FCC's Wireless Facility Rules Implementing Section 6409(a)

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As the popularity of smartphones, tablets and similar devices increases, wireless carriers continue to upgrade their networks, increasing their footprint and density. Cities play an important role in this deployment of wireless communications facilities with traditional land use regulations, seeking to balance the need for faster, better service and the aesthetic and other impacts these facilities have on localities.

The Federal Communications Commission ("FCC") recently issued regulations that require cities to approve some collocations at previously approved facilities. These collocations are not limited to traditional telecommunications towers but apply to essentially any communications facility. This paper discusses these regulations and their impact on cities' land use authority. To provide context for the new rules, the paper first outlines the various federal and state laws that preempt city authority over wireless communications facilities. It then discusses the federal statute, Section 6409[1] of the Middle Class Tax Relief and Job Creation Act of 2012 (H.R. 3630, P.L. 112-96), that the FCC relied on to adopt the new regulations. Lastly, the paper outlines the FCC regulations and potential city responses.[2]

Background – Existing Federal and State Preemption

California cities are preempted from regulating various aspects of wireless communications facility siting by both state and federal law. Below is a brief overview of the federal and state limitations on local control.

A. Telecommunications Act of 1996 §§ 332(c)(7) and 253

The Telecommunications Act of 1996 ("TCA") both recognized local zoning authority over wireless communications facilities ("WCF") and placed limitations on that authority.

47 U.S.C. section 253 precludes state and local governments from enacting ordinances that prohibit or have the effect of prohibiting the provision of telecommunications services, including wireless services. Such ordinances are expressly preempted by federal law.

47 U.S.C. section 332 preserves local authority over individual zoning decisions regarding the placement, construction and modification of WCFs, subject to the enumerated limitations on that authority set forth in that section. (*Sprint Telephony PCS, L.P. v. County of San Diego* (9th Cir. 2008) 543 F.3d 571, 576 ("*Sprint II*").[3]

The TCA limitations are both procedural and substantive. They are enumerated and explained in more detail below.

1. Decision on Application Must Be Made within Reasonable Period of Time

The City must act on any request for authorization to place, construct, or modify a WCF within a reasonable period of time after the request is filed, taking into account the nature and scope of such request.

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[1] Section 6409 is referred to in this paper as Section 6409(a) or simply 6409(a).

[2] A coalition of cities are currently challenging the regulations in federal court. This challenge is beyond the scope of this paper.

[3] Section 332(c)(7)(A) reads: "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."

In 2009, the FCC issued a ruling adopting what is referred to as the "Shot Clock", establishing "presumptively reasonable periods" for local action on a WCF siting application.[4] Under the ruling, local governments must review WCF applications for completeness within thirty days from the time the application is submitted by the wireless carrier. Excluding time when the application is incomplete, the agency has ninety days to review and decide on collocation applications and one hundred fifty days to review and decide on all other siting applications.[5]

The FCC's ruling authorizes applicants to file lawsuits if local agencies fail to act within these timelines, and, if sued, the agency must prove that it acted "reasonably" when it failed to act within these time frames. The ruling expressly authorizes these time limitations to be extended by mutual consent of the parties and tolls the thirty-day period while such an agreement is in place. The Shot Clock exists independently of state law so cities must comply with the Shot Clock as well as applicable state requirements like the Permit Streamlining Act.

As part of the Section 6409(a) regulations discussed below, the FCC clarified some factors of the Shot Clock. First, the Shot Clock applies regardless of any local moratoria. Second, the Shot Clock begins to run "when an application is first submitted, not when it is deemed complete."[6] The FCC also clarified that after an applicant responds to an incompleteness notice, a local government may then only toll the Shot Clock if it notifies the applicant within ten days that the request information remains incomplete. The local government must "specify the code provision, ordinance, application instruction, or otherwise publically-stated procedures that require the information to be submitted."[7]

2. Decision to Deny Must be in Writing

Any decision to deny a request to place, construct, or modify personal wireless service facilities must be in writing.

To satisfy the "written ruling" requirement, localities must provide their reasons for denying a siting application. However, they are not required to provide their reasons in the denial notice itself so long as the reasons are sufficiently clear and are provided or made accessible to the applicant essentially contemporaneously with the written denial letter or notice. (*T-Mobile South, LLC v. City of Roswell, GA* (2015) 574 U.S. ____, Slip Op. No. 13-975.). (*Metro PCS, Inc. v. City and County of San Francisco* (9th Cir. 2005) 400 F.3d 715, 723.) Of course, the adoption of a resolution that contains findings in addition to a discussion of the evidence to support the findings will satisfy this requirement.

