

WATOA Annual Conference



Implementing the FCC Order on Wireless Facilities Collocations - Ordinances and Application Forms

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- Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 mandates that a State or local government approve certain wireless broadband facilities siting requests for modifications and collocations of wireless transmission equipment on an existing tower or base station that does not result in a substantial change to the physical dimensions of such tower or base station.
- In October 2014, the Federal Communications Commission unanimously approved rules interpreting Section 6409(a).



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- Wireless industry associations PCIA and CTIA worked the National League of Cities, the National Association of Counties, and the National Association of Telecommunications Officers and Advisors to develop a model ordinance and application for reviewing eligible facilities requests under Section 6409(a)
- **Recommendation:** use that model as a basis for reviewing your current land use and rights-of-way codes, and rewrite or revise as necessary to be consistent with the FCC rules while maintaining local authority that remains and outlining your application, review and approval process
- **Recommendation:** Develop an application form that will provide you with all the information you need to review under the new rules



FCC Collocation Rules Definitions (can be mirrored in local ordinance)

- *Base Station*: A structure or equipment at a fixed location, enabling FCC authorized Wireless communications. It is not a tower or any equipment associated with a tower.



- Private, broadcast, public safety services, wireless and fixed wireless services, microwave backhaul
- Radio transceivers, antennas, cabling, backup power supplies, distributed antenna systems (“DAS”) and small cell network equipment
- Structures other than towers that support or house equipment described here that has been reviewed and approved under applicable zoning or siting processes

Ordinance Definitions

- *Collocation:* the mounting or installation of transmission equipment on an eligible support structure for the purpose of transmitting/receiving radio frequency signals for communications purposes
- *Eligible Facilities Request:* Any request for modification of an existing tower or base station that does not substantially change the physical dimensions of such tower or base station, involving:
 - Collocation of new transmission equipment;
 - Removal of transmission equipment; or
 - Replacement of transmission equipment (does **not** include 'drop and swap')



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Ordinance Definitions

- *Eligible support structure:* Any tower or base station as defined in this section, provided that it is existing at the time the relevant application is filed with the jurisdiction under this section
- *Existing:* A constructed tower or base station is existing if it has been reviewed and approved under the applicable zoning or siting process, or under another State or local regulatory review process, provided that a tower that has not been reviewed and approved because it was not in a zoned area when it was built, but was lawfully constructed, is existing for purposes of the ordinance (this requires both a physical and a legal existence - i.e., does a valid permit exist for the antennas on this structure? Mandatory collocation does not apply to structures (1) that merely could support transmission equipment or (2) were illegally constructed without all proper wireless site review



Ordinance Definitions

- *Site*: For towers other than towers in PROW, the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site, and, for other eligible support structures, further restricted to that area in proximity to the structure and to other transmission equipment already deployed on the ground
- *Substantial Change*: A modification substantially changes the physical dimensions of an eligible support structure if it meets any of the following criteria:
 - For towers other than towers in the public rights-of-way, it increases the height of the tower by more than 10% or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater; for other eligible support structures, it increases the height of the structure by more than 10% or more than ten feet, whichever is greater

Ordinance Definitions

- *Substantial Change:*

- For towers other than towers in the PROW, adding an appurtenance to the body of the tower that would protrude from the edge of the tower more than 20 feet, or more than the width of the Tower structure at the level of the appurtenance, whichever is greater; for other eligible support structures, 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;
- For any eligible support structure, it involves installation of more than the standard number of new equipment cabinets for the technology involved, but not to exceed 4 cabinets; or, for towers in the public rights-of-way and base stations, 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;

Ordinance Definitions

- *Substantial Change:*
- It entails any excavation or deployment outside the current site;



Ordinance Definitions



- *Substantial Change:*

- It would defeat the concealment elements of the eligible support structure;



Ordinance Definitions



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Ordinance Definitions

- *Substantial Change:*

- It does not comply with conditions associated with the siting approval of the construction or modification of the eligible support structure or base station equipment, provided however that this limitation does not apply to any modification that is non-compliant only in a manner that would not exceed the thresholds identified in this section



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Ordinance Definitions

- *Substantial Change:* With respect to non-compliance with conditions associated with the siting approval of the construction or modification of the eligible support structure or base station equipment ...
 - Essentially, if a prior condition of approval does not have to do with changes to height or width of the original site, and there would be a violation related to any of those prior conditions, then the proposed change would be a substantial change, and therefore not subject to Section 6409(a)
 - In other words, if a condition for the original site bars expansion, then that condition would be *not* be enforceable if the proposed collocation would not be a “substantial change” under Section 6409(a)
 - But ... if there is a condition of approval limiting height that is tied to concealment, then a small increase in height that defeats concealment, could be a substantial change, and not subject to mandatory approval

