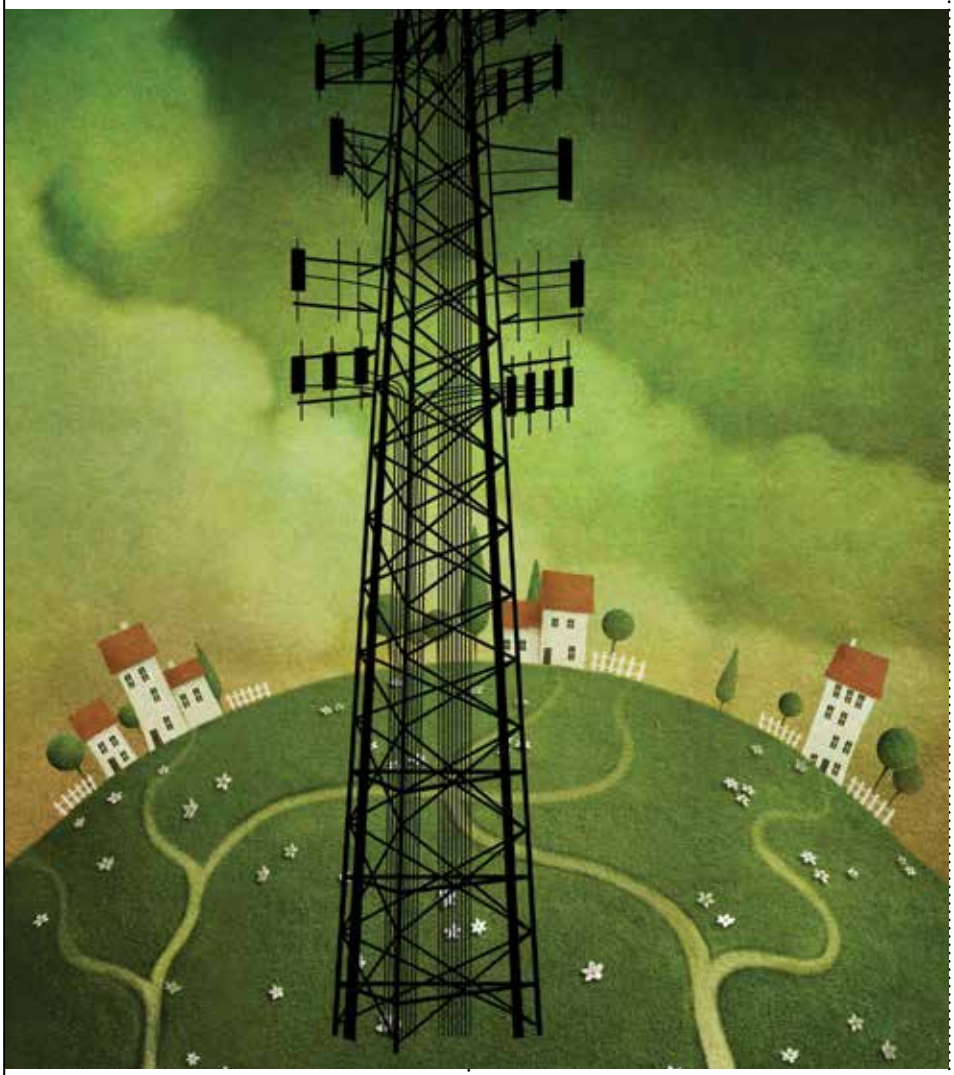
Cell Towers—Beware the "Substantial Change" Ahead

By Matthew K. Schettenhelm



How did *that* happen? Three recent changes in your community leave you scratching your head:

- A small wireless antenna, no more than the size of a deck of cards, in the heart of your vibrant downtown corridor, suddenly changed. It grew to more than 20 times its previously approved size. It now reaches up an additional 10 feet up and has added arms protruding 6 feet out in all directions. Other small wireless facilities are now changing in similar ways.

- A building that hosts an antenna at the very top of the community's general height limit now defies that limit. To accommodate a new antenna, the building itself exceeded the height of any other structure in the community.

- A nonconforming use structure hosting antennas has long been a community eyesore. But previously it could not expand further without complying with the community's zoning code. Now, however, the grandfathered facility has expanded. It has added many more antennas—*without* complying with the code.

Who voted to permit these changes? The answer might surprise you. It is not the zoning board, the city council, or even the state legislature.

It is a federal agency.

