

Role of Small Cell Infrastructure Legal/Regulatory Background

March 29, 2018

Javan N. Rad
Chief Assistant City Attorney Overview

Office of the City Attorney/City Prosecutor



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

Jan 7, 2016

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.



Overview

Office of the City Attorney/City Prosecutor

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

3

PASADENA



Telecommunications Act of 1996

Office of the City Attorney/City Prosecutor

- Local governments must decide wireless facility application in a “reasonable amount of time”
 - > 47 U.S.C. Section 332(c)(7)(B)(ii)

4

PASADENA



2009 FCC Shot Clock Ruling

Office of the City Attorney/City Prosecutor

- 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”) 5



PASADENA



Section 6409(a) passed in 2012

Office of the City Attorney/City Prosecutor

- 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

6

PASADENA



FCC Issues 6409(a) Report & Order in 2014

Office of the City Attorney/City Prosecutor

- “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



7

PASADENA



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

Office of the City Attorney/City Prosecutor

- “cost-effective way of addressing increased demand for wireless broadband services, particularly in urban areas”
- “the industry has not always been consistent in the terms it uses for different types of small-cell technology”
- “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”

8

PASADENA



FCC's Section 6409(a) Report & Order

Office of the City Attorney/City Prosecutor

- “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



PASADENA

9



Court Challenge to Section 6409(a) Report & Order

Office of the City Attorney/City Prosecutor

- *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

PASADENA

10



AB 57 (Quirk)

Office of the City Attorney/City Prosecutor

- 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”

11

PASADENA



Where to from here?

Office of the City Attorney/City Prosecutor



- Don't assume it's out of your hands
- Educate decisionmakers
- Formalize submittal requirements
 - > Provide citations in incomplete determinations

12

PASADENA



Where to from here? (cont.)

Office of the City Attorney/City Prosecutor

- 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



13



Where to from here? (cont.)

Office of the City Attorney/City Prosecutor

- 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

14

PASADENA



Where to from here? (cont.)

Office of the City Attorney/City Prosecutor

- 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)