Ordinance Definitions

- *Substantial Change (summarized):*
 - Section 6409(a) does not mandate approval for *all* requests to collocate or modify facilities
 - Approval mandated only those that do not “substantially change the physical dimensions of the existing wireless tower or base station”



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Ordinance Definitions

- *Substantial Change (summarized):*
- The new FCC rules generally preempt compliance with *subjective* requirements for wireless site modifications that do not result in a substantial change, but preserve *objective* requirements
- “States and localities may continue to enforce and condition approval on compliance with generally applicable building, structural, electrical, and safety codes and other laws codifying objective standards reasonably related to health and safety”



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Ordinance Definitions

- *Substantial Change:*

- However, applicants may modify legal non-conforming towers and base stations under the new rules without bringing those structures into code compliance
- The FCC determined that a different rule would allow municipalities to exclude towers and base stations through a change in zoning laws that transforms a conforming site
- Whether the new rules preempt zone-height limits and setbacks remains unclear
 - Generally applicable laws contain objective standards and reasonably relate to health and safety, which the new rules expressly do not preempt
 - But ... height limits and setbacks may also serve subjective aesthetic purposes, which the new rules generally do preempt
 - The answer will likely come from future case law

Ordinance Definitions

- *Transmission Equipment*: Equipment that facilitates transmission for any FCC-authorized wireless communication service, including, radio transceivers, antennas, cable, and power supply...includes equipment associated with wireless communications services including private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul



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Ordinance Definitions



- *Tower*. Any structure built for the sole or primary purpose of supporting any FCC authorized antennas and associated facilities



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So let's review ... is this chimney an eligible support structure, and ...



Is this a collocation that the local government entity *must* approve?



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Ordinance Contents

- Application
 - You can require an application
 - Should include all the info staff needs to determine whether it is an Eligible Facilities Request
 - More on this later ...
- Type of Review (Administrative)
- Timing – shall approve the application within 60 days unless it is not a covered request
- Incomplete applications can toll the deadline to act if notice is giving within 30 days

Ordinance Contents

- Interaction with Previously Adopted Shot Clock Rules Implementing Section 332 (c)(7)



- If the application is not a valid 6409(a) request the presumptively reasonable timeframe for the application under the prior shot clock order begins to run from the issuance of the City's decision that the application is not a covered request
- Shot clock rules apply to DAS and small cells
- There is no “deemed granted” rule for 332 (c)(7) applications



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Ordinance Contents Related to Action on Application

- If you fail to approve or deny a request under this chapter ...
- ... within 60 days, accounting for any tolling
- The request is ...

DEEMED GRANTED



- “Deemed Granted” does not become effective until applicant notifies the jurisdiction in writing that the review period has expired



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- Remedies: Either the jurisdiction or the applicant may bring any claims under Section 6409 (a) to any court of competent jurisdiction



Application Form Contents

- You want to get all the information you need to determine whether the application qualifies for mandatory approval

APPLICATION FOR ELIGIBLE FACILITIES REQUEST		
APPLICANT INFORMATION		
Name:		
Company:		
Address:		
City:	State:	ZIP Code:
Telephone:		
Email Address:		
City:	State:	ZIP Code:

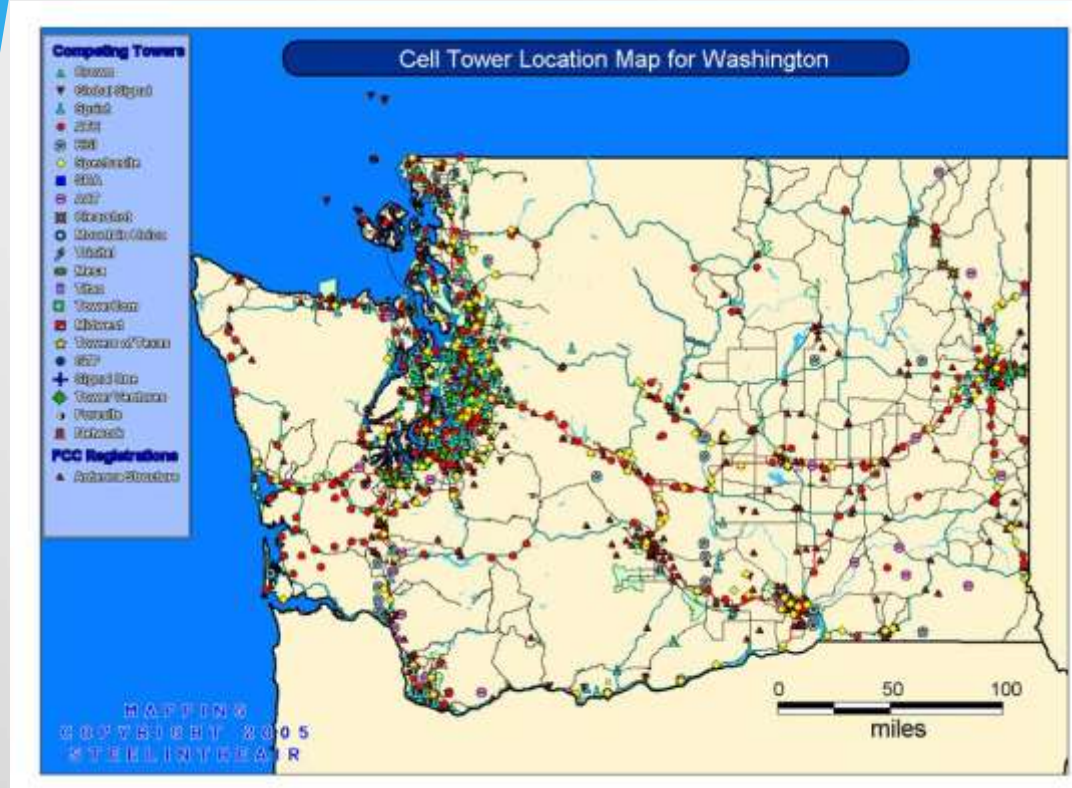
- The new rules limit the issues you can decide, but still permits you to decide what information you need to resolve those issues



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Application Form Contents (what you can't require)



- Demonstration of need for the facilities
- Business case showing necessity to fill a gap in coverage or increase network capacity

Application Form Contents (what you can require)

- whether the applicant holds a valid property interest in the site (i.e., a lease or license)
- whether the proposal qualifies as an eligible facilities request
- whether the structure qualifies as an existing wireless tower or base station



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Application Form Contents (what you can require)

- whether the proposal will cause a substantial change in the physical dimensions
- whether the proposal violates objective generally applicable laws or prior conditions of approval that reasonably relate to public health and safety
- whether the proposal raises any environmental or historic preservation concerns



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Application - Timing

- Can toll the shot clock if application is incomplete
- Notify applicant of deficiencies within 30 days - must cite to an application defect in some “code provision, ordinance, application instruction, or otherwise publically-stated procedure”
- If applicant responds and is still incomplete, but advise of deficiencies within 10 days



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Application – Is Conditional Approval Permitted?

- Yes, if consistent with the FCC’ s new rules
- Conditions that do not conflict with the new rules include “compliance with generally applicable building, structural, electrical, and safety codes and with other laws codifying objective standards reasonably related to health and safety” such as environmental and historic preservation requirements
- Applicants must also comply with pre-existing “other conditions of approval placed on the underlying structure” so long as the conditions do not conflict with the new rules



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Application – Is Conditional Approval Permitted?

- Unenforceable conditions include any that set limits lower than the criteria for a substantial change as set out in the new rules, and likely also include any that impose subjective or discretionary standards for compliance (such as, for example, anything required “to the satisfaction of the planning director or commission”)
- The new rules appear to preserve the power to include, for example, conditions on parking space allocations, site maintenance, site access, lighting, fencing, drainage, compliance with all laws, insurance, indemnification, collocation, signage, and landscaping

Other Issues - Local Government Preferences to use Government Property

- a preference for placing wireless sites on local government property does not, on its own, unreasonably discriminate against functionally equivalent service providers



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Other Issues - Historic Preservation

The new rules adopt a new categorical exclusion from NHPA requirements for collocations on utility structures that applies when:

- the proposed collocation does not exceed certain size limitations;
- the proposed collocation does not involve any new ground disturbance; and
- the proposed collocation is not (1) within a historic district; (2) on a structure registered or eligible for registration in the National Register of Historic Places; or (3) subject to a pending complaint about adverse effects on historic value

Other Issues – Historic Preservation (cont.)

The new rules adopt a new categorical exclusion from NHPA requirements for collocations on buildings that apply when:

- an antenna already exists on the structure;
- the proposed collocation is within a certain size and proximity to the existing antenna;
- the collocation antenna will comply with all zoning and historic preservation conditions (i.e., camouflage) designed to mitigate adverse effects on historic value;



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Other Issues – Historic Preservation (cont.)

