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DATE: June 20, 2014

RE: Development Code Text Amendment – AT&T
OMC Ch. 18.44 and Definitions

On January 23, 2014, the City of Olympia Community Planning and Development Department (the "Department") received a letter from Ken Lyons, an attorney representing AT&T. The letter requested text amendments to the City's wireless communications code and related provisions of the City Code.

The requested amendments fall within three categories: (1) amendments eliminating conditional use permit requirements for attachment of antenna facilities to City or publicly owned property; (2) amendments that would conform the wireless code to changes in state and federal law; and (3) amendments to the City Code to provide for consistency.

Our firm has been retained to assist the Department in evaluating the proposed text amendments and to provide guidance regarding the meaning and scope of federal and state regulations governing the siting of wireless communication facilities. This memorandum provides the background information necessary to evaluate the proposal from AT&T.

I. BACKGROUND

A. Federal Law.

1. The 1996 Telecommunication Act. In 1934, Congress enacted the Communications Act of 1934, creating the FCC and granting it authority over common carriers engaged in the provision of interstate or foreign communications services. Sixty six years later, telecommunications regulation was substantially altered when the 1934 Act was amended by

Congress in the 1996 Telecommunications Act (the "Act").[1] The Act regulates both wireless and wire line communications facilities and was intended to open up local and long distance markets to competition by allowing long distance companies, cable companies, wireless service operators, gas utilities, and electric utilities to sell local telephone service. The 1996 Telecommunications Act, thus, "fundamentally restructure[d] local telephone markets."[2]

When considering the 1996 Act, Congress debated the extent to which the Act should preempt local regulatory and land use authority as a strategy to encourage development and deployment of new communications facilities. Ultimately, a balance was struck between local zoning and regulatory authority and removal of barriers to entry into the market. The Act achieves this balance by preserving local zoning authority except where it specifically limits such authority. Such limitations are both substantive and procedural. Traditionally, the federal courts have taken an extremely deferential stance in reviewing local zoning decisions, limiting the scope of inquiry to the constitutionality of the zoning decision under a standard of rational review." *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 493 (2d Cir. 1999) (*citing Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981)). However, the Act altered that traditional deference with regard to local decisions that may interfere with or impact siting of wireless communications facilities. Thus, the methods by which siting decisions are made are now subject to judicial oversight and are reviewed by the court more closely than standard local zoning decisions.

Early interpretations of the Act favored local government regulation of siting decisions. The balance then shifted to decisions resulting in greater limitations upon local zoning and police power regulations. However, the balance was tipped back in local governments favor in a 9th circuit decision[3] reversing its decision in *Auburn v. Qwest*.[4] Contemporaneously, the FCC continues to adopt rules that interpret the provisions of the Act preempting local government authority. Additionally, Congress enacted provisions in 2012 further encroaching upon local government zoning and regulatory authority. The following discussion explains the pertinent provisions of the Act and subsequent legislation and rule making.

a. 47 USC § 332 – As Applied. The pertinent provisions of the Act (Section 704) relating to wireless communications facilities are codified at 47 USC § 332(c)(7) & 332(d), and provide in pertinent part as follows:

> (7) PRESERVATION OF LOCAL ZONING AUTHORITY.
>
> (A) *General authority*. Except as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions

[1] Pub. L. No. 104-104, 110 Stat. 70 (1996).
[2] *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 371 (1999).
[3] *Sprint Telephony PCS v. County of San Diego*, 543 F.3d 571, 580 (9th Cir. 2008), *cert. den.* 129 S. Ct. 2860 (2009).
[4] *Auburn v. Qwest*, 247 F.3d 966 (9th Cir.), *amended*, 260 F.3d 1160 (9th Cir. 2001), *cert. denied.*

regarding the placement, construction, and modification of personal wireless service facilities.

(B) *Limitations.*

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof--

(I) shall not UNREASONABLY DISCRIMINATE among providers of functionally equivalent services; and

(II) shall not PROHIBIT OR HAVE THE EFFECT OR PROHIBITING the provision of personal wireless services.

(ii) (*Act within Reasonable Time*) 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) (*Writing/Substantial Evidence/Written Record*) 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 Regulation Based on RF Emissions*) 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.

(v) (*Commence Legal Action 30 Days after Action*) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, WITHIN 30 DAYS AFTER SUCH ACTION OR FAILURE TO ACT, COMMENCE AN ACTION IN ANY COURT OF COMPETENT JURISDICTION. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or

local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

The ACT contains both substantive and procedural requirements. The Substantive requirements of Section 704 provide that local governments cannot:

(1) Unreasonably discriminate among providers of functionally equivalent services; or

(2) Prohibit or have the effect of prohibiting the provision of personal wireless services; or

(3) Deny an application based on the environmental effects of radio frequency emissions to the extent that the proposed wireless telecommunications facilities comply with the FCC's regulations concerning such emissions.

The procedural provisions of Section 704 provide that local governments must:

(1) Act upon any request for authorization to place, construct or modify personal wireless service facilities within a reasonable period of time; and

(2) Justify a denial of an application in writing and supported by substantial evidence contained in a written record; and

(3) Any person adversely affected by any final action or failure to act may commence an action in any court of competent jurisdiction within 30 days after action or failure to act.

The above described substantive and procedural requirements have been reviewed by various federal courts throughout the country with varying and often conflicting results. The 9th Circuit Court of Appeals has taken a middle of the road position on the substantive and procedural requirements of Section 704. These requirements were explained as follows by the 9th Circuit Court of Appeals in *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715 (9th Cir. 2005).

i. In Writing – Sufficient Explanation to Evaluate: The 9th circuit follows a middle approach to the "in writing" requirements and requires local governments to issue a written denial separate from the written record which contains a sufficient explanation to allow a reviewing court to evaluate the evidence in the record supporting those reasons.

ii. Substantial Evidence Inquiry. The Act requires that decisions be supported by substantial evidence in the record but does not define what this means or what evidence may be considered. The court viewed this essentially as two questions: (1) what rules govern the consideration of evidence and the decision that was made, and (2) what constitutes substantial evidence?

The first question is really a question of the scope of the substantial evidence inquiry. The Court found that this inquiry does not require incorporation of the substantive federal

standards imposed by the Act, but rather, requires that the determination of whether the zoning decision at issue is supported by substantial evidence reviewed in the context of the established principles under *state and local law*. In other words, the courts will look to state and local laws to determine whether or not the decision that was made was authorized under those laws. For example, if the decision was based in part upon evidence regarding the necessity of the particular wireless communications facility, the court will look at whether or not the state or local rules allowed the consideration of evidence on this subject. This is exemplified in the case of *Medina v. T-Mobile,* 123 Wn. App. 19 (2004).

In this case, the City of Medina appealed a decision of the hearing examiner to grant a special use permit and variances to T-Mobile for installation of a pole and WCF in the public right of way. The City argued that the hearing examiner could not consider evidence related to the adequacy of service. The court rejected this argument finding that not only did the Act allow local governments to consider adequacy of service in determining if a permit should be issued or a variance granted, the Medina City Code required consideration of service in making such determinations.[5] *Medina v. T-Mobile,* 123 Wn. App. At 25-26. In particular the court focused upon language in the City of Medina Wireless Communications Facilities Code providing that one its purposes was to allow facilities that were adequate to meet the needs of its citizens, the traveling public, others within the City, and neighboring communities. Thus, the local rules defined whether or not evidence of adequacy of service could be considered to determine if approval of a permit based upon consideration of that evidence was authorized.

