Regulation of Wireless Towers

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I. Introduction

In recent years the federal government has restricted and thus preempted local regulation of wireless antenna siting with the passage of Section 332(c)(7) of the Telecommunications Act in 1996, and Section 6409(a) of the Middle Class Tax Relief and Job Creation Act in 2012. Perhaps more significant because of the impact on and guidance for local regulations, the Federal Communications Commission ("FCC") has issued two orders interpreting these statutes: the 2009 Shot Clock Order ("2009 Order") and the October 2014 Report and Order ("2014 Order"). This paper will focus on Section 6409(a) because it has the most impact on a city's processes and policies related to these types of sites. Likewise, it will focus on the portions of the 2014 Order concerning Section 6409(a) because those portions contain the most recent and extensive new rules relating to local regulation in this area.

The 2014 Order contains rules intended to streamline wireless infrastructure placement and to clarify provisions of federal law that affect a city's ability to deny certain requests from providers. These rules impact local wireless ordinances, practices, and policies regulating cell sites, broadcast towers, and other licensed and unlicensed communications services authorized by the FCC. Specifically, Section 6409(a) preempts a city from denying certain requests related to existing sites. This does not affect a city's ability to regulate new applications for wireless towers or base stations – only modifications to towers or base stations that a city has already approved. The potential impact on a city's regulations in these areas may require a city's action to amend current ordinances, practices or policies.

II. Section 6409(a)

Section 6409(a) states that local governments "may not deny, and shall approve" an "eligible facilities request" so long as that request does not "substantially change the physical dimensions of the existing wireless tower or base station."[1] The 2014 Order provides guidance as to what these terms mean for purposes of practical application. [2]

"Eligible Facilities Request"

Section 6409(a)(2) defines an "eligible facilities request" as a request for a modification that involves collocation, removal, or replacement of transmission equipment at an existing wireless tower or base station.[3]

The FCC broadly defines the terms in Section 6409(a) to include changes to virtually all equipment associated with antennas at any structure, either principally designed or legally permitted for any type of wireless use including, without limitation, cell sites, broadcast sites, and other licensed or unlicensed, authorized or unauthorized services. In practice, this means that providers will be able to use Section 6409(a) to modify any existing facility regardless of the service they provide.

[1] Middle Class Tax Relief and Job Creation Act of 2012, Section 6409(a) (codified at 47 U.S.C.A. § 1455).
[2] *See* 2014 Order at ¶ 145.
[3] *Id.* at ¶ 146.

"Existing Wireless Tower or Base Station"

The FCC narrowly defines "tower" as any structure built for the sole or primary purpose of supporting any FCC-licensed or authorized antennas and their associated facilities.[4] It defines "base station" broadly to include not only the equipment that communicates with user equipment, but also the structure that supports or houses that equipment.[5] The FCC clarified that a structure would qualify as an existing base station, only if at the time of the application for modification, the structure already supports or houses communications equipment. Other structures that do not currently host communications equipment are not considered to be "base stations."

To qualify as an "existing wireless tower or base station," the facility must have been previously "approved under the applicable zoning or siting process" or have "received another form of affirmative state or local regulatory approval," such as an authorization from the state utilities commission, if applicable.

"Substantially Change the Physical Dimensions"

Section 6409(a) does not require approval for all eligible facilities requests — only those that do not "substantially change the physical dimensions of the existing wireless tower or base station." Concerned that a more contextual or subjective test would invite lengthy review processes that conflict with Congress's intent, the FCC adopted an objective test in the 2014 Order to determine whether or not an eligible facilities request causes a substantial change.[6] The list below outlines the types of requests that *would* create a substantial change under the regulations.

- Height. A request causes a substantial change when it increases the height: (1) more than 10% or one additional antenna array not more than 20 feet higher for towers on private property, or (2) more than 10% or 10 feet (whichever is greater) for towers in the public rights-of-way and all base stations. Changes in height are measured from the structure as originally approved or from the last approved modification *prior to* the adoption of Section 6409 in February of 2012.[7]

  The FCC established a cumulative height change limit to combat "a series of permissible small changes [that] could result in an overall change that significantly exceeds" the standards for a permissible height change. In other words, after a site is increased in height cumulatively to the maximum permitted (10% or 20 feet for towers on private property, for example), then Section 6409 is no longer applicable and any future expansions of the site must be handled as if it is a "substantial change" and thus must follow whatever process is adopted by the city in its local regulations.[8]

[4] *Id.* at ¶ 161.
[5] *Id.*
[6] *Id.* at ¶ 188-89.
[7] *Id.* at ¶ 196.
[8] *Id.*

- Width. A request causes a substantial change when it increases the tower width: (1) more than 20 feet or more than the width of the tower structure at the level of the appurtenance (whichever is greater) for towers on private property; or (2) more than 6 feet for towers in the public rights-of-way and all base stations.

