

ShawPittman

A Law Partnership Including Professional Corporations

JOHN T. EPTING
202.663.8879
john.epting@shawpittman.com

April 18, 2001

By Hand Delivery

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

Re: Antenna Roundtable (ZC 01-02R) Comments
of Crown Castle Atlantic, LLC

Dear Members of the Zoning Commission:

This letter on behalf of Crown Castle Atlantic, LLC ("Crown Castle") 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.

Detailed comments on the existing antenna regulations (Zoning Commission Order No. 587 (February 24, 1989) (ZC Case No. 84-10)) and the then proposed Amendments were provided in our February 5, 2001 statement to the Zoning Commission (attached as Exhibit A). The current Zoning 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.

Issues To Be Addressed in the Proposed Zoning Amendments

1. 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 Broadcast Antenna). To a large degree, these distinctions are still valid and should be

ZONING COMMISSION
District of Columbia

Case **01-02R**
Exhibit **36**
202.663.8000 Fax: 202.663.8007

Washington, DC
ZONING COMMISSION
District of Columbia
CASE NO. 01-02
EXHIBIT NO. 36
New York
Los Angeles
London

Zoning Commission

April 18, 2001

Page 2

reflected in any new regulatory scheme. Antennas for TV/radio commercial broadcast are generally located on towers which are typically several hundred feet in height. Towers are typically four (4) legged, requiring substantial land area at the base. In contrast to towers, monopoles are substantially shorter, typically under 200 feet. Unlike a tower, monopoles are slender, single shaft structures. No guy wires or other supporting structures are required for monopoles. Therefore, set back and related restrictions are also minimized for monopoles.

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. BZA approvals have also been obtained to permit antenna structures to extend above the top of roof structures (see BZA Order Nos. 15423 and 15777). In addition, antennas for commercial broadcast utilize very high power transmitters compared with lower-power antennas (with relatively less coverage) used for wireless facilities. (These distinctions were also made by Neil B. Feldman at the March 19, 2001 Roundtable).

Therefore, the current distinctions between commercial broadcast and non-commercial broadcast wireless antenna remain relevant, and should be incorporated into any new regulations.

2. Federal Preemption over RF Emissions for Wireless Facilities

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 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 B. The FCC's preemptive authority is clear. Once a wireless provider has shown and maintains compliance with the FCC standard, there is no role for the Zoning Commission in this matter.

Zoning Commission

April 18, 2001

Page 3

3. Federal Aviation Administration (FAA) and FCC Approval Requirements

These proposed amendments as originally drafted included new standards for antenna structures beginning in the C-1 district (see proposed § 712). Under these proposed regulations, in order to seek review before the BZA, an applicant for a proposed tower must submit evidence of approval by the Federal Aviation Administration (FAA) and the FCC (See §§ 712.1, 735.1, and 745.1). This standard raises several difficulties for applicants such as Crown Castle that are involved in constructing structures for wireless antennas. These structures rarely exceed 200 feet in urban areas. Notification to the FAA is not required for structures that are less than 200 feet, unless the structure is within a specific distance of an airport.¹ It is Crown Castle's practice, as directed by the FAA, to obtain a report from a certified FAA consultant as to whether, a proposed facility structure requires FAA approval. Should the consultant determine that the proposed facility does not require notification to the FAA, no approval is needed from the FAA. Thus, there is no "evidence of approval" of the FAA which can be submitted prior to the BZA's hearing. As an alternative to requiring evidence of FAA approval, future amendments could be modified to allow a certified FAA consultant to submit the report regarding FAA compliance.

Where FAA approval is not required, it is not possible to provide the FCC authorization required by the proposed regulations. The FCC does not require a structure to be registered prior to construction unless the structure requires FAA approval. So, where a site does not require FAA approval, there is no FCC approval. Moreover, the FCC does not routinely issue any license or registration to a tower owner for the construction of a facility at a height that does not require FAA approval.

