

# Crash Course in New and Proposed FCC Rules

SCAN NATOA  
February 6, 2020

# Neurotic Lawyer Disclaimer

The information in this presentation does not represent policies or practices by any Telecom Law Firm clients. These materials merely represent best-thinking in new and evolving subject matters. This presentation does not contain legal advice and no attorney-client relationship is formed.

You are encouraged to contact the presenter if you have any questions or would like to discuss any of the materials presented.

# *Section 6409 - Redux*

*In re Implementation of State and Local Governments  
Obligation to Approve Certain Wireless Facility Modification  
Requests Under Section 6409(a) of the Spectrum Act of 2012,  
WT Docket No. 19-250 and RM-11849*

# Background

## Section 6409

- limits local authority to deny certain changes to existing wireless facilities
- embedded in legislation to authorize new spectrum auction and FirstNet
- short statute; virtually no legislative history

## *FCC's 2014 Infrastructure Order*

- interprets key terms in Section 6409
- shorter shot clock; deemed granted remedy

# Section 6409 (in a nutshell)

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.*”

# Tower/Base Station



# Substantial Change

Criteria	Towers Outside of RoW	Other Support Structures & ROW
Height	20 feet or ten percent	10 feet or 10 percent
Width	20 feet or tower width	6 feet
Equipment Cabinets	4 maximum	None if no ground cabinets; otherwise same, plus volumetric limits
Excavation	within the leased or owned area	same, but further restricted to proximity to other ground equipment
Concealment	cannot “defeat” the concealment elements	
Compliance with Prior Permit Conditions	changes must comply with all prior conditions except where only non-compliance meets FCC thresholds on height, width, cabinets or excavation	

# Case Law Developments

## Concealment?

- *Douglas Cty. v. Crown Castle USA, Inc.*, Case No. 18-cv-03171-DDD-NRN, 2020 WL 109208 (D. Colo. Jan. 9, 2020) (upholding denial for expansion to wood pole based on defeated concealment and holding concealment elements refer to specific steps not “overall appearance”).

## Money Damages?

- *ExteNet Systems, Inc. v. Village of Pelham*, 377 F. Supp. 3d 217 (S.D.N.Y. 2019) (holding that § 6409 cannot be enforced through § 1983 because the statutory command limits what local governments may do rather than confer a benefit on applicants).

## Constitutionality?

- *ExteNet Systems, Inc. v. Village of Pelham*, 377 F. Supp. 3d 217 (S.D.N.Y. 2019) (rejecting 10th Amendment argument because § 6409 “confers a federal right on private actors and properly preempts conflicting state and local laws”).



# Some Proposed Changes in the Petitions

## Shot Clock Commencement and Scope

- commence after a “good faith attempt” by “any reasonable process”
- apply to all processes (appeals, permitting, inspection)
- preempt public notice/hearing requirements

## Limits on a “Complete” Application

- curb local authority previously preserved by FCC
- specifically prohibit additional requirements
- allow applicant to disregard incomplete notices

## More Detailed Findings for Denials

- written denial with specific references to Section 6409
- higher standard for clarity in reasons for denial

# Some Proposed Changes in the Petitions

## Substantial Change Thresholds

- taller height limits on towers
- no limit on additional radios
- allow site expansions up to 30 feet in all directions
- fewer concealment elements preserved

