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Local Regulation of Wireless Antenna Siting:

Guide to Impact on Local Regulation of Wireless Antenna Siting in Texas of 1996 and 2012 Federal laws, and the 2009 and 2014 FCC Orders.

- **Review of FCC Wireless Shot Clock Order:** ***FCC 2009 Declaratory Ruling*****, FCC 09-99, 24 FCC Rcd. 13994 (2009), Interpreting what constituted "a reasonable period of time" to act in 47 U.S.C. § 332(c) (7).**
- **Review of FCC Mandatory Wireless Antenna Co-Location Order:** ***FCC 2014 Wireless Infrastructure Order*****, FCC 14-153, __ FCC Rcd. ___ (Oct. 2014), Interpreting Section § 6409(a) (47 U.S.C. § 1455 (a) and clarifying the** ***FCC 2009 Declaratory Ruling*****.**

- **Texas State Law Issues on Wireless Providers (No Legislative Grant to Use of Rights-of-Way).**
- **General actions a city should take to wireless siting reviews and to avoid "deemed granted" Section 6409 (a) collocations.**

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- **Timeline for City to Act on Wireless Siting Applications.**
- **47 U.S.C. § 332(c) (7) Preservation of Local Zoning Authority.**
- **Definition of Collocations for proposes of Section 332 (c) (7) Shot Clock.**
- **Section § 6409(a)(47 U.S.C. § 1455(a) Wireless facilities deployment)**
- **FCC Rules, 47 C.F.R. § 1.40001 Wireless Facility Modifications.**
- **Wireless antenna cellular distribution system technology: Key distinctions between "Microcells", "Small Cells" and "DAS".**

Local Regulation of Wireless Antenna Siting:

Guide to Impact on Local Regulation of Wireless Antenna Siting in Texas of 1996 and 2012 Federal laws, and the 2009 and 2014 FCC Orders.[1]

Overview:

Local Regulation of Wireless Antenna Siting under 47 U. S.C. § 332 (c) (7) and Section 6409 (a) and the 2009 and 2014 FCC Orders Interpreting those Statutes,

This memo is a discussion of the interplay of local regulation of wireless antenna siting and two federal statutes that restrict and preempt those regulation and two Federal Communications Commission ("FCC") orders interpreting those two federal statutes. The two federal statutes are: 47 U. S.C. § 332 (c) (7), adopted in 1996, and Section 6409 (a), enacted in 2012. The two FCC orders are: the 2009 FCC Wireless Shot Clock Order ("*2009 Declaratory Ruling*"), [2] and the October 2014 FCC Mandatory Wireless Antenna Co-Location Order ("*2014 Wireless Infrastructure Order*").[3]

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[1] Clarence A. West, Attorney. The views expressed in this Memo are the author's and not presented as legal advice for any specific situation. The Memo is to provide guidance and an overview of applicable federal and state statutes and case law only as a beginning point in analyzing wireless antenna siting city permitting issues. Each City should consult and review any specific wireless antenna siting permitting matter in detail with their City Attorney.

This memo does not address additional issues concerning wireless attachments which may arise for a municipality operating an electric utility that has poles and conduits in the rights-of-way that are subject to the requirements of the Federal Pole Attachment Act, 47 U.S.C. § 224, *et seq*., through Tex. Util. Code, § 54.204 (c); or any applicability of 47 U.S.C. § 253, to the extent it may be applicable, if at all. Among the arguments that it is not applicable is that the preface of 47 U. S.C. § 332 (c) (7) (A) that "*Except* as provided in this paragraph, *nothing in this chapter* shall limit or affect the authority of a …. local government ….. over decisions regarding the placement, construction, and modification of personal wireless service facilities…." bars any claim of a § 253 challenge to a city. This author would agree with that assessment, as 47U.S.C. § 253 are in Chapter 5 of Title 47.

[2] *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B),* FCC 09-99, 24 FCC Rcd 13994 (2009) ("*2009 Declaratory Ruling*") presumptively set the time frames of what constituted "a reasonable period of time" for a city to act under Section 332(c) (7). The *2009 Declaratory Order* was appealed by two Texas cities, Arlington and San Antonio (and financially supported by TCCFUI), as beyond the jurisdiction of the FCC. The Federal 5th Circuit upheld the *2009 Declaratory Order* by it "substantial deference", which was affirmed by the U.S. Supreme Court in 2013. *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S.Ct. 1863 (2013). This FCC Order is downloadable in several formats, including WORD and .pdf Adobe, at: https://apps.fcc.gov/edocs_public/Query.do?mode=advance&rpt=cond

[3] *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, WT Docket No. 13-238*, __ FCC Rcd ___(Adopted Oct. 17, 2014, Released Oct. 27, 2014 [eff. 90 and 30 days after FR, as noted below]) ("*FCC 2014 Wireless Infrastructure Order*"). Interpretation of Section § 6409(a) (47 U.S.C. § 1455(a)). This FCC Order is downloadable in several formats, including WORD and .pdf Adobe, at: http://www.fcc.gov/document/wireless-infrastructure-report-and-order. The memo also does not discuss the modifications in this FCC Order as to the applicability of the Federal National Environmental Policy Act ("NEPA"), 42 U.S.C.§§ 4321 et seq., or the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470f.

Effective dates of the FCC 2014 Wireless Infrastructure Order: per its ¶ 241, the Section 6409 (a) portion of the Order is effective 90 days after publication in the Federal Register to allow cities to make necessary changes to their "laws and procedures". *2014 Wireless Infrastructure Order*, ¶ 289, the balance of the Order on NHPA, NEPA and clarification of Section 332 (c) (7) (A) are effective 30 days from FR publication, unless Office of Management and Budget (OMB) approval is required.

Both FCC Orders give cities guidance as to how to determine the extent of local authority to grant or deny an application for a wireless antenna site; how the city may determine if those applications are complete to trigger the "shot clock" to act on them; and the time allowed to act on the applications, which varies.

This memo will discuss the impact of the two FCC Orders on city regulations applicable to the review and permitting of wireless antenna, both on towers (macrocells), and with a particular focus on wireless "small cells" and Distributed Antenna Systems (DAS) and the use of city property for those wireless antenna locations. There is also discussion of DAS as a component of a wireless "*commercial mobile servic*e", as statutorily defined under federal law. To the extent DAS meets the statutory definition of "personal wireless service facilities", 47 U. S.C. § 332 (c) (7) (C) (ii) applies, and DAS siting that are for Section 6409 (a) purposes, as "wireless antenna", city permitting regulation must conform to the limitations in 47 U.S.C. § 332 (c) (7) (B) and Section 6409 (a).[4]

The distinctions between the larger macrocell towers, with an array of antennas, and small cell and DAS installations may be critical, particularly when there may be a subsequent request for a modification at those previously approved (existing) sites eligible under Section 6409 (a).[5]

All cities should bear in mind, with the addition of Section 6409 (a) in 2012 and the further interpretation of that Section in 2014 in the *FCC 2014 Wireless Infrastructure Order* for an *existing* "eligible facility", even one in the public rights-of-way, it may be modified virtually at will up to ten feet taller, and six foot wider if it meets the FCC criteria!

Detailed in the last section of this memo Texas state law that may be applicable (or not) on these matters.

Federal Regulation of Local Review of Wireless Siting Applications.

Background: Initial Limitations in the 1996's 47 U.S.C. Sec. 332 (c) (7) and the *2009 FCC Declaratory Order, on* "Reasonable" Time Frame to Review Wireless Siting Applications, the "Shot Clock" Order:

Section 704 of the Federal Telecommunication Act of 1996,[6] added subsection (7) entitled, "Preservation of Local Zoning Authority", to 47 U.S.C. Section 332 (c),[7] which imposed several restrictions on local authority concerning "the *placement, construction, and modification of personal wireless service facilities"*[8] , while otherwise preserving municipal regulatory and zoning authority.

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[4] *FCC 2014 Wireless Infrastructure Order*, ¶ ¶ 270-272.

[5] See Appendix, "Understanding generally the wireless antenna cellular distribution system technology: Key distinctions between "Microcells", "Small Cells" and "DAS"."

[6] Telecommunications Act of 1996 (Public Law 104–104, Feb. 1996) ("*1996 TCA*") (Codified as 47 U. S.C. § 152, et seq.).

[7] See Appendix for full text of 47 U. S.C. § 332 (c) (7) (A)-(C), (d).

[8] 47 U. S.C. § 332 (c) (7) (C) Definitions For purposes of this paragraph--(i) the term "*personal wireless services*" means commercial mobile services [cellular service], 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…"

While local regulation of *could not* "unreasonably discriminate among providers of functional equivalent services",[9] case law has held that *reasonable* (explainable) discrimination among providers of functionally equivalent services was implicitly allowed.[10] Further, local regulation could not effectively prohibit or have the *effect of prohibiting the provision of personal wireless services*.[11]

In addition to these limitations, the 1996 statute had procedural requirements to review and decide on a wireless siting application "within a reasonable amount of time"[12]; and if there was a city denial of a permit, it was required to "be in writing and supported by substantial evidence contained in a written record."[13] The statute also allowed an adversely affected applicant to file suit in 30 days after a city's "failure to act" on the permit within a reasonable period of time or after a denial of a permit.[14]

FCC Wireless Siting Review Shot Clock Order (*2009 Declaratory Order*) (This 2009 Order was further clarified in the *FCC 2014 Wireless Infrastructure Order*, as noted below)**:**

In 2008 the wireless industry requested the FCC to determine what constituted review of an application "within a reasonable period of time" and when a city "failed to act" to trigger the 30 days allowed to challenge the city's action. On November 18, 2009, the FCC released its *2009 Declaratory Order* stating *presumptive* (but rebuttable) reasonable periods of time for a city to review and act on a wireless cellular tower application, i.e., 90 days on a "collocation" i.e., not a "substantial increase in the size of a tower"[15] application and 150 days on an application for a new tower site or one that is a "substantial increase in the size of a tower". These time frames were called "shot clocks" for the city to act.

