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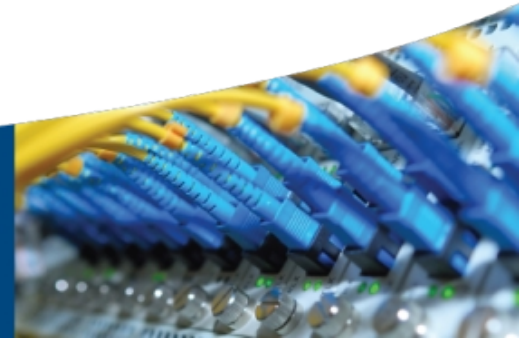
The FCC's New Wireless Rules: What They Say, How Your Community Might Respond?

Gerard Lavery Lederer



March 13, 2015
Washington D.C.

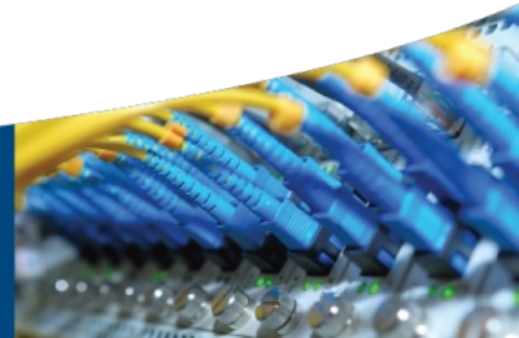
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Caveat

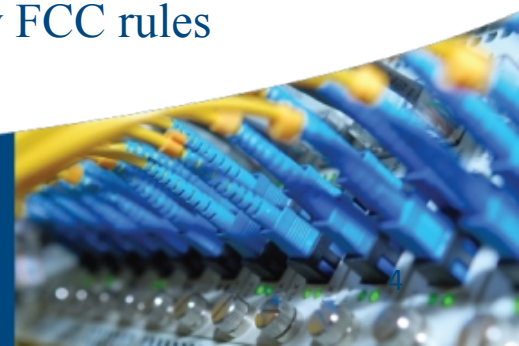
This presentation should not be considered legal advice, and it does not create an attorney-client relationship. It represents our best thinking on issues and developments arising from the FCC's Wireless Infrastructure Report & Order. Should you disagree with any conclusion or suggestion, or if you would simply like to add to the discussion, email Gerard.Lederer@bbklaw.com or provide a comment in the area provided on your screen.

Thanks to Tripp May, Esq. for use of some of the photos in this presentation.



Supreme Court Rules on Section 332(c)(7) “In Writing” Question

- Applies to “personal wireless service (PWS) facilities,” which includes commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services
 - Generally preserves local zoning authority, but imposes five limitations.
 - Shall not “unreasonably discriminate” among providers of functionally equivalent services (332(c)(7)(B)(i)(I))
 - Prohibit or effectively prohibit provision of PWS (332(c)(7)(B)(i)(II))
 - Locality must act on request within “reasonable period of time”
 - Decision to deny must be “in writing” and supported by “substantial evidence”
- Denial and substantial evidence need not be in same document, but must be essentially contemporaneous. See *T-MOBILE SOUTH, LLC v. CITY OF ROSWELL* http://www.supremecourt.gov/opinions/14pdf/13-975_8n6a.pdf
- No regulation of RF – except may require applicant to satisfy FCC rules
 - Limitations do not apply to proprietary property.



Goals of Program

- Understand that there are now three Federal shot clocks for siting wireless devices and that all three apply to DAS/small cell applications.
- Examine whether your laws or forms/practices are consistent with FCC new time frames. If not:
 - Do you want to change your laws to conform, or
 - Do you want to merely change your practices?
 - Do you want to affirmatively seek to reduce impact of order?



FCC Report and Order

Federal Communications Commission

FCC 14-153

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
Acceleration of Broadband Deployment by)	
Improving Wireless Facilities Siting Policies)	WT Docket No. 13-238
)	
Acceleration of Broadband Deployment:)	
Expanding the Reach and Reducing the Cost of)	WC Docket No. 11-59
Broadband Deployment by Improving Policies)	
Regarding Public Rights of Way and Wireless)	
Facilities Siting)	
)	
2012 Biennial Review of)	WT Docket No. 13-32
Telecommunications Regulations)	

REPORT AND ORDER

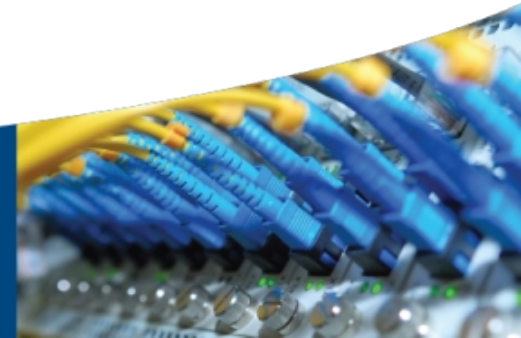
Adopted: October 17, 2014

Released: October 21, 2014

By the Commission: Chairman Wheeler and Commissioners Clyburn, Rosenworcel, Pai, and O'Rielly
issuing separate statements.

155 Page Report and Order

- Adopted October 17,
- Released October 21,
- Published in Fed. Register on January 8, 2015
- Appeal Date – March 9
- Effective Date – April 9



Section 6409(a) (47 USC 1455)

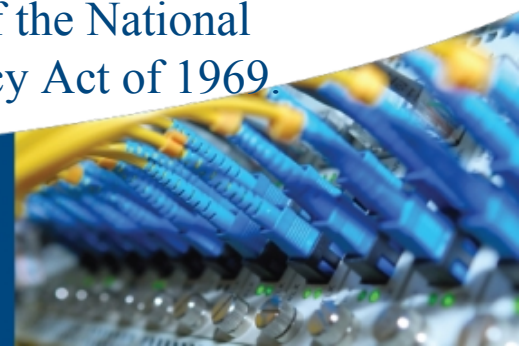
(a) **Facility modifications.**

(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.