Note that this requirement is similar to that already generally applicable to quasi-adjudicatory decisions under California law – i.e., such decisions must be based on written findings. (*Topanga v. County of Los Angeles* (1974) 11 Cal.3d 506.)

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[4] See *In re Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(b)*, 25 FCC Rcd 11157 (F.C.C. 2010); *In re Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B)*, 24 FCC Rcd 13994 (F.C.C. 2009). See also *City of Arlington v. FCC* (2013) 569 U.S. ___.

[5] As discussed below, the new FCC regulations establish a third category of applications that are entitled to a sixty-day shot clock.

[6] *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting* FCC 14-153 (F.C.C. 2014), ¶ 263.

[7] *Id.*

3. Decision to Deny Must Be Supported by Substantial Evidence

Any decision to deny a request to place, construct, or modify personal wireless service facilities must be supported by substantial evidence contained in a written record.

To satisfy the "substantial evidence" standard, the decision must be (1) authorized by local regulations; and (2) supported by substantial evidence. (*Metro PCS, Inc. v. City and County of San Francisco* (9th Cir. 2005) 400 F.3d at 725.) "Substantial evidence" in the context of WCF applications is the same as that applicable for judicial review of agency decisions generally. It means "such relevant evidence as reasonable minds might accept as adequate to support a conclusion." (*Id.*) It must be more than a "mere scintilla" but not necessarily a preponderance. (*Id.*) While this standard of review is deferential to the local agency, the court will review the record in its entirety, including evidence opposed to the local agency's decision.

Assuming the governing municipal code provisions for the relevant permit application allow or require a city to consider aesthetic factors in making its decision on the permit, evidence regarding aesthetic impacts may be considered and can constitute substantial evidence.[8] The City's constitutionally reserved "police power authority" includes the authority to regulate based on aesthetics. (*T-Mobile USA, Inc. v. City of Anacortes* (9th Cir. 2009) 572 F.3d 987; *Sprint PCS Assets, LLC v. City of Palos Verdes Estates* (9th Cir. 2009) 583 F.3d 716, 722-723.)

In *T-Mobile USA, Inc. v. City of Anacortes*, T-Mobile applied for a special use permit to erect a 116-foot monopole in order to close a service gap and expand its coverage in the city. The city denied the permit on the basis of its municipal code, which authorized it to consider a number of aesthetic factors including the height of the proposed tower, the proximity of the tower to residential structures, the nature of uses on adjacent and nearby properties, the surrounding topography, and the surrounding tree coverage and foliage. (*City of Anacortes*, 572 F.3d at 994.)

The court concluded there was substantial evidence concerning the city's stated aesthetic concerns to justify denial of the application under its municipal code. The evidence that the court pointed to as being "substantial" included: "a number of residents claim[s] that the monopole would have a detrimental impact on the surrounding residential property, that the pole would not be completely screened, and that it would interfere with residents' views of the Cascade Mountains and other scenic views." (*Id.* at 994-995.)

Note that even where substantial evidence exists to support a decision to deny a WCF permit, the denial may still be prohibited by the TCA if it unreasonably discriminates among providers of functionally equivalent services, or effectively prohibits the provision of wireless services (see below).

4. Decision May Not Be Based on or Regulate Radio Frequency Emissions

Cities may not regulate placement, construction of modification of WCFs based on radio frequency ("RF") emissions if the proposed wireless facility complies with FCC RF emissions regulations. Cities may also not attempt to regulate the operation of WCFs based on these

[8] *City of Palos Verdes Estates*, 583 F.3d at 725; *City of Anacortes*, 572 F.3d at 994, *citing*, *Sprint II*, 543 F.3d at 580 [stating that the zoning board may consider "other valid public goals such as safety and aesthetics"]; *T-Mobile Cent., LLC v. Unified Gov't of Wyandotte County* (10th Cir. 2008) 546 F.3d 1299, 1312 [noting that "aesthetics can be a valid ground for local zoning decisions"]; *Cellular Tel. Co. v. Town of Oyster Bay* (2d Cir. 1999) 166 F.3d 490, 494 [recognizing that "aesthetic concerns can be a valid basis for zoning decisions"]; *Voice Stream PCS I, LLC v. City of Hillsboro* (D. Or. 2004) 301 F.Supp.2d 1251, 1255.

concerns, e.g., by conditioning a permit to construct a WCF on a requirement to eliminate RF interference with appliances in a nearby home or a city's public safety system. (*Freeman v. Burlington Broadcasters* (2d Cir. 2000) 204 F.3d 311; *Southwestern Bell Wireless v. Johnson County Bd. of Commissioners* (10th Cir. 1999) 199 F.3d 1185.)