The Federal Communications Commission, by a 5-0 vote, ruled that a 2012 federal law commands your community to approve these requests. In fact, the FCC did more than that: its rule deemed that your local zoning authority approved the requests—even though it did no such thing.[1]

Here's the good news: your community does not have to accept these mandates. Local governments have serious arguments that the FCC's rules conflict with the statute, defy fundamental constitutional principles, and undermine the very policy that the FCC intended the rules to serve. For these reasons, a coalition of local governments is assembling now to challenge the rules in federal court. This article describes the rules, outlines some of their potential vulnerabilities, and discusses how communities are beginning to formulate a challenge.[2]

Section 6409(a) and the FCC's New Rules

As you might guess from the law's title, in the Middle Class Tax Relief and Job Creation Act of 2012, Congress did not focus on telecommunications. In fact, five of the Act's substantive titles address other topics, including Medicare payments, unemployment benefits, and the Social Security payroll tax. But title VI of the law concerns public safety communications, and tucked in the middle, Congress added a critical provision, section 6409(a), which concerns states' and local governments' authority over communications-facility modification. It states that, notwithstanding 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.[3]

Although section 6409(a) includes many important concepts—"eligible facilities request," "modification," "existing," "wireless tower," "base station," and "substantially change the physical

dimensions," it defines only one: An "eligible facilities request" is "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."[4]

Congress's lack of definitions in section 6409(a) led the FCC to initiate the current rulemaking to define the statute's key terms and operation.[5] The wireless industry, local governments, and other interested persons filed more than 200 comments. And on October 21, 2014 the FCC released its new rules implementing section 6409(a).[6]

How do the FCC's rules implement the statute, including the "may not deny, and shall approve" language? Here are key questions that the rules answered:

What services do the new rules govern? The FCC decided that section 6409(a) applies to equipment used for "any Commission-authorized wireless communications service."[7] This differs from the other federal-law provision that addresses wireless siting, 47 U.S.C. § 332(c)(7). That provision addresses only those facilities used to provide "personal wireless service." In the FCC's view, Congress intended section 6409(a) to apply more broadly.

What is "transmission equipment?" Understanding what qualifies as "transmission equipment" is important because section 6409(a) applies only to a modification request that involves collocation, removal, or replacement of this equipment. Local governments argued that facilities that do not transmit communications, such as back-up power supplies, are not transmission equipment. The FCC rejected that view. It found that the term includes antennas and other equipment associated with and necessary to their operation, including power supply cables and backup power supplies.[8]

What is a "wireless tower?" The FCC defined "wireless tower" by looking to the structure's purpose. It defined the term as any structure "built for the sole or primary purpose of supporting any Commission-licensed or authorized antennas and their associated facilities... and the associated site."[9] Any structure that was not built "primarily" to support wireless facilities would not qualify. Local governments generally supported this approach. Note, however, that the FCC defines "tower" more broadly than the support structure itself: it also includes "associated facilities . . . and the associated site."

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What is a "base station?" Many local governments strongly disagreed with the FCC's definition of "base station." They argued that the term encompasses the equipment that communicates with other "stations," which may be "fixed" or "mobile." They maintained that Congress's use of the term "wireless tower or base station" makes perfect sense: Congress was addressing one form of support structure—a "wireless tower"—and the communications equipment that is situated with it. Local governments emphasized that a "base station" is certainly not any *other* support structure that a "base station" happens to sit upon.

The FCC disagreed. It ruled that a "base station" includes not just communications equipment but also any "non-tower supporting structure at a fixed location."[10] Through this maneuver, the FCC expands section 6409(a)'s "may not deny, and shall approve" language to apply also to any request to modify any facility that houses or supports an antenna, including street signs, utility poles, street lights, water towers, and buildings.

What is "existing?" The FCC adopted a definition of "existing" that many local governments can support. By its terms, section 6409(a) applies only to modifications of "existing" wireless towers or base stations. The FCC clarified that "existing" means a facility that was "reviewed and approved under the applicable local zoning or siting process or that the deployment of existing transmission equipment on the structure received another form of affirmative State or local regulatory approval (e.g., authorization from a State public utility commission)."[11] As a result, if a facility was constructed or deployed "without proper review, was not required to undergo siting review, or does not support transmission equipment that received another form or affirmative State or local regulatory approval,"[12] the facility is not governed by section 6409(a). A femtocell on a home that never received local zoning approval, for example, could not be modified under the statute.

