

BEST BEST & KRIEGER LLP

ATTORNEYS AT LAW

Responding to Federal Challenges

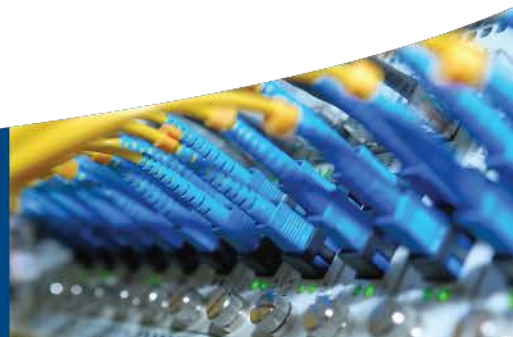
Local and National Strategies for Success

IMLA Spring Conference
Washington, D.C. April 23, 2012

PRESENTED BY

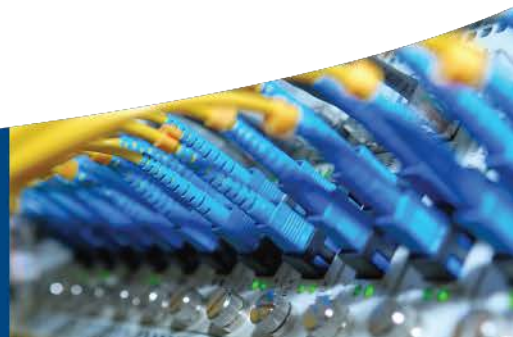
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Overview – To Succeed You Must

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

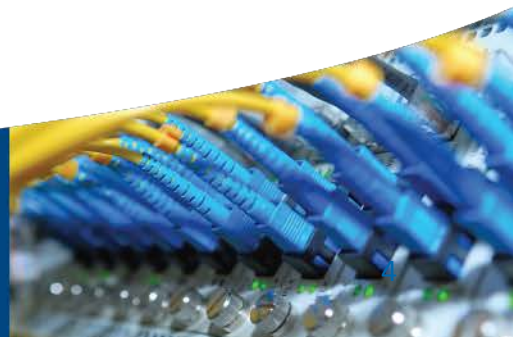


Revising Wireless Collocation Under HR 3630

Sec. 6409. WIRELESS FACILITIES DEPLOYMENT.

(a) Facilities Modifications

(1) "IN GENERAL ….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."



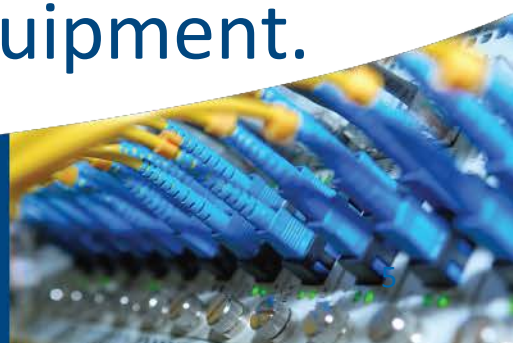
Revising Wireless Collocation Under HR 3630

(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;

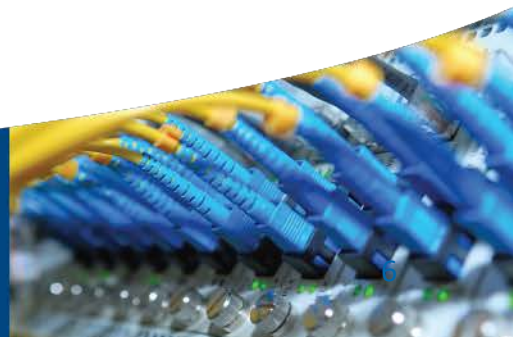
(B) removal of transmission equipment; or

(C) replacement of transmission equipment.



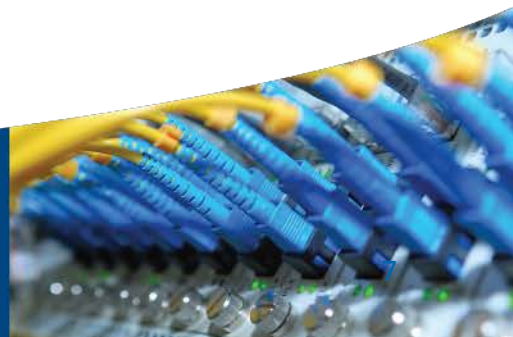
Revising Wireless Collocation Under HR 3630

(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.



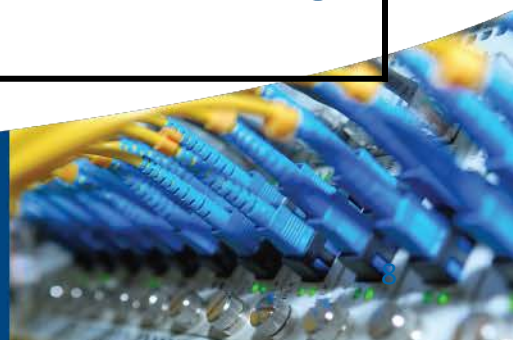
What Does the Restriction Mean?