However, cities most likely can impose reasonable requirements on an applicant/operator to demonstrate the WCF complies with FCC RF emission standards. The statute itself appears to allow such requirements in that it only preempts local regulation of RF emissions "to the extent such facilities comply with the [FCC]'s regulations concerning such emissions." (47 U.S.C. § 332(c)(7)(B)(iv).)

The FCC and Local and State Advisory Committee of the FCC published a guide for local officials to help determine whether a facility complies with FCC standards. It can be found online at http://www.fcc.gov/encyclopedia/radio-frequency-safety.

5. Cities May Not Unreasonably Discriminate Among Providers of Functionally Equivalent Services

The regulation of the placement, construction and modification of WCF shall not unreasonably discriminate between providers of functionally equivalent services.

A city unreasonably discriminates if it treats facilities that are "similarly situated" in terms of the "structure, placement or cumulative impact" differently. (*Metro PCS*, 400 F.3d at 727.) This analysis is intensely factual and requires a detailed comparison between the subject project and competitors' projects within the area.

However, courts almost universally consider discrimination based on "traditional bases of zoning regulation" such as "preserving the character of the neighborhood and avoiding aesthetic blight" reasonable and thus permissible. (*Id.*)

The legislative history of the TCA provides that the "reasonableness standard" was intended to provide cities with the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning requirements even if those facilities provide functionally equivalent services. For example, the fact that a city grants a permit in a commercial district, does not require it to grant a permit for a competitor's 50-foot tower in a residential district. (*Id. citing* H.R. Conf. Rep. No. 104-458, at 208 (1996).)

6. Decision May Not Prohibit or Have the Effect of Prohibiting the Provision of Personal Wireless Services

A regulation prohibits or has the effect of prohibiting the provision of personal wireless services if it: (1) bans the provision of telecommunication services outright or (2) has actually effectively prohibited the provision of such services, e.g., by imposing restrictions that amount to ban. (*Sprint II*, 543 F.3d at 579; *Metro PCS*, 400 F.3d at 730-31.) The mere fact that the

regulations could potentially allow the locality to prohibit the provision of telecommunications services is insufficient. (*Sprint II*, 543 F.3d at 579.[9])

A regulation results in an "effective prohibition" of personal services if it prevents a wireless services provider from closing a "significant gap" in service coverage. (*Metro PCS*, 400 F.3d at 731.) A significant gap in service exists whenever a provider is prevented from filling a significant gap in its own[10] service coverage. (*Id.* at 733.) There is no bright-line rule regarding when a coverage gap is "significant," the determination is based on a fact specific analysis. (*Id.*; *City of Palos Verdes Estates*, 583 F.3d at 727.) However, the Ninth Circuit has commented that in order for the gap to be "legally significant" its closure needs to be tantamount to a prohibition on telecommunications service. (*Id.*)

Some factors considered by district courts in other circuits in assessing the significance of alleged gaps include: whether the gap affected significant commuter highway or railway; the "nature and character of that area or the number of potential users in that area who may be affected by the alleged lack of service"; whether facilities were needed to improve weak signals or to fill a complete void in coverage; whether the gap covered well-traveled roads on which customers lack roaming capabilities; the results of "drive tests"; whether the gap affects commercial district; and whether the gap poses a public safety risk.[11]

To support the contention that a site is necessary to close a coverage gap, the provider's application should show how the proposed WCF would close the gap, supported by data showing the coverage afforded by other sites. The city can then investigate and determine whether the provider's representations are sound and persuasive. If it concludes they are not, the provider must be given an opportunity to reply to the locality's challenges. (*City of Anacortes*, 572 F.3d at 999.)

Once the provider has demonstrated the requisite gap exists, the provider must show that the manner in which it proposes to fill the significant gap in service is the "least intrusive on the values that the denial sought to serve." (*Metro PCS*, 400 F.3d at 734.) To do so the provider must demonstrate that it has made a good faith effort to identify and evaluate less intrusive alternatives, e.g., its permit application should show that it has considered less sensitive sites, alternative system designs, alternative tower designs, placement of antennae on existing structures, etc. (*City of Anacortes*, 572 F.3d at 996, fn. 10.)

Although the city is not compelled to accept the provider's representations, in order to reject them, it must show that there are some potentially available and technologically feasible alternatives, and the provider must have an opportunity to dispute the availability and feasibility of the alternatives favored by the locality. (*Id.* at 999.)

