A Workshop

On Section 6409 & other Applicable Law on Local Regulatory Authority related to the location/siting, construction and modification of Wireless Facilities

Presented by

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On February 22, 2012, President Obama signed into law a bill that includes language pertaining to *co-locations* and *modifications* of existing *cell towers*. In spite of what the industry asserts, this legislation need not have much net effect on most local governments' authority to regulate the traditional issues related to cell towers and wireless facilities.

Section 6409(a)

Of the Middle Class Tax Relief Act

HR 6409

(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.

Understanding 6409(a) in Context

It is necessary to understand 6409(a) in the context of other applicable law, rules and regulations

Applicable Federal Law

3 applicable parts to Federal Law & Regulation

- **1996: Section 704 of the 1996 Telecommunications Law**
  U.S.C. 47 Sec. 332(c)(7)
- **2009 and 2010: FCC's 'Shot Clock' orders**
- **February, 2012: Section 6409(a) – Middle Class Tax Relief Act**

From a regulatory perspective the issue is now divided between 2 situations and 4 sets of regulations

- Section 704 of the '96 Telecom Act – Applicable to new Towers and Non-Tower mounted facilities, i.e. anything other than a tower

- FCC's 'Shot Clock' Rule re time allowed for action on an application

- Section 6409(a) - Modifications of carriers' facilities on <u>towers</u> *specifically and expressly built for wireless service*

- Local regulations as applicable

Applicable Federal Law (cont.)

1996 Telecommunications Act @ Section 704

Establishes what local governments

may not do;
may do; and
must do

Tower companies have no 'standing' **under Section 704 . . . which is why the tower industry (i.e. PCIA) wrote and had sponsored Section 6409 of the Middle Class Tax Relief Act.**

- **Tower companies have *no 'technical need'*, and thus no rights, standing or protection under Section 704 of the 1996 Telecom Act.**
- **Only *carriers* have rights, standing and protections under 704.**

Applicability of Section 704 of the 1996 Telecommunications Act

Applicable to *carriers of 'personal wireless services' only*, not tower companies, unless they are *officially* a *co-applicant* with a carrier.

Definition: Personal wireless services*:* Commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access service

What a local government may, must and may not do

- **(I) shall not unreasonably discriminate among providers of functionally equivalent services; and**
- **(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.**
- **(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.**
- **(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.**
- **(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.**

Section 704
1996 Telecommunications Act

Prohibitions

- **Unreasonable discrimination among functionally equivalent service providers – Note: Only '<u>Unreasonable</u>' discrimination**
- **Prohibit or act in a manner that has the effect of prohibiting the provision of 'Personal Communications Service'**
- **Regulate based on RF emissions, as long as the facility complies with the FCC's RF Emissions regulations (i.e. OET 65).**
- **Note: Authority to require initial and periodic verification/proof of compliance with OET 65 RF Emissions standards is <u>not</u> preempted.**

Requirements

- **Act on an application in a *reasonable* amount of time, taking into account the facts and circumstances (now defined by FCC 'Shot Clock' Policy and Section 6409(a)**
- **Base a denial on a <u>*written*</u> record containing '*substantial*' evidence**

Section 704
1996 Telecommunications Act (cont.)

Examples of issues allowed to be locally regulated

- **Location (of both towers or wireless facilities)**

- **Height (of both towers or wireless facilities)**

- **Number/spacing (of both towers or wireless facilities)**

- **Aesthetics, i.e. use the *least intrusive means* and lowest height that is not technologically impracticable, camouflaged or stealthed (both towers and carrier's facilities)**

- **Safety issues (for both towers and carrier facilities)**

- **Impact on the nature and character of a general area (in harmony)**

- **Impact on Property values (if demonstrable by a qualified expert)**

- **Fees**

- **Cost of needed Expert Assistance**

Section 704
1996 Telecommunications Act

- ***Local governments are <u>Not</u> required*** **to allow a carrier to fill a gap in service in the most cost efficient manner possible, e.g. from a single facility, *especially if it can be done in a less intrusive manner* from more than one facility.**

- **Federal law and case law don't require a community to permit facilities to fill all (i.e. non-substantial) gaps or to fill any gap at a *specific signal strength*.**

- **Local governments are allowed to require an *alternate site analysis*, if local regulations don't give 'as-of-right' status to applicants for the proposed location. The test is,**

"Will it have the effect of <u>*prohibiting*</u> service?"

Litigation & Damages

- No exposure for local governments to a Section 1983 claim under Section 704 for attorneys' fees or financial damages for successful challenges to actions by local governments

Citation

CITY OF RANCHO PALOS VERDES, CALIFORNIA, et al., PETITIONERS *v.* MARK J. ABRAMS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Applicable State Law

Streamlining Act

- **CAL. GOV. CODE § 65940 : California Code - Section 65940**

CPUC 7901 & 79.01 – Right to occupy and use PROW

- Includes DAS Facilities

- DAS is deemed equivalent to 'telephone corporations'

7901: Telephone corporations "*may construct lines if telegraph or telephone lines along and upon any public road or highway . . . and may erect poles, posts, piers or abutments for supporting the insulators, wires and other necessary fixtures of their lines, in such a manner and at such points as not to incommode the public use*."