¹ See 47 CFR 17.7

Zoning Commission
April 18, 2001
Page 4

4. Issues Related to the Height Act of 1910

As detailed in our February 5th Statement (Exhibit A), Crown Castle has concerns about the proposed amendments' interpretation of the Act of June 1, 1910 (36 Stat. 452) (the "Height Act") which must be addressed in any future regulations.

Section 5 of the Height Act specifies the maximum general height restrictions for buildings and structures in the District of Columbia. (A copy of the Height Act is attached as Exhibit C). The Height Act also provides specific exceptions: "spires, towers, domes, ... may be erected to a greater height than any limit prescribed in this act when and as may be approved by the Commissioners of the District of Columbia".² The Zoning Commission has no authority to modify the Height Act or to provide standards for the Mayor's review under the Height Act. The Height Act allows such towers to be permitted above the height specified in the Act when approved by the Mayor.

Thus, the framework is essentially two-tiered. Where an antenna tower/monopole seeks to exceed the matter of right zone height, BZA approval is required. Where an antenna tower/monopole seeks to exceed the matter of right height and the height permitted under the Height Act, which is the more likely scenario, BZA relief is required to exceed the zone height. A separate independent decision by the Mayor (or designee) is required to exceed the Height Act. The Zoning Regulations cannot, however, impose conditions on the Mayor's authority under the Height Act.

In addition, the proposed amendments revise §§ 530.3, 630.3 and 770.3. The Office of Planning report has added § 930.20. Those sections provide that "spires, towers,

² The Office of the Corporation Counsel argues in its Defendant's Opposition to Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction at 15-18, American Towers, Inc. v. The Honorable Anthony Williams, Mayor of the District of Columbia, et al., (D.D.C. 2000) Civil Action No. 00-2436 (PLF), that only the Director, and not DCRA in general, has this authority. We express no opinion at this time regarding the delegation of authority within DCRA; however, it is clear that the Zoning Commission and BZA do not have this authority.

ShawPittman

Zoning Commission

April 18, 2001

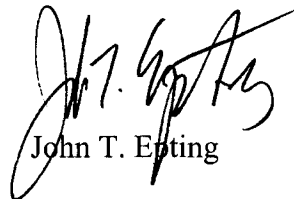
Page 5

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, with respect to "antenna tower" added by the proposed regulations, is unnecessary and confusing. As noted above, the 1910 Height Act allows such structures (which would include monopoles) to exceed the overall height limits imposed by the Height Act (as long as approved by the BZA). 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.

Conclusion

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

Sincerely,



John T. Epting

Enclosures

cc: Andrew Altman
Ellen McCarthy
Jennifer Steingasser
Robert Posilkin

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: Comments of Crown Castle Atlantic, LLC
Zoning Commission Case No. 00-29TA
(Development Standards for Antenna Towers)

Dear Members of the Zoning Commission:

Introduction

On behalf of Crown Castle Atlantic, LLC¹ we appreciate the opportunity to comment on the proposed Zoning Regulations related to antenna towers. We recognize that the proposed regulations seek to provide additional controls over antenna towers, such as the antenna tower at Tenley Circle.

¹ Crown Castle Atlantic, LLC is a part of Crown Castle International Corp. Crown Castle International Corp. engineers, deploys, owns and operates technologically advanced shared wireless infrastructure, including extensive networks or towers and rooftops as well as analog and digital audio and television broadcast transmission systems. The Company offers significant wireless communications coverage to 68 of the top 100 United States markets. Crown Castle International owns communication towers internationally. For more information on Crown Castle International, visit: www.crowncastle.com.

Mr. Anthony Hood, Chair
February 5, 2001
Page 2

The proposed regulations (Section 199) define an "antenna tower" 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." Basically, the proposed regulations require that any antenna tower (whether ground or roof mounted) which seeks to exceed the matter-of-right zoning heights for the applicable zone district obtain Board Zoning Adjustment (BZA) approval. Such BZA approval would be required in both the residential and commercial zones.