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?



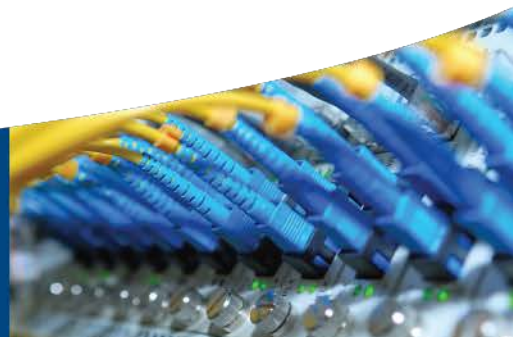
What Does the Restriction Mean?

Undefined terms	
"substantially change the physical dimensions"	•Measured in terms of a percentage increase in height, width, and volume only? OR • impact? (safety hazards, intrusion on sensitive areas changes that expose structures on a stealth facility)? AND WHAT ABOUT: •Weight or wind-loading changes? • Noise characteristics? •Changes to grandfathered, non-conforming use towers?



Possible Sources for Terms

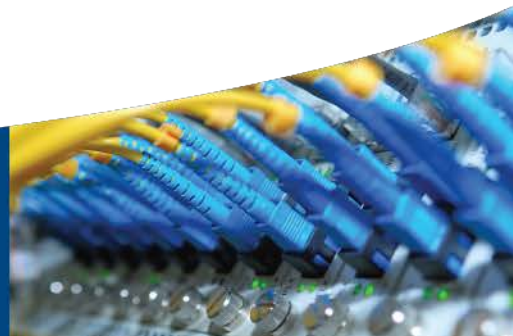
- Nationwide Programmatic Agreement, Report and Order FCC 04-22 http://wireless.fcc.gov/siting/npa.html
- Also see: Public Notice DA 02-28 http://wireless.fcc.gov/siting/environment.html#collocation



