union Station Plaza—80 feet.

Appendix F

EXCERPTS FROM THE ACT TO REGULATE THE HEIGHT OF BUILDINGS

(Act of June 1, 1910, 36 Stat. 452)

"SEC. 5. That no building shall be erected, altered, or raised in the District of Columbia in any manner so as to exceed in height above the sidewalk the width of the street, avenue, or highway in its front, increased by twenty feet; but where a building or proposed building confronts a public space or reservation formed at the intersection of two or more streets, avenues, or highways, the course of which is not interrupted by said public space or reservation, the limit of height of the building shall be determined from the width of the widest street, avenue, or highway. Where a building is to be erected or removed from all points within the boundary lines of its own lots, as recorded, by a distance at least equal to its proposed height above grade, the limits of height for fireproof or noncombustible buildings in residence section shall control, the measurements to be taken from the natural grades at the buildings as determined by the Commissioners.

"No building shall be erected, altered, or raised in any manner as to exceed the height of one hundred and thirty feet on a business street or avenue as the same is now or hereafter may be lawfully

designated, except on the north side of Pennsylvania Avenue between First and Fifteenth Streets northwest, where an extreme height of one hundred and sixty feet will be permitted.

"On a residence street, avenue, or highway no building shall be erected, altered, or raised in any manner so as to be over ninety feet in height at the highest part of the roof or parapet, nor shall the highest part of the roof or parapet exceed in height the width of the street, avenue, or highway upon which it abuts, diminished by ten feet, except on a street, avenue, or highway sixty to sixty-five feet wide, where a height of sixty feet may be allowed; and on a street, avenue, or highway sixty feet wide or less, where a height equal to the width of the street may be allowed: *Provided*, That any church, the construction of which had been undertaken but not completed prior to the passage of this act, shall be exempted from the limitations of this paragraph, and the Commissioners of the District of Columbia shall cause to be issued a permit for the construction of any such church to a height of ninety-five feet above the level of the adjacent curb." (Amended by acts of December 30, 1910, and February 21, 1925.)

"The height of a building on a corner lot will be determined by the width of the wider street.

"On streets less than 40 feet wide where building lines have been established and recorded in the Office of the Surveyor of the District, and so as to prevent the lawful erection of a building in advance of said line, the width of the street, insofar as it controls the height of buildings under this law, shall be held to be the distance between said building lines.

"On blocks immediately adjacent to public buildings or to the side of any public building for which plans have been prepared and money appropriated at the time of the application for the permit to construct said building, the maximum height shall be regulated by a schedule adopted by the Commissioners of the District of Columbia.

"Buildings hereafter erected to front or abut on the plaza in front of the new Union Station provided for by act of Congress approved February 28, 1903, shall be fireproof and shall not be of a greater height than eighty feet.

"Spires, towers, domes, minarets, pinnacles, penthouses over elevator shafts, ventilation shafts, chimneys, smokestacks, and fire sprinkler tanks may be erected to a greater height than any limit prescribed in this act when and as the same may be approved by the Commissioners of the District

of Columbia: *Provided*, That such structures when above the limit of height shall be fireproof, and no floor or compartment thereof shall be constructed or used for human occupancy above the top story of the building upon which such structures are placed: *And provided*, That penthouses, ventilation shafts, and tanks shall be set back from the exterior walls distances equal to their respective height above the adjacent roof.

"Sec. 6. That no wooden or frame building hereafter erected, altered, or converted for use as a human habitation shall exceed three stories or exceed forty feet in height to the roof.

"Sec. 7. That for the purposes of this act the height of buildings shall be measured from the level of the sidewalk opposite the middle of the front of the building to the highest point of the roof. If the building has more than one front, the height shall be measured from the elevation of the sidewalk opposite the middle of the front that will permit of the greater height. No parapet walls shall extend above the limit of height, except on nonfireproof dwellings where a parapet wall or balustrade of a height not exceeding four feet will be permitted above the limit of height of building permitted under this act." (As amended by act of May 20, 1912, and further amended September 22, 1961.)