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[9] 47 U. S.C. § 332 (c) (7) (B) (i) (I).

[10] *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630, 638 (2d Cir. 1999); *AT & T Wireless PCS, Inc. v. City Council of Va. Beach*, 155 F.3d 423, 427 (4th Cir. 1998). (finding no unreasonable discrimination) "even assuming that the City Council discriminated, it did not do so "unreasonably," under any possible interpretation of that word as used in subsection (B) (i) (I). … emphasizing the obvious point that the Act explicitly contemplates that some discrimination "among providers of functionally equivalent services" is allowed. Any discrimination need only be reasonable. [citing lower court] See 979 F.Supp. at 425 ("The fact that a decision has the effect of favoring one competitor, in and of itself, is not actionable."). There is no evidence that the City Council had any intent to favor one company or form of service over another. In addition, the evidence shows that opposition to the application rested on traditional bases of zoning regulation: preserving the character of the neighborhood and avoiding aesthetic blight...)"

[11] 47 U. S.C. § 332 (c) (7) (B) (i) (II).

[12] 47 U.S.C. § 332 (c) (7) (B) (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.

[13] 47 U.S.C. § 332 (c) (7) (B) (iii). "Substantial evidence" has been construed in the Federal 5th Circuit, which includes Texas, as: "Under substantial evidence review, the City need not even demonstrate that a preponderance of the evidence supported its decision; rather, the City need only demonstrate that the Council had some reasonable evidence to support the conclusion that the proposal did not conform to setback requirements and that no reduction was warranted." *US Cellular Corp. v. Wichita Falls, Texas*, 364 F.3d 250, 259 (5th. Cir. 2004).

[14] 47 U.S.C. § 332 (c) (7) (B) (vi).

[15] *2009 Declaratory Ruling*, ¶ 46. "an application is a request for collocation *if it does not involve a 'substantial increase in the size of a tower'*" (italics added), as defined in its footnote 146.

If there was no city action within these "shot clock" timelines it established a *presumption* of a "failure to act", triggering the 30 days allowed the applicant to file suit in court to challenge the city's "failure to act" or denial. (Unlike the *FCC 2014 Wireless Infrastructure Order*, the FCC did not promulgate rules, all the guidance is in the text of the *2009 Declaratory Order*.)

Section 332 (c) (7): Summary of local reviews under Section 332 (c) (7) as to personal wireless service facilities siting applications--Limitations and Notice requirements:

Section 332 (c) (7) applies to applications for 1.) *new sites;* 2.) *collocations* that do not "substantially *increase* in the size of a tower";[16] and 3.) modifications that do not qualify under Section 6409 (a), i.e., that "substantially *chang*e the physical dimensions" of an "eligible facility" (as each phrase is distinctly defined by the FCC).[17] (It is recommended that applications require the applicant to indicate initially if it is an application for a Section 332 (c) (7) site or a "claimed" Section 6409 (a) eligible facility request.)

Municipal regulatory and zoning authority applies, except:

Limitations: Local regulation of "the *placement, construction, and modification of personal wireless service facilities:*

- **Shall not "unreasonable" discriminate between functional equivalents.** 47 U. S.C. § 332 (c) (7) (B) (i) (I). Note this explicitly contemplates and allows discrimination among providers of functionally equivalent services, provided such discrimination is reasonable.[18]

[16] *2009 Declaratory Ruling*, ¶ 46, "an application is a request for collocation *if it does not involve a 'substantial increase in the size of a tower'"* (italics added) as defined in its footnote 146: "(1) [t]he mounting of the proposed antenna on the tower would increase the existing height of the tower by more than 10%, or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to avoid interference with existing antennas; or (2) [t]he mounting of the proposed antenna would involve the installation of more than the standard number of new equipment cabinets for the technology involved, not to exceed four, or more than one new equipment shelter; or (3) [t]he mounting of the proposed antenna would involve adding an appurtenance to the body of the tower that would protrude from the edge of the tower more than twenty feet, or more than the width of the tower structure at the level of the appurtenance, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to shelter the antenna from inclement weather or to connect the antenna to the tower via cable; or (4) [t]he mounting of the proposed antenna would involve excavation outside the current tower site, defined as the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site." This is also in the Appendix.

[17] Significantly adding confusion, in the *FCC 2014 Wireless Infrastructure Order*, ¶ 276, the FCC chose to not change the 2009 scope of what constitutes a Section 332 (c) (7) collocation by the definition of "substantial *increase in the size*…" to the same as the Section 6409 (a) defined phrase of "*substantially change the physical dimensions of* such tower or base station" in Section 6409 (a), discussed *infra*.

[18] *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630, 638 (2d Cir. 1999); *AT & T Wireless PCS, Inc. v. City Council of Va. Beach*, 155 F.3d 423, 427 (4th Cir. 1998). (finding no unreasonable discrimination) "even assuming that the City Council discriminated, it did not do so "unreasonably," under any possible interpretation of that word as used in subsection (B) (i) (I). … emphasizing the obvious point that the Act explicitly contemplates that some discrimination "among providers of functionally equivalent services" is allowed. Any discrimination need only be reasonable. [citing lower court] See 979 F.Supp. at 425 ("The fact that a decision has the effect of favoring one competitor, in and of itself, is not actionable."). There is no evidence that the City Council had any intent to favor one company or form of service over another. In addition, the evidence shows that opposition to the application rested on traditional bases of zoning regulation: preserving the character of the neighborhood and avoiding aesthetic blight...)"

- **Shall not prohibit or have the *effect of prohibiting the provision of personal wireless services***. 47 U. S.C. § 332 (c) (7) (B) (i) (II).

Time starts with Application filing: Time Frame for shot clock" runs from date of the filing of the 47 U. S.C. § 332 (c) (7) new or substantial change wireless facility siting application, not date deemed by city to be "complete".[19]

Time to Review:

Presumptive "reasonable time" for local review time for the city to act action on a wireless facilities application, which the city can rebut, depending on the circumstances:[20]

- **90 days for collocation applications** that are not a "substantial increase in the size of a tower". *See 2009 Declaratory Order* ¶¶ 45-46.
- **150 days for new siting applications and applications for a "substantial increase in the size of a tower"**. *See 2009 Declaratory Order* ¶¶ 45, and 75.

Incomplete Application Exception—Same for Section 332 (c) (7) and Section 6409 9(a) applications. Shot Clock Time line is tolled (not counted) pending submittal of supplemental information, *2009 Declaratory Order,*[21] as further clarified by the FCC *2014 Wireless Infrastructure Order*:

30 days to give detailed notice of incompleteness: For incompleteness, detailed written notice must be given by the City 30 days after the application is filed, citing specifying "the *code provision, ordinance, application instruction, or otherwise publically-stated proc*edures that require the information to be submitted…. not restrict[ed] …to reliance on codified documentation requirements." [22] This stops (tolls) the time clock.

Supplemental documentation that may be requested for a Section 332(c) (7) new site or "substantial change" modification/collocation application documentation is not restricted, unlike for Section 6409 (a), and can include factually justification determine if a denial would prohibit or have the effect to prohibit "personal wireless services" (commercial cellular mobile services) if that is being claimed by the applicant.

10 days to review supplemental information to give subsequent notice of incompleteness based on initial 30 day notice: Once the supplemental information is received, the time clock starts anew, and the city has 10 days to review for incompleteness based only on the items identified in the initial 30 day incomplete notice, i.e., the city *cannot* ask for any other "missing" or non-compliant information. If the application is still incomplete, the city must give this notice

[19] Clarification in FCC *2014 Wireless Infrastructure Order,* ¶ 258.

[20] For rebuttable discussion, *See 2009 Declaratory Order* ¶ ¶ 32 and 39, and FN 126.

[21] *2009 Declaratory Order* ¶ 52 "[W]hen applications are incomplete as filed, the timeframes do not include the time that applicants take to respond to …. [city] requests for additional information."; *2009 Declaratory Order* ¶¶ 52-53 However, a city must "notify applicants within a reasonable period of time that their applications are incomplete." As a result, "the time it takes for an applicant to respond to a request for additional information will not count toward the 90 or 150 days but only if [the city]… notifies the applicant within the first 30 days that its application is incomplete."

[22] Clarification in FCC *2014 Wireless Infrastructure Order,* ¶ 259.

10 days after receipt of that supplemental information, giving details as to what is missing from the original request.[23]

- For both Section 6409 (a) and Section 332 (c) (7) the City cannot not raise new incompleteness objections from 1st time on second or subsequent incompleteness notices.