In *City of Anacortes*, the City of Anacortes denied T-Mobile USA, Inc.'s application to erect a 116-foot monopole antenna on the property of a church located in a residential neighborhood. T-Mobile, cognizant of the "least intrusive means" standard, submitted a detailed

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[9] Examples of regulations that "effectively prohibit the provision of service" include, e.g., an ordinance requiring that all facilities be underground when, to operate, wireless facilities must be above ground, or, an ordinance mandating that no wireless facilities be located within one mile of a road, where, because of the number and location of roads, the rule constituted an effective prohibition. (*Sprint II*, 543 F.3d at 580.)

[10] The availability of wireless service from other providers in the area is irrelevant for purposes of this analysis. (*City of Palos Verdes Estates*, 583 F.3d at 726, fn 8.)

[11] *Cellular Tel. Co. v. Zoning Bd. of Adjustment of the Borough of Ho-Ho-Kus* (3d Cir. 1999) 197 F.3d 64, 70 fn.2; *Voice Stream PCS I, LLC v. City of Hillsboro* (D. Or. 2004) 301 F. Supp. 2d 1251, 1261; *Nextel Partners, Inc. v. Town of Amherst* (W.D.N.Y. 2003) 251 F. Supp. 2d 1187, 1196; *Am. Cellular Network Co., LLC v. Upper Dublin Twp.* (E.D. Pa. 2002) 203 F. Supp. 2d 383, 390-391; *Sprint Spectrum, L.P. v. Town of Ogunquit* (D. Me. 2001) 175 F. Supp. 2d 77, 90.

permit application that included an analysis of eighteen alternative sites. The city nonetheless denied the permit, concluding that the "church site" was not the least intrusive means of closing the gap. However, the court disagreed, concluding that the city's alleged "available alternatives" were too speculative to be "potentially available and technically feasible alternatives" within the meaning of the TCA.

The city identified several public school sites as alternatives. Although the school district had already rejected T-Mobile's proposal to locate there, the planning commission argued that these sites were still technically feasible because the school district would likely change its mind if T-Mobile offered additional compensation. The court rejected this contention as too speculative and deferred to T-Mobile's experience in other cities: "T-Mobile presented testimony to the Planning Commission that it had approached thousands of school boards about locating WCFs on their properties, and that where there is opposition in the community to the construction of a WCF, such opposition is likely to be intensified if the proposed location of the WCF is on school property." (*Id.* at 998, fn. 12.)

B. CEQA and NEPA

The construction of WCFs are subject to environmental review under both federal and state law. All antenna structures must comply with NEPA. Smaller WCFs may be categorically exempt from CEQA pursuant to Guidelines § 15303. As explained above, cities may not regulate sitings based on RF emissions to the extent that the facilities comply with FCC standards. However, this does not relieve a city from the obligation to study any significant environmental effects caused by RF emissions.

Note also that larger antenna towers can affect bird flyways and otherwise result in the killing of birds, including endangered species. Accordingly, tower siting may require analysis of federal and state species protection statutes.

C. Government Code Sections 65850.6 and 65964

The state legislature enacted SB 1627 in 2006, which is codified as Government Code Sections 65850.6 and 65964. Section 65850.6 principally deals with collocations. The law removes discretionary authority for wireless telecommunications land use permits - but only over those wireless telecommunications facilities mounted to existing towers or structures (referred to as "collocation facilities" [12]). Section 65850.6 does not remove the City's discretionary authority to review and permit wireless telecommunications towers or structures that will include future collocation facilities (referred to as "wireless telecommunications collocation facilities" [13]). Section 65964 applies more broadly to all wireless telecommunications facilities and limits cities' ability to impose conditions of approval on these projects.

Original Discretionary Permit For Wireless Telecommunication Collocation Facilities: Section 65850.6 permits cities to require a discretionary permit (such as a conditional use permit) for a wireless telecommunication collocation facility if the city holds a public hearing and provides notice pursuant to Government Code Section 65091. In addition to being subject to a

[12] "Collocation facility" means the placement or installation of wireless facilities, including antennas, and related equipment, on, or immediately adjacent to, a wireless telecommunications collocation facility. (Gov. Code, § 65850.6(d).)