- Cabinets. A request causes a substantial change when it involves more than the "standard number of new equipment cabinets for the technology involved."

  If modifications would add more than 4 cabinets on private property it is a substantial change. Likewise, on public rights-of-way and all base stations where no cabinets exist at the time of the request, it is a substantial change to add any cabinets. On public rights-of-way and all base stations where cabinets already exist at the time of the request, it is a substantial change if the addition of the new cabinet would exceed 10% of the height or volume of the existing cabinets.

- Excavation. A request causes a substantial change when it involves excavation or deployment outside the current site of the tower or base station (i.e. outside the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site for towers not in the public rights-of-way; or outside the area in proximity to the structure already deployed on the ground for towers in the public rights-of-way).

- Stealth. A request causes a substantial change when it would defeat the existing concealment elements of the tower or base station. The FCC noted that an applicant might "violate the concealment elements," if it did not paint the equipment to match, even if the requested change did not alter the dimensions of the tower or base station at all.[9]

- Noncompliance. A request causes a substantial change when it would violate a prior condition of approval that does not conflict with the FCC standards for a substantial change.[10]

III. City Process

A city may, and should, require an individual seeking approval under Section 6409(a) to submit an application, so that the city can determine whether the request for approval is covered by the statute.[11] However, a city may only require documentation that is reasonably related to determining whether the request falls under the statute and may not require documentation "proving the need for the proposed modification or presenting the business case for it."[12] Cities

[9] *Id.* at ¶ 200.
[10] *Id.*
[11] *Id.* at ¶ 211 ("Further, nothing in the provision indicates that States or local governments must approve requests merely because applicants claim they are covered. Rather, under Section 6409(a), only requests that do in fact meet the provision's requirements are entitled to mandatory approval. Therefore, States and local governments must have an opportunity to review applications to determine whether they are covered by Section 6409(a), and if not, whether they should in any case be granted.")
[12] *Id.* at ¶ 205.

have "considerable flexibility in determining precisely what information or documentation to require" to make the determination as to whether a request is covered by Section 6409(a).[13]

The new rules in essence encourage an administrative approval process by mandating that certain requests must be granted. However, as discussed, the rules do not prohibit a city from requiring the provider that is requesting the change to fill out an application so that the city can analyze the request. In other words, the rules do not preempt all review of requests for modifications. Instead, the rules take away the city's discretion to deny a request only if it falls within the parameters outlined above. It is for this reason that creation or use of an administrative process to govern these types of requests is recommended.

Such an administrative process should be memorialized in an ordinance, policy, or procedure so that the city can cite to specific provisions of said ordinance, policy, or procedure when reviewing these types of applications for completeness. This is important for situations where the city receives a request for which the city cannot determine whether it falls within an eligible facilities request under Section 6409(a). If the city has a checklist of items needed to analyze the request, then the city may properly determine whether the request must be granted pursuant to Section 6409(a).

Exhibit A to this paper contains an example of suggested ordinance language designed for cities that regulate telecommunication sites by requiring a special use permit for said sites. Note that the suggested language requires submission of a 6409(a) request application for any individual who wishes to modify an existing, permitted telecommunications site. This gives the city the ability to review all requests to determine whether Section 6409 requires the city to grant the modification request. Requiring such an application in all circumstances, even in circumstances where the provider does not cite Section 6409 or demand immediate approval, helps keep the city from inadvertently denying a request that may not be denied under federal law. In other words, it might keep some requests from falling through the cracks.

Requiring an application is only part of the process. A city must also determine what information it wishes to include on the application and what questions to ask in order to determine whether the request should be administratively approved. As discussed, the FCC did not enumerate what information cities could require on these applications, but instead left the local governments with "considerable flexibility" to determine what should be included on the applications. Items that we believe may be permitted include, but are not limited to the following:

- Questions designed to determine whether the applicant holds a valid property interest in the site and what that property interest is;
- Questions designed to determine whether the structure qualifies as an existing wireless tower or base station;
- Questions designed to determine whether the request qualifies as an eligible facilities request; or

[13] *Id.* at ¶ 214.

- Questions designed to determine whether the request will cause a substantial change in the physical dimensions of the site and, if so, particular questions related to the specific scope of change requested.

As the application is developed, a city should develop a justification for the questions being posed and the items requested. A city should be able to articulate the relationship between the question asked or information requested and the specific issue within Section 6409 to which that question relates. Of course, the application items can be supported by more than one rationale or justification, but these justifications should be maintained for use in the event of a legal challenge from a provider who complains that the application items are too burdensome or unreasonable such that the city is preempted from requiring compliance with the application process.