The Office of Planning's (OP) Final Report (dated January 18, 200[1]; filed on January 26, 2001) revises the definition of antenna tower to include monopoles. OP's report defines antenna towers 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 support and stabilizing elements for individual antennas". Monopole is defined as "a single, self-supporting pole-type antenna tower, tapering from the base to the top and supporting a fixture designed to hold one or more telecommunications antennas." (OP Report, p.1).

Antenna Towers in Residential Districts

The regulations have separate classifications for antenna towers, with one set of criteria for residential zones and a completely different set of criteria and classification of antenna towers in commercial zones.

The regulations continue the distinction in the residential zones between antenna towers/antennas for commercial broadcast (§ 211) and antenna towers/antennas other than commercial broadcasting (§ 212)². Section § 212 for non-commercial broadcast antennas/antenna towers is essentially unchanged and requires BZA approval for these antenna towers in residential zones, with very limited exceptions.

The commercial/non-commercial distinction is followed in Section 701.6(g) which permits an antenna tower for commercial broadcast as a matter of right, as long as

² We note that in the Chapter heading for Chapter 2 and the introduction to proposed Section 212 (p.2 of the Notice of Public Hearing) the term "other than" is left out before "Commercial Broadcast". To be consistent, it should read in both cases "antenna tower, other than commercial broadcast"

Mr. Anthony Hood, Chair
February 5, 2001
Page 3

the mounted height of the antenna tower and any antennas does not exceed the matter of right zoning height. For whatever reason, non-commercial antenna towers are still not so permitted.

Antenna Towers in Commercial Districts

The proposed regulations appear to drop the commercial broadcast/non-commercial broadcast distinction beginning in the C-1 commercial zone district. Beginning at new Section 712 (antenna towers in C-1 zone district), the proposed regulations merge antenna towers (both commercial broadcast and non-commercial broadcast) into one regulatory scheme for any tower requiring a height greater than the matter of right height permitted in the applicable zone district.

In addition, the proposed regulations adopt new standards for antenna towers beginning in the C-1 district at proposed § 712. Under the proposed regulations, in order to seek review before the BZA, an applicant for a proposed tower must submit evidence of approval by the Federal Aviation Administration (FAA) and the Federal Communications Commission (FCC) (See §§ 712.1, 735.1, and 745.1).

This standard raises several difficulties for applicants such as Crown Castle that are involved in constructing structures for cellular antennas. These structures rarely exceed 200 feet. Notification to the FAA is not required for structures that are less than 200 feet, unless the structure is within a specific distance of an airport.³ It is Crown Castle's practice to obtain a report from a certified FAA consultant as to whether a proposed structure requires FAA approval. Should the consultant determine that the proposed facility does not require notification to the FAA, no approval is needed from the FAA and thus there is no "evidence of approval" which can be submitted prior to the BZA's hearing. As an alternative to requiring evidence of FAA approval, the proposed regulations could be modified to allow a certified FAA consultant to submit the report regarding FAA compliance.

In instances where FAA approval is not required, it will be impossible for the FCC authorization required by the proposed regulations to be provided. The FCC does not require a structure to be registered prior to construction unless the structure requires

³ See 47 CFR 17.7.

Mr. Anthony Hood, Chair

February 5, 2001

Page 4

FAA approval. Accordingly, where a site does not require FAA approval, a FCC approval cannot be obtained. Moreover, the FCC does not issue any license or registration to a tower owner for the construction of a facility at a height that does not require FAA approval.

The proposed zoning regulations for antenna towers in commercial zones also seek to impose a standard as part of the BZA process related to the Act of June 1, 1910 (36 Stat. 452) (referred herein as the "Height Act"). Proposed section 712.1 states that "[w]here required by the Act of June 1, 1910 (36 Stat. 452), a height in excess of that permitted may be authorized by the Mayor, if determined to be in the best interest of the city." Proposed § 712.1 is confusing at best. The proposed regulations provide that any tower proposed to exceed the matter of right height requires special exception approval by the BZA. For example, an antenna tower proposed in the C-1 district above 40 feet in height would require BZA relief. The BZA has the authority to grant zoning approval for an antenna tower to exceed the matter of right zone height. But the final decision whether to approve a height above that allowed by the Height Act is solely vested in the Mayor (or his designee). A zoning regulation which requires BZA approval as a condition of the Mayor's approval under the Height Act or seeks to provide standards for the Mayor's review under the Height Act, exceeds the Zoning Commission's authority. The authority to zone under the Zoning Act, and the Mayor's authority under the Height Act, are completely separate. The Office of Planning's Report (pp. 5-6) appears to recognize this distinction, but the proposed regulations are unchanged.