What modifications "substantially change the physical dimensions of [a] tower or base station?" Defining "substantially change the physical dimensions" properly is essential because it serves as the primary limitation on the statute's direction that a local government "may not deny, and shall approve" a modification request. If a "modification" is a "substantial change," a local government need not approve it. Local governments argued that evaluating whether a modification would substantially change a particular tower or base station's physical dimensions must start with context—with evaluating *the particular* wireless tower or base station that would be modified. It must start with that facility's size, its location, and any conditions that a local government placed on later changes to it.

Continued on page 12



Matthew K. Schettenhelm, an attorney in Best Best & Krieger LLP's Washington, D.C. office, focuses his practice on assisting local governments and other clients with appellate litigation and communications matters. In 2012, IMLA honored Matt with the President's Award to the Most Outstanding Associate Member for his work at the certiorari stage of the Supreme Court case, *City of Arlington v. FCC*, No. 11-1545.

In significant part, the FCC took the industry's preferred approach: its "substantial change" test largely relies on predetermined measurements of permitted changes and ignores the context of the actual "wireless tower" or "base station" that would be modified. In the FCC's view, a "substantial change" occurs only if it meets specific criteria regarding height, width, equipment cabinets, excavation, concealment elements, or noncompliance with other conditions. Of particular "importance, with respect to height, a substantial change" occurs only if it increases a facility in the right-of-way's height by the greater of 10 percent or 10 feet. For other facilities, a height increase may be even larger without qualifying as "substantial." With respect to width, a facility in the right-of-way may be extended by an appurtenance that protrudes from the facility's edge "more than six feet" without constituting a substantial change. Again, width increases may be even larger for other facilities.

One positive for local governments is that the FCC recognized that a modification would be a substantial change if it "would defeat the concealment elements" of the wireless tower or base station. But the FCC's treatment of preexisting conditions on the underlying facilities is more troubling. The FCC found that a "substantial change" occurs if the modification would conflict with conditions on the underlying tower or base station, but only if those conditions do not limit modifications more than the Commission's standards for height, width, equipment cabinets, and excavation. Therefore, a modification conflicting with a condition that limits a base station's future expansion to two feet by two feet by would not constitute a "substantial change," because the FCC's standard decrees that height and width changes of 10 feet by 6 feet are never "substantial," regardless of the underlying structure's physical dimensions.[13]

Must a local government approve a modification to a nonconforming-use structure? Local governments argued that any physical-dimension change to a nonconforming use structure—a grandfathered facility that does not comply with the community's current zoning code—should be considered "substantial." The FCC concluded otherwise. It said that these grandfathered facilities may be modified just as any other "wireless tower" or "base station."[14]

Of particular importance, with respect to height, a "substantial change" occurs only if it increases a facility in the right-of-way's height by the greater of 10 percent or 10 feet.

Can local governments require that an application comply with other codes? Yes. One positive aspect of the FCC's rules is that local governments "may continue to enforce and condition approval on compliance with generally applicable building, structural, electrical, and safety codes and with other laws codifying objective standards reasonably related to health and safety."[15]

What can a local government require in a Section 6409(a) application? A local government may only require "documentation that is reasonably related to determining whether the request meets the requirements of the provision."[16] A local government may not inquire about the need or business case for the requested modification.[17]

How quickly must a local government act on an application? A local government must act on a section 6409(a) request 60 days after it receives a complete application.[18] The 60-day period may be tolled by agreement or when the local government notifies the applicant within 30 days that the application is incomplete.[19]

What is the remedy if a local government does not grant or deny an application within 60 days? The FCC deems the application granted by federal rule.[20] The FCC found that "withholding a decision on an application indefinitely, even if an applicant can seek relief in court or in another tribunal, would be tantamount to denying it."[21] (The FCC does not explain why the logical remedy is not therefore to treat the application as denied, not approved.) Whether the application *actually* qualifies for approval under section 6409(a) is irrelevant: if a local government does not act, the FCC's rule *assumes* that the application qualifies. The local government cannot undo its "deemed approval" by subsequently denying the application. Its only option is to sue, and to attempt to undo the approval in court.[22]

Local Governments' Concerns

Do the FCC's rules properly implement section 6409(a)? Many in the local government community have doubts. The rules appear vulnerable to challenge on a number of fronts. Here are some examples:

- **Modification of small facilities.** A key focus for the FCC was facilitating the deployment of "small cells" and Distributed Antenna Systems, which the record evidence showed could be as small as a deck of cards. But the FCC's rules arguably misapply section 6409(a) to these facilities. For example, if a community approved a small facility, when an applicant seeks to modify that facility using section 6409(a), a key question would be whether the modification would "substantially change [the facility's] physical dimensions." This analysis must start with a basic fact: *what are the underlying facility's physical dimensions?* But the FCC's rules effectively ignore this question. For both a facility the size of a deck of cards and one that is 100-feet tall, the FCC's rules allow *the same* automatic height and width expansions: 10 feet by 6 feet. Local governments therefore have a strong argument that the rules do not evaluate what the statute requires: the change in the facility's physical dimensions.