The Court next turned to the meaning of the evidentiary standard, finding substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Review under this standard is essentially "deferential," such that courts may neither engage in their own fact finding nor supplant the hearing body's reasonable determinations. In applying this standard to the facts of a given case, the written record must be viewed in its entirety, including all evidence supporting both parties, and "local and state zoning laws govern the weight to be given the evidence."

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[5] Specifically the court held that,

> First, both the MMC and the Federal Telecommunications Act of 1996 (FTA), 47 U.S.C. §§ 151-614, expressly and implicitly allow decision makers to consider service needs when making permit decisions. Under the MMC, a hearing examiner is authorized to make variance decisions "in harmony with the general purpose and intent of said zoning ordinances and such variances may vary any rules . . . of the zoning ordinances relating to the use of land and/or structures so that the spirit of the ordinances will be observed." Chapter 17.90 MMC expressly states that one of its purposes is to establish "appropriate locations, site development standards, and permit requirements to allow for wireless communications services to the residents of the city [Medina], in a manner which will facilitate the location of various types of wireless communications facilities in permitted locations so they are consistent with the residential character of the city." In addition, the chapter is "intended to allow wireless communications facilities *which are sufficient to allow adequate service to citizens, the traveling public and others within the city* and to accommodate the need for connection of such services to wireless facilities in adjacent and surrounding communities." Given both of these MMC objectives, a hearing examiner not only may consider the adequacy of wireless service, but indeed *must* consider coverage and weigh it against the competing interests of aesthetics, retaining neighborhood character, and preserving property values. This becomes particularly important when determining whether a variance from the chapter 17.90 MMC siting requirements is "necessary" . . . .

Thus, the Court may not overturn the hearing body's decision on "substantial evidence" grounds if that decision is authorized by applicable local regulations and supported by a reasonable amount of evidence (i.e., more than a "scintilla" but not necessarily preponderance). "Authorized by local rules" means that local and state law authorize consideration of the evidence in question.

iii. Unreasonable Discrimination. The Act also mandates that state or local governments *shall not unreasonably discriminate among providers of functionally equivalent services*. 47 U.S.C. § 332(c)(7)(B)(i)(I). This language explicitly contemplates that some discrimination among providers of functionally equivalent services' is allowed. Any discrimination need only be reasonable. Most courts have held that discrimination based on "traditional bases of zoning regulation" such as "preserving the character of the neighborhood and avoiding aesthetic blight" are reasonable and thus permissible. Aside from reflecting the plain meaning of the Act's text, this interpretation is also supported by the Act's legislative history. The House Conference Report on the Act explained the Act's nondiscrimination clause as follows:

> The conferees also intend that the phrase "unreasonably discriminate among providers of functionally equivalent services" will *provide localities with the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning requirements even if those facilities provide functionally equivalent services*. For example, the conferees do not intend that if a State or local government grants a permit in a commercial district, it must also grant a permit for a competitor's 50-foot tower in a residential district. H.R. Conf. Rep. No. 104-458, at 208 (1996) (emphasis added).

Almost all federal courts considering such cases have ruled that providers alleging unreasonable discrimination must show that they have been treated differently from other providers whose facilities are "*similarly situated*" in terms of the "*structure, placement or cumulative impact*" as the facilities in question. It is not unreasonably discriminatory to deny a subsequent application for a cell site that is substantially more intrusive than existing cell sites by virtue of its structure, placement or cumulative.

The Court also made it clear that the simple fact that wireless communications facilities are in different locations is not in and of itself a basis for discrimination between providers or facilities. Accordingly, wireless communications facilities can be similarly situated without a showing that the comparable facilities are in the same location or that the comparable facilities are functionally identical. Such a standard would otherwise be too narrow. Additionally, siting decisions have been found to be unreasonably discriminatory when a local government denies an application where it has previously allowed identical (or larger) facilities to be placed in similar locations,[6] and when local governments have failed to allow providers to "collocate" similar equipment on existing poles or structures.[7]

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[6] *Ogden Fire Co. No. 1. v. Upper Chichester Twp.*, 504 F.3d 370, 394 (7th Cir. 2007).

[7] *Nextel Partners, Inc. v. Town of Amherst*, 251 F. Supp. 2d 1187, 1195 (W.D.N.Y. 2003); *Nextel West v.*

iv. General Ban; Significant Gap in Service. A city-wide general ban on wireless services would constitute an impermissible prohibition of wireless services under the Act; however, the various circuit courts are split regarding what constitutes a general ban" on wireless services.

The 4th Circuit has held that only blanket prohibitions and general bans or policies affecting *all* wireless providers count as effective prohibition of wireless services under the Act. The 9th Circuit *MetroPCS* Court found that in addition to the blanket or general ban, a locality can run afoul of the Act's "effective prohibition" clause if it prevents a wireless provider from closing a "significant gap" in service coverage. Under this standard, the fact that some carrier provides some service to some consumers does not in itself mean that the town has not effectively prohibited services to other consumers. Local regulation will create a "significant gap" in service if the *provider in question* is prevented from filling a significant gap *in its own* service network."[8]

The FCC in its declaratory ruling clarifying the limitations under 47 U.S.C. 332(7)(B), agreed with the 9th Circuit in *MetroPCS*, and determined that,

> [W]here a State or local government denies a personal wireless service facility siting application solely because that service is available from another provider, such a denial violates Section 332(c)(7)(B)(i)(II).[9]

This section of the Act operates to preempt any regulation or action that prohibits or has the effect of prohibiting the provision of personal wireless services. In effect, the FCC has determined that local governments cannot prohibit siting of wireless communications facilities solely because another wireless communications service provider offers service within the same coverage area.

The court did not define what constituted a significant gap in coverage. Instead it recognized that although the Act does not guarantee wireless service providers coverage free of small "dead spots," the existing case law demonstrates that "significant gap" determinations are extremely fact-specific inquiries that defy any bright-line legal rule.[10] Other circuits have been more definitive regarding what a gap in coverage is. For example, the Third Circuit has held that a significant gap in personal wireless service exists "when a remote user of those services is unable either to connect with the land-based national telephone network, or to maintain a connection capable of supporting a reasonably uninterrupted communication." *Cellular Tel. v. Zoning Bd. of Adj. of Ho-Ho-Kus*, 197 F.3d 64, 70 (3d Cir. 1999); *Omnipoint Communications. Enters., L.P. v. Newton Twp.*, 219 F.3d 240, 244 (3d Cir. 2000). In making this determination, it

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Town of Edgewood, 479 F. Supp. 2d 1219, 1232 (D.N.M. 2006); *New Cingular v. West Haven*, 2013 WL 3458069 (July, 2013); *T-Mobile v. Leonia Zoning Board*, 942 F. Supp. 2d 474 (D.N.J. 2013)

[8] *MetroPCS*, at 731.

[9] See, In the Matter of Petition for Declaratory Ruling to Clarify provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, WT Docket No. 08-165.

[10] *MetroPCS*, at 733.

is relevant to consider whether the gap in service covers a "small residential cul-de-sac, or whether it straddles a significant commuter highway or commuter railway." *Id.* n.2. In the 4th Circuit, the court held that a "legally cognizable deficit in coverage is one that amounts to an effective absence of coverage."[11] Under this standard, it is not enough to show that coverage is not 100% reliable or fails to meet industry standards for reliability.