(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.

(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.

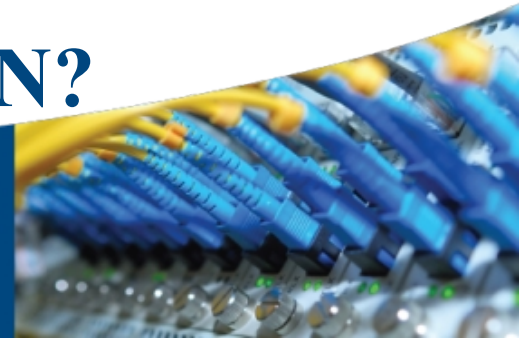


Section 6409(a)

BASIC RULE

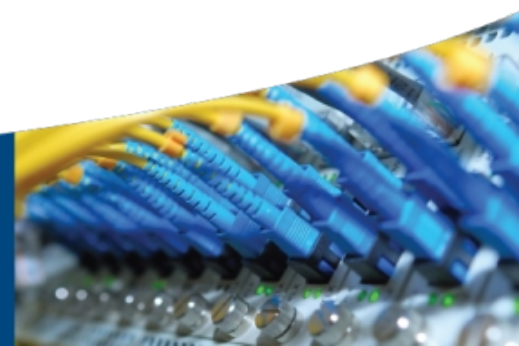
State and local governments “may not deny, and shall approve” any “eligible facilities request” so long as it does not “substantially change the physical dimensions of the existing wireless tower or base station.”

WHAT DOES THIS MEAN?



Section 6409(a)

State and local governments “may not deny, and shall approve” any “eligible facilities request” so long as it does not “substantially change the physical dimensions of the existing wireless tower or base station.”



ELIGIBLE FACILITIES REQUEST

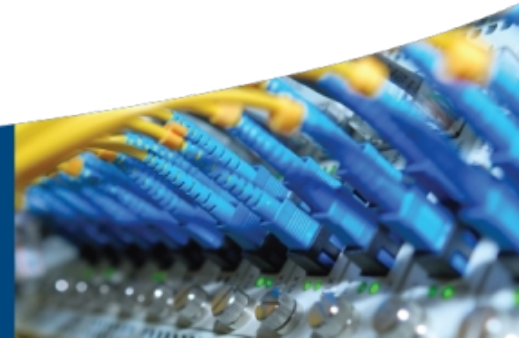
Collocations and modifications (removals and replacements) of wireless transmission equipment at an existing wireless tower or base station.

“**wireless transmission equipment**” means “any equipment that facilitates transmission for any Commission-licensed or authorized wireless communication service.” This includes backup power.



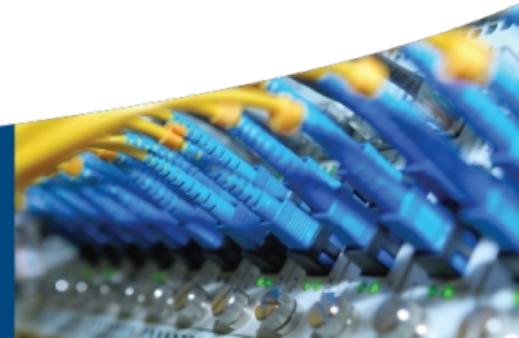
Section 6409(a)

State and local governments “may not deny, and shall approve” any “eligible facilities request” so long as it does not “substantially change the physical dimensions of the **existing wireless tower or base station.**”

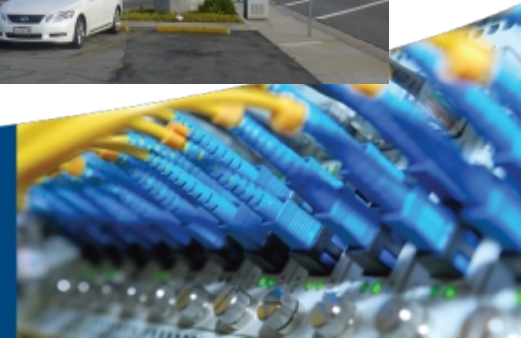


Wireless Tower

- **DEFINED AS:** “any structure built for the sole or primary purpose of supporting any Commission-licensed or authorized antennas and their associated facilities.”

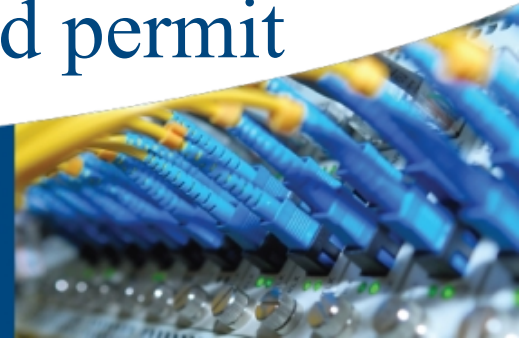


Wireless Tower



Base Station

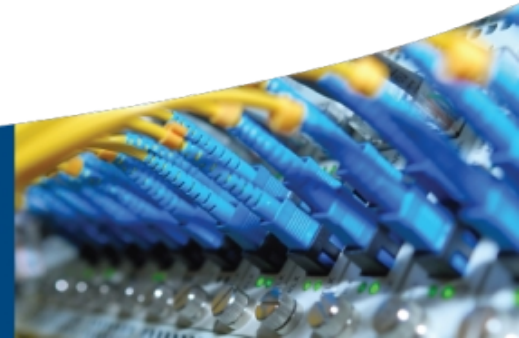
- **DEFINED AS:** “the equipment and non-tower supporting structure at a fixed location that enable Commission-licensed or authorized wireless communications between user equipment and a communications network.”
- **IN ENGLISH:** the transmission equipment itself and any non-tower structure that supports transmission equipment under a valid permit for a wireless use.



