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Wireless Antenna Update: Distributed Antenna Systems State and Federal Mandatory Collocation; New Regulatory and Legal Challenges

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League of California Cities

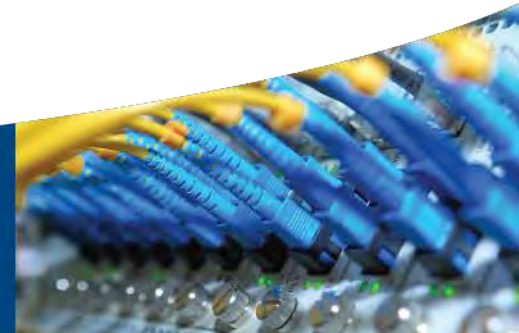
City Attorneys Spring Conference

May 2-4, 2012

Hollywood

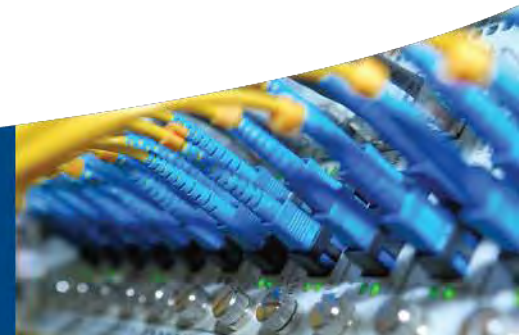


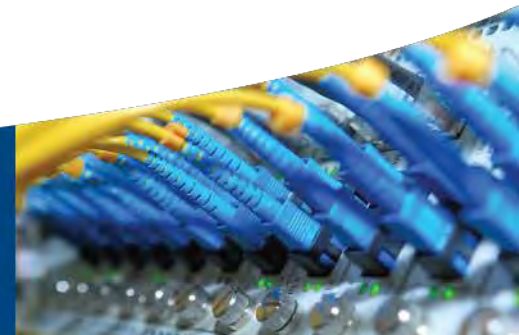
Telecommunications Law



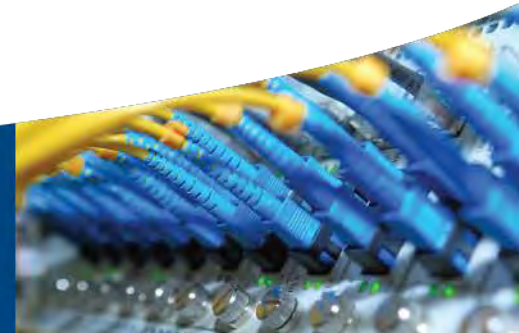
Wireless Facilities

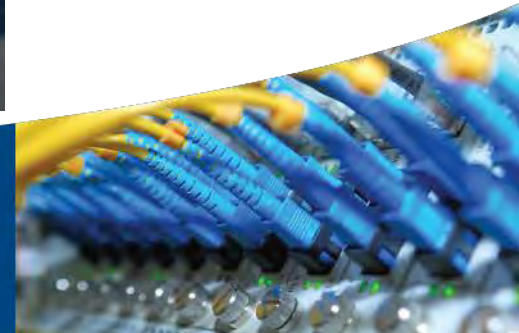
- Four Types of Traditional Wireless Facilities
 - Lattice
 - Monopole
 - Guyed
 - Stealth (Hidden) Antennas
- A Distributed Antenna System (DAS) is a hybrid collection of smaller wireless antennas (called nodes by the providers)
 - Single User
 - Multiple User
 - Traditional Setting – arenas; campuses;
 - Now RIGHTS OF WAY
- DAS nodes could double to 20,000 by the end of 2012 and reach 150,000 by 2017