[13] "Wireless telecommunications collocation facility" means a wireless telecommunications facility that includes collocation facilities. (Gov. Code, § 65850.6(d).)

discretionary permit, the wireless telecommunication collocation facility would have to comply with all of the following:

- City requirements that specify the types of wireless telecommunications facilities that are allowed to include a collocation facility;

- City requirements that specify the types of wireless telecommunications facilities that are allowed to include certain types of collocation facilities;

- Height, location, bulk, and size of the wireless telecommunication collocation facility;

- Percentage of wireless telecommunications collocation facility that may be occupied by collocation facilities;

- Aesthetic and design requirements for wireless telecommunications collocation facilities.

- City requirements for a proposed collocation facility;

- Compliance with state and local requirements, including the general plan, any applicable community plan or specific plan, and zoning ordinance;

- Compliance with CEQA through certification of an EIR, or adoption of a negative declaration or mitigated negative declaration.

Subsequent Review of Collocation Facilities: Upon approval of a wireless telecommunication collocation facility, cities are precluded from requiring discretionary permits for any subsequent collocation facility on the approved wireless telecommunication collocation facility if the following requirements are met:

- The collocation facility is consistent with the requirements for wireless telecommunications collocation facilities listed above (e.g., proposed collocation facility meets the City's requirements for height, location, bulk, size, etc., the requirements of any proposed collocation facility found in the original approval, the proposed collocation facility is located on the type of wireless telecommunications collocation facilities that is allowed to include a collocation facility.)

- The wireless telecommunications collocation facility on which the collocation facility is proposed was subject to a discretionary permit by the city and an EIR was certified, or a negative declaration or mitigated negative declaration was adopted for the wireless telecommunications collocation facility in compliance with CEQA.

Section 65964: Government Code section 65964 prevents cities from, "as a condition of approval for an application for a permit for construction or reconstruction" of a "wireless telecommunications facility":[14]

- Requiring an escrow deposit for removal of a wireless telecommunications facility or any component. However, a performance bond or other surety or another form of security may be required, so long as the amount of the bond security is rationally related to the cost of

[14] This is defined as "equipment and network components such as towers, utility poles, transmitters, base stations, and emergency power systems that are integral to providing wireless telecommunications services." (Gov. Code, § 65850.6.)

removal. In establishing the amount of the security, the city must take into consideration information provided by the applicant regarding the cost of removal.

- Unreasonably limiting the duration of any permit for a wireless telecommunications facility. Limits of less than ten years are presumed to be unreasonable absent public safety reasons or substantial land use reasons. However, cities may establish a build-out period for a site.

- Requiring that all wireless telecommunications facilities be limited to sites owned by particular parties (i.e., requiring facilities be built on city property).

D. Public Utilities Code Sections 7901 and 7901.1

Given the development of distributed antenna systems ("DAS") and small cells, wireless carriers have sought to increase WCF deployment within the public right-of-way under Public Utilities Code sections 7901 and 7901.1. Section 7901 allows telephone companies to place "poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines" in the rights of way. Section 7901.1 provides that "municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed, "and provides that, at a minimum, the control shall "be applied to all entities in an equivalent manner." The definition of "telephone company" is very broad, and a mobile telecommunications company that obtains a certificate of public convenience and necessity ("CPCN") from the California Public Utilities Commission ("CPUC") likely has access to the right-of-way subject to section 7901.1. (See *City of Huntington Beach v. Public Utilities Com.* (2013) 214 Cal.App.4th 566.)

Section 6409(a)

Congress, as part of the Middle Class Tax Relief and Job Creation Act of 2012 enacted Section 6409(a),[15] which states as follows:

> (1) IN GENERAL.—Notwithstanding section 704 of the Telecommunications Act of 1996 (Public Law 104–104) 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.
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> (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.

"Wireless tower," "base station," "modification," and "substantially change" are not defined in Section 6409(a).

[15] This is now codified at 47 U.S.C. § 1455(a).

In light of the statutory silence, the FCC first released non-binding guidance in 2013 to help define these terms.[16] This guidance took a very broad view of what types of collocations and other modifications qualified, including allowing towers to increase by at least twenty feet. In September 2013, the FCC moved to adopt binding rules interpreting Section 6409(a). These proposed rules were very similar to the non-binding guidance.