Base Station

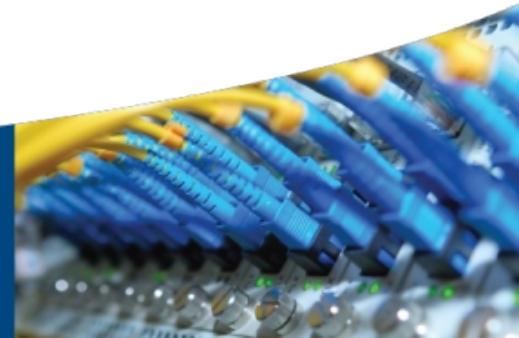


Both of the above photos contain non-tower structures that are base stations as they support legally permitted wireless transmission equipment.



Section 6409(a)

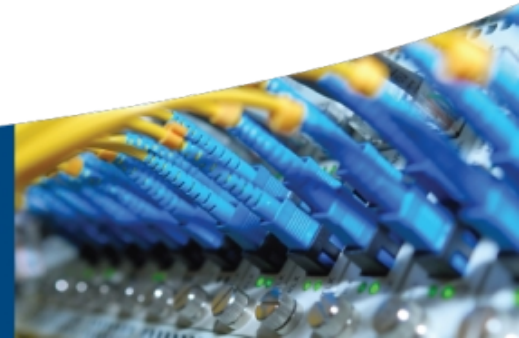
State and local governments “may not deny, and shall approve” any “eligible facilities request” so long as it does not “substantially change the physical dimensions of the existing wireless tower or base station.”



Substantial Change Occurs When...

the proposed eligible facilities request increases the height more than:

- (1) 10% or one additional antenna array not more than 20 feet higher for towers not in the rights-of-way, or
- (1) 10% or 10 feet (whichever is greater) for towers in the public rights-of-way and all base stations;
or

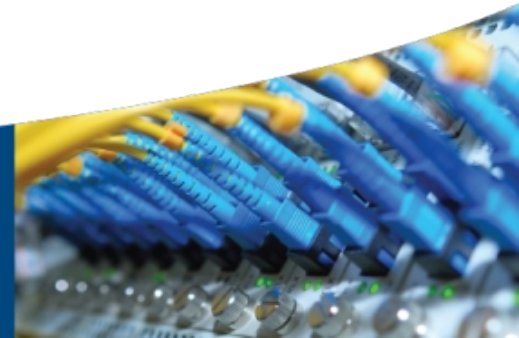


Substantial Change Occurs When . .

•

the proposed eligible facilities request **increases the width** more than:

- (1) 20 feet or the tower width at the level of the appurtenance (whichever is greater) for towers on not in rights-of-way, or
- (2) six feet for towers in the public rights-of-way and all base stations; **or**

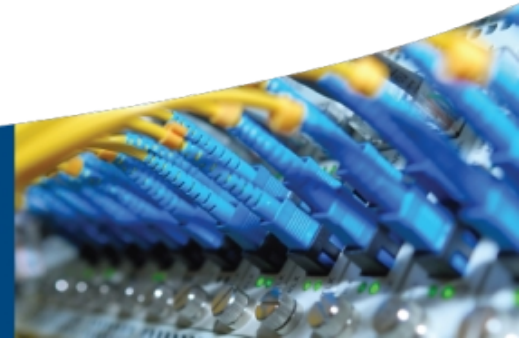


Substantial Change Occurs When . .

•

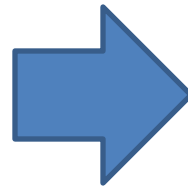
the proposed eligible facilities request involves
any excavation outside either:

- (1) the lease or license area on private property,
or
- (2) the proximity to the ground-mounted
equipment in the ROW; or



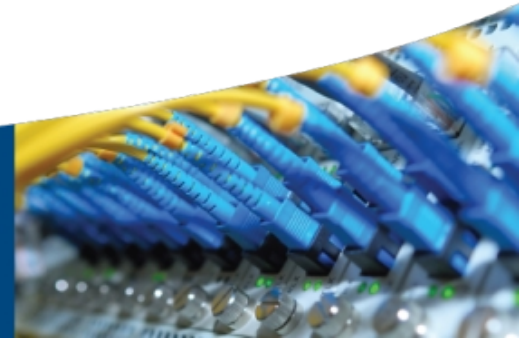
Substantial Change Occurs When...

the proposed eligible facilities request would defeat the existing concealment elements of the tower or base station; or



Substantial Change Occurs When...

the proposed collocation would violate a prior condition of approval that does not conflict with the Commission standards for a substantial change.