Maximum Allowable Power Levels From Antennas

UHF TV Antenna 5 Million Watts

FM Radio Antenna 100,000 Watts

AM Radio Antenna 50,000 Watts

Police & Fire Station Antenna 500 Watts

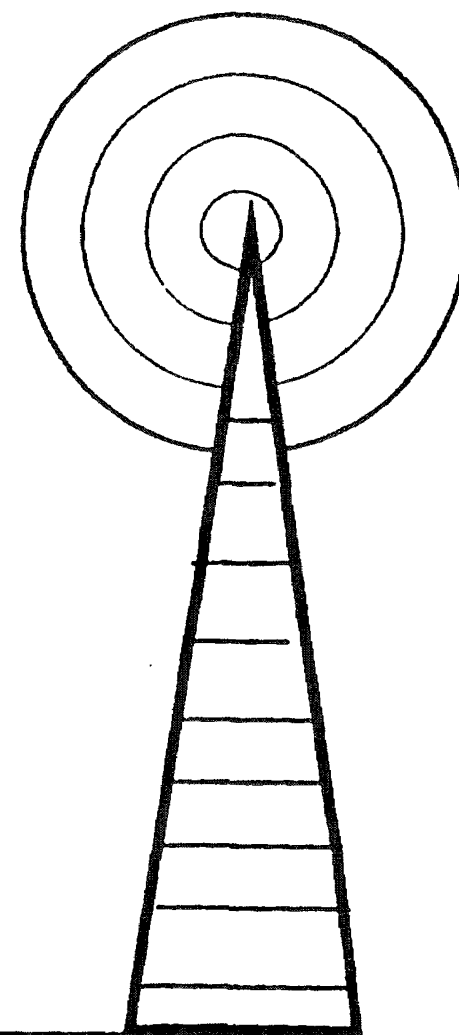
Cellular Antenna 500 Watts

Cellular Antenna Actual Power
(Urban & Suburban Areas) * 10-100 Watts or Less

Microcell Antenna * .25 - 1 Watt

* Source: CTIA

Source: Federal Communications Commission (Except as indicated)



By Marc Fisher

Talk in the Park

YOU HAVE A CELL PHONE, and you're driving in the woods or around a mountain, and suddenly the signal fades. You lose your conversation. Maybe you call back in a few minutes, maybe you just think about something else.

Not if you are a member of the United States Congress. No sirree. If you are Mr. Tom Daschle of South Dakota and you are elected to represent your fellow Americans on the essential questions of the day and you are driving through Rock Creek Park and your phone fades for a few moments, you must hold hearings! You must write

letters demanding action! *You must have your way!*

"We have heard numerous complaints from our colleagues about their inability to conduct cellular telecommunications in Rock Creek Park," Daschle and six other lawmakers wrote in an angry missive to Interior Secretary Bruce Babbitt. "These repeated expressions of congressional concern are being ignored."

And so, there we were, in a packed hearing room on Pennsylvania Avenue NW, in a confrontation as basic as they get. Progress vs. nature, technology vs. green. Members of the National Capital Planning Commission—appointed by

about her "precious park, assaulted from all sides, with the noise and the pollution and the traffic. And now here comes a commercial venture. I'm all for technology, but not in the park. The park is where I want to go to lose myself in nature."

Nature-lovers at the hearing, their passion palpable, pleaded for a respite from the wired world. There was menacing talk of cancer scares and good logic about the forest of steel towers that could grow if authorities allow this scarring of the park. Birders told of 145 different kinds of birds that hang out near the same maintenance yard where Bell Atlantic wants to build a tower. There were horror stories about millions of birds that died flying into phone towers at night.

The other side had it tougher. To create the illusion of popular support, Bell Atlantic's lawyers (what beautiful suits!) recruited members of community groups that the company happens to support with generous contributions. They trooped forward to testify to their "need" to stay connected at all times.

Never mind that other phone companies get their signals into the park just fine. The issue here, the lawyers said, spinning madly, is *safety*. Never mind that there has been exactly one homicide in all of Rock Creek Park in five

Anti-towers activist Elizabeth Berry interrupted: 'Don't drug dealers also use cell phones?' To which Bell Atlantic's PR woman, Audrey Schaefer, snapped, 'They use pens, too—and you've got one!'

the president and the mayor, with the feds in the majority, of course—would get to decide. Well, they would if they voted as the members of Congress expected them to.

With the National Park Service on its side, Bell Atlantic wants to erect two antenna poles that will tower up to 130 feet over Rock Creek Park to give its cell phone customers uninterrupted coverage. The phone company has met a wave of resistance from local residents, park lovers, the mayor and a slew of local officials.