By 90 day and 150 day Presumptive Deadlines:

City denial:

For a city to deny a permit for a Section 332 (c) (7) wireless site, it must be based on substantial evidence, in a written record. 47 U. S.C. § 332 (c) (7) (B) (iii).[24]

- **"Failure to act"-** If there is no action taken by a city on an application within those presumptive time periods then that lack of a decision constitutes the city's "failure to act", which allows 30 days for the adversely affected applicant to file an action in court.[25]
- **Rebuttal:** "[A] municipality may rebut a claim of failure to act under Section 332(c) (7) if it can demonstrate that a longer review period was reasonable, that is not the case under Section 6409(a)." [26]

Case Law clarifications of 47 U. S.C. § 332 (c) (7):

- 47 U. S.C. § 332 (c) (7) **does not preempt governmental actions that involve the management of its own property**.[27]
- A city is **not required to lease city property**, facilities, infrastructure to a wireless provider.[28]
- A city is **allowed to express a 1st preference for use of city property, and even an alternative technology** (in the below cited case, DAS) for a specific application on city property.[29]

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[23] Clarification in *FCC 2014 Wireless Infrastructure Order*, ¶ 259; *FCC 2014 Wireless Infrastructure Order*, ¶ 265 no city moratoria will toll this time frame.

[24] *United States Cellular Corp. v. City of Wichita Falls, Tex*., 364 F.3d 250, 256 (5th Cir. 2004) The burden is on the party seeking to overturn the city's decision——to show that the decision is not supported by substantial evidence. *See also--USCOC of Greater Iowa, Inc. v. Zoning Board of Adjustment of the City of Des Moines*, 465 F.3d 817, 821 (8th Cir. 2006); *Voicestream Minneapolis, Inc. v. St. Croix County*, 342 F.3d 818, 830 (7th Cir. 2003); *Am. Tower LP v. City of Huntsville*, 295 F.3d 1203, 1207 (11th Cir. 2002); *Southwestern Bell Mobile Systems, Inc. v. Todd*, 244 F.3d 51, 63 (1st Cir. 2001).

Level of detail required in a written denial is pending in: *T -Mobile T-Mobile S., LLC v. City of Roswell*, 731 F.3d 1213 (11th Cir. 2013, U.S. Sup. Ct., .cert granted, May 2014, Oral Argument was in November 2014, Decision pending).

[25] *2009 Declaratory Order* ¶ 37.

[26]FCC *2014 Wireless Infrastructure Order*, ¶ 216.

[27] *Omnipoint Commc'ns, Inc. v. City of Huntington Beach*, 738 F.3d 192, 201 (9th Cir. 2013) (Was not discrimination to condition lease of city property on a charter required voter approval.); *Accord Sprint Spectrum, L.P. v. Mills*, 283 F.3d 404, 417-21 (2d Cir. 2002) (School district could impose conditions on lease on school roof top).

[28] *Omnipoint Commc'ns Enters., L.P. v. Township of Nether Providence*, 232 F. Supp. 2d 430, 433-435 (E.D. Pa. 2002). "…Township's refusal to lease its own property does not constitute an exercise of zoning or regulatory powers, the Township had no duty under the TCA to negotiate or ultimately to lease portions of municipal property to Omnipoint for the purpose of installing an antenna."

Section 6409 (a) Subsequent Request to Modify *Existing* Wireless Antenna Facilities that do *"not substantially change" its physical dimensions*:

Section 6409 (a), codified at 47 U.S.C. § 1455 (a), was passed in 2012, as part of the Spectrum Act.[30] The legislative history is thin, at best, "…local governments [had the] right to apply zoning law procedures for requests to modify existing cell towers." but the new provisions "would require approval of requests for modification of cell towers."[31] Some municipal practitioners argue it is unconstitutional.[32]

Section 6409 (a), as codified, provides:

47 U.S.C. §1455 Wireless facilities deployment. (Italics added)

(a) Facility modifications.—

(1) IN GENERAL.

Notwithstanding section 704 of the Telecommunications Act of 1996 (Public Law 104–104) [47 U. S.C. § 332 (c) (7)] or any other provision of law, a State or *local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of* such tower or base station.

(2) ELIGIBLE FACILITIES REQUEST.

For purposes of this subsection, the term "*eligible facilities request*" means any request for modification of an existing wireless tower or base station that involves—

(A) *collocation* of new transmission equipment; (B) removal of transmission

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[29] *Nextel Comm. v. Town of Brookline,* 520 F.Supp.2d 238, 252-53 (D.Mass.2007). Consistent with the clarification in *FCC 2014 Wireless Infrastructure Order,* ¶ 280 that municipal property preferences were not a per se violation and should be considered on a case-by-case situation, citing *T-Mobile Northeast LLC v. Fairfax County Bd. of Sup'rs,* 672 F.3d 259 (4th Cir. 2012).

[30] Section 6409, from the "Middle Class Tax Relief and Job Creation Act of 2012". (112th Congress, 2nd Session, [February 22, 2012]), Tile VI-Public Safety Communications and Electromagnetic Spectrum Auctions, Subtitle D-Spectrum Auction Authority. There were no prior public hearings or drafts, committee mark-ups that were circulated to the general public or local government stakeholders well in advance of its consideration. There was "no oral debate or written comments offered during the pendency of the bill that resulted in Section 6409(a)." *See ex parte* letter of the California Local Governments, filed July 1, 2014, in Notice of Proposed Rulemaking, WT 13-238, WC 11-59, RM 11688 (terminated), WT 13-32, FCC 13-122 (Sept. 26, 2013) ("NPRM").

[31] The 174 page House Conference Report on H.R. 3630, had but two short sentences on local preemption issues. *See* H.R. Rep. 112-399, at 133 (2012) (Conf. Rep.) (stating that, prior to the adoption of Section 6409(a), "…local governments [had the] right to apply zoning law procedures for requests to modify existing cell towers." but that the new provision "would require approval of requests for modification of cell towers."

[32] Opining that Section 6409 is unconstitutional in compelling municipal approval, in violation of the U.S. Constitution's Commerce Clause and/or the Tenth Amendment. Joe Van Eaton, May 3, 2012, "Wireless Antenna Issues", League of California Cities, 2012 Conference; John W. Pestle, "Section 6409(a) of the Middle Class Tax Relief Act is Unconstitutional", *Municipal Lawyer,* (September - December, 2012) (International Municipal Lawyers Association, IMLA, magazine); and Tim L. Lay, "Federal Issues Relating to Wireless Facilities Leases on Municipal Property", Local Gov. Attorneys of Virginia, 2014 Conf. March 27, 2014.

equipment; or (C) replacement of transmission equipment.[33]

Oct 2014– *FCC 2014 Wireless Infrastructure Order*, interpreting Section § 6409(a) and clarifying the *2009 Declaratory Ruling*.[34]

- **Application- Under the Section 6409 (a) (1) a "*request for a modification*" is required. That "request" takes the form of an application. (**It is recommended that applications must be clear if it is a "claimed" Section 6409 (a) request.) A city's review of that *application allows the city to* determine if the self-purported "eligible facility" meets the statutory and FCC criteria for mandatory collocation.[35]
- **City as regulator**: Section 6409 (a) "does not preclude States and localities from continuing to require compliance with generally applicable health and safety requirements on the placement and operation of backup power sources, including noise control ordinances if any."[36]
- **Local Code zoning, and safety "Conditions"/requirements must still be met, except as preempted by Section 6409 (a):** It is a substantial change (and not eligible) if modifications would violate any condition of prior approval of construction or modification imposed on the tower or base station by city ordinance or permit, *unless* the non-compliance is due to an increase in *height, increase in width, addition of cabinets, or new excavation that does not exceed the corresponding "substantial change" thresholds in FCC rules, § 1.40001(b) (7)(i)-*

[33] Note Section 6409 subsections (b)-(c) are omitted as they pertain to federal land issues.

[34] See attached Appendix with the FCC Rules, 47 C.F.R. § 1.40001 Wireless Facility Modifications. The FCC Rules on Section 6409 (a) will take effect 90 days after publication ion the Fed. Register. *FCC 2014 Wireless Infrastructure Order*, ¶ 241and 289. Likely late Jan. early Feb. 2015.

[35] *FCC 2014 Wireless Infrastructure Order*, ¶ 211. "local governments may require parties asserting that proposed facilities modifications are covered under Section 6409(a) to file applications, and that these governments may review the applications to determine whether they constitute covered requests. …. the statutory provision requiring a State or local government to approve an "eligible facilities request" implies that the relevant government entity may require an applicant to file a request for approval. … *nothing in the provision indicates that States or local governments must approve requests merely because applicants claim they are covered*. …. only requests that do in fact meet the provision's requirements are entitled to mandatory approval. Therefore….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."; And see, 47 C.F.R. § 1.40001 (c).

[36] *FCC 2014 Wireless Infrastructure Order*, ¶ 202 "modification under Section 6409(a) should *remain subject to building codes and other non-discretionary structural and safety codes*. … Congress did not intend to exempt covered modifications from compliance with generally applicable laws related to public health and safety. .. States and localities *may require a covered request to comply with generally applicable building, structural, electrical, and safety codes or with other laws codifying objective standards reasonably related to health and safety, and that they may condition approval on such compliance*. …we clarify that Section 6409(a) *does not preclude States and localities from continuing to require compliance with generally applicable health and safety requirements on the placement and operation of backup power sources, including noise control ordinances if any*." *FCC 2014 Wireless Infrastructure Order*, ¶ 188, Cities "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."

(iv) .[37] For example, building and safety codes, "fencing, access to the site, drainage" must continue to be complied with in the Section 6409 (a) modification.[38]

- **Retain Stealth:** It is a substantial change (and not eligible) if modifications would defeat the existing concealment elements of the tower or base station.[39]
- **Comply "with any relevant Federal requirement,** including any applicable Commission, FAA, NEPA, or Section 106 requirements.**"**[40]
- **City as land owner:** Just as 47 U. S.C. § 332 (c) (7) (B) (iv) "applies only to local zoning and land use decisions and does not address a municipality's property rights as a landowner.",[41] it is the same with Section 6409(a), i.e., it will not apply to public property, absent an agreement for co-location by the city as property owner, not a regulator.
- **Section 6409 (a) does not apply to a city's proprietary public property** (City buildings, towers, rights-of-way, even if the city has already allowed an antenna). i.e., no mandated consent to co-locate on city property.