Substantial Change

TAKEAWAY POINTS

- **OBJECTIVE:** based on height, width, cabinets, excavation, camouflage and compliance with certain prior conditions of approval
- **DISJUNCTIVE:** must comply with all measures (violate one and it's a substantial change)
- **CUMULATIVE:** establishes a cumulative limit for increases that depends on the structure type and location
- Provides generally lower thresholds for sites in the ROW.
- Effectively creates an invisible envelope around a structure within which wireless infrastructure can freely modify their transmission equipment



May Not Deny, and Shall Approve

affects government in its
regulatory capacities

no effect on government in its
proprietary capacities

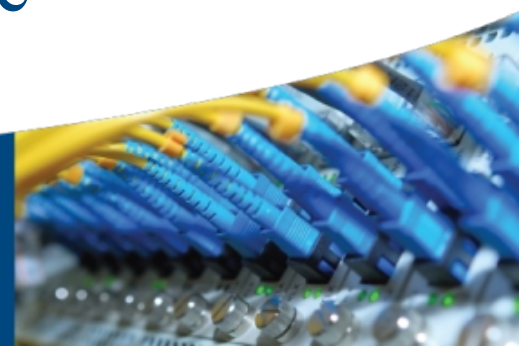
(watch modification language in leases/licenses anyway)



May Not Deny, and Shall Approve

PERMIT DEEMED GRANTED AFTER FAILURE TO ACT IN 60 DAYS

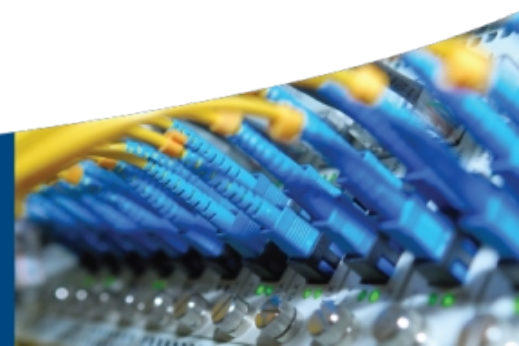
- commences when application is submitted
- period tolls by mutual agreement and some incomplete notices
- period does not toll for a moratorium
- applicant must provide written notice before it starts construction
- disputes still resolved by courts, not the Commission



May Not Deny, and Shall Approve

CONDITIONAL APPROVAL NOT TANTAMOUNT TO A DENIAL

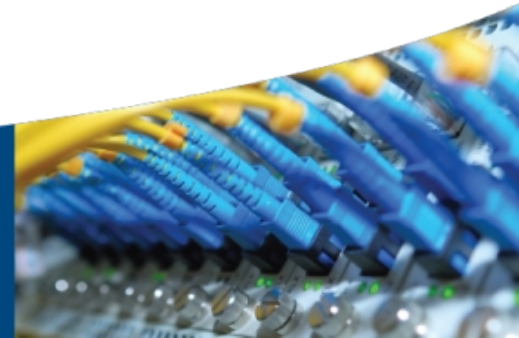
- Generally prohibits/invalidates conditions of approval that:
 - set **limits lower than the criteria for a substantial change**, or
 - impose **subjective standards**
- Probably still valid conditions include drainage, landscaping, maintenance, lighting, fencing, access, indemnification, compliance with all generally applicable laws, etc.



May Not Deny, and Shall Approve

TAKEAWAY POINTS

- Permit applications still required
- 60-day mini shot clock applies
- Mini shot clock runs through moratoria
- Deemed granted remedy for failure to act
- Some conditional approvals ok



Section 6409(a) FAQs

- What happens when the applicant wants to modify a legal nonconforming site?
- Does the “deemed granted” remedy apply to building and encroachment permits, too?
- Can we deny a new site just because we don’t want to see it get 20 feet taller?
- What happens when an applicant submits a project under Section 6409(a) but staff later determines that its not applicable?
- How can we make sure that applications don’t fall through the cracks?



30 Days

60 Days

90 Days

150 Days

• Incompleteness for
6409 (a) & 332(c)(7)