On the surface, it's a standard zoning dispute, but this is also the original clash of American values, one that goes back to the building of the railroads and further, to the rise of the steam engine. From Walden Pond to Love Canal, we've been suspicious of progress and technology even as we grow dependent on both. We love e-mail and voice mail even as we curse their insistent omnipresence.

What we couldn't even imagine a few years ago somehow becomes a "necessity" immediately after we figure out how to use the dang thing.

And now cell phones in the wilderness—an urban wilderness, to be sure, but 1,700-odd acres of forest nonetheless, an oasis from the clamor of the city.

That image is comforting for people like Ann Renshaw of Chevy Chase, D.C., whose voice cracked as she told me

years. A Bell Atlantic executive even managed to get Littleton, Colo., into his two-minute plea.

Things get a bit tense in these battles. In the hallway, as Metropolitan Police officer Curt Sloane told me it was essential for citizens to be able to report crimes from their cars, anti-towers activist Elizabeth Berry interrupted: "Don't drug dealers also use cell phones?"

To which Bell Atlantic's PR woman, Audrey Schaefer, snapped, "They use pens, too—and you've got one!"

Ah, democracy in action. But the District is no democracy. It is a colony. The planning commission dared to ask for a study of the towers issue. That same evening, Daschle—who last year got more campaign cash from Bell Atlantic than any other Democratic senator—attached an amendment to the D.C. budget. Debate over. Whatever the final budget decrees, Daschle intended his word to be final. "The park is located in the District, but it is a *federal* park," was Daschle's defense of his sneak attack. "I hope Mayor Williams and others eventually will agree." If they don't, too bad. The Lords of the Hill shall prevail; in the end, they'll be able to chat with their mistresses, their lobbyist pals or their friendly phone company contributors as they drive through the park, oblivious to its marred beauty. ■

Marc Fisher's e-mail address is fisherm@washpost.com.

C

The limitations on the role and powers of the Commission under this subparagraph relate to local land use regulations and are not intended to limit or affect the Commission's general authority over radio telecommunications, including the authority to regulate the construction, modification and operation of radio facilities.

The conferees intend that the court to which a party appeals a decision under section 332(c)(7)(B)(v) may be the Federal district court in which the facilities are located or a State court of competent jurisdiction, at the option of the party making the appeal, and that the courts act expeditiously in deciding such cases. The term "final action" of that new subparagraph means final administrative action at the State or local government level so that a party can commence action under the subparagraph rather than waiting for the exhaustion of any independent State court remedy otherwise required.

With respect to the availability of Federal property for the use of wireless telecommunications infrastructure sites under section 704(c), the conferees generally adopt the House provisions, but substitute the President or his designee for the Commission.

It should be noted that the provisions relating to telecommunications facilities are not limited to commercial mobile radio licensees, but also will include other Commission licensed wireless common carriers such as point to point microwave in the extremely high frequency portion of the electromagnetic spectrum which rely on line of sight for transmitting communication services.

SECTION 705—MOBILE SERVICE DIRECT ACCESS TO LONG DISTANCE CARRIERS

Senate bill

Subsection (b) of section 221 of the Senate bill, as passed, states that notwithstanding the MFJ or any other consent decree, no CMS provider will be required by court order or otherwise to provide long distance equal access. The Commission may only order equal access if a CMS provider is subject to the interconnection obligations of section 251 and if the Commission finds that such a requirement is in the public interest. CMS providers shall ensure that its subscribers can obtain unblocked access to the interexchange carrier of their choice through the use of interexchange carrier identification codes, except that the unblocking requirement shall not apply to mobile satellite services unless the Commission finds it is in the public interest.

House amendment

Under section 109 of the House amendment, the Commission shall require providers of two-way switched voice CMS to allow their subscribers to access the telephone toll services provider of their choice through the use of carrier identification codes. The Commission rules will supersede the equal access, balloting and prescription requirements imposed by the MFJ and the AT&T-McCaw consent decree. The Commission may exempt carriers or classes of carriers from the requirements of this section if it is consistent with the public interest, convenience, and necessity, and the

the owner shall provide written notification of such action to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment. Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible.

"(i) An entity that obtains an attachment to a pole, conduit, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole, duct, conduit, or right-of-way)."

SEC. 704. FACILITIES SITING; RADIO FREQUENCY EMISSION STANDARDS.