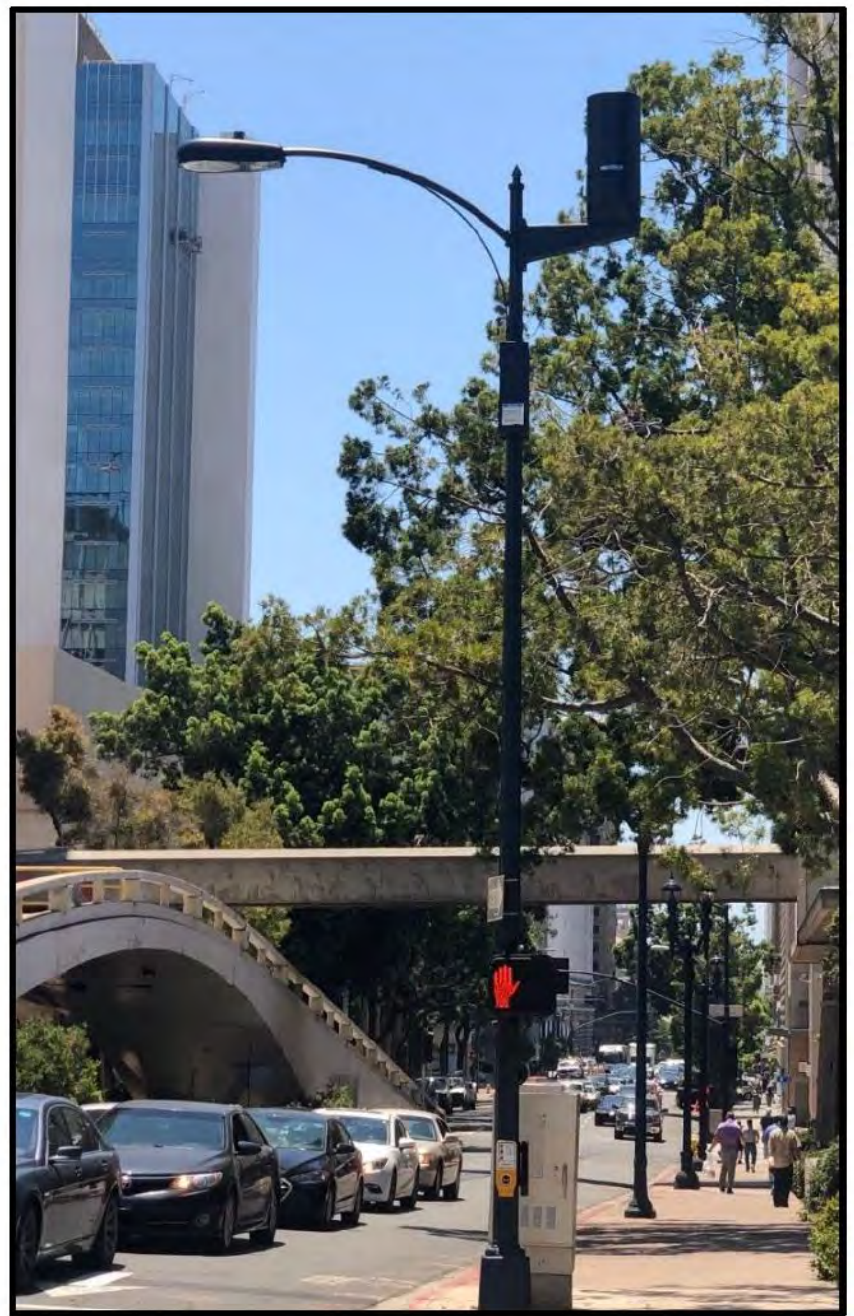
## Existing Concealment Elements

- limit applicability to only:
  - “stealth” facilities and
  - concealment specifically identified in the original approval as such on a stealth facility
- general exception for technical infeasibility



Forget something?





# Proposed Changes in the Petitions

## Conditions of Approval

- preempt authority impose conditions on EFRs
- exempt noncompliance with existing conditions as a basis for denial

## Deemed Granted Remedies

- declare that applicants can build without a permit after a failure to act by local government
- create a new limitations period on local governments to bring a lawsuit against deemed granted permits

# Why do COAs Matter?



**CROWN**  
CITY OF SAN DIEGO DEVELOPMENT SERVICES DEPARTMENT  
ENTITLEMENTS AND SPECIAL ZONING REGULATION FACILITIES

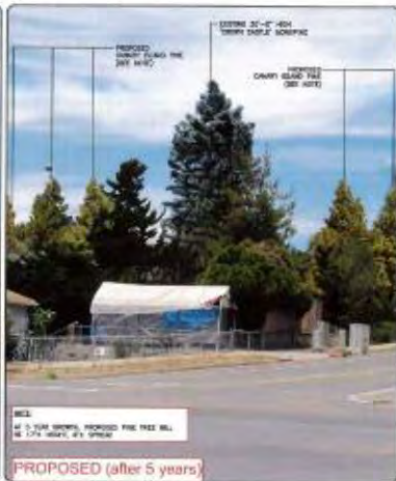
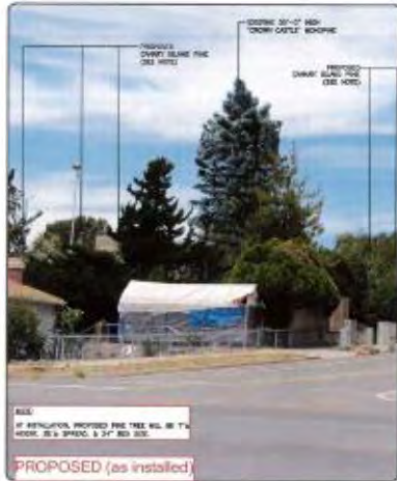
**EXHIBIT "A"**

Project Number: 358564  
Approval Date: 10/27/2016  
Signed (City Street): JC

SD903 - 627633  
7849 TOMMY DRIVE SAN DIEGO, CA 92119



EAST ELEVATION  
DATE: 05/17/15



applicant proposes this modification . . .

applicant builds this . . .