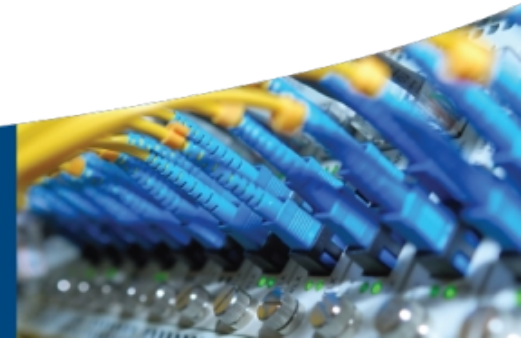
• 6409 Collocations

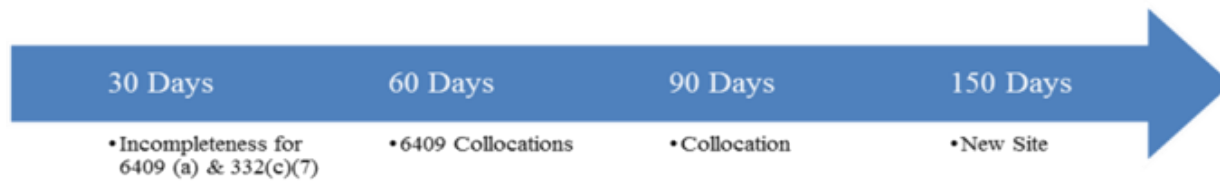
• Collocation

• New Site

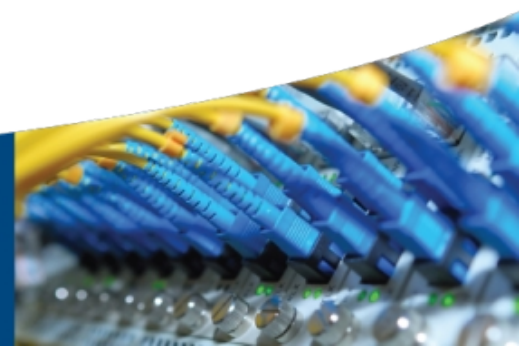
332(c)(7) Terms

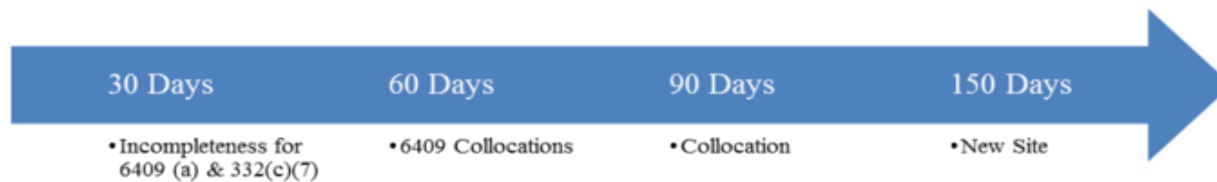
- Order clarifies how shot clocks work and how/grounds for tolling shot clocks
- No shortening of shot clock
- **NO DEEMED GRANTED** for 332(c)(7)
- Clarifies that Shot clocks apply to DAS and Small Cell systems
- No per se violation for preference of municipal property
- Moratoria have no impact on shot clock



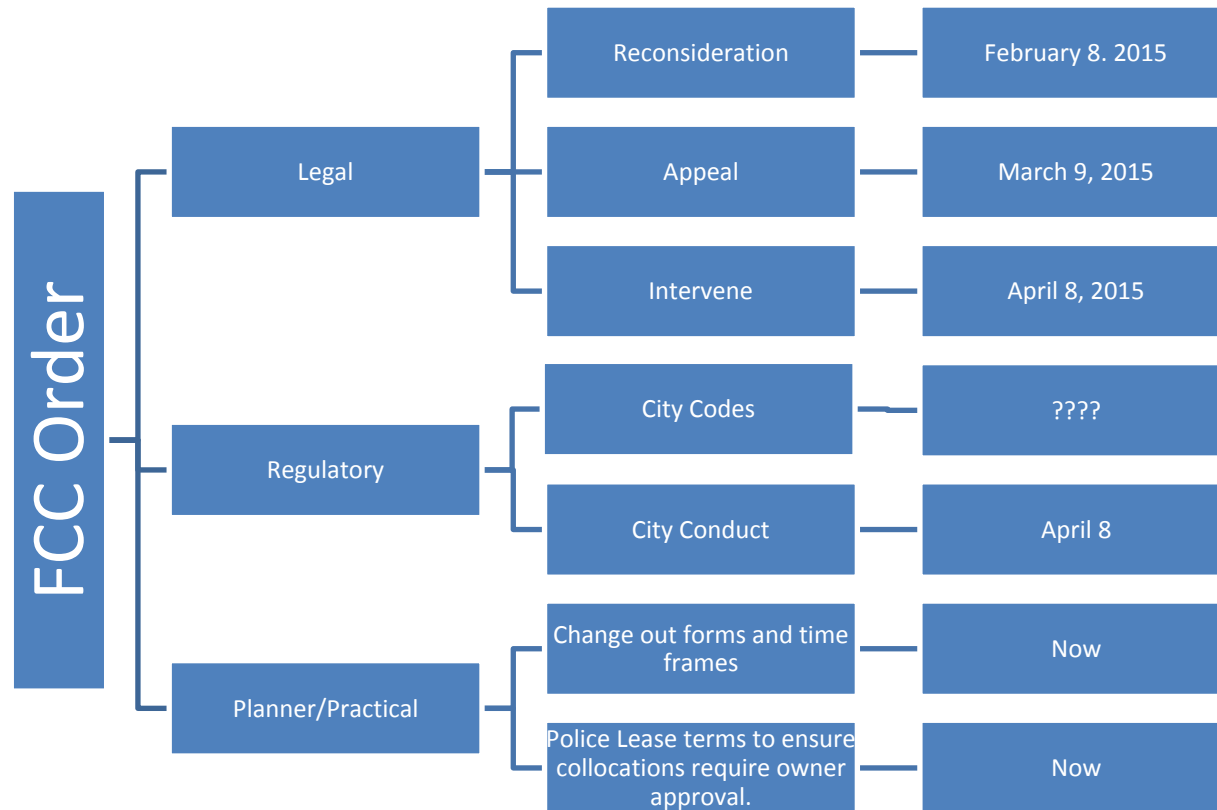


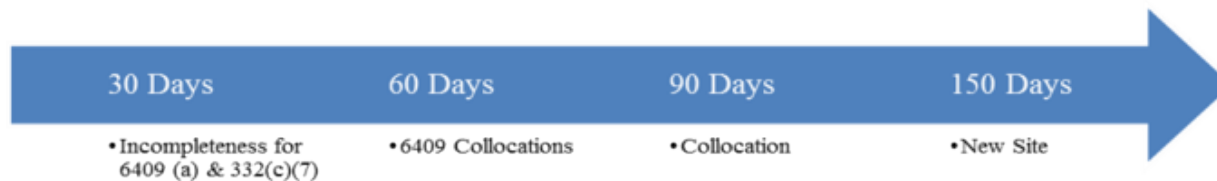
Local government response to the FCC's rules