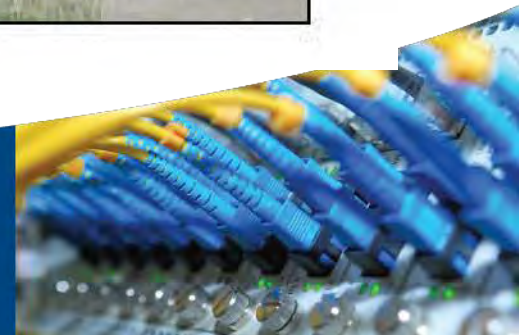


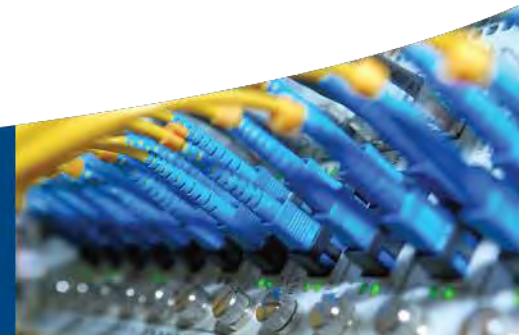


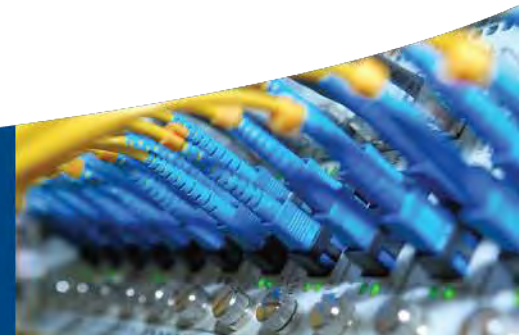
Distributed Antenna Systems







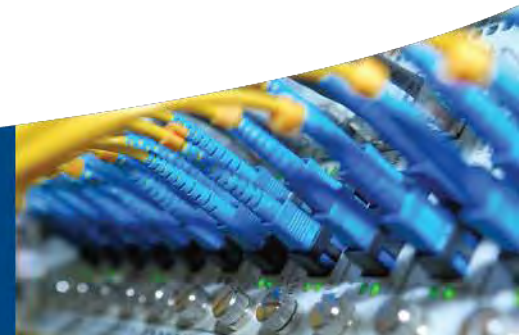






Key Federal Provisions

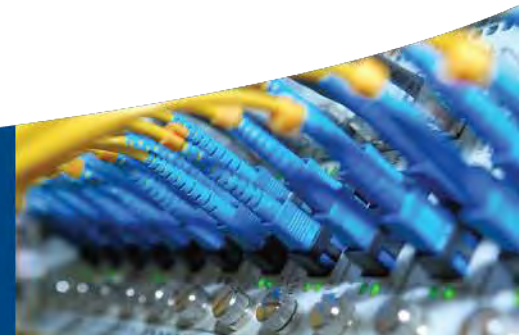
- 47 USC Section 332(c)(7) of the Telecommunications Act – Preservation of Local Zoning Authority
- 47 USC 253 – Removal of Barriers to Entry (questionable whether this provision applies)
- HR 3630 – Section 6409 – Mandatory Collocation



Background

332(c)(7)

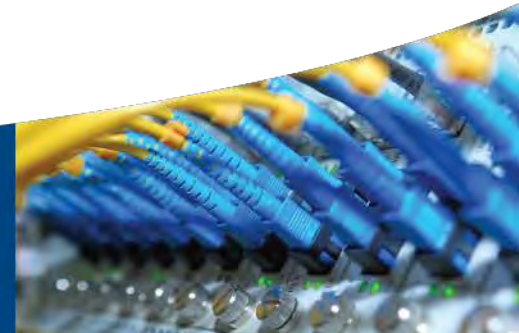
- Grant of Authority to Regulate:
- (A) **Except as provided in the paragraph**, nothing in this chapter shall limit the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction and modification of **personal wireless service facilities**. (Emphasis added)
- “Personal Wireless Service Facilities:” commercial mobile services, unlicensed wireless services and common carrier wireless exchange access services.
 - Not wireless broadband used only for Internet



Background

332(c)(7)

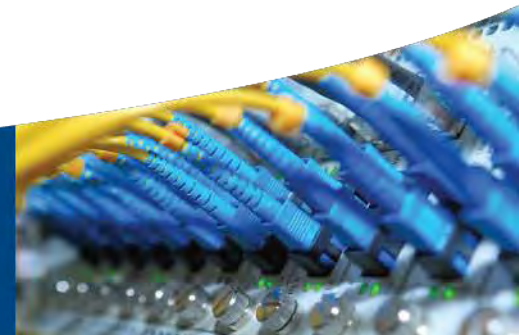
- Protects local zoning rules but:
 - Local regulation shall not:
 - unreasonably discriminate among providers of functionally equivalent services;
 - prohibit or have the effect of prohibiting the provision of personal wireless services
 - Localities can require providers to meet FCC RF standards, but cannot regulate based on RF (but may be able to refuse to lease their own facilities on RF grounds)



Background

332(c)(7)

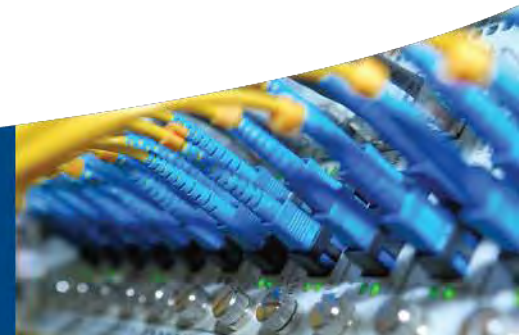
- Must act on a request within a reasonable period of time after the request is duly filed
- Any decision to deny must be in writing and supported by substantial evidence contained in a written record
- Provider can challenge zoning decision in court within 30 days



Background

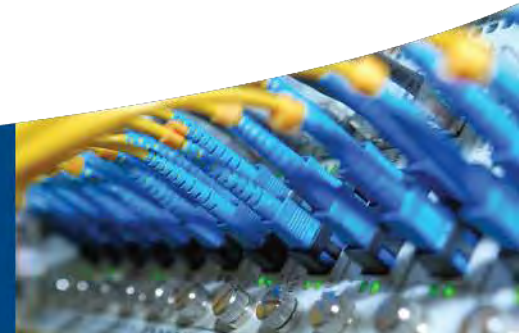
Section 253

- No state or local regulation “may prohibit or have the effect of prohibiting the ability of any entity to provide ... telecommunications service”
- Two safe harbors where local action is protected even if prohibitory:
 - Requirements that are competitively neutral ... to protect the public safety and welfare
 - Management of the public ROW, and charges for use of ROW on a competitively neutral and nondiscriminatory basis
- May not apply to wireless providers