# What Happens Next?

**Comment Period Closed; *Ex Partes* Active**

**FCC Seems Cautiously Interested**

- when asked by a reporter, Commissioner Carr responded that he would need time to do a “deep dive” into the record and he had no specific timeframe for further action.

**My Prediction: NPRM**

- cure procedural defects in current proceeding
- gives industry second chance to develop a factual record that supports their proposals



# *Small Cell Litigation*

*Portland v. FCC*, No. 18-72689 (9th Cir.)

*Sprint Corp. v. FCC*, No. 19-70123 (9th Cir.)

# FCC Orders

## August Order

- preempts *de jure* and *de facto* moratoria
- adopted on Aug. 2, 2018; effective now

## September Order

- defines “small wireless facility”
- broad preemption over state and local authority
  - abrogates proprietary/regulatory capacity distinction
  - restricts all compensation to cost recovery (or less)
  - re-writes judicial interpretations for effective prohibitions under two different provisions in the Communications Act
- new “shot clocks” requiring local gov’ts to do more with less time and fewer resources
- new evidentiary presumptions and remedies
- adopted on Sep. 27, 2018; became fully effective on Apr. 15, 2019

# What's a Small Cell?

Small cells are  
the size of a  
pizza box!  
Yeah. That's it!



# “Small Wireless Facility”

(l) *Small wireless facilities*, consistent with section 1.1312(e)(2), are facilities that meet each of the following conditions:

(1) The facilities—

(i) are mounted on structures 50 feet or less in height including their antennas as defined in section 1.1320(d), or

(ii) are mounted on structures no more than 10 percent taller than other adjacent structures, or

(iii) do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater;

(2) Each antenna associated with the deployment, excluding associated antenna equipment (as defined in the definition of antenna in section 1.1320(d)), is no more than three cubic feet in volume;

(3) All other wireless equipment associated with the structure, including the wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than 28 cubic feet in volume;

(4) The facilities do not require antenna structure registration under part 17 of this chapter;

(5) The facilities are not located on Tribal lands, as defined under 36 CFR 800.16(x); and

(6) The facilities do not result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified in section 1.1307(b).



9312

5.25 feet

2.25 feet

1.90 feet

AT&T

22.5 cubic feet





# Effective Prohibitions

## General Rule

a state or local requirement effectively prohibits deployment when it “materially limits or inhibits **any competitor’s or potential competitor’s** ability to compete in a fair and balanced legal and regulatory environment.”

## Fee Requirements

must be (1) reasonably approximate to cost; (2) objectively reasonable to pass to applicant; and (3) no higher than fees charged to competitors in similar circumstances

## Non-Fee Requirements (e.g. Aesthetics)

must be (1) reasonable; (2) no more burdensome than those applied to other infrastructure deployments; and (3) objective and published in advance



# New Shot Clock Rules

## Shorter Timeframes

**60 days**

- small wireless facility “**collocations**”
- all eligible facility requests under Section 6409

**90 days**

- small wireless facilities on new structures
- collocations not covered as an eligible facilities request or small wireless facility

**150 days**

- everything else...
- new, freestanding non-small wireless facilities

# The Parties

## Local Governments

- Portland, OR; Seattle, WA; San Jose, CA; San Francisco, CA; Huntington Beach, CA; Montgomery County, MD; Austin, TX; Eugene, OR; Bowie, MD; Huntsville, AL; Marin County, CA; Westminster, MD; Arcadia, CA; Culver City, CA; Bellevue, WA; Burien, WA; Burlingame, WA; Gig Harbor, WA; Issaquah, WA; Kirkland, WA; Las Vegas, NV; Los Angeles, CA; Monterey, CA; Ontario, CA; Piedmont, CA; San Jacinto, CA; Shafter, CA; Yuma, AZ; Fairfax, CA; New York, NY; Ann Arbor, MI; Anne Arundel County, MD; Atlanta, GA; Boston, MA; Chicago, IL; Clark County, NV; College Park, MD; Dallas, TX; Washington D.C.; Gaithersburg, MD; Howard County, MD; Lincoln, NE; Myrtle Beach, SC; Omaha, NE; Philadelphia, PA; Rye, NY; Scarsdale, NY; Seat Pleasant, MD; Takoma Park, MD; Meridian Township, MI; Bloomfield Township, MI; Baltimore, MD; Albuquerque, NM; Bakersfield, CA; Ocean City, MD; Brookhaven, GA; Coconut Creek, FL; Dubuque, IA; Emeryville, CA; Fresno, CA; La Vista, NE; Lacey, WA; Medina, WA; Olympia, WA; Papillion, NE; Plano, TX; Rancho Palos Verdes, CA; Rockville, MD; San Bruno, CA; Santa Monica, CA; Sugarland, TX; Tumwater, WA; Contra Costa County, CA; Thurston County, WA; Corte Madera, CA; Yarrow Point, WA; King County, WA