Carriers may also argue that effective prohibition may exist if a city denies an application to provide additional capacity. This is a much more nebulous concept because capacity has more to do with quality and level of service than with a prohibition upon service. More importantly, availability of high speed and reliable communications technology may be an integral component to economic development and quality of life for the residents of a city. However, for those communities that choose to regulate wireless communications facilities on the basis of necessity (i.e., filing a significant gap in coverage) the *MetroPCS* decision seems to wholly support this as long as the application of the ordinance is not unreasonably discriminatory and does not result in a significant gap in coverage.

v. Least Intrusive vs. No Alternative Sites. If the provider has made an adequate showing of a significant gap in coverage (assuming the development code requires such a showing) the city is not necessarily obligated to issue a permit to avoid violating the effective prohibition clause. The necessity of the facility and the means chosen to close the significant gap in coverage remain issues.

The *MetroPCS* court identified a split regarding the burden of a wireless provider with respect to the intrusiveness or necessity of its proposed means of closing an identified "significant gap." The 2nd and 3rd Circuits require the provider to show that 'the manner in which it proposes to fill the significant gap in service is the *least intrusive on the values that the denial sought to serve*." By contrast, the 1st, 4th and 7th Circuits hold that there must be no alternative sites which would solve the problem. The 9th Circuit in *MetroPCS* found the "no alternative sites" option too exacting because it conceivably could mean that no site could be chosen if another site was available. Further, there would be no practical mechanism to choose between the two sites. Thus a provider may have to apply for each site and be denied until a single feasible site remained.

Ultimately, the *MetroPCS* court adopted the "least intrusive means" standard of the 2nd and 3rd Circuits because it allows for a meaningful comparison of alternative sites before the siting application process is needlessly repeated. It also gives providers an incentive to choose the least intrusive site in their first siting applications, and it promises to ultimately identify the best solution for the community, not merely the last one remaining after a series of application denials. Accordingly, if the wireless communications service provider demonstrates a significant gap in service, to prove a violation of the Act, it must still demonstrate that the way "it proposes to fill the significant gap in services is the least intrusive on the values that the denial sought to

[11] *T-Mobile v Loudon County,* 903 F. Supp. 2d 385, 401 (2012).

serve".[12] This means that the provider "has the burden of showing the lack of available and technologically feasible alternatives."[13] This standard is intended to,

> . . . allow for meaningful comparison of alternative sites before the siting application process is needlessly repeated. It also gives the providers an incentive to choose the least intrusive site in their first siting applications, and it promises to ultimately identify the best solution for the community, not merely the last one remaining after a series of application denials.[14]

Division II of the Washington State Court of Appeals followed the 9th Circuit *MetroPCS* decision, finding that an "effective prohibition" exists only when the proposed site is "the least intrusive means" of closing a "significant coverage gap," in light of the values that denial of the permit sought to serve.[15] In that case, Cingular Wireless demonstrated that it had a significant coverage gap but not that the proposed WCF was the least intrusive means of closing it.

b. 47 USC § 253 – Facial Challenge. In a majority of cases, the courts have upheld local zoning decisions challenged under 47 USC § 332 (Section 704 of the Act), thus making it very difficult for applicants to prevail in a challenge to a particular local decision. However, wireless communications services providers have more recently challenged wireless regulations under 47 USC § 253 (Section 101 of the Act) entitled removal of barriers to entry. This section provides in pertinent part as follows:

> § 253. Removal of barriers to entry.
>
> (a) In general. No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
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> (b) State regulatory authority. Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 [47 U.S.C. § 254] requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
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> (c) State and local government authority. Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable

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[12] *MetroPCS* at 734.
[13] *T-Mobile USA, Inc. v. City of Anacortes, 572 F.3d 987, 996* (9th Cir.2009) (*citing Sprint Telephony PCS, L.P. v. Cnty. of San Diego*, 543 F.3d 571, 579 (9th Cir .2008) (en banc) ("Sprint II ")).
[14] *T-Mobile v. Anacortes* at 995.
[15] *Cingular Wireless, L.L.C. v. Thurston County*, 131 Wn. App. 756, 781 (2006).

> compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.
>
> (d) Preemption. If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

Section 253 has been litigated extensively by wireline telecommunications service providers but had not generally been thought by local governments to be applicable to wireless service providers. However, when Sprint brought a challenge to the wireless siting regulations adopted by the County of San Diego, it did so as a facial challenge to the ordinance under § 253.[16] Sprint claimed that the ordinance was invalid on its face arguing that the onerous permitting process and the amount of discretion retained by the county effectively prevented Sprint from providing wireless service. The County argued that Congress did not intend to apply § 253 to siting decisions and instead, enacted § 332 to ensure that the Act did not abrogate local siting decisions. However, after a long and strained analysis, the panel of the 9th Circuit Court of Appeals, relying upon its prior decision in *Auburn v. Qwest*[17], concluded that § 253 could be applied to invalidate the regulations themselves as opposed to the individual siting decision.

San Diego County sought en banc review of the panel decision and surprisingly, the 9th Circuit Court of Appeals granted en banc review.[18] The Court quickly issued a decision reversing the panel decision and more importantly, reversing its prior decision in *Auburn v. Qwest*. Although the Court did not ultimately determine whether or not § 253 applies to wireless facility siting decisions, this decision is significant because the Court found that the effective prohibition provisions of § 253(a) and 332(c)(7)(B)(i) have the same meaning. If this had been the limit of the Court's ruling, local governments would have been faced with a heavy handed interpretation of § 332 identical to that given to § 253 by the *Auburn* court. This would have resulted in preemption of local government zoning authority over wireless siting decisions. However, the Court embarked upon its own analysis of § 253 and found that the Court in *Auburn* had incorrectly interpreted the meaning of § 253. This decision restored the intent of Congress to preserve local government right of way and zoning regulations and applications of those regulations that do not actually prohibit or have the effect of prohibiting competition.

The Court found that Congress enacted § 253 to preempt state and local regulations that maintain the monopoly status of a telecommunications service provider. The focus of this

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[16] Nos. 05-56076 and 05-56435 (9th Cir. 2007). A simultaneous proceeding in the California Appellate Court was denied review by the California Supreme Court on the basis of the 9th Circuit Decision. See, *PCS v. County of San Diego*, No. S145541.

[17] *Supra.*

[18] *Sprint v. County of San Diego*, 527 F.3d 791 (9th Cir. 2008).

provision was upon state and local regulations that prohibit entry into the market place as opposed to regulations that merely make it more burdensome. Accordingly, the court found that a showing that a local government could *potentially* prohibit the provision of telecommunications services would be insufficient to show a violation of either § 253 or § 332. The Court, having found these provisions to have the same meaning, found it unnecessary to determine whether or § 253 applies to regulations affecting wireless communication facilities.

The Court then applied the "effective prohibition" standard to the San Diego County ordinance. Because *Sprint* brought a facial challenge, rather than a challenge to a specific decision to deny or condition a permit, the Court had to find that "no set of circumstances exists under which the Act would be valid" if it were to find the ordinance to be invalid.[19] The Court had no trouble finding that ordinance was not in fact an outright ban, thus its analysis of the ordinance focused upon whether or not it created an effective prohibition upon entry into the market.[20]

Like many ordinances in Washington State, the San Diego County ordinance imposed a layer of requirements for wireless facilities in addition to the zoning requirements for other structures. One of the requirements that Sprint focused upon was the discretion reserved to the decision maker. Sprint complained that,

> [T]he zoning board must consider a number of 'malleable and open-ended concepts' such as community character and aesthetics; it may deny or modify applications for 'any other relevant impact of the proposed use'; and it may impose almost any condition that it deems appropriate.[21]

The Court was not troubled by such requirements because it recognized that, although a zoning board may use its discretion to effectively prohibit the provision of wireless services, it could just as likely use its discretion appropriately, "to balance the competing goals of an ordinance—the provision of wireless services and other valid public goals such as safety and aesthetics."[22] Thus, because there are circumstances in which the ordinance would be applied lawfully, these provisions would not support a facial challenge.