FCC Regulations Implementing Section 6409(a)

In a Report and Order ("Wireless Infrastructure Order" or "Order") released October 21, 2014, FCC 14-153, the FCC interpreted and implemented the "collocation" provisions of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012.[17] An explanation of the Order is below.[18]

A. Definition of Terms in Section 6409(a)

Given the lack of statutory definitions or guidance in Section 6409(a), the FCC first determined how broadly Section 6409(a) applied and then provided definitions for many of the statutory terms.[19]

1. Scope of Covered Services

The FCC determined that Section 6409(a) applies to facilities used in connection with "any Commission-authorized wireless communications service." [20] This includes broadcast facilities. The Commission rejected local governments' view that the statute is best read to apply only to personal wireless service and public-safety communications.[21]

The FCC's determination will ensure that Section 6409(a) and the Commission's rules apply broadly. Providers will be able to use Section 6409(a) to modify a facility regardless of the service it provides. This differs from 47 U.S.C. § 332(c)(7), which applies only to "personal wireless service" facilities.

2. Transmission Equipment

The FCC defines "transmission equipment" broadly as equipment that facilitates transmission of any Commission-authorized wireless service. [22] It includes, but is not limited to, radio transceivers, antennas, coaxial or fiber-optic cable, and regular and backup power supply.

3. Existing Wireless Tower or Base Station

The FCC defines "tower" narrowly as "[a]ny structure built for the sole or primary purpose" of supporting any Commission-licensed or authorized antennas and their associated

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[16] *Wireless Telecommunications Bureau Offers Guidance on Interpretation of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012*, DA 12-2047 (Jan. 25, 2013).
[17] The Order also adopted new or modified rules for environmental and historic preservation review of small wireless facilities, including DAS and codified an exception to advance notice of the placement of temporary towers under the Antenna Structure Regulation ("ASR") requirements. These changes are outside the scope of this paper. As discussed above, the Order also clarified some provisions of the Shot Clock.
[18] The Order is available at http://www.fcc.gov/document/wireless-infrastructure-report-and-order. The regulations are located at 47 C.F.R. § 1.40001. The bulk of the regulations became effective on April 8th. However, §§ 1.40001(c)(3)(i), 1.40001(c)(3)(iii), 1.140001(c)(4) and 17.4(c)(1)(vii) will not be effective until approved by the Office of Management and Budget (OMB).
[19] Order ¶145.
[20] Order ¶146.
[21] Order ¶¶148-154.
[22] Order ¶160.

facilities.[23] It defines "base station" broadly to include not only the equipment that communicates with user equipment (regardless of the technological configuration, and encompassing DAS and small cells), but also the "structure" that supports or houses that equipment.[24] The FCC clarified, however, that a structure would qualify as an existing "base station" only if at the time of the application, the structure already supports or houses communications equipment.[25] Other structures that do not host communications equipment are not "base stations." The FCC also clarified that to qualify as a "base station," the facility must have been "approved under the applicable zoning or siting process" or have "received another form of affirmative State or local regulatory approval," such as an authorization from the CPUC.[26] This is a very broad definition and would include the light pole, building or other structure that currently houses communications equipment as long as it received the applicable regulatory approvals, even if those approvals did not anticipate future collocation.

4. Collocation, Replacement, Removal, Modification

The FCC then addressed what modifications Section 6409(a) permits a provider to make to a "wireless tower" or "base station."[27] The Commission ruled that "collocation" includes the *first* placement of transmission equipment on a "wireless tower" or "base station."[28] This differs from local governments' view that "collocation" occurs only if the tower or base station already hosts other equipment with which the new equipment would be *co*-located.[29] (This is effectively the result of modifications to "base stations," but that is not because of the "collocation" definition but because the FCC defined "base station" to include only those structures that already host wireless equipment.) The FCC also found that if the collocation, replacement, or removal of transmission equipment makes structural enhancements to (i.e., "hardening" of) the wireless tower or base station "necessary," Section 6409(a) applies to that hardening activity.[30] The Commission ruled that Section 6409(a) does not permit a provider to replace the structure on which the equipment is located.[31]

5. Substantial Change and Other Conditions and Limitations

The FCC then turned to defining "substantially change the physical dimensions" of a tower or base station. [32] The Commission adopted an "objective standard." Under its rule, a modification substantially changes the physical dimensions of a wireless tower or base station if it meets any of the following criteria:[33]

(i) Height

(i) for towers other than towers in the public rights-of-way:

a. it increases the height of the tower by:

i. more than 10% or

[23] Order ¶166.
[24] Order ¶170; 47 C.F.R. § 1.40001(b)(1).
[25] Order ¶¶172-174; 47 C.F.R. § 1.40001(b)(1)(iii).
[26] Order ¶174.
[27] Order ¶176.
[28] Order ¶176; 47 C.F.R. § 1.40001(b)(2).
[29] *Id.*
[30] Order ¶180.
[31] Order ¶181.
[32] Order ¶182.
[33] Order ¶188; 47 C.F.R. § 1.40001(b)(7).