(a) NATIONAL WIRELESS TELECOMMUNICATIONS SITING POLICY.—Section 332(c) (47 U.S.C. 332(c)) is amended by adding at the end the following new paragraph:

"(7) PRESERVATION OF LOCAL ZONING AUTHORITY.—

"(A) GENERAL AUTHORITY.—Except as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

"(B) LIMITATIONS.—

"(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—

"(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

"(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

"(ii) A State or local government or instrumentality thereof shall 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 with such government or instrumentality, taking into account the nature and scope of such request.

"(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

"(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

"(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

"(C) DEFINITIONS.—For purposes of this paragraph—

"(i) the term 'personal wireless services' means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

"(ii) the term 'personal wireless service facilities' means facilities for the provision of personal wireless services; and

"(iii) the term 'unlicensed wireless service' means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v))."

(b) RADIO FREQUENCY EMISSIONS.—Within 180 days after the enactment of this Act, the Commission shall complete action in ET Docket 93-62 to prescribe and make effective rules regarding the environmental effects of radio frequency emissions.

(c) AVAILABILITY OF PROPERTY.—Within 180 days of the enactment of this 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 that are dependent, in whole or in part, upon the utilization of Federal spectrum rights for the transmission or reception of such services. These procedures may establish a presumption that requests for the use of property, rights-of-way, and easements by duly authorized providers should be granted absent unavoidable direct conflict with the department or agency's mission, or the current or planned use of the property, rights-of-way, and easements in question. Reasonable fees may be charged to providers of such telecommunications services for use of property, rights-of-way, and easements. The Commission shall provide technical support to States to encourage them to make property, rights-of-way, and easements under their jurisdiction available for such purposes.

SEC. 705. MOBILE SERVICES DIRECT ACCESS TO LONG DISTANCE CARRIERS.

Section 332(c) (47 U.S.C. 332(c)) is amended by adding at the end the following new paragraph:

"(8) MOBILE SERVICES ACCESS.—A person engaged in the provision of commercial mobile services, insofar as such person is so engaged, shall not be required to provide equal access to common carriers for the provision of telephone toll services. If

portionate share of the costs incurred by the owner in making such conduit or right-of-way accessible.

Conference agreement

The conference agreement adopts the Senate provision with modifications. The conference agreement amends section 224 of the Communications Act by adding new subsection (e)(1) to allow parties to negotiate the rates, terms, and conditions for attaching to poles, ducts, conduits, and rights-of-way owned or controlled by utilities. New subsection 224(e)(2) establishes a new rate formula charged to telecommunications carriers for the non-useable space of each pole. Such rate shall be based upon the number of attaching entities. The conferees also agree to three additional provisions from the House amendment. First, subsection (g) requires utilities that engage in the provision of telecommunications services or cable services to impute to its costs of providing such service an equal amount to the pole attachment rate for which such company would be liable under section 224. Second, new subsection 224(h) requires utilities to provide written notification to attaching entities of any plans to modify or alter its poles, ducts, conduit, or rights-of-way. New subsection 224(h) also requires any attaching entity that takes advantage of such opportunity to modify its own attachments shall bear a proportionate share of the costs of such alterations. Third, new subsection 224(i) prevents a utility from imposing the cost of rearrangements to other attaching entities if done solely for the benefit of the utility.

SECTION 704—FACILITIES SITING; RADIO FREQUENCY EMISSION
STANDARDS

Senate bill

No provision.

House amendment

Section 108 of the House amendment required the Commission to issue regulations within 180 days of enactment for siting of CMS. A negotiated rulemaking committee comprised of State and local governments, public safety agencies and the affected industries were to have attempted to develop a uniform policy to propose to the Commission for the siting of wireless tower sites.

The House amendment also required the Commission to complete its pending Radio Frequency (RF) emission exposure standards within 180 days of enactment. The siting of facilities could not be denied on the basis of RF emission levels for facilities that were in compliance with the Commission standard.

The House amendment also required that to the greatest extent possible the Federal government make available to use of Federal property, rights-of-way, easements and any other physical instruments in the siting of wireless telecommunications facilities.