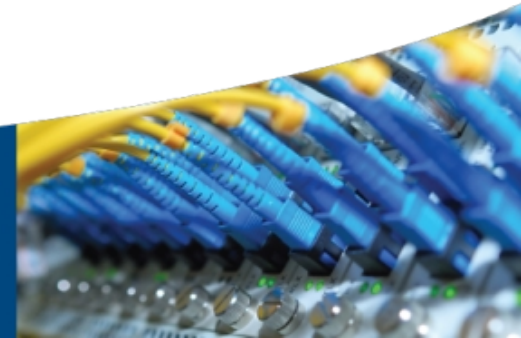
Local Government Responses & Time Line

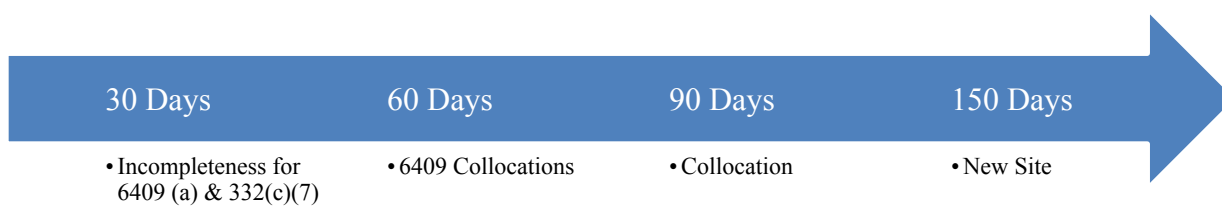




Do's

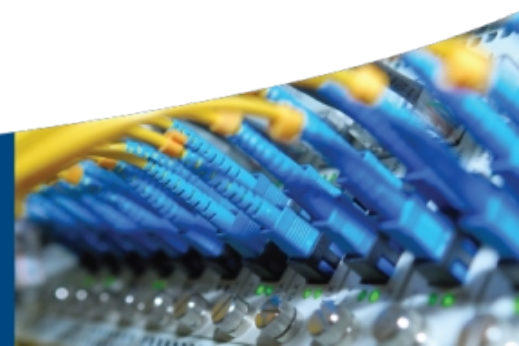
- Examine whether your laws and forms are consistent with new order (Hint: Probably not).
 - Clarify in your ordinance/government practice manual that DAS/small cell applications are entitled to Shot Clock.
- Consider enactment of an ordinance that prefers government property for cell locations.





Do's

- Proprietary
 - Ensure everyone in your organization understands that this order does not grant right of free collocations on government property.
 - Ensure that you don't grant that right in your leases /licenses by requiring approval in writing of municipality/Special District.
 - Ensure that industry does not use new rules as an excuse to install generators or switch out equipment at your sites.



30 Days

60 Days

90 Days

150 Days

• Incompleteness for
6409 (a) & 332(c)(7)

• 6409 Collocations

• Collocation

• New Site

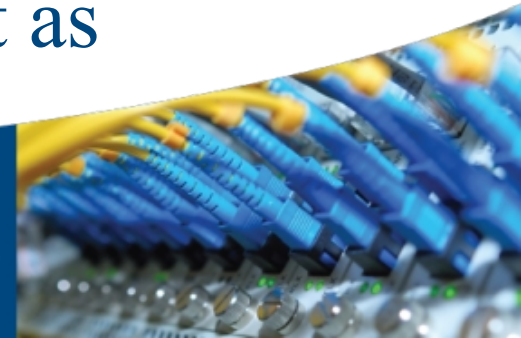
Thoughts on Your Process

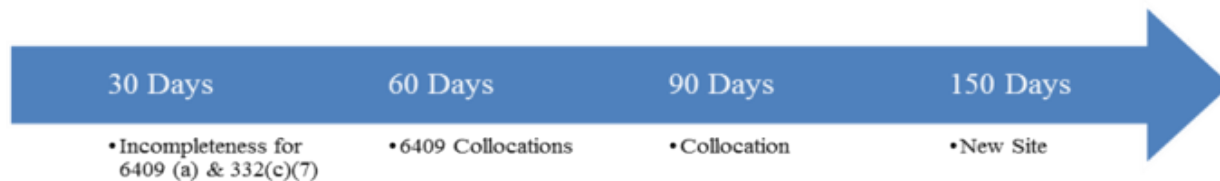
- Require the applicant to choose under what statutory term it is seeking approval:
 - 332(c)(7) or
 - 6409(a).

In so doing, they establish their own time line.

- Understand that there are now three Federal shot clocks, and that Federal times do not extend shorter state timelines.
- You are limited to what you first list as missing.

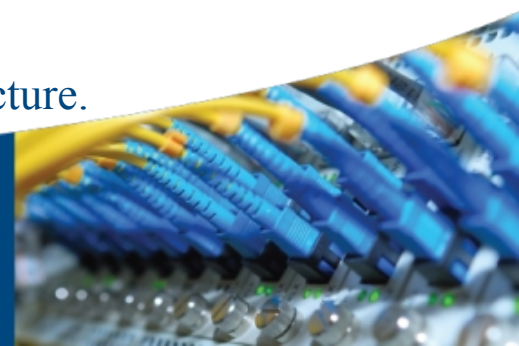
- No opportunity to add missing items





Changes to Your Applications

- Require applicant provide documentation that is “reasonably related to determining whether the eligible facilities request meets the requirements of Section 6409(a).”
 - Meets size change – including cumulative limit
 - Meets any stealth obligations
 - Meets any building code obligations
 - Meets and safety code obligations
 - Meets any non-discretionary structural code
 - Complies with any condition of approval of construction or modification imposed on the applicable wireless tower or base station, i.e. does it comply with:
 - Conditions regarding fencing,
 - Access to the site,
 - Drainage, and
 - Other conditions of approval placed on the underlying structure.