> '[C]ase law distinguishes between actions a State entity takes in a proprietary capacity—actions similar to those a private entity might take—and its attempts to regulate.' … Like private property owners, local governments enter into lease and license agreements to allow parties to place antennas and other wireless service

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[37] 47 C.F.R. § 1.40001 (b) (7) (vi).

[38] *FCC 2014 Wireless Infrastructure Order,* ¶ 200. "[A] change is substantial if it violates any condition of approval of construction or modification imposed on the applicable wireless tower or base station, unless the non-compliance is due to an increase in height, increase in width, addition of cabinets, or new excavation that does not exceed the corresponding "substantial change" thresholds we identify above. In other words, modifications qualify for Section 6409(a) only if they comply, for example, with conditions regarding fencing, access to the site, drainage, height or width increases that exceed the thresholds we adopt above, and other conditions of approval placed on the underlying structure. This approach, we find, properly preserves municipal authority to determine which structures are appropriate for wireless use and under what conditions."; *FCC 2014 Wireless Infrastructure Order,* ¶ 200 "reject municipal arguments that any modification of an existing wireless tower or base station that has "legal, non-conforming" status should be considered a "substantial change" to its "physical dimensions." … the approach urged by municipalities could thwart the purpose of Section 6409(a) altogether, as simple changes to local zoning codes could immediately turn existing structures into legal, non-conforming uses unavailable for collocation under the statute.

[39] 47 C.F.R. § 1.40001 (b) (7) (v). *FCC 2014 Wireless Infrastructure Order*, ¶ 200." a modification that undermines the concealment elements of a stealth wireless facility, such as painting to match the supporting façade or artificial tree branches, should be considered substantial under Section 6409(a). We agree with commenters that in the context of a modification request related to concealed or "stealth"-designed facilities—*i.e.*, facilities designed to look like some feature other than a wireless tower or base station—any change that defeats the concealment elements of such facilities would be considered a "substantial change" under Section 6409(a)."

[40] *FCC 2014 Wireless Infrastructure Order,* ¶ 203.

[41] *Omnipoint Commc'ns, Inc. v. City of Huntington Beach*, 738 F.3d 192, 201 (9th Cir. 2013). *Accord Sprint Spectrum, L.P. v. Mills*, 283 F.3d 404, 417-21 (2d Cir. 2002); *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1240 (9th Cir. 2004) (recognizing that Section 253(a) preempts only "regulatory schemes"); *Sprint Spectrum v. Mills*, 283 F.3d 404, 421 (2d Cir. 2002) (finding that Section 332(c)(7) "does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity").*Omnipoint Commc'ns Enters., L.P. v. Township of Nether Providence*, 232 F. Supp. 2d 430, 433-435 (E.D. Pa. 2002); *Sprint Spectrum, L.P. v. City of Woburn*, 8 F. Supp. 2d 118, 120 (D. Mass. 1998) (§ 332(c)(7)(B) does not apply to requests to locate wireless facilities on municipal property) (Lease of city property signed by Mayor without City Council consent; as the wireless company had no property inertest in the property due to a defective lease, they had no standing to challenge zoning requirement."

facilities on local-government property, and we find no basis for applying Section 6409(a) in those circumstances. [42]

Applicability of Section 6409 (a) under the FCC's Rules.

Scope of what constitutes a Section 6409(a) "modification" is broad:

Scope of what constitutes a Section 6409 (a), "modification", i.e., a "collocation", removal or replacement of "transmission equipment", including both FCC licensed or FCC authorized wireless transmissions, is broader that the narrow term "personal wireless service" used in Section 332(c)(7).[43]

Definitions, FCC Rules, 47 C.F.R. § 1.40001 Wireless Facility Modifications.

- "**Base station**"- Any structure (building, water tower, street light, utility pole), including "transmission equipment" itself, that *already has "transmission equipment", i.**e.,** an antenna or other associated equipment on it*, which was previously lawfully permitted even if it was not built for that purpose. [44]
- **"Collocation"** is not just an additional antenna, but it also includes "transmission equipment", with "transmission equipment" being broadly defined, including backup power**.**[45]

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[42] *2014 Wireless Infrastructure Order*, ¶ 239. While not specifically listing rights-of-way as public property, that issue was raised by the industry as something outside the proprietary area, in contrast to municipalities. The FCC choose not to delve into this issue of what was proprietary property or proprietary actions, leaving that issue to the courts referencing to *American Airlines v. Dept. of Transp*., 202 F.3d 788, 810 (5th Cir. 2000); *Building & Construction Trades Council of Metropolitan District v. Associated Builders & Contractors of Massachusetts/Rhode Island Inc.*, 507 U.S. 218, 231-32 (1993). However, beware of possible discrimination claims if there is permitted use of public property by others that are similarly situated under equal protection arguments.

[43]*FCC 2014 Wireless Infrastructure Order*, ¶ 149 "Section 6409(a) applies both to towers and base stations and to transmission equipment used in connection with any Commission-authorized wireless communications service. …. [and with] the broader term "wireless" in Section 6409(a) rather than the narrow term "personal wireless service" it previously used in Section 332(c)(7)..." Note, Section 332(c)(7) defines "personal wireless services" as "commercial mobile [radio] services, unlicensed wireless [telecommunications] services, and common carrier wireless exchange access services."

[44] 47 C.F.R. § 1.40001 (b) (1) Base Station. This definition should be reviewed carefully. The FCC also stated that: *FCC 2014 Wireless Infrastructure Order,* ¶ 167, "we define that term [Base Station] as the equipment and non-tower supporting structure at a fixed location that enable Commission-licensed or authorized wireless communications between user equipment and a communications network. We find that the term includes any equipment associated with wireless communications service including, but not limited to, radio transceivers, antennas, coaxial or fiber-optic cable, regular and backup power supply, and comparable equipment."

[45] 47 C.F.R. § 1.40001 (b) (2) *Collocation.* The mounting or installation of transmission equipment on an eligible support structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes. … (8) *Transmission Equipment.* Equipment that facilitates transmission for any Commission-licensed or authorized wireless communication service, including, but not limited to, radio transceivers, antennas, coaxial or fiber-optic cable, and regular and backup power supply. The term includes equipment associated with wireless communications services including, but not limited to, private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul.

- **Replacement-**Includes "*hardening* through structural enhancement *where such hardening is* *necessary* for a covered collocation, replacement, or removal of transmission equipment, but *does not include replacement of the underlying structure*." [46]

- **Eligible Support Structure.** Any *tower or base station, as defined* in the FCC rules, which are *existing* at the time the application is filed. [47]

- **"Existing" –** "A constructed tower or base station is *existing* for purposes of this section if it has been reviewed and approved under the applicable zoning or siting process, or under another State or local regulatory review process, provided that a tower that has not been reviewed and approved because it was not in a zoned area when it was built, but was lawfully constructed, is *existing* for purposes of this definition."[48]

    - **"***Existing*", essentially equates to previously lawfully approved and permitted. "Section 6409(a) will apply only where a State or local government has approved the construction of a structure with the sole or primary purpose of supporting covered transmission equipment (*i.e.*, a wireless tower) or, with regard to other support structures, where the State or local government has previously approved the siting of transmission equipment that is part of a base station on that structure."[49]

- "**Tower**"—"Any structure *built for the sole or primary purpose of supporting* any Commission-licensed or authorized *antennas and their associated facilities*, including structures that are constructed for wireless communications services including, but not limited to, private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul, and the associated site."[50]

    - Note: Even a bare tower without antenna can be eligible. To be "eligible" for Section 6409 (a) treatment the "Tower" must only have been built for the purpose of supporting antenna *but need not have any "transmission equipment"* (antenna) *on it*

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[46] *FCC 2014 Wireless Infrastructure Order*, ¶ 180-81. Replacement is of "transmission equipment", but can include hardening of the structure, but not replacement of it.

[47] 47 C.F.R. § 1.40001 (b) (8) Eligible Support Structure. This definition should be reviewed carefully.

[48] 47 C.F.R. § 1.40001 (b) (5) Existing. This definition should be reviewed carefully.