Effective Prohibition Standard

- The FCC declared that “a State or local government that denies an application for personal wireless service facilities siting solely because “one or more carriers serve a given geographic market” has engaged in unlawful regulation that “prohibits or ha[s] the effect of prohibiting the provision of personal wireless services”



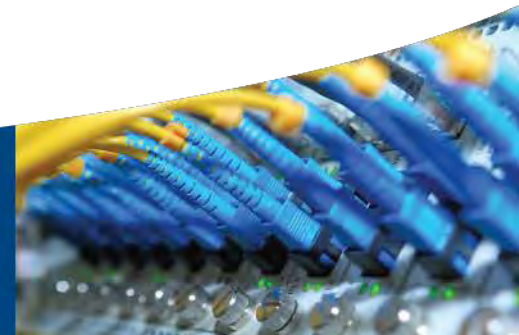
FCC Shot Clock

- FCC asserted right to “implement” Section 332 by interpreting “vague terms” in provision. FCC authority was upheld by the 5th Circuit (Arlington, Texas case)
- FCC adopted a nationwide standard for a reasonable period of time” to process wireless applications
- 90 days for collocation request
- 150 days for new siting applications
- Time runs from a “complete application”
 - But only if the applicant is notified within 30 days of filing that the application is incomplete.



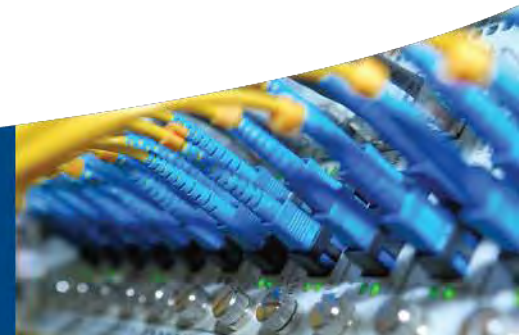
Key State Provisions

- Permit Streamlining Act, Gov't Code 65920 et seq.
- Pub. Util. Code Sec. 7901 et seq.
- Mandatory Collocation, Gov't Code 65850.6



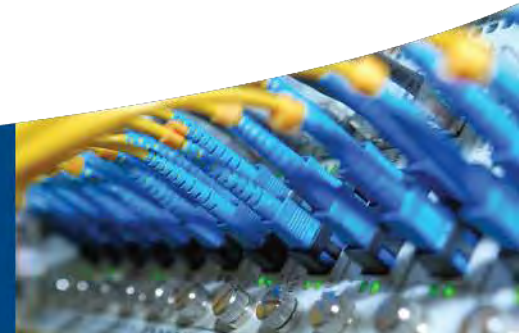
Permit Streamlining Act

- Different and, sometimes, shorter timeframes than the FCC Shot Clock
- Limited ability to extend, even with mutual consent
- *In re Cell Tower Litigation*, Case No. 07cv399, US District Court, Southern District of California (Aug./Sept. 2011) Held: PSA required the city to approve or disapprove a project 60 days from the determination by the lead agency that the project was exempt from CEQA and that failure to act “shall be deemed approval of the permit application for the development project.” 2011 U.S. Dist. LEXIS 96599, *28 (Aug. 26, 2011) (quoting Gov’t Code § 65956 (b)). Even though applicant had agreed to extension in writing
- Exceptions: PSA’s automatic approval requirements do not apply to a non-legislative or adjudicatory project when such permit application would require legislative changes in applicable general plans, zoning ordinance, or other controlling land use regulations. The PSA also does not apply to administrative appeals.



PUC 7901; 7901.1

- Telephone companies “ may construct lines... along and upon any public road...and may erect poles, posts... and other necessary fixtures... in such a manner as not to incommode the public use.”
- Cities “ have the right to exercise reasonable control as to the time, place, and manner in which the roads are accessed”

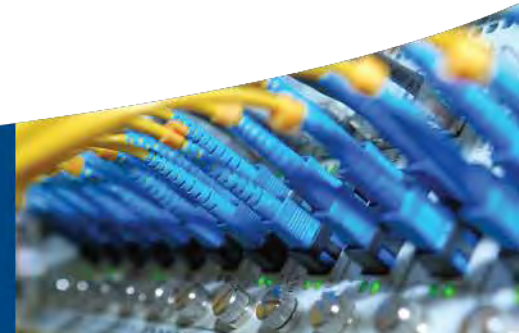


Mandatory Collocation California Law

- California – Streamlining Collocation to Facilitate Deployment
- Government Code section 65850.6

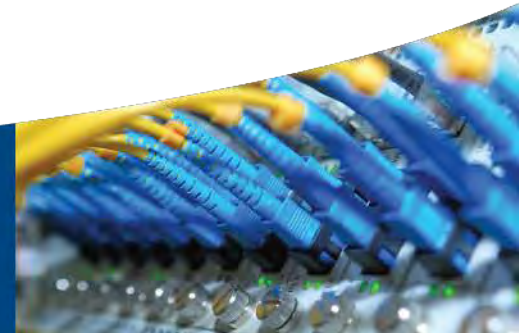
Generally, collocation is a permitted use not subject to discretionary review if:

1. It is on a permitted wireless telecommunications facility (WTF);
 2. The WTF was permitted by a discretionary permit that had environmental review under CEQA; and
 3. The new facility satisfies the conditions that applied to the underlying facility (height, bulk, etc.)
- Requires localities to think “what if?”