Section 5 of the Height Act specifies the maximum general height restrictions for buildings in the District of Columbia. (A copy of the Height Act is attached as Exhibit A). The Height Act also provides specific exceptions: "spires, towers, domes, ... may be erected to a greater height than any limit prescribed in this act when and as may be approved by the Commissioners of the District of Columbia: **Provided, however,** That such structures when above such 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." (Emphasis original).⁴ The

⁴ The Office of the Corporation Counsel argues in its Defendant's Opposition to Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction at 15-18, American Towers, Inc. v. The Honorable Anthony Williams, Mayor of the District of Columbia, et al., (D.D.C. 2000) Civil Action No. 00-2436 (PLF), that only the Director,

Footnote continued on next page

Mr. Anthony Hood, Chair
February 5, 2001
Page 5

Zoning Commission has no authority to modify the Height Act or to provide standards for the Mayor's review under the Height Act. The Height Act allows such towers to be permitted above the height specified in the Act for buildings when approved by the Mayor. Thus, the framework is essentially two-tiered, as recognized by the OP Final Report, at pp. 5-6. Where an antenna tower seeks to exceed the matter of right zone height, BZA approval is required. Where an antenna tower seeks to exceed the matter of right height and the height permitted under the Height Act, which is the more likely scenario, BZA relief is required to exceed the zone height. A separate independent decision by the Mayor (or designee) is required to exceed the Height Act. If, however, the Zoning Commission so chooses, the Zoning Regulations may specify that the BZA provide its recommendation to approve a tower at a specified height (above the Height Act), for consideration by the Mayor in his determination. The Zoning Regulations cannot, however, impose conditions on the height or on the Mayor's authority under the Height Act.

In addition, 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, is unnecessary and confusing. As noted above, the 1910 Height Act 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.

Footnote continued from previous page

and not DCRA in general, has this authority. We express no opinion at this time regarding the delegation of authority within DCRA; however, it is clear that the Zoning Commission and BZA do not have this authority.

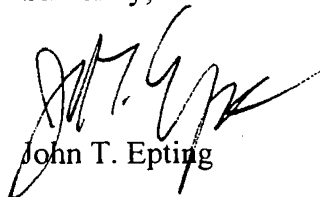
Mr. Anthony Hood, Chair
February 5, 2001
Page 6

Conclusion

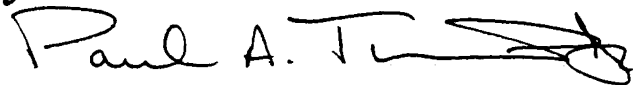
In summary, we believe that the proposed regulations are confusing and will be difficult to interpret/enforce if finalized as proposed. We have raised issues with respect to the FAA/FCC approval conditions specified in the regulations. We have also raised concerns, regarding the proposed regulations' conformance with the Height Act. Both of these issues need to be addressed before the proposed regulations are finalized. Therefore, we request that the record in this case be left open to address any issues that may arise at the February 5, 2001 public hearing.

We appreciate the opportunity to comment.

Sincerely,



John T. Epting



Paul A. Tummonds, Jr.

Enclosures

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 ninety 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, however,* 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.)

EXHIBIT B

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

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.

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

Government of the District of Columbia

OFFICE OF THE CORPORATION COUNSEL

DISTRICT BUILDING

WASHINGTON, D. C. 20004



IN REPLY REFER TO:
OCC:CDD:RLA:fmm

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

1988 AUG 31 AM 10:32
ZONING SECRETARIAL
DISTRICT OF COLUMBIA
150

222 4/1/88

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

C

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 twenty 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, however,* 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.)