[49] *FCC 2014 Wireless Infrastructure Order*, ¶ 179; And See, *FCC 2014 Wireless Infrastructure Order*, ¶ 174 (footnotes omitted) "the term "existing" requires that wireless towers or base stations have been reviewed and approved under the applicable local zoning or siting process or that the deployment of existing transmission equipment on the structure received another form of affirmative State or local regulatory approval (*e.g.*, authorization from a State public utility commission). Thus, if a tower or base station was constructed or deployed without proper review, was not required to undergo siting review, or does not support transmission equipment that received another form of affirmative State or local regulatory approval, the governing authority is not obligated to grant a collocation application under Section 6409(a). We further clarify that a wireless tower that does not have a permit because it was not in a zoned area when it was built, but was lawfully constructed, is an "existing" tower….. a facility that was deployed unlawfully does not trigger a municipality's obligation to approve modification requests under Section 6409(a). Further, it guarantees that the structure has already been the subject of State or local review. …, under this interpretation, a homeowner's deployment of a femtocell that is not subject to any zoning or other regulatory requirements will not constitute a base station deployment that triggers obligations to allow deployments of other types of facilities at that location under Section 6409(a). By thus preserving State and local authority to review the first base station deployment that brings any non-tower structure within the scope of Section 6409(a) …"

[50] 47 C.F.R. § 1.40001 (b) (9) tower.

at the time of the application to be "existing", so long as it was previously lawfully permitted for that purpose.[51]

- "**Substantially changes the physical dimensions of a tower or base station** (E**ligible Support Structure).**[52]

  The limit on height and width increases depends on the type and location (in or out of the rights-of-way) of the underlying tower or base station, as the E**ligible Support Structure.**

  Changes in <u>height</u> are <u>measured from</u>: Original structure or last approved appurtenance *prior to* February 22, 2012; or if separately horizontally, from the original support structure (e.g., roof top).[53] **Therefore, cannot have cumulative increases** from the most recent modification that received local regulatory approval prior to Feb. 27, 2012, even with subsequent multiple requests for modifications.[54]

  <u>Specific Physical Changes By Location (in or outside of rights-of-way):</u>

  For <u>*towers NOT in public rights-of-way*</u>, *they* may <u>*expand by*</u> at least 20 feet higher and 20 feet wider, <u>*if otherwise eligible*</u>.

  Height: It is a substantial change (and not eligible) if modifications would increase the height by more than *20 feet* or 10%, whichever is greater, from nearest antenna array whichever is greater, as measured from original structure or last approved appurtenance prior to February 22, 2012; or if separately horizontally, from the original support structure (e.g., roof top).[55]

  Protrudes (width): It is a substantial change (and not eligible) if modifications would e **protrude** from the edge of the tower more *than twenty feet, or more than the width of the tower structure at the level of the appurtenance, whichever is greater.* [56]

  For those <u>*towers IN the rights-of-way*</u> *and* <u>*for All base stations, in or outside the rights-of-way, they may expand by*</u> at least 10 feet higher and 6 feet wider, <u>*if eligible*</u>.

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[51] *FCC 2014 Wireless Infrastructure Order*, ¶ 179.

[52] 47 C.F.R. § 1.40001 (b) (7) Substantial Change. This definition should be reviewed carefully.

[53] 47 C.F.R. § 1.40001 (b) (7) [Substantial Change] (i) (A)*; FCC 2014 Wireless Infrastructure Order*, ¶ 197 "for structures where collocations are separated horizontally rather than vertically (such as building rooftops), substantial change is more appropriately measured from the height of the original structure, rather than the height of a previously approved antenna. Thus, for example, the deployment of a 10-foot antenna on a rooftop would not mean that a nearby deployment of a 20-foot antenna would be considered insubstantial."; and see, *FCC 2014 Wireless Infrastructure Order*, ¶ 188.

[54] *FCC 2014 Wireless Infrastructure Order*, ¶ 196. "whether a modification constitutes a substantial change must be determined by measuring the change in height from the dimensions of the "tower or base station" as originally approved or as of the most recent modification that received local zoning or similar regulatory approval *prior to* the passage of the Spectrum Act [Feb. 27, 2012], whichever is greater."; *FCC 2014 Wireless Infrastructure Order*, ¶ 197. "[M]odifications of an existing tower or base station that occur *after the passage of the Spectrum Act Act [Feb. 27, 2012] will not change the baseline for purposes of measuring substantial change*. Consistent with our determination above that a tower or base station is not covered by Section 6409(a) unless it received such approval, this approach will in all cases limit modifications that are subject to mandatory approval to the same modest increments over what the relevant governing authority has previously deemed compatible with local land use values.

[55] 47 C.F.R. § 1.40001 (b) (7) (i).

[56] 47 C.F.R. § 1.40001 (b) (7) (ii).

Height: It is a substantial change (and not eligible) if modifications would increase the height of the tower or base station by more than *10% or 10 feet, whichever is greater, as measured from original structure or last approved appurtenance prior to February 22, 2012; o*r if separately horizontally, from the *original support structure (e.g., roof top).* [57]

Protrudes (width):

It is a substantial change (and not eligible) if modifications would protrude from the edge of the structure more than six feet.[58]

Equipment cabinets:[59]

Outside of right-of-way: It is a substantial change (and not eligible) if modifications would **may add more than 4 cabinets;**

For towers In rights-of-way, and All base stations, in or outside the rights-of-way,

If there are no pre-existing ground cabinets none can be added: it is a substantial change (and not eligible***) if modifications would add any cabinets.***

If there are pre-existing ground cabinets, then it is a substantial change (and not eligible) if **the new cabinets exceed 10% of the height or volume of existing cabinets.**

Must be within *the current "site"* of the tower or base station: It is a substantial change (and not eligible) if modifications would have any excavation or deployment *outside the current site* of the tower or base station. [60]

"Site":

For towers Not in the public rights-of-way, the *current boundaries* of the leased or owned property surrounding the tower *and any access or utility easements* currently related to the site.

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[57] 47 C.F.R. § 1.40001 (b) (7) (i). *FCC 2014 Wireless Infrastructure Order,* ¶ 195. "We further find that towers in the public rights-of-way should be subject to the more restrictive height and width criteria applicable to non-tower structures rather than the criteria applicable to other towers. We note that, to deploy DAS and small-cell wireless facilities, carriers and infrastructure providers must often deploy new poles in the rights-of-way. Because these structures are constructed for the sole or primary purpose of supporting Commission-licensed or authorized antennas, they fall under our definition of "tower." They are often identical in size and appearance, however, to utility poles in the area, which do not constitute towers. As a consequence, applying the tower height and width standards to these poles constructed for DAS and small-cell support would mean that two adjacent and nearly identical poles could be subject to very different standards. To ensure consistent treatment of structures in the public rights-of-way, and because of the heightened potential for impact from extensions in such locations, we provide that structures qualifying as towers that are deployed in public rights-of-way will be subject to the same height and width criteria as non-tower structures."

[58] 47 C.F.R. § 1.40001 (b) (7) (ii).

[59] 47 C.F.R. § 1.40001 (b) Definitions … (7) *Substantial Change*. A modification substantially changes the physical dimensions of an eligible support structure if …. (iii) "for any eligible support structure, it involves installation of more than the standard number of new equipment cabinets for the technology involved, but not to exceed four cabinets; or, for towers in the public rights-of-way and base stations, it involves installation of any new equipment cabinets on the ground if there are no pre-existing ground cabinets associated with the structure, or else involves installation of ground cabinets that are more than 10% larger in height or overall volume than any other ground cabinets associated with the structure."

[60] 47 C.F.R. § 1.40001 (b) (7) (iv).

For towers IN the public rights-of-way and all base stations the site is restricted to that *area* *in proximity* to *the structure* and to *other transmission equipment* *already deployed* on the *ground*.[61]

60 day Time Period Runs from Date of Section 6409 (a) Application (shorter than for a Section 332 (c) (7) application):[62]

60 day Shot Clock to Review Section 6409 (a) Application.[63] City has a 60 day collocation shot clock to review but within the *1st 30 days* the City must give written, detailed notice to toll (stop the clock) of any incomplete Section 6409 (a) application.

Incompleteness of Section 6409 (a) Application-Notice must be specific:[64]

30 days: If City provides notice in writing within 30 days of the application's submission, specifically delineating all missing information, and specifying the code provision, ordinance, application instruction, or otherwise publically-stated procedures, the 60 days is tolled (not counted), pending receipt of the supplemental information.

Documentation:

For a Section 6409 (a) "non-substantial change" modification/collocation application: City may only require documentation that is reasonably related to whether the request meets the FCC's Section 6409 (a) criteria, [65] but "*local governments have considerable flexibility in determining precisely what information or documentation to require.* ……however …localities *may not require documentation proving the need for the proposed modification* or presenting the business case for it." [66] (As noted, this is different, and more restrictive that the documentation that may be required for a Section 332(c) (7) new site or "substantial change" modification/collocation application.)

Incompleteness of resubmitted application:[67]

10 days: City must provide written notice within 10 days of the resubmitted application's submission that the supplemental submission did not provide the specific information identified in the original notice delineating missing information.

City cannot not raise new incompleteness objections from 1st time on second or subsequent incompleteness notices.

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[61] 47 C.F.R. § 1.40001 (b) (6) Site. For towers other than towers in the public rights-of-way, the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site, and, for other eligible support structures, further restricted to that area in proximity to the structure and to other transmission equipment already deployed on the ground.

[62] 47 C.F.R. § 1.40001 (c) (3).

[63] 47 C.F.R. § 1.40001 (c) (2).

[64] 47 C.F.R. § 1.40001 (c) (3).

[65] 47 C.F.R. § 1.40001 (c) (1).

[66] *2014 Wireless Infrastructure Order*, ¶ 214.

[67] 47 C.F.R. § 1.40001 (c) (3) (iii).

"Failure to Act"[68]**--Deemed Granted: 60 days to review is absolute (absent tolling**) "[W]hereas a municipality may rebut a claim of failure to act under Section 332(c) (7) if it can demonstrate that a longer review period was reasonable, that is not the case under Section 6409(a). Rather, if an application covered by Section 6409(a) has not been approved by a State or local government within 60 days from the date of filing, accounting for any tolling, as described below, the reviewing authority will have violated Section 6409(a)'s mandate to approve and not deny the request, and the request will be deemed granted." [69]

Written notice to City from Applicant is required to fix the "effective date" of "deemed granted".[70]

Remedy from "Deemed Granted" for City -Go to Court in 30 days: Unlike Section 332(c) (7) where the applicant must take the City to Court, under Section 6409 (a) a City must take the applicant to court to challenge a "deemed granted" application. And the city has 30 days to do so from the date of the applicant's notice of a "deemed granted" permit.[71]

Texas State Law Issues on Wireless Providers:

State and City Entry Regulations are Preempted by federal law, therefore no PUC certificate or City Franchise is required; and no state legislative grant to use the rights-of-way access.