ii. the height of one additional antenna array with separation from the nearest existing antenna not to exceed 20 feet, whichever is greater;

(ii) for other eligible support structures:

a. it increases the height of the structure by:

i. more than 10% or

ii. more than **10 feet**, whichever is greater.[34]

(ii) Width

(i) for towers other than towers in the public rights-of-way:

a. it involves adding an appurtenance to the body of the tower that would protrude from the edge of the tower

i. more than **20 feet**, or

ii. more than the width of the tower structure at the level of the appurtenance, whichever is greater;

(ii) for other eligible support structures:

a. it involves adding an appurtenance to the body of the structure that would protrude from the edge of the structure by more than **6 feet**;

(iii) Equipment Cabinets

(i) for any eligible support structure:

a. it involves installation of more than the standard number of new equipment cabinets for the technology involved, but **not to exceed four cabinets**; or,

(ii) for towers in the public rights-of-way and base stations,

a. 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) Excavation/Deployment Beyond Site

(i) it entails "any excavation or deployment outside the current site."

a. The Commission defines "site" as:

i. For towers other than towers in the public rights-of-way,

[34] Changes in height are 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.

1. the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site, and,

ii. for other eligible support structures,

1. further restricted to that area in proximity to the structure and to other transmission equipment already deployed on the ground.

(v) Concealment Elements

A modification is a substantial change if it would "defeat the concealment elements of" the wireless tower or base station.

(vi) Other Conditions on the Wireless Tower or Base Station

A modification is also a substantial change if it does not comply with conditions—other than those conditions related to height, width, equipment cabinets, excavation/deployment, or concealment elements—associated with the siting approval of the construction or modification of the eligible support structure or base station equipment.

The FCC also ruled that facility modification remains subject to "building codes and other non-discretionary structural and safety codes."[35] Specifically, local governments 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."[36]

B. Application Review Process, Including Timeframe for Review

The FCC ruled that a local government may require a party seeking approval under Section 6409(a) to submit an application so that the local government can determine whether its request is covered by the statute. [37] The FCC clarified, however, that a local government may require only that documentation that is reasonably related to determining whether the request falls under the statute. A local government may not require documentation "proving the need for the proposed modification or presenting the business case for it."[38]

The FCC established that a local government must act on a Section 6409(a) request within sixty days.[39] That period may be tolled by the parties' agreement or if the local government notifies the applicant within thirty days that specific information in the application is incomplete.[40] After the applicant makes a supplemental filing, the local government then has an additional ten days to notify the applicant that the application remains incomplete because the specific information that the local government had identified remains incomplete (the local government may not toll the sixty-day clock by notifying the applicant of other missing

[35] Order ¶202.
[36] *Id.*
[37] Order ¶211.
[38] Order ¶214.
[39] Order ¶216; 47 C.F.R. § 1.40001(c)(2).
[40] Order ¶217; 47 C.F.R. § 1.40001(c)(3).

information).[41] The FCC also clarified that its sixty-day clock runs regardless of local moratoria.[42]

C. Remedies

The FCC determined that because Section 6409(a) states that a local government "may not deny, and shall approve" a qualifying request, a local government must act either to approve or deny an application within the sixty-day period. [43] If the local government fails to take any action during that period, the request is deemed granted at the time the applicant notifies the local government of the deemed grant in writing. The FCC explains that a local government may challenge a deemed grant in court "when it believes the underlying application did not meet the criteria in Section 6409(a) for mandatory approval, would not comply with applicable building codes or other non-discretionary structural and safety codes, or for other reasons is not appropriately 'deemed granted.'"[44] The FCC indicates that it will not be involved in adjudicating disputes. [45]

D. Non-Application to States or Municipalities in Their Proprietary Capacities

The FCC explained that Section 6409(a) and its rules do not apply when local governments act in a proprietary capacity, e.g., when they enter into lease and license agreements to allow parties to place antennas and other wireless service facilities on local-government property. [46] The FCC also declined to determine whether ordinances that express a preference for siting facilities on municipal property are invalid.[47]

E. Cities' Responses

Cities should consider how to implement Section 6409(a) within their jurisdictions. In part, this will require reviewing the city's land use and zoning regulations for WCF to ensure that they are consistent with federal law. Similarly, cities should consider how to process Section 6409(a) collocations and applications for new towers and base stations under CEQA. Lastly, because Section 6409(a) did not affect cities' proprietary rights, cities should ensure that they do not unwittingly forfeit any review over Section 6409(a) applications when they own or lease the property.