Sprint also complained about the detailed application requirements, including the requirements for a public hearing. Again the Court found that, although such provisions could be used to stall an application, these provisions could also be used to fully and promptly evaluate the merits of the application.[23] In particular, the Court found that, even if there was an excessively long waiting period that was being used to unreasonably delay an application, the Telecommunications Act provides an expedited judicial review process in federal or state

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[19] *Sprint*, at 12714.
[20] *Sprint*, at 12714.
[21] *Sprint*, at 12714-12715.
[22] *Sprint*, at 12715.
[23] *Sprint*, at 12715.

court.[24] Thus, a remedy is available for the Courts to determine if local government authority is acting unreasonably.

Finally, the Court addressed Sprint's challenges to the substantive requirements of the Ordinance. The Court could not find a single substantive requirement that amounted to an effective prohibition, finding that,

> Sprint has not identified a single requirement that effectively prohibits it from providing wireless services. On the face of the Ordinance, requiring a certain amount of camouflage, modest setbacks, and maintenance of the facility are reasonable and responsible conditions for the construction of wireless facilities, not an effective prohibition.[25]

Thus, none of the factors that had been cited by the *Auburn* Court, the three-judge panel in the earlier *Sprint* decision, and in other preemption decisions[26], were found to be preempted under § 253 or § 332 as a barrier to entry. Instead, the Court found that the types of regulations that may not survive a facial challenge are provisions that constitute an "effective prohibition." The Court gave clear examples of such provisions, such as undergrounding requirements for wireless facilities and prohibitions that prevent providers from addressing a "significant gap" in service coverage.

> That is not to say, of course, that a plaintiff could never succeed in a facial challenge. If an ordinance required, for instance, that all facilities be underground and the plaintiff introduced evidence that, to operate, wireless facilities must be above ground, the ordinance would effectively prohibit it from providing services. Or, if an ordinance mandated that no wireless facilities be located within one mile of a road, a plaintiff could show that, because of the number and location of roads, the rule constituted an effective prohibition. We have held previously that rules effecting a "significant gap" in service coverage could amount to an effective prohibition, *MetroPCS*, 400 F.3d at 731-35, and we have no reason to question that holding today.[27]

Thus, the Court upheld the Ordinance because Sprint could not show that there were no facts under which the Ordinance or certain challenged provisions of the Ordinance could be applied lawfully.

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[24] *Sprint*, at 12715, (citing to 47 U.S.C. § 332(c)(7)(B)(ii) & (v)).
[25] *Sprint*, at 12715-12716.
[26] E.g., *T-Mobile USA, Inc. v. City of Anacortes*, No. CO7-1644RAJ (WD WA May 6, 2008); and, *Next G Networks v. County of LA*, 522 F. Supp. 2d 1240 (CD CA 2007).
[27] *Sprint*, at 12716.

2. The FCC 2009 Declaratory Ruling – The 90/150 Day Shot Clock. In 2008, CTIA – The Wireless Association ("CTIA") filed a petition requesting that the Federal Communications Commission issue a declaratory ruling clarifying provisions of the Communications Act regarding state and local review of wireless facility siting applications.[28] In particular, CTIA wanted the FCC to require local governments to take formal action within 45 days of a request for a permit for collocation and within 75 days for any other wireless facility siting application and to implement procedural steps whereby an application shall be deemed granted if no action is taken within the above procedural timelines.

The FCC released its declaratory ruling in November of 2009 adopting new shot-clock rules applicable to local government wireless siting decisions.[29] The FCC's new rules were unsuccessfully challenged resulting in a ruling by the United States Supreme Court upholding the authority of the FCC to issue rules interpreting the 1996 Telecommunication Act.[30] These rules create a presumption that an application to site a wireless facility has not been acted upon within a reasonable period of time if the local government agency does not act within a specific time period. The rules generally provide as follows:

- New Facilities – 150 days. Applications to site a wireless facility must be decided within 150 days of the filing of an application;

- Collocation – 90 days. An application for collocation of a wireless facility must be acted upon within 90 days of the filing of an application;

- Remedy. If the local government fails to act within the presumptively reasonably time period, then the applicant may file an action in federal court seeking redress. The local government can then provide evidence to the court rebutting this presumption. If the presumption is not overcome by such evidence, then the court can review the record to determine the appropriate remedy.

- The parties may mutually consent to extend the time frame for taking action.

- If the local government notifies the applicant that its application is incomplete within 30 days of receipt of the application, the time period during which the applicant takes to respond to the request for additional information is excluded from the 90/150 time period;

- State and local rules with shorter time periods for taking action continue to apply but do not provide a basis for seeking resolution in federal court;

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[28] See, In Re the Petition of CTIA – The Wireless Association, to clarify provisions of section 332(c)(7)(b) to ensure timely siting review and to preempt under section 253 state and local ordinances that classify all wireless siting proposals as requiring a variance, WT Docket No. 08-165.

[29] See, In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, WT Docket No. 08-165, *Declaratory Ruling.*

[30] *City of Arlington, Texas et. al. v FCC*, No. 11–1545 (2012).

- An application to site a wireless facility constitute a collocation for purposes of the shot clock rule, if the request is for a collocation that does not involve a "substantial increase in the size of a tower" as defined in the nationwide Programmatic Agreement for the Collocation of Wireless Antennas.

Accordingly, local governments that have enacted wireless facility regulations should conform those regulations to the FCC shot clock rules. However, it should also be noted that the FCC is in the process of another rule making proceeding to reconsider the shot clock rules. In December of 2013 the FCC published a notice of proposed rule-making and sought comments regarding a number of issues including potential revisions to the FCC shot clock rule. These changes are discussed below.

3. Section 6409 of the Middle Class Tax Relief Act - 2013 NPRM. In 2012, Congress passed the "Middle Class Tax Relief and Job Creation Act of 2012" (the "Act") (PL-112-96; codified at 47 U.S.C. § 1455(a)). Title VI of this Act (Title VI - Public Safety Communications and Electromagnetic Spectrum Auction") generally provided for incentives to auction spectrum and for the allocation of spectrum for a nationwide interoperable broadband network for first responders and provided funding ($7 billion) for public safety broadband network build out. However, this Act includes provisions at Section 6409 (hereafter "Section 6409") affecting applications for modification of an existing wireless communication tower or base station. Section 6409 provides as follows:

SEC. 6409. WIRELESS FACILITIES DEPLOYMENT.

(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.
. . .

Section 6409 makes reference to Section 704 of the 1996 Telecommunications Act (47 U.S.C. § 332); providing that, Section 6409 is not intended to be subject to the limitations of Section 704. Section 704 of the 1996 Telecommunications Act had preserved local government zoning and land use regulatory authority over siting of personal wireless service facilities. See discussion, supra. Thus, it appears that the intent of Section 6409 of the Middle Class Tax Relief

Act was to preempt local government zoning and land use authority relative to land use approval that fall within the parameters of Section 6409. This appears clearly to be the approach taken by the FCC.