Conference agreement

The conference agreement creates a new section 704 which prevents Commission preemption of local and State land use decisions and preserves the authority of State and local governments over

zoning and land use matters except in the limited circumstances set forth in the conference agreement. The conference agreement also provides a mechanism for judicial relief from zoning decisions that fail to comply with the provisions of this section. It is the intent of the conferees that other than under section 332(c)(7)(B)(iv) of the Communications Act of 1934 as amended by this Act and section 704 of the Telecommunications Act of 1996 the courts shall have exclusive jurisdiction over all other disputes arising under this section. Any pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of CMS facilities should be terminated.

When utilizing the term "functionally equivalent services" the conferees are referring only to personal wireless services as defined in this section that directly compete against one another. The intent of the conferees is to ensure that a State or local government does not in making a decision regarding the placement, construction and modification of facilities of personal wireless services described in this section unreasonably favor one competitor over another. The conferees also intend that the phrase "unreasonably discriminate among providers of functionally equivalent services" will provide localities 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. For example, the conferees do not intend that if a State or local government grants a permit in a commercial district, it must also grant a permit for a competitor's 50-foot tower in a residential district.

Actions taken by State or local governments shall not prohibit or have the effect of prohibiting the placement, construction or modification of personal wireless services. It is the intent of this section that bans or policies that have the effect of banning personal wireless services or facilities not be allowed and that decisions be made on a case-by-case basis.

Under subsection (c)(7)(B)(ii), decisions are to be rendered in a reasonable period of time, taking into account the nature and scope of each request. If a request for placement of a personal wireless service facility involves a zoning variance or a public hearing or comment process, the time period for rendering a decision will be the usual period under such circumstances. It is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decision.

The phrase "substantial evidence contained in a written record" is the traditional standard used for judicial review of agency actions.

The conferees intend section 332(c)(7)(B)(iv) to prevent a State or local government or its instrumentalities from basing the regulation of the placement, construction or modification of CMS facilities directly or indirectly on the environmental effects of radio frequency emissions if those facilities comply with the Commission's regulations adopted pursuant to section 704(b) concerning such emissions.

D

Government of the District of Columbia

OFFICE OF THE CORPORATION COUNSEL

DISTRICT BUILDING

WASHINGTON, D. C. 20004



IN REPLY REFER TO:
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MEMORANDUM

August 30, 1988

TO : Maybelle T. Bennett
Chairperson, Zoning Commission

FROM : Richard L. Aguglia *RLA*
Deputy Corporation Counsel
Community Development Division

SUBJECT : Proposed Regulations Relating to the
Size and Location of Antennas in the
District of Columbia

By memorandum dated March 28, 1988, you requested the advice of this office on the proposal of the Zoning Commission to adopt proposed rules regulating the size and location of antennas in the District of Columbia.

This office has extensively researched the complex issues involved, including the impact of the Federal Communications Commission's ("FCC") preemption rule, 47 CFR Part 25, on the proposed rules. The issue of whether the FCC federal preemption applies to a congressionally created commission that is statutorily mandated to consider the federal interest has been reserved. The purpose of this memorandum is to advise you of different issues related to the proposed rules and present recommendations to insure that when rules are adopted, the rules will fit within the exemption to the FCC preemption, as provided in 47 CFR Sec. 25.104.

1. The proposed rules fail to define specifically SHF antennas. It has been alleged that such antennas are comparable in size to small rooftop VHF/UHF/FM antennas. Assuming the validity of this agreement, there may be unequal treatment between VHF/UHF/FM antennas and SHF antennas because, subject to certain height and width limitations in the definitional section, the former

ZONING COMMISSION

CASE No. 84-10

EXHIBIT No. 167

see 9/1/88

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DISTRICT OF COLUMBIA

are permitted as a matter of right. The latter (SHF) are subjected to a review by the Office of Planning (OP) and the Zoning Administrator (ZA) (and, if appealed, the BZA).

Recommendation: Determine the validity of the allegation that SHF antennas are no different in size than other antennas defined and permitted to be mounted as of right under certain width and height limitations. If that theory is correct, define those SHF antennas that will be permitted as of right. Those SHF antennas that exceed this new definition (which most likely will be the majority given that this format relies on an unimpeded line of sight) will be then subjected to review by OP and ZA.

2. Statements throughout the regulations that antennas that do not fall within the definitional category "shall be permitted as a matter of right" is a misnomer since such antennas are subject to the recommendation of the OP and approval of the ZA.

Recommendation: Strike the words "as a matter of right" throughout the regulations when antennas are permitted subject to the recommendation of OP and approval of the ZA.