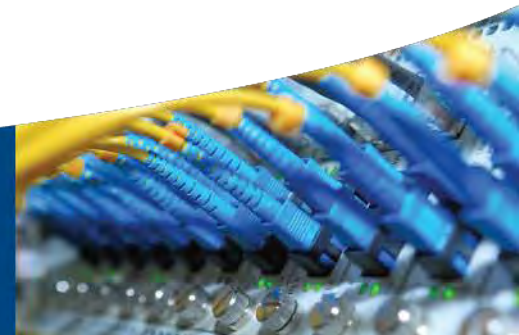
Mandatory Collocation

- What is a WTF?
- Permitted under local wireless regulations that regulate: height, location, bulk, and size of collocation facilities, including percentage of facility that may be occupied by collocation equipment; and aesthetic and design requirements
- Meet State and local requirements (i.e. General plans, specific plans and zoning requirements)



Mandatory Collocation

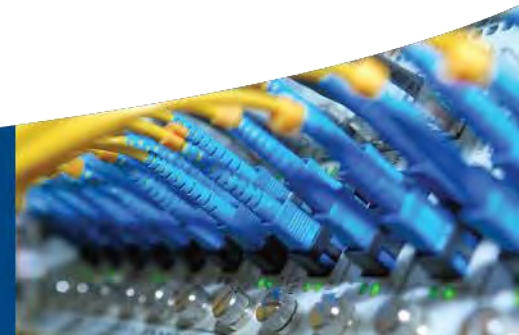
- Is reviewed under CEQA (the California Environmental Quality Act) similar to NEPA
- There is at least one noticed public hearing on the application
- If approved, all future collocations that are consistent with the approval are ministerial approvals.



Distributed Antenna Systems

Unique Issues

- DAS has been licensed as a telephone company by the CPUC and claims 7901 “rights”
 - 7901 Eligibility is in litigation
- CEQA regulations are unclear
 - GO 159A applies to wireless providers and defies to local agencies
 - GO 170 (vacated, pending rulemaking) CPUC as lead agency for CEQA; most telephone/DAS permits exempt



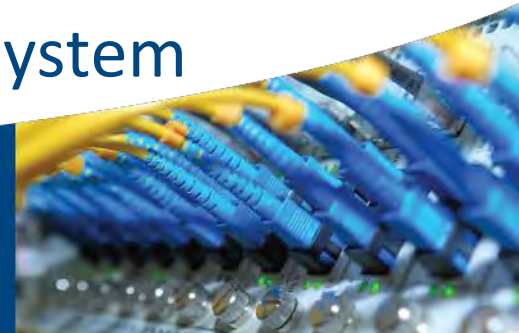
More Unique Issues

- DAS location of preference is the public right-of-way
- Claims exemption from zoning ordinances
- Seeks to go where other wireless facilities are prohibited
- May be built on spec - hoping to lease the facilities to providers like AT&T, T-Mobile, Sprint – meaning facilities could occupy ROW but not be used
- DAS seeks protections granted to providers under the Telecommunications Act, but sometimes claim exemption from obligations



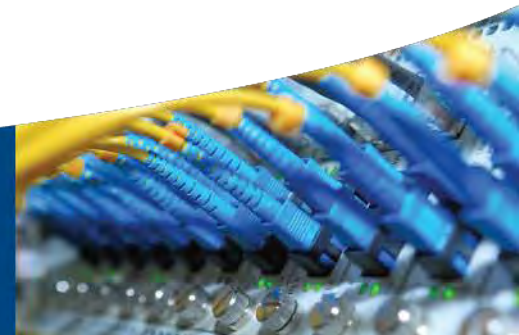
A Few Industry Arguments

- Nodes are not antenna
- We cannot move any of our nodes because DAS is a network approach to wireless service
- City must approve as a network, not individual antennas
- Undergrounding requirements do not apply to us because we are wireless and cannot go underground
- DAS is a telephone company, DAS is a utility
- City is preempted – Must approve our system



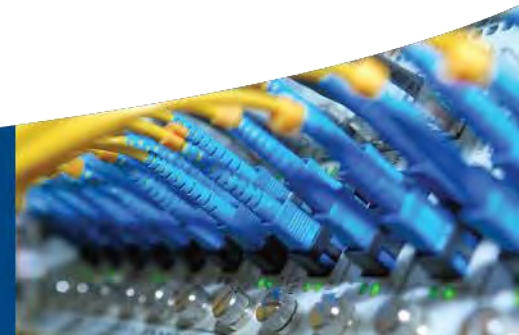
DAS Legal Issues

- Is a DAS provider who leases facilities to cell phone companies a commercial mobile radio service provider?
- Is the application subject to the FCC shot clock and PSA?
- Is the placement of DAS facilities subject to, and protected by Section 332?
- How does the prohibition test work when the “need” is to *enhance data service speeds* as opposed to closing a gap in service?
- Can the city regulate DAS differently from traditional cell facilities or other facilities in the rights-of-way? Is this discriminatory?
- How does 7901 impact the City’s rights to deny or modify the application?