IV. Timeliness of Review

The 2014 Order requires that a city act on a Section 6409(a) request within 60 days of submittal of the request (or application). That 60 day period may be tolled by agreement or if a city notifies the applicant within 30 days that specific information required to be included with or in the application is incomplete. A city must cite all incomplete aspects of an application the first time it issues an incomplete notice or forfeit the chance to toll the 60 day deadline.[14] The incomplete notice must cite to an application defect in some "code provision, ordinance, application instruction, or otherwise publically-stated procedure."[15] After the applicant responds, if the application remains incomplete for any of the reasons cited in the original incomplete notice, the city must issue the second incomplete notice within 10 days and it cannot deem an application incomplete for a reason not cited in the first notice.

If a city does not take action on a request for modification under Section 6409(a) within the 60 day time-period (and that time period is not tolled as discussed above), the request is deemed granted at the time the applicant notifies the city of the deemed grant in writing. The applicant must provide written notice to the city in order for a request to be deemed granted.

A permit that is deemed granted may be challenged by a city in a court of competent jurisdiction within 30 days after the applicant delivers the deemed granted notice to the city.[16] Although the FCC possesses the authority to adjudicate Section 6409(a) disputes, the Commission found that administrative hearings at the FCC would impose substantial burdens on local governmental entities such that it would not serve the public interest.[17] Accordingly, the new rules do not require cities to adjudicate disputes before the FCC in Washington D.C., instead any disputes will likely be fought in local federal district courts.

[14] *Id.* at ¶ 257.
[15] *Id.* at ¶ 260.
[16] *Id.* at ¶ 234.
[17] *Id.* at ¶ 234-35.

V. Conditional Approval of a 6409 Request

A city may conditionally approve a Section 6409(a) request provided that the conditions do not conflict with the FCC's rules. The 2014 Order states that a city "may continue to enforce and condition approval on compliance with generally applicable building, structural, electrical, and safety codes and with other laws codifying objective standards reasonably related to health and safety."[18]

Providers must also comply with pre-existing "other conditions of approval placed on the underlying structure," so long as the conditions do not conflict with the 2014 Order.[19] In other words, a city's ordinance regulating wireless structures still applies even if a provider makes a request for a minor change (a request that does not "substantially change" the existing structure) pursuant to Section 6409. The approval of a minor change under Section 6409 does not wipe out all other conditions lawfully enacted by the city. For example, the 2014 Order preserves the power of a city to include conditions on parking space allocations, site maintenance, site access, lighting, fencing, drainage, compliance with all laws, insurance, indemnification, collocation, signage, and landscaping.[20]

VI. Antennas on City Owned Facilities

It is important to note that, pursuant to the 2014 Order, Section 6409(a) does not apply when a city acts in a proprietary capacity.[21] For example, if the city enters into a lease or license agreement to allow a provider to place antennas and other wireless service facilities on a water tower or other city property, the city may regulate those facilities pursuant to its capacity as a landowner. Section 6409(a) would not require approval of minor amendments to sites located on city property for which the city has entered into such a lease with the provider.

VII. Conclusion

The most recent changes to federal law on this topic are not all bad news for cities. The rules only preempt a city from denying an amendment to an existing wireless tower or base station if the requested amendment does not substantially change the physical dimensions of what was already approved. However, cities are still permitted to regulate new sites and any requested change that is considered to be a substantial change as the city sees fit. Likely this means that your city's current regulations would still apply to those types of requests. Since the city must grant approval for minor amendments that meet the requirements of Section 6409(a), it is recommended that any modifications to your regulations focus on the changes related to Section 6409 requests only.

[18] *Id.* at ¶ 188.
[19] *Id.* at ¶ 200.
[20] *Id.*
[21] *Id.* at ¶ 237.

EXHIBIT A
EXAMPLE ORDINANCE LANGUAGE

Section X.Y.Z. Administrative Approval upon Application for Eligible Facilities Request Pursuant to Federal Law.

(a) The holder of a special use permit who wishes to modify an existing wireless tower, antenna, or base station for which that special use permit was issued shall submit a complete "Claimed 6409(a) Request" application as prescribed by the city.

(b) The city shall administratively approve a request to modify an existing wireless tower, antenna, or base station, only upon submission of a complete "Claimed 6409(a) Request" application that meets the requirements of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012.

(c) If the city determines that a request does not meet the requirements of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 or if, after notice from the city, the "Claimed 6409(a) Request" application is deemed incomplete, this subsection does not apply and the request may not be administratively approved.

(d) A request that is administratively approved pursuant to this section shall automatically amend the special use permit with no further action required by the city.

(e) This subsection does not apply to towers, antennas, or base stations located on property owned, leased, or otherwise controlled by the City Council of the City of EXAMPLE.