30 Days

60 Days

90 Days

150 Days

• Incompleteness for
6409 (a) & 332(c)(7)

• 6409 Collocations

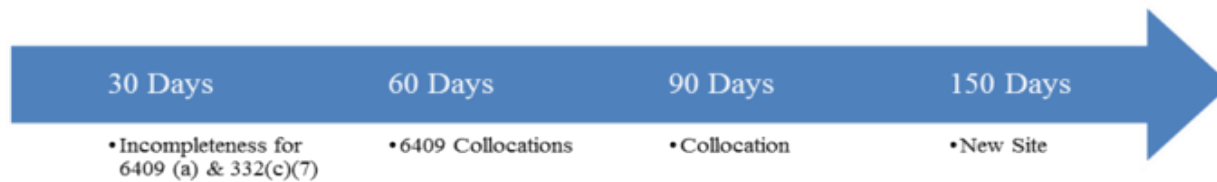
• Collocation

• New Site

6409(a) Forms (cont.)

- Fees are not addressed in Order.
 - Make sure you comply with your state law.
- Not clear that you can demand documentation that site complies with any relevant Federal requirement, including any applicable Commission, FAA, NEPA, or Section 106 requirements.
- Not clear what the status is of local historic preservation limitations.



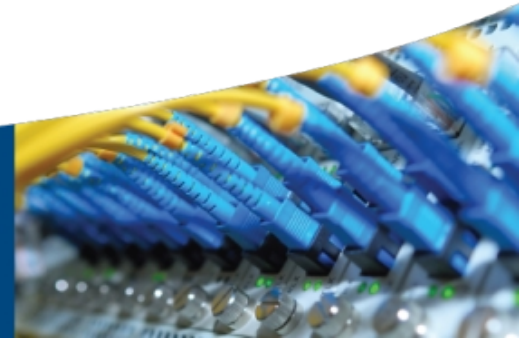


Don'ts

- Impose a moratorium –
 - Commission is specific that moratoria will not toll 6409(a) or 332(c)(7) applications.
- Approve without understanding how a facility may expand – the smallest facility may grow an additional 10 feet up and 6 feet out.
- Demand documentation for the business need for the proposed modification or require a business case for expansion.

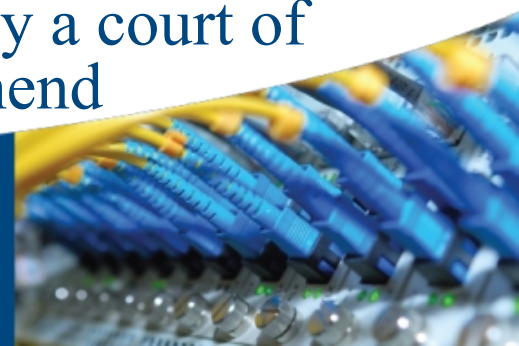


If you choose to change only
your practices

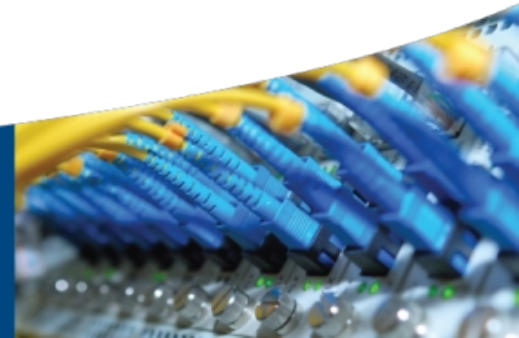


Consider an Acknowledgement Ordinance

- “Community is aware of new 6409 (a) standard as established by Federal Communications Commission in *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 80 Fed. Reg. 1238 (Jan. 8, 2015) (amending C.F.R. Part 1 and 17). (“Report & Order”).”
- Staff is directed to act in compliance with the timeframes and limitations outlined in the Report and Order.
 - Might empower 1 person to review; nothing requires process to be ministerial or nondiscretionary;
 - Might allow staff to require applicants to comply with extensive notice requirements and/or other procedural hurdles
- Should any part of the Order be struck down by a court of competent jurisdiction, staff are directed to amend community practices accordingly.



WHAT IF MY COMMUNITY HAS A WIRELESS ORDINANCE THAT IS INCONSISTENT WITH NEW FCC RULE?

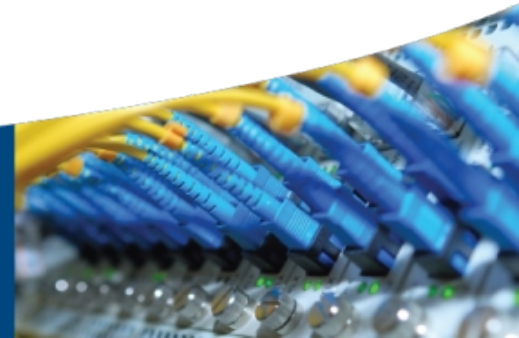


Amending Existing Rules

- You could employ an acknowledgement ordinance in addition to directing staff to act in conformance with the new FCC order.
 - Make clear that any portions of the communities Wireless Ordinance (cite) or other Codes or Forms/Practices that are inconsistent with the new FCC Rules are repealed.
- Repeat reversion language should any part of the order be overturned.



WHAT IF MY COMMUNITY WANTS TO ACTUALLY AMEND OUR CODE TO INCLUDE NEW LANGUAGE?