Some Questions to Ask

- Is the DAS based system necessary or required to provide wireless services in the city?
- Is there a significant gap in service?
 - Carrier's web site
 - Standards; testing protocols
- Alternative Technologies and Locations
 - Non-right of way sites
 - Least Intrusive Means – technology neutral?
 - Macro v. many DAS micro sites?



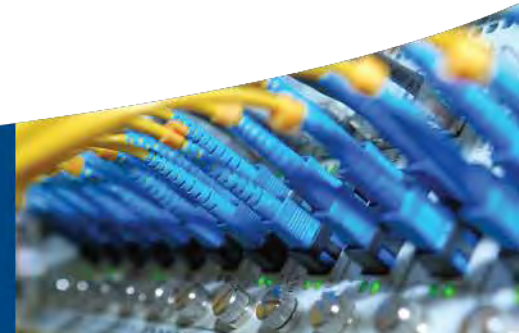
DAS Policy Issues

- Does the City want to share its light poles?
- Does the City allow ancillary equipment above ground (does it matter if the area is residential)
- Is it better to have a lot of small antennas or a few larger antennas?
- If the City allows any single user on its proprietary property, will it be required to lease to others and allow collocation?
- If City allows DAS on ground that it is unintrusive, how will collocation be addressed? What if multiple providers wish to build?
- How do you address community concerns about RF?



Questions?

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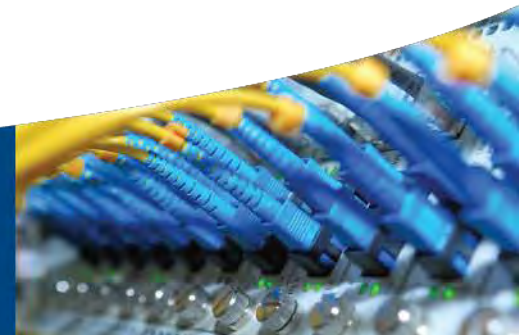
New Wireless Challenges Created by HR 3630

Local and National Strategies for Success

PRESENTED BY

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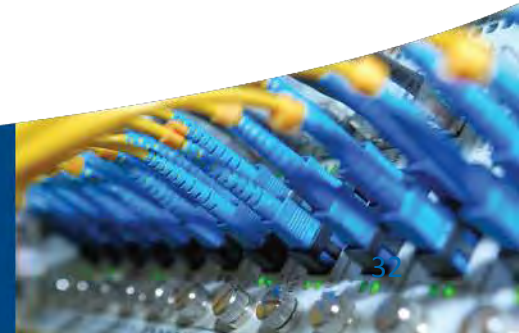


Revising Wireless Collocation Under HR 3630

Sec. 6409. WIRELESS FACILITIES DEPLOYMENT.

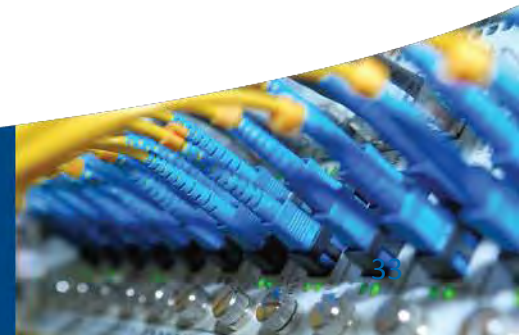
(a) Facilities Modifications

(1) “IN GENERALa 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.”



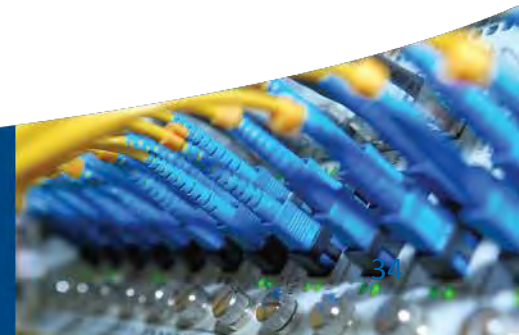
Revising Wireless Collocation Under HR 3630

- (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.