7901.1: ". . .consistent with Section 7901, that municipalities shall have the right to exercise reasonable control as to the time, place and manner in which roads . . . are accessed"

Such right must "be applied to all entities in an equivalent manner."

Applicable State Law (continued)

SB 1627 (Government. Code Section 65850.6 & 65962) - CEQA

65850.6(a): *Prohibits cities from using <u>discretionary</u> permitting process* for co-located facilities if applicant meets requirements.

Requirements

Co-located equipment does not conflict with the conditions of permit for the base station/tower

the base station/tower was properly permitted, i.e. underwent a discretionary permitting process

the base station/tower CEQA review resulted in negative declaration; a mitigated declaration; or certification of an environmental impact report

there have no substantial changes in the base station/tower that would require a supplemental environmental impact study/report

65850.6(b)(4): Requires that new facilities that *<u>might</u>* later accommodate antennas on them *<u>must</u>* undergo a CEQA review, including finding, i.e. a <u>negative declaration</u>; a <u>mitigated declaration</u>; or <u>certification of an environmental impact report</u>.

Cities *may not use a CEQA categorical exemption* to permit a new facility, i.e. base station. There *must* be a specific CEQA review for each new base station.

Cities must employ some form of discretionary permitting process, e.g. a Conditional Use Permit, to permit a new facility that might later accommodate antennas

Origin, Intent, Scope & Effect of 6409 Understanding it in Context

- **Sponsored by Tower Industry, i.e. PCIA**
- **Not Carrier-sponsored legislation**

- **This legislation is *far more limited in scope than the industry (and others) would have you believe*, at least based upon information being disseminated by the tower industry. First, it's limited in scope to co-locations, modifications and upgrade to actual communications towers, as defined by the FCC; not to all wireless facilities. All the legislation says is that an application for a co-location or modification on a communications tower cannot be denied, and must be approved, if such does not substantially change the facility, e.g. the physical dimensions of the tower or base station. . . and, of course, if it complies with applicable (i.e. local) law. It says nothing about preempting or prohibiting:**
  - **1) the review of any portion of the application for compliance with applicable law; or**
  - **2) attaching conditions to any permit that are not contrary to applicable law or are needed to bring the facility into compliance with local law; or**
  - **3) requiring the remediation of any matters that involve safety or are contrary to local law.**
- **No legal expert or authority CMS has conferred with can imagine any (reasonable and informed) court saying the local government may not require adherence to zoning or land use ordinances and regulations and safety-related laws, codes and generally accepted standards. The language merely says the application may not be denied, i.e. *as long as it complies and comports with local and state law and reasonable requirements*, including any location/siting requirements and safety requirements. It doesn't preempt any of the issues that most well-done ordinances have historically required be reviewed.**

Enforcement of 6409

Using the 'Plain Language' (Strict Constructionist) test re Enforcement

***It says exactly what it says; no more and no less*, and courts normally give deference to the plain language, because:**

- **The authors *had the opportunity to say whatever they wanted* using whatever language they wanted; and**
- **expressly chose to say what they said and not to say what they didn't say; and**
- **The legislative body *had the opportunity to change the language before adoption*, e.g. in Joint Committee Markup.**

What may you regulate in the context of 6409?

Anything required by your regulations that doesn't run counter to state law

- **Location**
- **Height**
- **Aesthetics/Appearance**
- **Safety**

Applicability

- **Applicable (only) to *co-locations* and *modifications* on a *communications 'tower'*, i.e. as 'tower' is defined by the FCC.**
- **It says *nothing* about being applicable to *any* other types of 'towers' or other structures, e.g. buildings/rooftops, water towers, electric transmission towers, light towers, utility poles, billboards, silos, church steeples, etc., etc.**

PCIA's Incorrect Asserted Interpretations of 6409

Assertion

Requires eligible facilities requests only be subject to an administrative review process and not a discretionary review process that allows state or local government to deny or condition an eligible facilities request."

Comment

The use of a review process, i.e. other than an *administrative* review process, is *not* preempted by the language. There is absolutely no language in the legislation to that effect, such as public hearings for public *informational* purposes or to address situations *not compliant with applicable law*, e.g. safety issues such as structural inadequacies of the tower).

Incorrect Industry Assertions

Assertion

"Requires eligible facilities requests only be subject to an administrative review process and not a discretionary review process that *allows* state or local government to deny or condition an eligible facilities request."

Comment

The use of a process, i.e. other than an *administrative* review process, is *not preempted by the language*. There is absolutely no language in the legislation to that effect, such as public hearings for public *informational* purposes or to address situations *not compliant with applicable law*, e.g. safety issues such as structural inadequacies of the tower).

Incorrect Industry Assertions (continued)

Assertion

"Zoning review and/or conditional approvals of eligible facilities requests can have the effect of denying such requests, as a conditional approval is not an approval, per se; therefore it is a denial."

Comment

This is simply not true. Nothing in the legislation states the application must in effect be 'rubber stamped', i.e. as submitted, which is what they mean by the industry's use of the term 'per se' if the local regulations allow for the grant of a Conditional Use Permit (CUP) or Special Use Permit (SUP).

Regardless of the "*possibility*" of denying an application vis-à-vis any given process, the *only* thing that's preempted by the language is an ultimate act of denial, not the process itself.