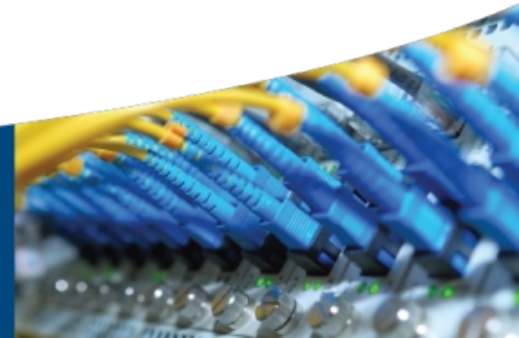


Model Ordinance

- Engage counsel
- See National Orgs model.
- Please make sure not to incorporate into local law obligations not in place in federal law – or subject to appeal.
 - 30 day, 10 day and deemed granted are all subject to OMB approval
 - Other sections that may be overturned on appeal.

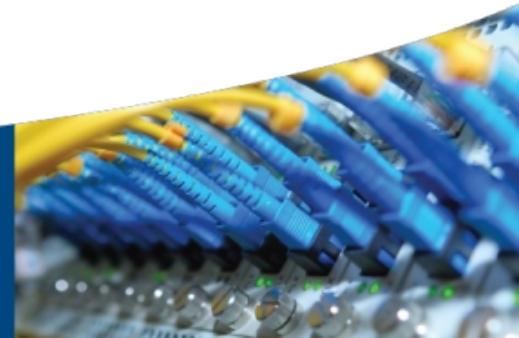


ADDITIONAL STRATEGIES TO LIMIT SCOPE OF 6409(a)



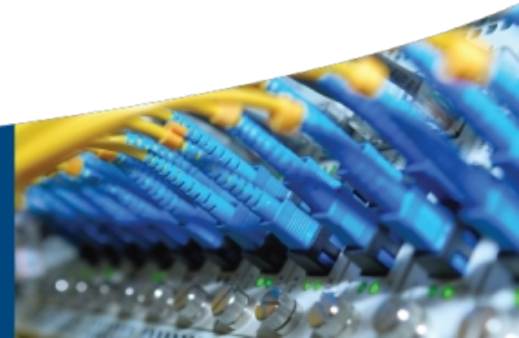
Minimal Steps Your Community Might Take

- Consider enactment of an ordinance that prefers government property for cell locations.
 - As a landlord you have greater rights to govern the “look” of a site than you do as a regulator.
- Consider changing height limits, setbacks and separations distances in your city/county code to accommodate for a 10% growth in towers.



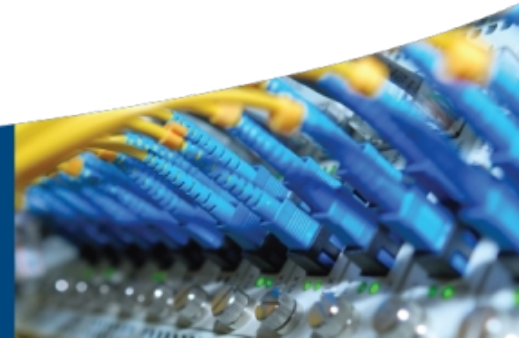
Avoid Permit by Grant

- Limit Permitting for R-O-W
 - By allowing a certain class of small facilities (DAS and small cells in RoW up to a certain size) “as of right” (meaning would only get safety/traffic-type reviews) you can prevent the facilities from expanding later (because the facilities are not “existing” for 6409(a) purposes)



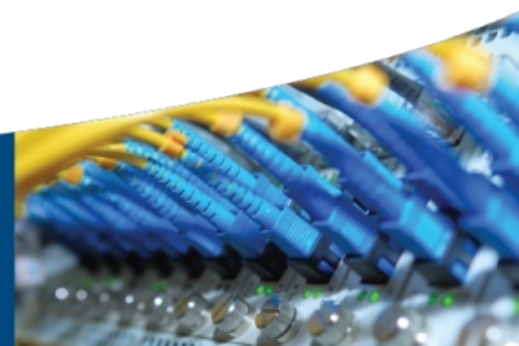
Expanded Requirement of Stealth Deployments

- Unless stealth obligations are present at inception, you cannot impose a 6409(a) collocation request
- Example -- Authorize DAS and small cells of every size , but limit possibility of future growth by requiring stealth or restriction of placement on utility poles)



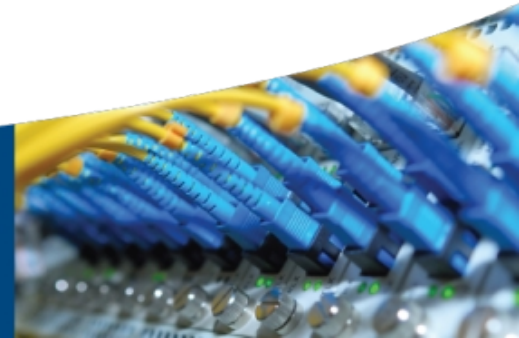
Stricter Standards for Initial Authorizations

- Because subsequent review is limited, a community might choose to adopt stricter standards for initial placement of facilities.
- Possible methods:
 - Requiring significant proofs of the “need” for facilities and denying them when not demonstrated.
 - Allowing permits to expire and not renewing them unless federal law absolutely requires it.
 - Requiring every facility to have concealment elements.



Favor “Proprietary” Requirements

- Strictly enforcing right-of-way “proprietary” requirements.
- Favoring placement on municipal property (which can be controlled through leases).



Summary

Minimal Steps Your Community Should Take

- Understand that there are now three Federal shot clocks for siting wireless devices and that all three apply to DAS/small cell applications.
- Examine whether your laws or forms are consistent with new order's time frames. If not:
 - Do you want to change your laws to conform, or
 - Do you want to merely change your practices?



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