The new rules adopt a new categorical exclusion from NHPA requirements for collocations on buildings that apply when:

- the proposed collocation does not involve new ground disturbance; and
- the proposed collocation is not (1) within a historic district; (2) on a structure registered or eligible for registration in the National Register of Historic Places; or (3) subject to a pending complaint about adverse effects on historic value



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Other Suggestions

- We should not necessarily throw out our pre-Section 6409(a) wireless ordinance standards and procedures for collocations and modifications
- These continue to apply to the extent that a proposed collocation or modification does not qualify as an eligible facilities request or does result in a substantial change

Other Suggestions

- Publish application materials on your jurisdiction's website
- Update and improve with experience
- Be explicit about what and how materials must be submitted
- Make sure there's a good rationale for each application requirement
- Avoid any requirements that empower local officials to require additional information on a case-by-case basis

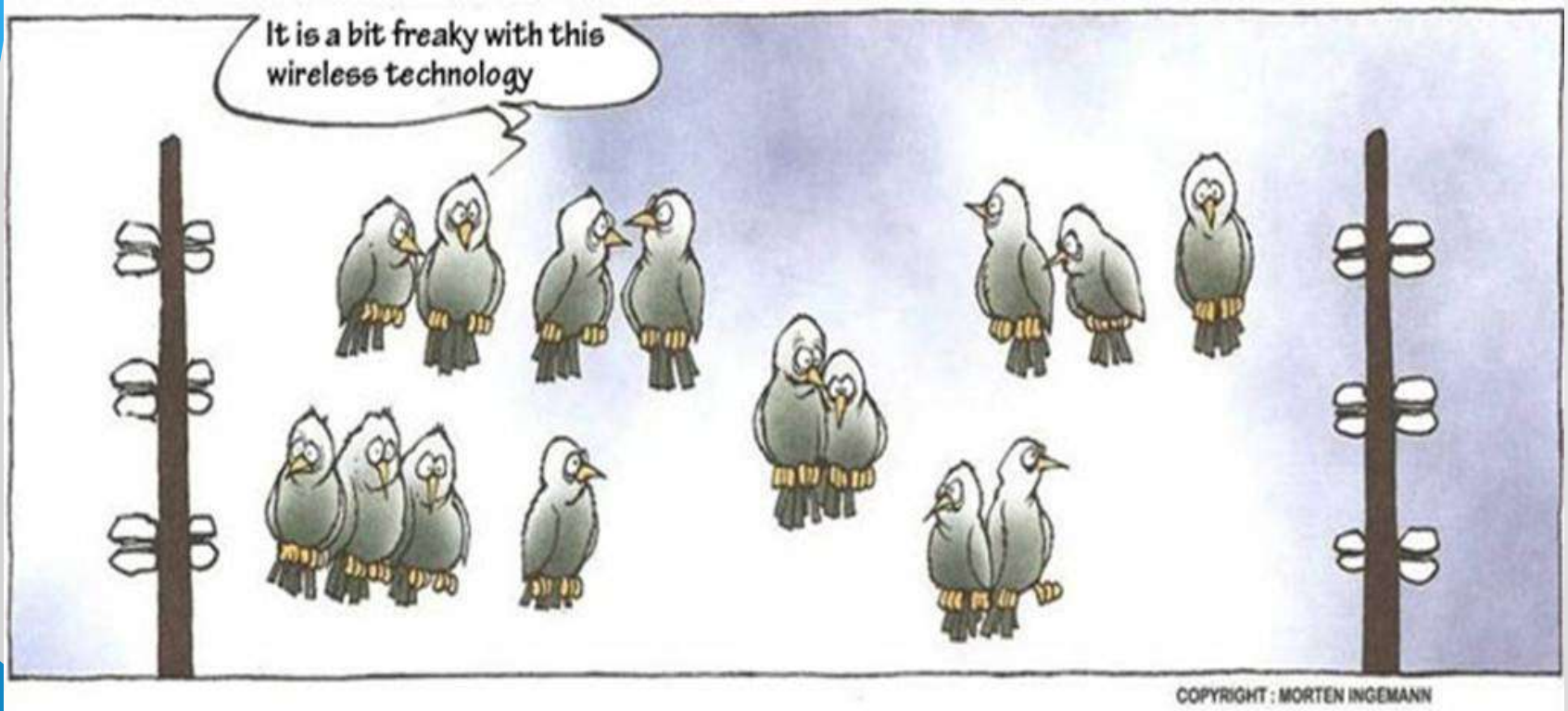
Other Suggestions

- Consider requiring pre-submittal meetings to make sure applicant and staff understand what is going to be submitted
- May want to develop and use a ‘notice to applicant’ form to identify incomplete applications with check-the-box line items for each required application material
- When ambiguities arise about whether an application contains sufficient information, review immediately with legal counsel

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