3. The Feb. 1986 edition of the Zoning News reported that the FCC final rulemaking prevented local ordinances from "... impos[ing] size restrictions that effectively precluded satellite dish antenna reception. In a footnote, the commission stated that, given current technology, a receive-only dish antenna must be at least eight to twelve feet in diameter." The fact that the Zoning Commission's proposed rules target such antennas is obvious:

2519 Regulations of Antennas

2519.1 The purposes for the regulation of antennas as a particular type of structure are as follows:

* * *

c. The principal types of antennas regulated are those that, because of their shape and relatively large mass, potentially have the greatest visual impact and include, by example, large satellite earth station antennas and certain microwave terrestrial antennas.

* * *

201.2 The following classes of antennas shall be permitted as a matter of right in an R-1 district, subject to the requirements for each class of antenna:

* * *

- d. One satellite earth station or one microwave terrestrial antenna with a diameter of no more than 48 inches . . .

While the Zoning Commission's proposed rules have a procedural mechanism for the possible grant of permits for antennas of greater dimensions (misabeled "as of right" as discussed above), it was this type of delay that the FCC intended to avoid if applied to certain antennas as opposed to all. Therefore, if FCC preemption does apply, it is doubtful that § 201.2(d) as currently written would survive. If FCC preemption does not apply, however, the issue raised is whether the diameter limitation is a reasonable classification or unreasonable discrimination. It is to be noted that UHF/VHF/FM antennas may not exceed 8 feet horizontally, or twice that allowed satellite and microwave dishes. § 201.2(a). The sole rationale for the dish limitation appears to be that the dishes occupy more space and thus are visually obtrusive.

Recommendation: The Commission may wish to support this particular rule by reference to and examination of health and safety (radiation) factors for dishes beyond four feet in diameter. It is also assumed that there is sufficient testimony, reports and/or expert opinion that large dishes are aesthetically obtrusive upon which this office may rely in representing the Commission in a potential lawsuit.

4. There appears to be no zoning rationale for regulating other than whip antennas mounted on a vehicle in a given square for more than 24 hours.

Recommendation: Review of statutory authority to deal with this subject. D.C. Code § 5-413 describes the Commission's authority to regulate the "location, height, bulk, number of stories and size of buildings and other structures. . . and the uses of buildings, structures, and land for trade, industry, residence, recreation, public activities, or other purposes." The sole reference to automobiles in that section is as follows:

The said Zoning Commission shall also have power to promulgate regulations to require, with respect to buildings erected subsequent to the promulgation of such regulations, that facilities be provided and maintained either on the same lot with any such building, or on the same lot with any such building or elsewhere, for the parking of automobiles and motor vehicles of the owners, occupants, tenants, patrons, and customers of such building, and of the business, trades and professions conducted therein. All such regulations shall be uniform for each class or kind of building throughout each district, but the regulations in 1 district may differ from those in other districts.

5. It is alleged that non-conforming antennas which malfunction cannot be repaired and are virtually assured of being replaced. Under the proposed regulations, replacement but not repair requires

Board approval. Assuming arguendo that this is true, the loss of transmission and/or reception pending Board approval could be disruptive to customer service and financially disastrous to the company providing service.

Recommendation: Determine the validity of the allegation that antennas are not easily repaired and usually must be replaced and, if permission to replace is not immediate, both the consumers and the companies could suffer. If the allegation is correct, consider a regulation providing for an immediate temporary replacement (same size, etc.) while a permanent replacement is undergoing the Board approval process or some other alternative to outright loss or disruption of transmission.

6. There are various height limitations for roof-mounted and ground-mounted antennas in various zoning districts. There are allegations that these height limitations are arbitrary and fictional.

Recommendation: Assure that there are reasonable and rational facts, reports, etc. for the varying height limitations that exist throughout the proposed regulations.

CONCLUSION

Passage of the rules in its present form will undoubtedly be attacked in court by a coalition of groups, and most probably in the form of an injunction to stay the implementation and execution of the rules pending a decision on the preemption question and/or on grounds of lack of equal protection, discrimination or arbitrariness. Since this office will most likely be charged with defending the Commission's regulations in court, it is important that rational and reasonable grounds are apparent for each and every rule finalized.

cc: Frederick D. Cooke, Jr.
Ed Curry