1. Reviewing and Updating WCF Regulations

The Order substantially interferes with traditional local land use controls, and all cities should consider the effect of the Order on their WCF regulations. For example, if existing zoning ordinances permit telecommunications towers up to one hundred feet in a zone, the Order now allows all existing towers to add an additional ten feet. Similarly, if a city's ordinance allows DAS providers to install ground-based equipment within the right-of-way, the Order allows expansion of those cabinets by up to ten percent in height or overall volume.

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[41] Order ¶218; 47 C.F.R. § 1.40001(c)(3).
[42] Order ¶219; 47 C.F.R. § 1.40001(c)(3).
[43] Order ¶227; 47 C.F.R. § 1.40001(c)(4).
[44] Order ¶231.
[45] Order ¶234; 47 C.F.R. § 1.40001(c)(5).
[46] Order ¶239.
[47] Order ¶244. Of course, these types of ordinances are still subject to California restrictions on preferences under Government Code section 65964.

In addition, the FCC rejected the argument that any modification of an existing wireless tower or base station that has "legal, non-conforming" status should be considered a "substantial change." So, proposed modification of a legal, non-conforming structure is subject to the same "substantial change" analysis as other structures. As such, any existing prohibition on expanding or modifying a non-conforming tower is no longer valid.

Based on this, cities should, at the very least, review their existing ordinance and ensure that they process 6409(a) applications pursuant to the requirements set forth in the Order. In addition, cities may wish to modify their ordinances to incorporate the Order. There are two ways to do this. First, cities can adopt a short section noting that qualifying applications will be processed pursuant to the requirements of Section 6409(a) and the Order. Second, cities can substantively incorporate the Order into their codes. The one issue to note with this approach is that cities should carefully draft their codes to ensure that they are not creating new local rights for carriers in the event that the Order is revised, repealed or invalidated.[48] In addition, drafters should ensure that the burden of asserting rights under Section 6409(a) are on the applicant so that staffers can review the application to ensure it qualifies.

2. CEQA Review Under 6409(a)

Cities should also consider what CEQA review will be required for new towers and base stations and for 6409(a) applications. As CEQA requires agencies to consider the "whole of the action,"[49] environmental review of any new towers or base stations cannot be limited to the proposed proportions of the facility. Rather, agencies should evaluate the facility, assuming it will be increased to the extent permitted by Section 6409(a). Cities that take this approach should ensure that they receive sufficient information from applicants to undertake this review. Under the Shot Clock, cities only have ten days to request additional information.

For Section 6409(a) applications, cities should determine whether and what CEQA review is required. In most cases, 6409(a) applications will not be subject to CEQA as ministerial actions (assuming the local ordinance make permit issuance ministerial) or may be categorically exempt from CEQA.[50] In the event that a 6409(a) application requires CEQA review, cities should be cognizant of the Shot Clock. Unless the applicant agrees to an extension, review must be completed within sixty days or the application will be deemed granted.

3. Utilize Proprietary Rights to the Extent Possible

Lastly, cities should ensure that they retain and utilize their proprietary rights to the extent possible. The Order expressly declined to restrict local agencies' authority over their own property. Based on this, cities are not required to approve modifications subject to Section 6409(a) on towers and base stations located on city property. The one potential exception to this is locations within the right-of-way. As discussed above, carriers with a CPUC-issued CPCN are likely entitled to access the right-of-way under Public Utilities Code sections 7901 and 7901.1.

For locations outside of the right-of-way, cities should review the applicable lease or license when they receive a request for a Section 6409(a) collocation. Unless the requested modification is within the scope of the carrier's rights under the agreement, the city could deny

[48] As noted above, a coalition of cities are currently challenging the Order in federal court.
[49] See 14 CCR § 15378.
[50] See, e.g., 14 CCR § 15301.

the request or condition its approval on the payment of additional rent or other concessions. City attorneys should ensure that staff members that regularly negotiate telecommunications license and similar agreements are aware of the city's proprietary rights and do not agree to a Section 6409(a) modification on the mistaken belief that cities do not have discretion to deny or condition the change.[51]

Conclusion

Section 6409(a) and the Order are the latest federal effort to encourage WCF deployment through restricting land use authority. However, in many ways, the Order is the most substantial interference to date. The Order creates an entire class of WCFs that are largely exempt from local discretionary authority. As such, cities should consider the impact and effect of the Order on their existing and future WCF ordinances.

[51] In the authors' experience, some carriers have been known to overstate the scope of Section 6409(a) and similar restrictions on local authority over WCFs.