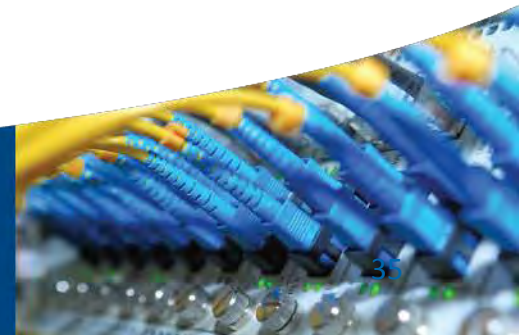
Revising Wireless Collocation Under HR 3630

- (3) APPLICABILITY OF ENVIRONMENTAL LAWS.—
Nothing in paragraph (1) shall be construed to relieve the Commission from the requirements of the National Historic Preservation Act or the National Environmental Policy Act of 1969.



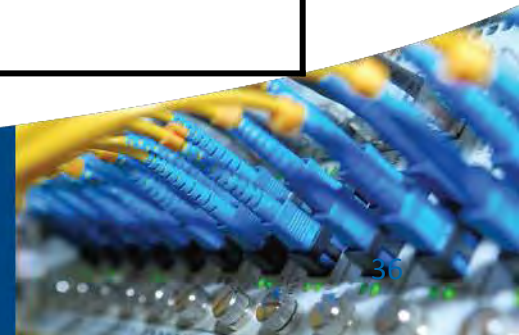
What Does the Restriction Mean?

Key terms undefined	Questions:
“Wireless tower”	Limited to towers solely designed to support wireless antennae?
“Collocation”	What activities/facilities does it include?
“Base station”	What facilities constitute a base station?



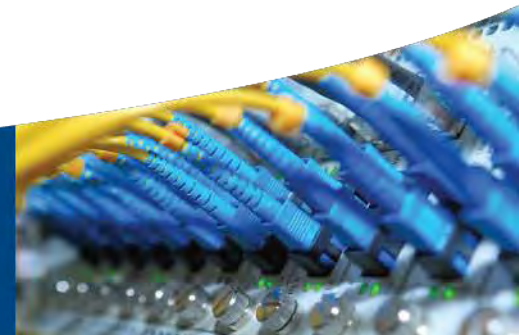
What Does the Restriction Mean?

Undefined terms	
“substantially change the physical dimensions”	<ul style="list-style-type: none">• Measured in terms of a percentage increase in height, width, and volume only? OR <ul style="list-style-type: none">• impact? (safety hazards, intrusion on sensitive areas changes that expose structures on a stealth facility)? AND WHAT ABOUT: <ul style="list-style-type: none">• Weight or wind-loading changes?• Noise characteristics?• Changes to grandfathered, non-conforming use towers?



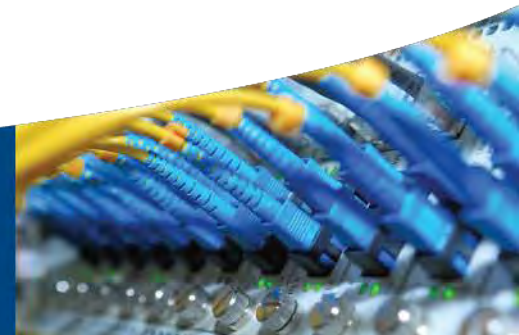
Possible Sources for Terms

- Nationwide Programmatic Agreement, Report and Order FCC 04-22
<http://wireless.fcc.gov/siting/npa.html>
- Also see: Public Notice DA 02-28
<http://wireless.fcc.gov/siting/environment.html#collocation>



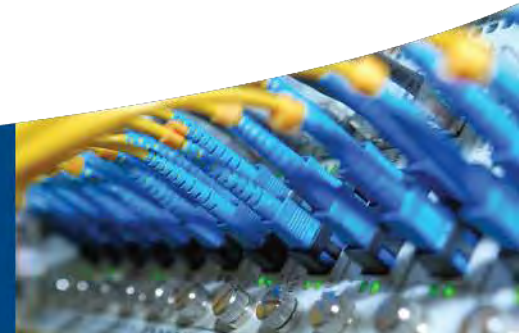
Possible Sources for Terms

- Fact sheet says tower
“is any structure built for the sole or primary purpose of supporting antennas and their associated facilities used to provide FCC-licensed services. A water tower, utility tower, or other structure built primarily” for another purpose “”is not a “tower””...