## Municipal Orgs.

- League of OR Cities
- ~10 other municipal leagues and organizations
- municipal power entities/associations

## FCC/Industry

- FCC
- Sprint, AT&T, Verizon, PRTC
- CTIA, WIA, CCA

# Procedural History

## October 2, 2018

- Portland, OR files petition for review of the *Moratorium Order* in the Ninth Circuit

## October 24-25, 2018

- San Jose, CA; Seattle, WA; and Huntington Beach, CA file in the Ninth Circuit
- industry parties file in the First, Second, Tenth and DC Circuits

## November 2, 2018

- docketed in the Tenth Circuit after lottery

## January 10, 2019

- Tenth Circuit denied motion for stay, simultaneously granted transfer to the Ninth Circuit
- 14 related cases consolidated in the Ninth Circuits

## September 4, 2019

- Briefing concluded for all parties

## October 7, 2019

- Ninth Circuit grants Joint Petitioners' motion for expedited oral argument

## February 10, 2020

- Oral argument to be held in Pasadena
- Panel not yet announced

# What About the Substantive Arguments?

## Recent FCC Orders Ignore:

- the Communications Act
- the U.S. Constitution
- Supreme Court precedent
- common sense

# Current Status

## Both Orders Effective

- briefing concluded
- oral argument likely; decision as early as 2020

## D.C. Circuit Serves Cold Pizza

- *United Keetoowah v. FCC* (D.C. Cir. Aug. 9, 2019)
- harbinger for the Ninth Circuit?
- “the Commission inadequately justified its portrayal of deregulation’s harms as negligible. The FCC partly based its public-interest conclusion on a picture of small cells that the record does not support.”

***United Keetoowah  
Band of Cherokee  
Indians v. FCC***

**933 F.3d 728 (D.C. Cir. 2019)**

# Harbinger for Our Case?

“[T]he Commission inadequately justified its portrayal of deregulation’s harms as negligible. The FCC partly based its public-interest conclusion on a picture of small cells that the record does not support.”

# *What Else is Happening?*



# Related Litigation

## Significant Gap Not Dead?

- VWI Towers v. North Andover, 404 F. Supp. 3d 456 (D. Mass. 2019)
- Up State Tower Co. v. Southport, No. 6:18-CV-06445 (EAW) (W.D.N.Y. Sep. 25, 2019)

## Fee Litigation

- Verizon v. City of Rochester, NY
- FCC Clark County, NV Petition for Declaratory Ruling
- Crown Castle v. Glendale, No. 2:19-CV-08518-ODW-JW (C.D. Cal. 2019)

# Related Federal Regulatory Activities

## Further Rulemakings by FCC

- pending reconsideration petition in *Small Cell Order*
- OTARD NPRM (comment period closed, *ex partes* ongoing)
- Section 6409 Declaratory Ruling Petitions

## Legislation

- repeal: H.R. 530 (Eshoo); S. 2012 (Feinstein)
- cement: S. 1699 (Thune)

# About the Presenter



## Robert C. May III

Partner

Telecom Law Firm, PC

3570 Camino del Rio N.

Suite 102

San Diego, CA 92108

(619) 272-6200

[tripp@telecomlawfirm.com](mailto:tripp@telecomlawfirm.com)

practice focused on representing governments and other landowners in telecommunications infrastructure regulations and transactions

counsel for the CA League, AZ League and OR League in *Small Cell Order* litigation

counsel for the Western Cities Coalition in other FCC proceedings

co-author of the Brief of Amici Curiae in support of Petitioners in *Montgomery Cnty. v. FCC*

JD, University of San Diego School of Law

- Executive Editor, *San Diego Law Review*
- Executive Board, Moot Court