Federal law (47 U. S.C. § 332 (c) (3) (A)) preempts the state and city from regulating entry of "*commercial mobile servic*es", which DAS is a component.

DAS is a component of a "telecommunications provider" under Tex. Utilities Code, § 51.002, definitions as a component of a provider of "*commercial mobile servic*es" and/or as a non-dominant carrier of telecommunications services.[72]

A PUC certificate is not needed from the PUC to provide "commercial mobile services".[73] As DAS is a component of "commercial mobile services", no PUC certificate is needed to provide a DAS.

State Law Non-discrimination provisions: These provisions only apply to a certificated telecommunication providers or cable/video provider, which a wireless DAS operator, as a provider of wireless "Commercial Mobile Services".

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[68] 47 C.F.R. § 1.40001 (c) (4).

[69] FCC *2014 Wireless Infrastructure Order*, ¶ 216.

[70] 47 C.F.R. § 1.40001 (c) (4).

[71] *2014 Wireless Infrastructure Order*, ¶ 236.Liklewise if a city does deny a Section 6409 (a) application as ineligible or otherwise not qualified in accordance with the FCC's Section 6409 (a) criteria in the rules, the applicant has 30 days to go to court.

[72] Tex. Util. Code, § 51.002, definitions, (10) (A) (iv) "*commercial mobile servic*es" [47 U. S.C. § 332 (d) (1)]; and/or as a (10) (A) (iii) non-dominant carrier of telecommunications services.

Note -" telecommunications services" is not defined in state law, but "basic telecommunications service", "local exchange telephone service" excludes "dark fiber", as defined in Tex. Util. Code, § 51.002, (1) and (5), respectively.

[73] Tex. Util. Code, § 54.003 (5). A certificate from the PUC is required to provide--"basic telecommunications service", "local exchange telephone service" "switched access service". Tex. Util. Code, § 54.001 (3).

The non-discrimination provisions of, Tex. Util. Code, Sec. 54.204 (a) (3) and (b) (1)[74] and Tex. Util. Code, Sec. 66.010,[75] only apply to a certificated telecommunication providers (CTPs), and a communication network of a cable or video services provider, respectively, and both statutes, by definition exclude Commercial Mobile Services.[76]

There are No state legislative grants to wireless entities that deploy DAS as a Commercial Mobile Services provider to use the public-rights of ways:

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[74] Tex. Util. Code, Sec. 54.204. Discrimination by Municipality Prohibited. (Italics added)

(a) "…a municipality or a municipally owned utility may not discriminate against a *certificated telecommunications provider* regarding: (1) the authorization or placement of a facility in a public right-of-way; (2) access to a building; or (3) a municipal utility pole attachment rate or term." (b) "In granting consent, a franchise, or a permit for the use of a public street, alley, or right-of-way within its municipal boundaries, a municipality or municipally owned utility may not discriminate in favor of or against a *certificated telecommunications* provider regarding: (1) municipal utility pole attachment … rates or terms."

[75] Tex. Util. Code, Sec. 66.010. Nondiscrimination by Municipality. (Italics added)

(a) A municipality shall allow the *holder of a state-issued certificate of franchise* authority to install, construct, and maintain a communications network within a public right-of-way and shall provide the holder of a state-issued certificate of franchise authority with open, comparable, nondiscriminatory, and competitively neutral access to the public right-of-way. …...

(b) A municipality may not discriminate against the *holder of a state-issued certificate of franchise authority* regarding:

(1) the authorization or placement of a communications network in a public right-of-way; (2) access to a building; or

(3) a municipal utility pole attachment term"

[76] Tex. Local Gov. Code., Sec. 283.002. Definitions. (Italics added)

(2) "*Certificated telecommunications provider*" means a person who has been issued a certificate …by the commission to offer local exchange telephone service or a person who provides voice service.

(6) "Public right-of-way" means the area on, below, or above a public roadway, highway, street, public sidewalk, alley, waterway, or utility easement in which the municipality has an interest. *The term does not include the airwaves above a right-of-way with regard to wireless telecommunications*.

(7) "Voice service" means voice communications services provided through wireline facilities located at least in part in the public right-of-way, without regard to the delivery technology, including Internet protocol technology. The term *does not include voice service provided by a commercial mobile service provider as defined by 47 U.S.C. Section 332(d).*

Tex. Util. Code, Sec. 66.02. Definitions. (Italics added)…

(2) "Cable service" is defined as set forth in 47 U.S.C. Section 522 (6).

(3) "Cable service provider" means a person who provides cable service.

(4) "Communications network" means a component or facility that is, wholly or partly, physically located within a public right-of-way and that is used to provide video programming, cable, voice, or data services….

(10) "Video service" means video programming services provided through *wireline facilities* located at least in part in the public right-of-way without regard to delivery technology, including Internet protocol technology. This definition *does not include any video service provided by a commercial mobile service provider* as defined in 47 U.S.C. Section 332(d).

(11) "Video service provider" means a video programming distributor that distributes video programming services through wireline facilities located at least in part in the public right-of-way without regard to delivery technology. This term does not include a cable service provider.

The legislative grants to use the public-rights of ways in Tex. Loc. Gov. Code, Chapter 283 and Tex. Util. Code, Sec. 66.003 (c), are restricted to the defined entities of CTPs and a cable and video services, respectively.[77] DAS operators, as a Commercial Mobile Services provider, have no such legislative grant to use the rights-of-way.

General actions a city should take to wireless siting reviews and to avoid "deemed granted" Section 6409 (a) collocations:

In response to the critical timelines established by the *2009 Declaratory Order* and FCC *2014 Wireless Infrastructure Order* each city should:

- Educate all relevant staff, and assign specific staff, including legal, to review these wireless siting applications immediately. Remember 1st 30 days are critical to give notice of incompleteness or not.
- Draft amendments to existing wires siting ordinances with timelines to conform to the two FCC Orders. Everyone needs to know the rules, timelines, and it should all be written in clear language.
- Draft clear wireless siting application forms to indicate what type of wireless siting is being applied for, using when possible applicant check-offs, with detailed explanations, for types of sites:
    - New Site.
    - Addition to Existing Site, with detailed references to prior permit:
        - Changes that are a "substantial increase in the size" to the existing tower as collocation under Section 332 (c) (7). (Include in form FCC definition for clarity.)
        - Changes that are not a "substantial increase in the size" as a collocation under Section 332 (c) (7). (Include in form FCC definition for clarity.)
        - Changes that are not a "substantial change in physical size" for purposes of a Section 6409 (a) modification. (Include in form FCC Rule definition for clarity.)

[77] Tex. Local Gov. Code., Sec. 283.052. Effect of Payment of Right-of-Way Fees to Municipality.

(a) …., a certificated telecommunications provider that complies with this chapter …:(1) may erect poles or construct conduit, cable, switches, and related appurtenances and facilities and excavate within a public right-of-way to provide telecommunications service…"

Tex. Loc. Gov. Code, Sec. 283.002. Definitions., exclude wireless both as an interoffice/between carrier transport that does not terminate with an end user ("Voice service" definition, which expressly excludes commercial mobile service, citing 47 USC § 332 (d)) ; And see PUC Rule §26.461 (c) (1) (B) [interoffice transport is excluded]; and see (c) (6); PUC Rule § 26.465 (f) (2) and (3) Lines not to count as "access lines" include wireless provider connections

Tex. Util. Code, Sec. 66.003. "(c) The certificate of franchise authority issued by the commission shall contain: (1) a grant of authority to provide cable service or video service …; (2) a grant of authority to use and occupy the public rights-of-way in the delivery of that service, subject to the laws of this state, including the police powers of the municipalities in which the service is delivered…"

        - With detail drawings on height, width, cabinet/equipment, site and excavation changes. (Include in form FCC Rules on where measurements are taken for clarity.)

- Develop Internal Checklist unique to City Departments and Personnel.
- Extensions of Timelines: Have the legal department/city attorney have forms developed and available for the applicant and the city to mutually agree in writing to extend deadlines.

Appendix:

- **Timeline for City to Act on Wireless Siting Applications:**
- **47 U.S.C. § 332(c) (7) Preservation of Local Zoning Authority.**
- **Definition of Collocations for proposes of Section 332 (c) (7) Shot Clock.**
- **Section § 6409(a)(47 U.S.C. § 1455(a) Wireless facilities deployment)**
- **FCC Rules, 47 C.F.R. § 1.40001 Wireless Facility Modifications.**
- **Wireless antenna cellular distribution system technology: Key distinctions between "Microcells", "Small Cells" and "DAS".**

Timeline for City to Act on Wireless Siting Applications:

- **Immediately upon filing,** as time period for review runs from date of application for both Section 332(c)(7) and Section 6409 (a),[78] each City should:
- **Time Stamp and Track Applications for compliance with FCC timelines:** Have the appropriate city staffs review in detail the new timelines established by the two FCC Orders, and institute programs to track applications in accordance with these timelines.
- **Determine what type of wireless facility siting is being requested to determine which shot clock applies:**
    - **60 days**[79] to review for changes that are not a "substantial change in physical size" for purposes of a *Section 6409 (a)* modification; or
    - **90 day** collocation for changes that are not a "substantial increase in the size" to a tower as a collocation under *Section 332 (c) (7)*; [80] or
    - **150 day** shot clock for new sites and changes that are a "substantial increase in the size" to the existing tower as collocation under *Section 332 (c) (7)* or do not qualify as a non-"substantial change in physical size" Section 6409 (a) modification. [81]
- **Immediately Schedule any required hearings.** May need to modify or delete any hearing requirements for Section 6409 applications. City can always cancel any hearing if the application is determined to be incomplete, and then reschedule any hearing upon receipt of all requested supplemental information.
- **Confirm Completeness of Applications:** Upon filing have the appropriate city staffs immediately review applications as to completeness. If not complete, ensure that within thirty (30) days from receipt of an application there is verifiable and specific written notification to the applicant the application is incomplete, with detail as to why.