Section 6409 has been criticized because local governments had no input into the drafting of this provision, it likely overreaches constitutionally permissible federal regulatory authority[31], it preempts local government regulatory authority, and it lacks objective standards and criteria pursuant to which local governments may implement the requirements of Section 6409. The lack of clarity makes it difficult to draft amendments with any reasonable certainty that the amendments will conform to the requirements of this statute. For example[32],

- What is a wireless tower or base station?
- What is an existing tower or base station (must something actually be in use for wireless)?
- What are collocation, removal and replacement (only changes to the existing facility, or additions of facilities and equipment associated with the existing facility)?
- How does the law affect non-conforming uses (and why are non-conforming uses needed)?
- Must a government approve a modification that does not conform to an existing permit condition?
- What is a substantial change in physical dimension?
  - Just size or something more?
  - Is it an absolute or relative standard?
  - Does same test apply to all structures or are different tests appropriate for light and utility poles, buildings, etc.? To stealth facilities?
  - Are changes measured from original structure or from structure as modified?
- What does "shall not deny and shall approve" mean?
- Are there any special circumstances where an application may be denied?
- Does it require approval where a structure violates safety codes, or otherwise places persons and property at risk?
- Can it be read to allow imposition of conditions?
- Does the statute apply where gov't is acting as a proprietor and not as a regulator?
- What application process may be required if any, and before what entity?
- What remedy is appropriate and constitutional?

The lack of specificity in the statute has not gone unnoticed by the FCC. In September of 2013 the FCC adopted and released a Notice of Proposed Rulemaking ("NPRM") which focused in part upon whether or not the FCC should adopt rules regarding implementation of Section

[31] For a discussion of the potential constitutional defects in Section 6409, see John W. Pestle's article published in the September - December, 2012 issue of *Municipal Lawyer Magazine* published by the International Municipal Lawyer's Association.

[32] Examples taken from Sept 30, 2013 presentation by Joe VanEaton of Best, Best & Kreiger, LLP.

6409.[33] The FCC in its NPRM tentatively found that it would serve the public interest to clarify the requirements and scope of Section 6409 and it announced what rules its intends to adopt. It made clear that it viewed collocation as an efficient and preferred way to enhance and speed deployment,

> . . .[C]ollocation on existing structures is often the most efficient and economical solution for mobile wireless service providers that need new cell sites, either to expand their existing coverage area, increase their capacity, or deploy new advanced services. Therefore, the Commission has taken several significant steps to facilitate collocations, including tailoring environmental review of collocations through the Collocation Agreement, adopting a time frame for local review of collocations in the 2009 Declaratory Ruling, and adopting comprehensive rules to streamline the pole attachment process in the Pole Attachment Order.210 Collocation is also commonly encouraged by zoning authorities to reduce the number of new communications towers.[34]

The FCC has clearly signaled that its rulemaking will favor interpretations of Section 6409 that limit local regulatory control over collocation of wireless communications facilities.[35]

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[33] *In re Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket No. 13-238, FCC 13-122.

[34] *Id.* at ¶ 6.

[35] The proposed rule is set forth as follows:

> Sec. 1.40001. Wireless Facility Modifications.
>
> (a) Purpose. These rules are issued under the Communications Act of 1934, as amended, 47 U.S.C. 151 et seq., implementing section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012 (codified at 47 U.S.C. 1455), which requires a State or local government to 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.
>
> (b) Definitions. Terms used in this section have the following meanings.
>
> Base Station. A station at a specified site that enables wireless communication between user equipment and a communications network, including any associated equipment such as, but not limited to, radio transceivers, antennas, coaxial or fiber-optic cable, and regular and backup power supply. It includes a structure that currently supports or houses an antenna, transceiver, or other associated equipment that constitutes part of a base station. It may encompass such equipment in any technological configuration, including distributed antenna systems and small cells.
>
> Collocation. The mounting or installation of transmission equipment on an eligible support structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes.
>
> Eligible Facilities Request. Any request for modification of an existing wireless tower or base station involving;
>
> (i) Collocation of new transmission equipment;
>
> (ii) Removal of transmission equipment; or
>
> (iii) Replacement of transmission equipment.
>
> Eligible Support Structure. Any structure that meets the definition of a wireless tower or base station.
>
> Transmission Equipment. Any equipment that facilitates transmission for wireless communications, including all the components of a base station, such as, but not limited to, radio transceivers, antennas, coaxial or fiber-optic cable, and regular and backup power supply, but not including support structures.
>
> Wireless Tower. Any structure built for the sole or primary purpose of supporting any FCC-licensed or authorized license-exempt antennas and their associated facilities, including the on-site

The FCC's proposed rules follow guidance given by the FCC's Wireless Bureau[36] shortly after adoption of Section 6409. This document provided interpretive guidance[37] regarding the meaning and application of Section 6409(a) relying upon the 2004 Nationwide Programmatic Agreement ("Collocation Agreement") for the collocation of Wireless Antennas.[38] The Collocation Agreement was intended to streamline federal review of collocations involving national historic properties and assumed that the effect of collocations on historic properties were likely to be minimal and not adverse. The NPRM includes definitions from the Collocation Agreement in its proposed rules.

Section IV of the NPRM governs implementation of Section 6409 and expresses the Commissions desire to develop best practices for industry and local governments.[39] The following is a summary of what the Commission proposes:

a. Scope of Application of Section 6409. The FCC first proposes that Section 6409 should apply broadly to any equipment, including a tower or base station, used in connection with wireless transmission equipment without reference to the type of service being provided. In other words, Section 6409 is not limited to facilities used to provide "personal wireless services."

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fencing, equipment, switches, wiring, cabling, power sources, shelters, or cabinets associated with that tower. It includes structures that are constructed solely or primarily for any wireless communications service, such as, but not limited to, private, broadcast, and public safety services, as well as fixed wireless services such as microwave backhaul.

(c) 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.

(d) A modification of an eligible support structure would result in a substantial change in the physical dimension of such structure if (1) The proposed modification would increase the existing height of the support structure 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, except that the proposed modification may exceed the size limits set forth in this paragraph if necessary to avoid interference with existing antennas; or (2) The proposed modification would involve the installation of more than the standard number of new equipment cabinets for the technology involved, not to exceed four, or more than one new equipment shelter; or (3) The proposed modification would involve adding an appurtenance to the body of the support structure that would protrude from the edge of the support structure more than twenty feet, or more than the width of the support structure at the level of the appurtenance, whichever is greater, except that the proposed modification may exceed the size limits set forth in this paragraph if necessary to shelter the antenna from inclement weather or to connect the antenna to the support structure via cable; or (4) The proposed modification would involve excavation outside the current structure site, defined as the current boundaries of the leased or owned property surrounding the structure and any access or utility easements currently related to the site.

[36] The "Wireless Bureau" is a Division of the FCC that regulates wireless communications.

[37] The Wireless Bureau provided guidance regarding, how to interpret the term "wireless tower or base station; what it means to "substantially change the physical dimensions" of a tower or base station; whether a State or local government may require an application for a modification covered under Section 6409(a); and, whether there is a time limit within which such an application must be approved.

[38] This agreement between the FCC, the National Conference of State Historic Preservation Officers and the Advisory Council on Historic Preservation was executed in compliance with Section 106 of the National Historic Preservation Act (16 U.S.C. Section 470 et. seq.) which can be found at 47 CFR 1.

