Role of Small Cell Infrastructure

Legal/Regulatory Background

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Overview

Big Thought: New shot clock already feels like an old friend

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The whole thing has been so smooth, in fact, that it’s been possible to go whole
weeks forgetting there was ever a resistance to these changes in the first place.
We sometimes forget the changes happened at all. The shot clock is just the shot
clock. The game is just the game. You couldn’t fathom holding a 5-inch cell
phone screen, but now that you have one, you can’t fathom going back.
1996 - Telecom Act – decide in "reasonable time"

2009 – FCC Shot Clock Ruling - 90 and 150 day shot clocks

2014 – FCC R&O re: Section 6409(a) – 60-day "deemed granted" remedy

2015 – AB 57 – Converts FCC’s 2009 Shot Clock Ruling to “deemed granted” status

• Local governments must decide wireless facility application in a “reasonable amount of time”

> 47 U.S.C. Section 332(c)(7)(B)(ii)
2009 FCC Shot Clock Ruling

- Co-location applications
  > Decide 90 days from complete application
- Other applications
  > Decide 150 days from complete application
- Shot clock violation presumed to be unreasonable (but not “deemed granted”)

Section 6409(a) passed in 2012

- Summary:
  > State and local governments “may not deny, and shall approve” any “eligible facilities request” for a modification to an “existing tower or base station” so long as it does not “substantially change” the physical dimensions of such existing wireless tower or base station.”
- Mandates local approvals for less-than-substantial changes to existing wireless facilities
- Many terms not defined in statute
FCC Issues 6409(a) Report & Order in 2014

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• “Unfortunately, as soon as the ink was dry on the Telecom Act, some state and local governments went to work to undermine, and in some cases, completely ignore the siting provisions in the statute.”
  • Commissioner Michael O’Reilly

Small Cells Discussed in FCC’s 6409(a) Report & Order

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• “cost-effective way of addressing increased demand for wireless broadband services, particularly in urban areas”
• “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”
• “the industry has not always been consistent in the terms it uses for different types of small-cell technology”
FCC’s Section 6409(a) Report & Order

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• “Substantial change” defined
  > Height / Width / Cabinets / Excavation / Stealthing

• 6409(a) applications – decide in 60 days
  > “Deemed granted” remedy (not just a presumption)

• Clarified 2009 Shot Clock Ruling
  > Shot Clock runs even while moratoria in place
  > Shot Clock runs from submittal (not when complete)

• Incomplete notices (for all applications)
  > 30 days initially, 10 days on supplemental submissions

Court Challenge to Section 6409(a) Report & Order

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• *Montgomery County v. FCC* (Fourth Circuit)
  > Court denied municipalities’ petition in 2015
    ▪ “Deemed granted” process does not violate the Tenth Amendment (states’ rights)
      » Cities not required to act – applications are “granted by default if the [city] does not affirmatively approve within 60 days”
    ▪ Report & Order is consistent with Section 6409(a)
    ▪ Definitions are not overly broad

• Report & Order remains in effect
AB 57 (Quirk)

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• Signed by Governor Brown in 2015
• Adds Government Code Section 65964.1
• Extends the Section 6409(a) Report & Order “deemed granted” process to all wireless facilities
  > Includes 90-day and 150-day shot clocks of 2009 Report & Order
• Wireless facilities are “not a municipal affair” and are a “matter of statewide concern”

Where to from here?

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• Don’t assume it’s out of your hands
• Educate decisionmakers
• Formalize submittal requirements
  > Provide citations in incomplete determinations
Where to from here? (cont.)
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• When application received
  > Which shot clock applies?
  > Schedule meetings/hearings

• Ensure submittals can be processed and decided in a timely manner
  > CEQA, land use, and building and safety

• Process applications with designated staff and/or consultants for consistent approach

Where to from here? (cont.)
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• Revisit ordinances?
  > Consider residents, businesses, visitors, and carriers
  > Preferred sites
  > Fees for city-owned poles/property
  > Gap in service
  > Alternative site analysis
  > But – one size does not fit all

• Share success stories
• Trust but verify carriers’ claims
• City “not required to take [the carrier’s] word” about whether alternative designs or sites would have filled a significant gap in coverage
  > *American Tower Corp. v. City of San Diego*, 763 F.3d 1035 (9th Cir. 2014)