Possible Sources for Terms

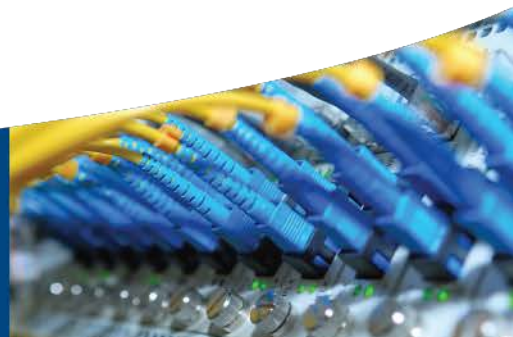
- Fact sheet says tower

"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""…



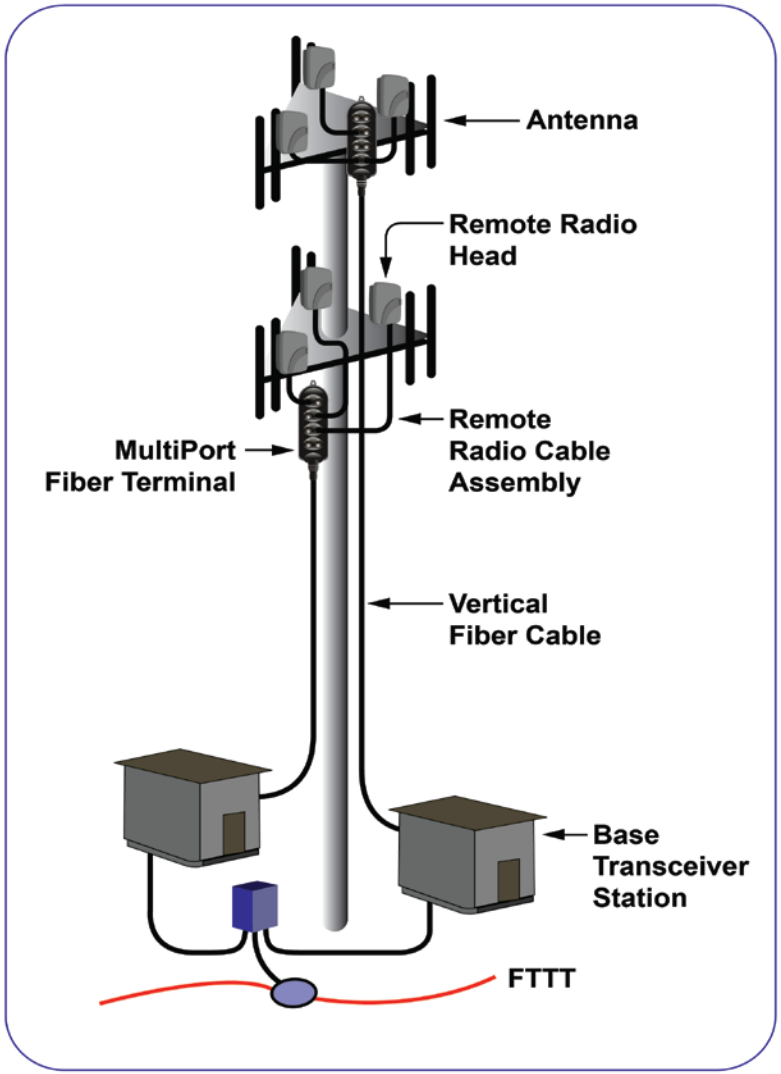
Base Station

- 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?




Antenna
Remote Radio Head
MultiPort Fiber Terminal
Remote Radio Cable Assembly
Vertical Fiber Cable
Base Transceiver Station
FTTT

What is what?

What is covered?

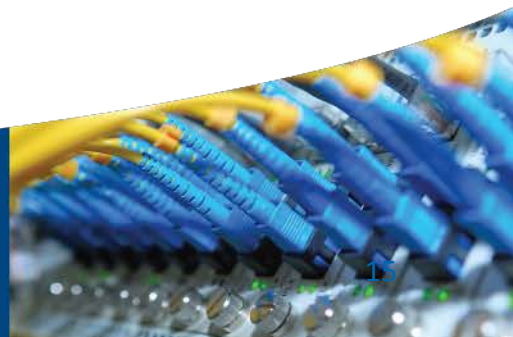
DAS?
Only
Freestanding
Towers?





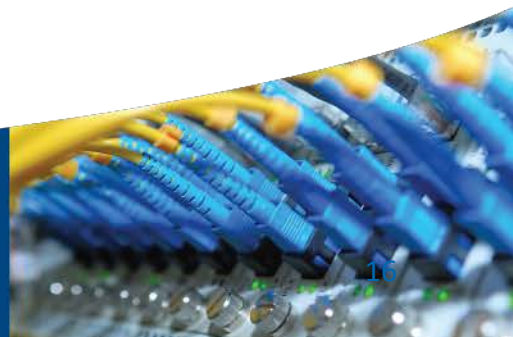
Expect

- 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?



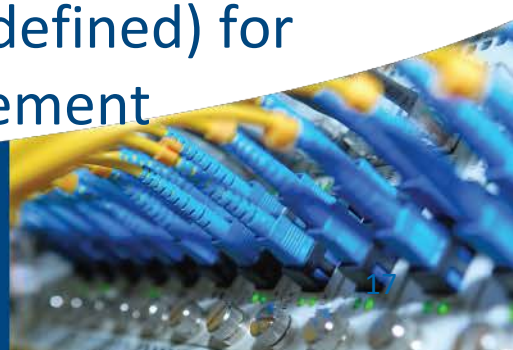
How to Respond

- *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



Engaging at FCC and on Hill

- IMLA and its members 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



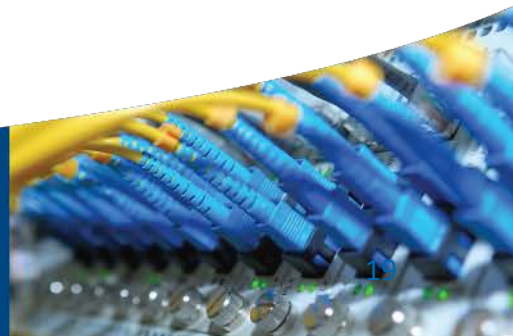
Engaging at FCC and on Hill

- 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*

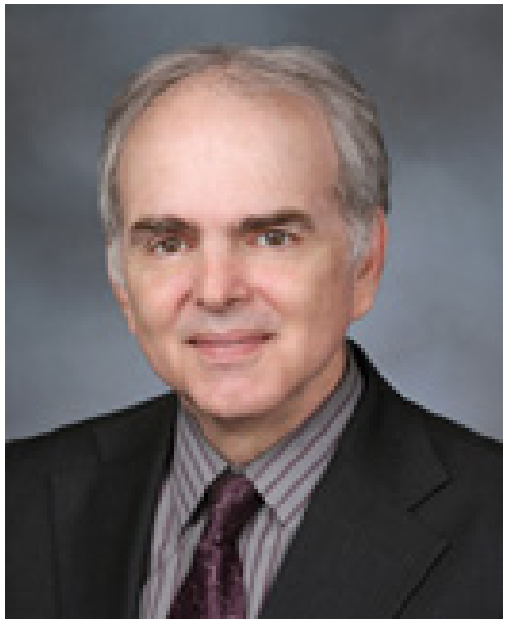


Defending Principles

- 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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