[39] In re Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, WT Docket No. 13-238, FCC 13-122, ¶ 56.

It applies to all Commission authorized wireless services including commercial mobile, private mobile, broadcast, and public safety services, as well as fixed wireless services such as microwave backhaul or fixed broadband.

b. Broad Definition of Transmission Equipment. The Commission proposes to broadly define transmission equipment to include antennas and other equipment associated with and necessary to their operation, including, for example, power supply cables and a backup power generator. Accordingly, an application for collocation, removal or replacement of "transmission equipment" would not be limited to antennas.

c. Broad Definition of Antenna. The Commission proposes adopting the definition in the Collocation Agreement for antenna to define the term "transmission facility".[40] The definition of antenna would include all equipment associated with the antenna including cabling and equipment shelters, but would not include the tower, structure or building to which the antenna is attached.

d. Meaning of Wireless Tower and Base Station. The Commission observed that it has adopted a definition of tower as a structure built for the sole or primary purpose of supporting antennas used for any wireless communication service. This definition is relatively narrow. However, Section 6409 is not limited to modifications of towers. It also refers to applications to modify a "base station." The Commission has adopted several definitions of "base station" and noted that the Wireless Bureau had opined that "base station" should include a structure that supports or houses an antenna or associated equipment. Accordingly, the Commission proposed to find that the terms wireless tower and base station should be interpreted to mean and include,

> . . . [S]tructures that support or house an antenna, transceiver, or other associated equipment that constitutes part of a base station, even if they were not built for the sole or primary purpose of providing such support.[41]

The foregoing definition, if adopted, would mean that a structure to which an antenna is attached would constitute a base station. One has to wonder why Congress bothered to refer to tower if the term base station includes a structure to which an antenna is attached.

e. Meaning of "Existing". The Commission recognized that Section 6409 provides that a wireless tower or base station must be "existing" in order for Section 6409 to apply. The wireless Bureau had opined that this meant that an existing base station only includes a structure that currently supports or houses base station equipment. However, the industry argued that this meant only that the structure was in existence at the time of the application. The Commission

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[40] Antenna is defined in part in the Collocation Agreement as follows,

> . . . [A]n apparatus designed for the purpose of emitting radio frequency (RF) radiation, to be operated or operating from a fixed location pursuant to Commission authorization, for the transmission of writing, signs, signals, data, images, pictures, and sounds of all kinds, including the transmitting device and any on-site equipment, switches, wiring, cabling, power sources, shelters or cabinets associated with that antenna and added to a tower, structure, or building as part of the original installation of the antenna.

[41] *Id.* at ¶ 66.

did not propose a rule interpreting this requirement and instead sought only comments. However, one of the questions the Commission asked was,

> Which interpretation, or some other, would be more consistent with both facilitating deployments that are unlikely to conflict with local land use policies (including policies that favor use of existing structures) and preserving State and local authority to review construction proposals that may have impacts?

Given the FCC's assumption in the Collocation Agreement that collocation on existing structures has little environmental impact, it is more probable that the FCC will favor the industry argument. This could lead to all wireless siting decisions being exempt from local control with the exception of construction/installation of new towers.

f. Meaning of Collocation, Removal and Replacement. The Commission did not propose a definition of removal or replacement but did propose a definition of collocation which would mirror the following definition found in the Collocation Agreement,

> . . . [C]ollocation is defined as the mounting or installation of an antenna on an existing tower, building or structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes.[42]

Given the proposed broad definitions of "antenna", "existing" and "tower" and the inclusion of "building or structure", this definition would apply Section 6409 to any application proposing to install or mount any antenna or its related equipment upon a tower or structure in existence on the date of the application. Under this definition, it is not necessary that an antenna be present upon the structure at the time of application.

Accordingly, Section 6409 would apply to any application to install or attach an antenna to an existing building, water tower, utility pole, transmission tower, etc.

g. Meaning of Modification. The Commission also proposed that "modification of a wireless tower or base station" should include collocation, removal or replacement of an antenna and any other transmission equipment associated with the supporting structure, even if the equipment is not physically located on the structure. In other words, an application to modify an equipment cabinet or shelter located on the ground, but associated with the structure, that seeks to collocate, remove or replace any transmission equipment would also be subject to Section 6409.

h. Replace or Improve an Existing Tower or Structure. The Commission further sought comment regarding whether or not it should interpret Section 6409 applications to cover replacement or modification of an existing structure that is necessary to support the collocation or replacement of transmission facilities and the new or modified structure does not substantially change the physical dimensions of the structure.

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[42] *Id.* at ¶ 71.

i. Meaning of Substantially Change the Physical Dimensions. The Commission has proposed that it adopt the four part test in the Collocation Agreement for what constitutes a "substantial increase in size" as the definition of this phrase.[43] The Commission also seeks comments regarding whether or not this test should apply to modification requests, request to modify previously modified towers or structures, whether the standard should be different depending upon the type of structure, and whether or not this standard should be evaluated in the context of each application.

j. Application Procedures. Perhaps the most vexing problem with Section 6409 is the lack of guidance regarding the scope and meaning of the mandate that, "State or local government may not deny, and shall approve any eligible facilities request". The Commission was likewise troubled by the meaning of this language. However, the Commission did find that "[S]ection 6409(a) permits a State or local government, at a minimum, to require an application to be filed and to determine whether the application constitutes a covered request."[44] The Commission described the process as follows,

> The Commission anticipates that in general, review of applications submitted under section 6409(a) will be limited to determining whether the application states an eligible facilities request, whether the request would substantially change the physical dimensions of the relevant tower or base station, and whether it satisfies any other criteria that, under interpretations the Commission may adopt in this proceeding, allow the State or local government to deny or condition an otherwise covered application.[45]

Should the Commission follow its proposed general guidance, local governments would retain authority to issue a permit, but the authority to deny a permit would be limited to consideration of the three criteria set forth above. This process is an oversimplification of the

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[43] Under this test, a substantial increase in the size of a tower occurs if:

(1) [t]he mounting of the proposed antenna on the tower would increase the existing 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, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to avoid interference with existing antennas; or

(2) [t]he mounting of the proposed antenna would involve the installation of more than the standard number of new equipment cabinets for the technology involved, not to exceed four, or more than one new equipment shelter; or

(3) [t]he mounting of the proposed antenna would involve adding an appurtenance to the body of the tower that would protrude from the edge of the tower more than twenty feet, or more than the width of the tower structure at the level of the appurtenance, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to shelter the antenna from inclement weather or to connect the antenna to the tower via cable; or

(4) [t]he mounting of the proposed antenna would involve excavation outside the current tower site, defined as the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site.

[44] In re Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, WT Docket No. 13-238, FCC 13-122, ¶ 89.