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[78] 47 C.F.R. § 1.40001 (c) (3).

[79] 47 C.F.R. § 1.40001 (c) (2).

[80] *2009 Declaratory Ruling*, ¶ 46, "an application is a request for collocation *if it does not involve a 'substantial increase in the size of a tower'*" (italics added) as defined in its footnote 146: "(1) [t]he mounting of the proposed antenna on the tower would increase the existing height of the tower by more than 10%, or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to avoid interference with existing antennas; or (2) [t]he mounting of the proposed antenna would involve the installation of more than the standard number of new equipment cabinets for the technology involved, not to exceed four, or more than one new equipment shelter; or (3) [t]he mounting of the proposed antenna would involve adding an appurtenance to the body of the tower that would protrude from the edge of the tower more than twenty feet, or more than the width of the tower structure at the level of the appurtenance, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to shelter the antenna from inclement weather or to connect the antenna to the tower via cable; or (4) [t]he mounting of the proposed antenna would involve excavation outside the current tower site, defined as the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site." This is also in the Appendix.

[81] Significantly adding confusion, in the *FCC 2014 Wireless Infrastructure Order*, ¶ 276, the FCC chose to not change the 2009 scope of what constitutes a Section 332 (c) (7) collocation by the definition of "substantial *increase in the size*…" to the same as the Section 6409 (a) defined phrase of "*substantially change the physical dimensions of* such tower or base station" in Section 6409 (a).

1st 30 days for all applications, Determine Completeness of Application Period:

Incompleteness of Application, notice must be specific:[82]

30 days: If City provides notice in writing within 30 days of the application's submission, specifically delineating all missing information, and specifying the code provision, ordinance, application instruction, or otherwise publically-stated procedures, the 60 days is tolled (not counted), pending receipt of the supplemental information.

Supplemental documentation that may be requested:

For a Section 6409 (a) "non-substantial change" modification/collocation application: City may only require documentation that is reasonably related to whether the request meets the FCC's Section 6409 (a) criteria, [83] but "*local governments have considerable flexibility in determining precisely what information or documentation to require*. ……however …localities *may not require documentation proving the need for the proposed modification* or presenting the business case for it." [84]

For a Section 332(c)(7) new site or "substantial change" modification/collocation application documentation can be broader, including to factually justification determine if a denial would prohibit or have the effect to prohibit "personal wireless services" (commercial cellular mobile services) if that is being claimed by the applicant.

- For both Section 6409 (a) and Section 332 (c) (7) the City cannot not raise new incompleteness objections from 1st time on second or subsequent incompleteness notices.

Action by Deadline for Section 9409 (a) applications:

- **By 60th day- "**Failure to Act"[85]--Deemed Granted: 60 days to review is absolute (absent tolling, cannot rebut).
- **Written notice to City from Applicant is required to fix the "effective date" of "deemed granted".**[86]
- **Remedy from "Deemed Granted" for City -T**he city has 30 days to file suit from the date of the applicant's notice of a "deemed granted".[87]

Action by Presumptive Deadlines for Section 332 (c) (7) applications:

- **By 90th day** –collocation for Section 332 (c) (7) or
- **By 150th day** for a new site and "substantial increases in size" applications under Section 332 (c) (7).

City denial:

[82] 47 C.F.R. § 1.40001 (c) (3).

[83] 47 C.F.R. § 1.40001 (c) (1).

[84] *2014 Wireless Infrastructure Order*, ¶ 214.

[85] 47 C.F.R. § 1.40001 (c) (4).

[86] 47 C.F.R. § 1.40001 (c) (4).

[87] *2014 Wireless Infrastructure Order*, ¶ 236.Liklewise if a city does deny a Section 6409 (a) application as ineligible or otherwise not qualified in accordance with the FCC's Section 6409 (a) criteria in the rules, the applicant has 30 days to go to court.

- **For a city to deny a permit for a Section 332 (c) (7) wireless site, it must be based on substantial evidence, in a written record.** 47 U. S.C. § 332 (c) (7) (B) (iii).[88]

- **"Failure to act"-** If there is no action taken by a city on a Section 332 (c) (7) application within the presumptive time periods, then that lack of a decision constitutes the city's "failure to act", which *allows 30 days for the adversely affected applicant to file an action in court*.[89]

- **Rebuttal:** "[A] municipality may rebut a claim of failure to act under Section 332(c) (7) if it can demonstrate that a longer review period was reasonable, that is not the case under Section 6409(a)." [90]

[88] *United States Cellular Corp. v. City of Wichita Falls, Tex*., 364 F.3d 250, 256 (5th Cir. 2004) The burden is on the party seeking to overturn the city's decision——to show that the decision is not supported by substantial evidence. *See also--USCOC of Greater Iowa, Inc. v. Zoning Board of Adjustment of the City of Des Moines*, 465 F.3d 817, 821 (8th Cir. 2006); *Voicestream Minneapolis, Inc. v. St. Croix County*, 342 F.3d 818, 830 (7th Cir. 2003); *Am. Tower LP v. City of Huntsville*, 295 F.3d 1203, 1207 (11th Cir. 2002); *Southwestern Bell Mobile Systems, Inc. v. Todd*, 244 F.3d 51, 63 (1st Cir. 2001).

Level of detail required in a written denial is pending in: *T -Mobile T-Mobile S., LLC v. City of Roswell,* 731 F.3d 1213 (11th Cir. 2013, U.S. Sup. Ct., .cert granted, May 2014, Oral Argument was in November 2014, Decision pending).

[89] *2009 Declaratory Order* ¶ 37.

[90]FCC *2014 Wireless Infrastructure Order*, ¶ 216.

47 U. S.C. § 332, Mobile services… (Emphasis and Italics added)

(c) Regulatory treatment of mobile services…..

(7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter 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 ser*vices; 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) of this title).[91]

Definition of Collocations for proposes of Section 332 (c) (7) Shot Clock.

"[A]n application is a request for collocation [under Section 332 (c) (7)] *if it does not involve a 'substantial increase in the size of a tower'"* *2009 Declaratory Ruling*, ¶ 46

"(1) [t]he mounting of the proposed antenna on the tower would increase the existing height of the tower by more than 10%, or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to avoid interference with existing antennas; or

(2) [t]he mounting of the proposed antenna would involve the installation of more than the standard number of new equipment cabinets for the technology involved, not to exceed four, or more than one new equipment shelter; or

(3) [t]he mounting of the proposed antenna would involve adding an appurtenance to the body of the tower that would protrude from the edge of the tower more than twenty feet, or more than the width of the tower structure at the level of the appurtenance, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to shelter the antenna from inclement weather or to connect the antenna to the tower via cable; or (4) [t]he mounting of the proposed antenna would involve excavation outside the current tower site, defined as the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site." **"** *2009 Declaratory Ruling*, ¶ 46, footnote 146.[92]

[91] 47 U. S.C. § 332 (d) Definitions [Pre-existed the 1996 amendments by Section 704 of the 1996 TCA]

For purposes of this section--

(1) the term "commercial mobile service" means any mobile service (as defined in section 153 of this title) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission;…

(3) the term "private mobile service" means any mobile service (as defined in section 153 of this title) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.

[92] *FCC 2014 Wireless Infrastructure Order*, ¶ 276, the FCC chose to not change the 2009 scope of what constitutes a Section 332 (c) (7) collocation by the definition of "substantial *increase in the size*…" to the same as the Section 6409 (a) defined phrase of "*substantially change the physical dimensions of* such tower or base station" in Section 6409 (a).

Section 6409 (a), as codified, 47 U.S.C. §1455 Wireless facilities deployment. (Italics added)

(a) Facility modifications.—

(1) IN GENERAL.

Notwithstanding section 704 of the Telecommunications Act of 1996 (Public Law 104–104) [47 U. S.C. § 332 (c) (7)] or any other provision of law, a State or *local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of* such tower or base station.

(2) ELIGIBLE FACILITIES REQUEST.

For purposes of this subsection, the term "*eligible facilities request*" means any request for modification of an existing wireless tower or base station that involves—

(A) *collocation* of new transmission equipment; (B) removal of transmission equipment; or (C) replacement of transmission equipment.

47 C.F.R. § 1.40001 Wireless Facility Modifications.

(a) ***Purpose***. These rules implement § 6409 of the Spectrum Act (codified at 47 U.S.C. 1455), which requires a State or local government to approve any eligible facilities request for a modification of an existing tower or base station that does not substantially change the physical dimensions of such tower or base station.

(b) ***Definitions***. Terms used in this section have the following meanings.

(1) ***Base Station***. A structure or equipment at a fixed location that enables Commission-licensed or authorized wireless communications between user equipment and a communications network. The term does not encompass a tower as defined in this subpart or any equipment associated with a tower.