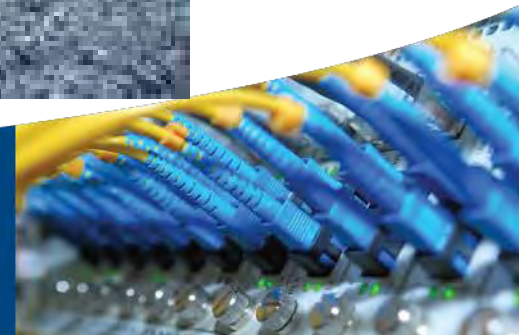


Base Station

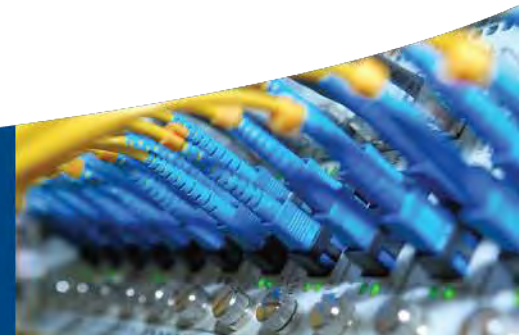
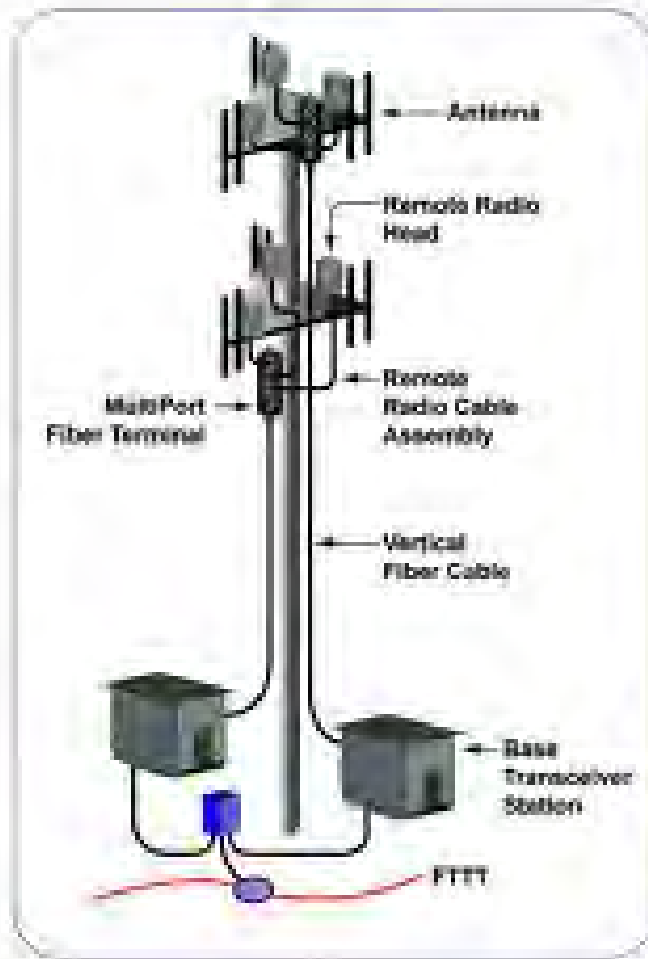
- Defined several times in FCC regulations;
- PCIA (cell industry association) cites 47 CFR Sec. 90.7
- “A station at a specified site authorized to communicate with mobile stations.”



What is what?

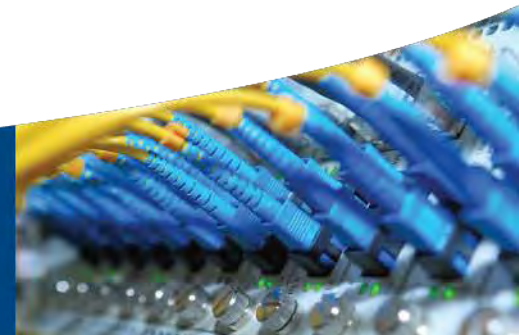


What is what?



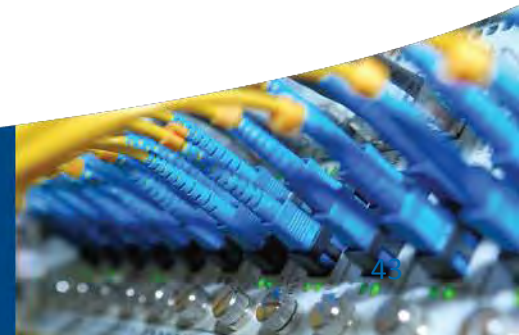
What is covered?

DAS?
Only
Freestanding
Towers?



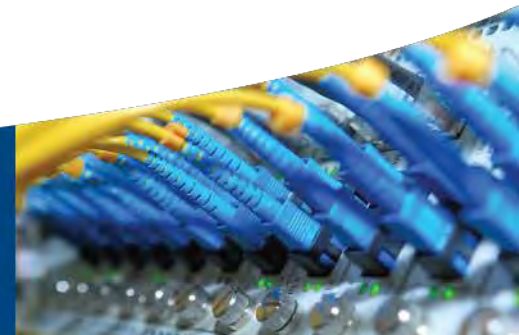
Expect

- Demands for special collocation treatment.
- Challenges to ordinances that allow consideration of factors other than “physical dimension.”
- Challenges to ordinances re: non-conforming uses
- Refusals to fill out forms that go beyond the “physical dimension” test, and aggressive interpretations of terms.
- Possible FCC declaratory actions/rulemakings.
- Requests that local failure to meet any new shot clock deadline means automatic approval.
- Debate as to what “shall approve” means.
- Possible damages/attorneys fees claims?