[45] *Id.* ¶ 94.

problems created by Section 6409 which are highlighted in the many comments sought by the Commission summarized below:

- Whether section 6409(a) places restrictions, limitations, or requirements on the filing and review process applicable to applications subject to section 6409(a)?
- If so, what Federal standards would appropriately implement such limitations?
- Whether, given the directive that the State or local government shall approve, section 6409(a) permits and warrants Federal limits on applicable fees, processes, or time for review?
- If so, should the Commission define what these limits are, or are the variations in circumstances such that it is better to address them case-by-case?
- If the *Commission* does define them, what should the limits be? For example, should the Commission find that section 6409(a) warrants specific expedited procedures or limits on the documentation that may be required with an application?
- Whether section 6409(a) warrants limiting the procedures for filing and reviewing an application that the applicant characterizes as stating a covered request to those procedures relevant to resolving whether the request is in fact covered by section 6409(a)?
- Whether section 6409(a) permits limitations on which officials may review an application, and if so, whether such limitations are warranted? For example, to the extent that review under section 6409(a) is ministerial, approval by administrative staff may be more efficient, and no less effective, than submission to an elected Board.
- Would a Federal standard requiring State and local governments to utilize such an administrative process sufficiently protect their ability to identify applications that are not covered by section 6409(a) and otherwise to exercise any permitted discretion?
- Would it be consistent with principles of federalism to constrain State and local government procedures in this manner, as a condition for continuing to review covered requests?
- Would such a standard contradict some local ordinances?
- If so, would it raise concerns that, at least for an interim period, the affected community could not review applications at all?
- Are administrative practices sufficiently uniform among communities that any rules could be meaningful?
- Whether section 6409(a) permits or warrants imposing limits on the kinds of information and documentation that may be required in connection with an application asserted to be a covered request. For example, should the Commission clarify that States and localities may not require information or documents in connection with an eligible facilities request asserted to be a covered request under section 6409(a) that are not relevant to the criteria for approval under section 6409(a)?[46]

[46] The Commission noted that some parties asserted that some jurisdictions were requesting extensive documentation for collocation approvals, thereby resulting in delay, while other jurisdictions required only the limited information necessary to issue a common building permit.

- Whether to establish a time limit for the processing of requests under section 6409(a), i.e should the Commission adopt a shorter time period than the 90 days set forth in the Commission's prior declaratory ruling?[47]
- How existing moratoria may relate to covered requests under section 6409(a). The Commission did propose that Section 6409 would preempt the application of any such moratoria to covered requests under section 6409(a), including with respect to the running of any applicable time period. In other words, a State or local government could not prevent or delay the filing of applications asserted to be covered by section 6409(a) due to a moratorium, and must approve covered applications within the same time period as if no moratorium were in effect.
- Should the Commission distinguish any set of applications that are unlikely to raise any significant questions of eligibility and therefore should be subject to more stringent limitations on process, timing, or fees?
- If so, what criteria should identify these applications and what limits are appropriate under section 6409(a)? For example, should requests for removal of transmission equipment be eligible for a more expedited process than new collocations?
- Should replacement applications also be subject to a more expedited process?
- If so, subject to what limitations on the size or appearance of the new equipment?

k. Remedies. The Commission seeks comments regarding whether or not it should deem an application to be granted if local government does not act within a specified time frame or impermissible denies a covered application. The Commission notes, that unlike judicial remedies available under 47 U.S.C. § 332, no such remedies are provided under Section 6409. The Commission also noted that 47 USC § 332 did not include the mandate provided under Section 6409. Accordingly, the Commission has sought comments regarding whether or not this statutory difference supports the remedy of deeming applications granted. The Commission also sought comment regarding the constitutional validity of such a remedy. The Commission's view is that the language of the Act completely preempts local government regulatory, much like that granted to interstate rail transportation and natural gas pipelines.

l. Dispute Resolution Forum. The Commission also raised questions regarding the appropriate forum to resolve issues regarding impermissible denial or other violations of Section 6409. It resolved this by proposing that the Commission would hear and decide complaints

m. 2009 Declaratory Ruling – Shot Clock. The Commission has also asked for comments regarding what constitutes a completed application for purpose of tolling the time periods set forth in its 2009 Declaratory ruling. It noted perceived abuses by local governments using the local regulatory standard for determining when an application was complete in order to delay action on an application.

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[47] This query focuses upon whether or not the Commission should modify its regulatory order and adopt a shorter time period for review because Section 6409 limits what local governments may consider in granting or denying an application.

n. Extending the Shot Clock. The Commission also sought comment regarding whether or not the shot clock should be extended to review applications for distributed antenna systems and similar applications that involve multiple facilities.

o. Preference for Siting on Municipal Property. The Commission sought comment regarding whether or not ordinances establishing preferences for the placement of wireless facilities on municipal property are unreasonably discriminatory under Section 47 U.S.C. § 332(c)(7). Such a per se standard would result in significant alteration of hierarchy standards in the City's code and would ignore the premise of the City's wireless plan.

The scope and nature of the comments sought by the Commission leaves little doubt that federal preemption is a real concern. The scope and breadth of the potential preemptive effect of the FCC's interpretation of Section 6409 raises a strong possibility of legal challenge to Section 6409. Likewise, failure to conform to Section 6409 and any rules promulgated by the FCC will subject local governments to legal challenge.

B. State Law.

1. Statutory Limitations RCW Ch. 35.99. On March 7, 2000, after three years of debate, the Washington State Legislature passed ESSB 6676 (the "Telecommunications Bill" or the "Bill"). This bill created a new Chapter in Title 35 relating to use of the public rights of way for telecommunications and cable services, codified at Chapter 35.99 RCW. Some of the key features are the requirements for timely written issuance or denial of permits for use of the right of way and limitations upon the regulation of providers of telecommunications services. The more pertinent requirements are described as follows:

a. Prohibits Regulation of Operations. This Chapter prohibits cities from adopting or enforcing regulations that regulate the services or business operations of the service provider.

b. Right of Access. This Chapter also prohibits cities from unreasonably denying the use of the right-of-way by a service provider for installing, maintaining, repairing, or removing facilities for telecommunications services. It could be argued that this provision prohibits cities from enacting prohibitions upon placement of wireless facilities in the right of way and further creates a statutory cause of action against any City that unreasonably denies access to the public rights of way.

c. Limitation upon a Ban. This Chapter specifically provides in another section that cities may not prohibit the placement of all wireless facilities in city and may not prohibit the placement of all wireless facilities in the public rights of way, unless the town is less than five square miles and has no commercial areas.

d. Section 253. Finally, This Chapter provides that a city may not enact regulations that violate Section 253, thus creating a state law cause of action for violation of federal law.

Other sections of the Chapter provide as follows:

RCW 35.99.020 – Requires that grant, issuance or denial of permits for use of the public right of way must comply with ordinances that are consistent with this Chapter.

RCW 35.99.030 – Local governments must timely issue a master permit or a use permit pursuant to written procedures and denials must be based upon substantial evidence contained in a written record.

RCW 35.99.040 – Local governments may not regulate service or the design, construction or operation of facilities or unreasonably deny access to the public right of way. Further, like § 332, this chapter does not operate to limit the authority of a city or town to regulate the placement of facilities through its local zoning or police power, if the regulations do not otherwise: (a) Prohibit the placement of all wireless or of all wireline facilities within the city or town; (b) Prohibit the placement of all wireless or of all wireline facilities within city or town rights-of-way, unless the city or town is less than five square miles in size and has no commercial areas, in which case the city or town may make available land other than city or town rights-of-way for the placement of wireless facilities; or (c) Violate Section 253 of the Telecommunications Act of 1996.

RCW 35.99.050 – Prohibits enactment of a moratorium upon placement of wireless facilities except in compliance with federal guidelines.

RCW 35.99.060 – Establishes substantive and procedural requirements for relocation of facilities.