(i) The term includes, but is not limited to, equipment associated with wireless communications services such as private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul.

(ii) The term includes, but is not limited to, radio transceivers, antennas, coaxial or fiber-optic cable, regular and backup power supplies, and comparable equipment, regardless of technological configuration (including Distributed Antenna Systems and small-cell networks).

(iii) The term includes any structure other than a tower that, at the time the relevant application is filed with the State or local government under this section, supports or houses equipment described in paragraphs (b)(1)(i)-(ii) of this section that has been reviewed and approved under the applicable zoning or siting process, or under another State or local regulatory review process, even if the structure was not built for the sole or primary purpose of providing such support.

(iv) The term does not include any structure that, at the time the relevant application is filed with the State or local government under this section, does not support or house equipment described in paragraphs (b)(1)(i)-(ii) of this section.

(2) ***Collocation***. The mounting or installation of transmission equipment on an eligible support structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes.

(3) ***Eligible Facilities Request***. Any request for modification of an existing tower or base station that does not substantially change the physical dimensions of such tower or base station, involving:

(i) collocation of new transmission equipment;

(ii) removal of transmission equipment; or

(iii) replacement of transmission equipment.

(4) ***Eligible Support Structure***. Any tower or base station as defined in this section, provided that it is existing at the time the relevant application is filed with the State or local government under this section.

(5) ***Existing***. A constructed tower or base station is existing for purposes of this section if it has been reviewed and approved under the applicable zoning or siting process, or under another State or local regulatory review process, provided that a tower that has not been reviewed and approved because it was not in a zoned area when it was built, but was lawfully constructed, is existing for purposes of this definition.

(6) ***Site***. For towers other than towers in the public rights-of-way, the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site, and, for other eligible support structures, further restricted to that area in proximity to the structure and to other transmission equipment already deployed on the ground.

(7) ***Substantial Change***. A modification substantially changes the physical dimensions of an eligible support structure if it meets any of the following criteria:

(i) for towers other than towers in the public rights-of-way, it increases the height of the tower by more than 10% or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater; for other eligible support structures, it increases the height of the structure by more than 10% or more than ten feet, whichever is greater;

(A) Changes in height should be measured from the original support structure in cases where deployments are or will be separated horizontally, such as on buildings' rooftops; in other circumstances, changes in height should be measured from the dimensions of the tower or base station, inclusive of originally approved appurtenances and any modifications that were approved prior to the passage of the Spectrum Act.

(ii) for towers other than towers in the public rights-of-way, it involves adding an appurtenance to the body of the tower that would protrude from the edge of the tower more than twenty feet, or more than the width of the tower structure at the level of the appurtenance, whichever is greater; for other eligible support structures, it involves adding an appurtenance to the body of the structure that would protrude from the edge of the structure by more than six feet;

(iii) for any eligible support structure, it involves installation of more than the standard number of new equipment cabinets for the technology involved, but not to exceed four cabinets; or, for towers in the public rights-of-way and base stations, it involves installation of any new equipment cabinets on the ground if there are no pre-existing ground cabinets associated with the structure, or else involves installation of ground cabinets that are more than 10% larger in height or overall volume than any other ground cabinets associated with the structure;

(iv) it entails any excavation or deployment outside the current site;

(v) it would defeat the concealment elements of the eligible support structure; or

(vi) it does not comply with conditions associated with the siting approval of the construction or modification of the eligible support structure or base station equipment, provided however that this limitation does not apply to any modification that is non-compliant only in a manner that would not exceed the thresholds identified in § 1.40001(b)(7)(i)-(iv).

(8) ***Transmission Equipment***. Equipment that facilitates transmission for any Commission-licensed or authorized wireless communication service, including, but not limited to, radio transceivers, antennas, coaxial or fiber-optic cable, and regular and backup power supply. The term includes equipment associated with wireless communications services including, but not limited to, private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul.

(9) ***Tower***. Any structure built for the sole or primary purpose of supporting any Commission-licensed or authorized antennas and their associated facilities, including structures that are constructed for wireless communications services including, but not limited to, private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul, and the associated site.

(c) ***Review of Applications***. A State or local government may not deny and shall approve any eligible facilities request for modification of an eligible support structure that does not substantially change the physical dimensions of such structure.

(1) ***Documentation Requirement for Review***. When an applicant asserts in writing that a request for modification is covered by this section, a State or local government may require the applicant to provide documentation or information only to the extent reasonably related to determining whether the request meets the requirements of this section. A State or local government may not require an applicant to submit any other documentation, including but not limited to documentation intended to illustrate the need for such wireless facilities or to justify the business decision to modify such wireless facilities.

(2) ***Timeframe for Review***. Within 60 days of the date on which an applicant submits a request seeking approval under this section, the State or local government shall approve the application unless it determines that the application is not covered by this section.

(3) ***Tolling of the Timeframe for Review***. The 60-day period begins to run when the application is filed, and may be tolled only by mutual agreement or in cases where the reviewing State or local government determines that the application is incomplete. The timeframe for review is not tolled by a moratorium on the review of applications.

(i) To toll the timeframe for incompleteness, the reviewing State or local government must provide written notice to the applicant within 30 days of receipt of the application, clearly and specifically delineating all missing documents or information. Such delineated information is limited to documents or information meeting the standard under paragraph (c)(1) of this section.

(ii) The timeframe for review begins running again when the applicant makes a supplemental submission in response to the State or local government's notice of incompleteness.

(iii) Following a supplemental submission, the State or local government will have 10 days to notify the applicant that the supplemental submission did not provide the information identified in the original notice delineating missing information. The timeframe is tolled in the case of second or subsequent notices pursuant to the procedures identified in this paragraph (c)(3). Second or subsequent notices of incompleteness may not specify missing documents or information that were not delineated in the original notice of incompleteness.

(4) ***Failure to Act***. In the event the reviewing State or local government fails to approve or deny a request seeking approval under this section within the timeframe for review (accounting for any tolling), the request shall be deemed granted. The deemed grant does not become effective until the applicant notifies the applicable reviewing authority in writing after the review period has expired (accounting for any tolling) that the application has been deemed granted.

(5) ***Remedies***. Applicants and reviewing authorities may bring claims related to Section 6409(a) to any court of competent jurisdiction.

Wireless antenna cellular distribution system technology: Key distinctions between "Microcells", "Small Cells" and "DAS".

"*Macrocells*": Larger towers, with an array of antenna, serves a large area (20 miles radius).

"*Small cells*":

> "[s]mall cells are low-powered wireless base stations that function like cells in a mobile network but provide significantly smaller coverage area than traditional [large tower] macrocells. DAS networks represent another wireless alternative to macrocells, but differ from small cells in that, whereas each small-cell deployment includes its own transceiver equipment that generally serves on[e] [sic] wireless carrier/operator, a DAS network involves the use of transceiver equipment at a central hub site to support multiple antenna locations throughout the desired coverage area and in "neutral-host" deployments can serve multiple wireless carriers/operators."[93]

Small cells are further described as "low-powered wireless base stations that function like cells in a mobile wireless network, typically covering targeted indoor or localized outdoor areas ranging in size from homes and offices to stadiums, shopping malls, hospitals, and metropolitan outdoor spaces."[94]

"*DAS*": DAS are generally described as a wireless network consisting of: "(1) a number of remote communications nodes deployed throughout the desired coverage area, each including at least one antenna for transmission and reception; (2) a high capacity signal transport medium (typically fiber optic cable) connecting each node to a central communications hub site; and (3) radio transceivers located at the hub site (rather than at each individual node as is the case for small cells) to process or control the communications signals transmitted and received through the antennas." [95]

DAS meets the statutory definition of "personal wireless service facilities", 47 U. S.C. § 332 (c) (7) (C) (ii), and thus any city permitting regulation must conform to the limitations in 47 U.S.C. § 332 (c) (7) (B) and Section 6409 (a).[96] These distinctions between the larger macrocell towers, with an array of antennas, and small cell and DAS installations may be critical, particularly with there may be a subsequent request for a "mandatory wireless antenna co-location" at those previously approved (existing) sites under Section 6409 (a).

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[93] FCC *2014 Wireless Infrastructure Order,* footnote 19.

[94] *FCC 2014 Wireless Infrastructure Order,* ¶ 30 (without footnotes) "…. Because these cells are significantly smaller in coverage area than traditional macrocells, networks that incorporate small-cell technology can reuse scarce wireless frequencies, thus greatly increasing spectral efficiency and data capacity within the network footprint. For example, deploying ten small cells in a coverage area that can be served by a single macrocell could result in a tenfold increase in capacity while using the same quantity of spectrum."; See also *FCC 2014 Wireless Infrastructure Order*, Footnote 42, "femtocells [home], picocells [enterprise/business], metrocells [100 meters, urban], and microcells [100 meters, rural] refer to types of small-cell technologies with coverage areas of increasing size."

[95]*FCC 2014 Wireless Infrastructure Order*, ¶ 31 (without footnotes) " A DAS network distributes RF signals from transceivers at a central hub to a specific service area ….whereas small cells are usually operator-managed and support only a single wireless service provider, DAS networks can often accommodate multiple providers using different frequencies and/or wireless air interfaces." As noted above, a DAS configuration differs from a traditional small cell configuration in that transceiver equipment supporting an antenna is typically located not at the antenna site, but at a remote hub site typically connected to the antenna by fiber-optic cable.

[96]*FCC 2014 Wireless Infrastructure Order*, ¶ ¶ 270-272.