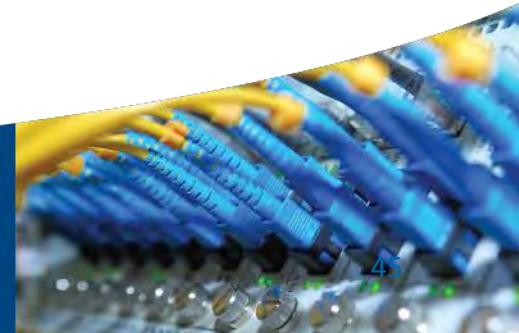
How to Respond - Overview

- Maintain and revise local ordinances
- Engage at the FCC and on the Hill
- Be prepared to defend principles



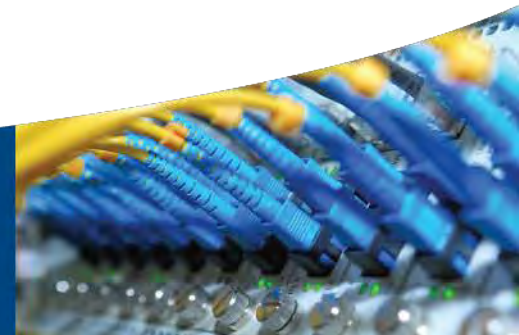
How to Respond

- *Immediately* review local ordinances, forms and processes for conformance with federal law; identify pending proceedings where new law is implicated
- *Recognize* that law does not require automatic approval of all collocation applications, and for now, localities must decide how to apply key provisions of law
- *Consider* appropriate changes to local codes
- *Brief* local officials/zoning boards on new law so that they are aware of new law
- *Prepare* to file comments if FCC begins to implement new law
- *Review* contracts for local property (light poles) and ensure collocation is addressed



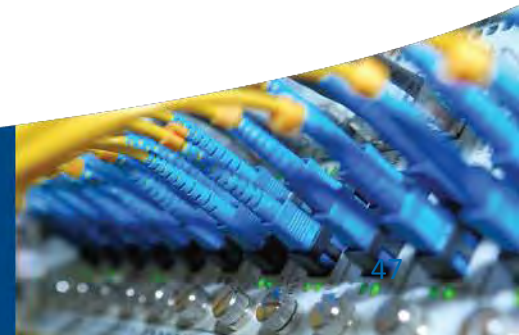
Ramping Up for DAS – Review Wireless Ordinance with eye on DAS facilities

- Does Ordinance apply to and regulate the rights-of-way (note limits on zoning codes, if wireless ordinance is part of that code)?
- Does Ordinance exempt utilities?
- Does Ordinance prohibit facilities in all residential zones?
- Does Ordinance provide standards for use of the rights-of-way – height, bulk, spacing, aesthetics?



Engaging at FCC and on Hill

- Public agency associations, such as IMLA, USCM and NLC, and their members, and CA cities have played significant role at FCC over last year.
- Example: *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*, WC Docket No. 11-59 (Apr. 7, 2011).
 - FCC asked to adopt new shot clocks, limits on authority to regulate DAS antennas in RoW
 - Limit localities to recovering costs (narrowly defined) for telecom facilities; regulate local RoW management



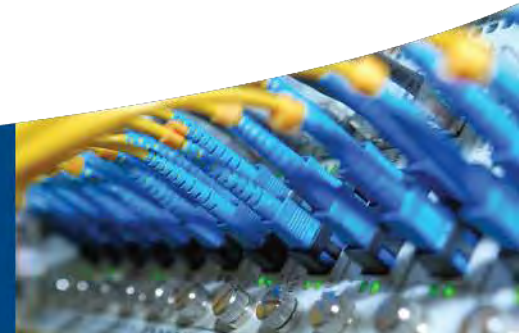
Engaging at FCC and on Hill

- IMLA and other national associations responded *factually* to claims that local actions/fees were deterring broadband deployment
- Urged FCC to reactivate an intergovernmental advisory committee, and to hold seminars and gather information that could lead to “best practices”
- FCC *has* reactivated the Intergovernmental Advisory Committee, and is holding seminars on key issues
- *But activity depended on member financial support and active response to FCC*



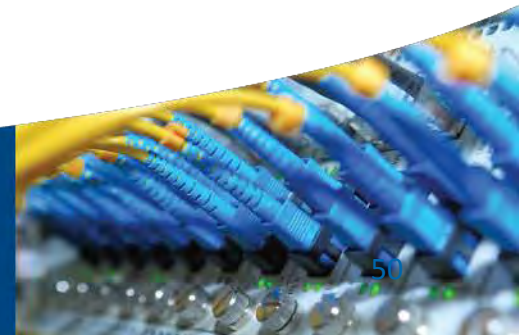
Engaging in CA Legislation and at the CPUC

- GO 170
- SB 1161 – attempt to preempt both the CPUC and local regulation
- Engage with the state law makers



Defending Principles

- Fifth Circuit Shot Clock Appeal 668 F.3d 229 (2012)
 - challenged FCC authority to regulate local zoning processes
 - principle: where Congress desires to have FCC to regulate local practices, it must say so clearly; the FCC cannot generally regulate state and local governments
 - Fifth Circuit ruled against localities on merits *because* it concluded it must defer to FCC view of its jurisdiction; acknowledged decision conflicted with other circuits
- Petition for certiorari due June 27
- Arlington leading an appeal group



Questions?



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