The FCC's failure to consider the features of the underlying facility also undermines the agency's chief policy goal: it discourages local governments from approving small facilities at all.

- ***Modification of non-communications facilities.*** Section 6409(a), by its terms, does not mandate that a local government approve modifications to buildings, water towers, street signs, or utility poles. The FCC nevertheless strained to bring these non-communications structures under section 6409(a). It did so by defining "base station" not only as the communications equipment that exchanges information with "mobile stations" and "fixed stations," but also as the *structure* on which the communications equipment sits. This expanded definition arguably conflicts with the Communications Act, the record, past FCC rules, and the FCC's own orders in this proceeding. Local governments have a strong argument that Congress did not intend Section 6409(a) to govern modifications to these non-communications facilities.

- ***Deeming local approvals granted.*** By deeming that a local government has granted an approval that it has not, the FCC arguably defies the 10th Amendment to the United States Constitution and raises serious due-process concerns—when there is no evidence that Congress intended this. The Supreme Court has established that the federal government may not commandeer local officials to administer a federal program.[23] Here, the FCC furthers its own policy by deeming that a local government granted a regulatory approval. Its rule *automatically* transforms local inaction "tantamount to a denial" into the opposite, an approval, and it does so without any neutral third party—a court or the FCC—evaluating whether the request actually qualifies for section 6409(a) approval. Local governments have a strong argument that if an applicant is deserving of any remedy under section 6409(a), the *applicant* must pursue and obtain it before a neutral decision-maker. Both section 6409(a) and core constitutional principles prevent the FCC from decreeing that the application automatically qualifies for approval or that a local government has granted it.

Local Governments' Response

Because the FCC's rules present real problems for local governments, including those described above, a coalition of local governments is assembling now to challenge the rules.

A "petition to deny" must be filed in a federal circuit court no later than 60 days after the rules are published in the Federal Register. That should occur by year-end, according to the FCC's latest estimate. After the 60-day deadline passes, other local governments likely can join the effort by filing a petition to intervene. The coalition may also pursue a stay of the rules. In addition, the coalition will be monitoring the FCC docket for reconsideration activities, and participating if necessary to protect its interests.

Local governments should consider whether they can join or support the coalition effort. They should also begin evaluating how the FCC's rules affect or alter their current siting policies. If the FCC's rules are not stayed, most will become effective 90 days after they are published in the Federal Register.

Note

1. *In re Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, WT Docket No. 13-238, FCC 14-153 (Oct. 21, 2014).
2. This article will provide a general overview of the rules. More information is available here: http://www.bbklaw.com/?t=40&an=34267&format=xml
3. 47 U.S.C. § 1455(a)(1).
4. 47 U.S.C. § 1455(a)(2).
5. *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket No. 13-238, Notice of Proposed Rulemaking, 28 FCC Rcd. 14238 (2013).
6. This article focuses on the FCC's rule implementing Section 6409(a). The FCC also revised its own rules under the National Environmental Policy Act of 1969 and the National Historic Preservation Act of 1966. In addition, the FCC clarified its "shot clock" rules under Section 332(c)(7).
7. Report and Order at ¶ 149.
8. *Id.* at ¶ 158.
9. *Id.* at 1.40001 (b)(9); *id.* at ¶ 166.
10. *Id.* at ¶¶ 167-172.
11. *Id.* at ¶ 174.
12. *Id.*
13. *Id.* at 1.40001 (b)(7).
14. *Id.* at ¶ 201.
15. *Id.* at ¶¶ 188, 202.
16. *Id.* at ¶ 214.
17. *Id.*
18. *Id.* at ¶ 215.
19. *Id.* at ¶ 217. The FCC adds other specific requirements about how local governments must review applications for incompleteness.
20. *Id.* at ¶ 227.
21. *Id.*
22. *Id.* at ¶ 231.
23. New York v. United States, 505 U.S. 144 (1992); Printz v. United States, 521 U.S. 898, 935 (1997). ML