RCW 35.21.860 – Generally allows a city or town to impose a site-specific charge pursuant to an agreement between the city or town and a service provider of personal wireless services acceptable to the parties for (i) the placement of new structures in the right-of-way regardless of height, (ii) the placement of replacement structures over 60 feet when necessary for the installation or attachment of wireless facilities unless the replacement structure is no higher than the original structure; or (iii) the placement of personal wireless facilities on structures owned by the city or town located in the right-of-way.

A site-specific charge shall not apply to the placement of personal wireless facilities on existing structures, unless the structure is owned by the city or town.

A city or town is not required to approve the use permit for the placement of a facility for personal wireless services that meets one of the criteria in this subsection absent such an agreement.

2. SHB 1183 (Amending SEPA at RCW 43.21C.0384). In 2013, the Washington State Legislature enacted HB 1183 in response to passage of Section 6409 of the Middle Class Tax Relief Act and was intended to implement the policy directive of the FCC.[48] The bill amended

[48] Federal law requires state and local governments to approve the request for the modification of an existing wireless tower or base station for certain facilities if the modification does not substantially change the physical dimensions of such tower or base station. A policy directive subsequently issued by the Federal Communication Commission interpreted substantial change to mean:

the State Environmental Policy Act ("SEPA") codified at RCW Ch. 43.21C by amendment to RCW 43.21C.0384. This statute previously established a categorical exemption from SEPA review for certain wireless facilities. The amendment expands the scope of those categorical exemptions to include the provisions of Section 6409 of the Middle Class Tax Relief Act together with the definition of substantial modification suggested by the FCC in its policy guidance.[49] Given the broad scope of the NPRM, it is questionable whether or not the SEPA categorical exemption is broad enough to apply to all applications governed by Section 6409.

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the mounting of equipment on a structure that would increase the height of the structure by more than 10 percent, or 20 feet, whichever is greater; the mounting of the proposed antenna or equipment would involve the addition of more than the standard number of new equipment cabinets, not to exceed four, or the addition of more than one new equipment shelter; the mounting of equipment that would involve adding an appurtenance to the body of the structure that would protrude from the edge of the structure more than 20 feet, or more than the width of the structure at the level of the appurtenance, whichever is greater; or the mounting of the proposed antenna would involve excavation outside the current tower site, defined as the boundaries surrounding the tower and any existing access or utility easements related to the site.

[49] This statute now provides as follows:

43.21C.0384 Application of RCW 43.21C.030(2)(c) to wireless services facilities — Reporting requirement — Definitions.

(1) Decisions pertaining to applications to site wireless service facilities are not subject to the requirements of RCW 43.21C.030(2)(c), if those facilities meet the following requirements:

(a) The collocation of new equipment, removal of equipment, or replacement of existing equipment on existing or replacement structures does not substantially change the physical dimensions of such structures; or

(b) The siting project involves constructing a wireless service tower less than sixty feet in height that is located in a commercial, industrial, manufacturing, forest, or agricultural zone. This exemption does not apply to projects within a designated critical area.

(2) The exemption authorized under subsection (1) of this section may only be applied to a project consisting of a series of actions when all actions in the series are categorically exempt and the actions together do not have a probable significant adverse environmental impact.

(3) The department of ecology shall adopt rules to create a categorical exemption for wireless service facilities that meet the conditions set forth in subsections (1) and (2) of this section.

(4) By January 1, 2020, all wireless service providers granted an exemption to RCW 43.21C.030(2)(c) must provide the legislature with the number of permits issued pertaining to wireless service facilities, the number of exemptions granted under this section, and the total dollar investment in wireless service facilities between July 1, 2013, and June 30, 2019.

(5) The definitions in this subsection apply throughout this section unless the context clearly requires otherwise.

(a) "Collocation" means the mounting or installation of equipment on an existing tower, building, or structure for the purpose of either transmitting or receiving, or both, radio frequency signals for communications purposes.

(b) "Existing structure" means any existing tower, pole, building, or other structure capable of supporting wireless service facilities.

(c) "Substantially change the physical dimensions" means:

(i) The mounting of equipment on a structure that would increase the height of the structure by more than ten percent, or twenty feet, whichever is greater; or

(ii) The mounting of equipment that would involve adding an appurtenance to the body of the structure that would protrude from the edge of the structure more than twenty feet, or more than the width of the structure at the level of the appurtenance, whichever is greater.

(d) "Wireless service facilities" means facilities for the provision of wireless services.

(e) "Wireless services" means wireless data and telecommunications services, including commercial mobile services, commercial mobile data services, unlicensed wireless services, and common carrier wireless exchange access services, as defined by federal laws and regulations.

3. SHB 2175 - Amendment of RCW 80.36.375. In 1996, the state legislature adopted the categorical exemption for microcell facilities and the microcell/minor facilities site permit provisions of RCW 80.36.375. At the time, there was concern that wireless communications facilities were emitting radio frequencies that were harmful to people. The legislature was convinced that microcell technology could reduce the potential harmful effects. The intent of these amendments was to encourage cities to make it easier for the wireless industry to site multiple microcells to provide wireless services which were thought to be less harmful than the larger antennas.

Accordingly, the purpose of the SEPA exemption and the consolidation of permits for siting micro-cells was to protect the public health, safety and welfare by encouraging siting of facilities that were perceived as less harmless by removing some of the regulatory hurdles.

In 2014, SHB 2175 was enacted amending this statute to include small cell facilities. Although the original bill would have mandated consolidation of permits, the substitute bill as enacted merely encourages consolidated applications for small cell facilities, providing as follows:

> (c) For small cell networks involving multiple individual small cell facilities, local governmental entities may allow the applicant, if the applicant so chooses, to file a consolidated application and receive a single permit for the small cell network in a single jurisdiction instead of filing separate applications for each individual small cell facility.

Small cell network and small cell facility are defined as follows:

> "Small cell network" means collection of interrelated small cell facilities designed to deliver personal wireless services.
>
> "Small cell facility" means a personal wireless services facility that meets both of the following qualifications:
>
> (i) Each antenna is located inside an antenna enclosure of no more than three cubic feet in volume or, in the case of an antenna that has exposed elements, the antenna and all of its exposed elements could fit within an imaginary enclosure of no more than three cubic feet; and
>
> (ii) Primary equipment enclosures are no larger than seventeen cubic feet in volume. The following associated equipment may be located outside the primary equipment enclosure and if so located, are not included in the calculation of equipment volume: Electric meter, concealment, telecomm demarcation box, ground-based

enclosures, battery back-up power systems, grounding equipment, power transfer switch, and cut-off switch.

C. Local Requirements.

1. Comprehensive Plan. The current Comprehensive Plan contains four goals that guide development and enforcement of regulations impacting the siting of wireless communications facilities.[50] These goals and pertinent policies are as follows:

GOAL U 4. To promote the collocation of utility corridors and distribution and communication facilities.

U 4.1 Wherever feasible, promote the collocation of new utility distribution and communication facilities when doing so is consistent with utility industry practices and national electrical and other codes. Examples of facilities which could be shared are trenches, rights-of-way, towers, poles, and antennas.

GOAL U 5. To minimize adverse impacts of above-ground utility facilities on surrounding land uses.

U 5.1 Private utility facilities should be located near compatible adjacent land uses. City regulations will specify that approval of new private utility facilities shall be reasonably compatible with the development of the surrounding properties.

U 5.2 City regulations in its Zoning Code will include standards that ensure that new private utility facilities shall be coordinated and integrated with surrounding land uses so as to be reasonably compatible with the natural or built environment. These regulatory standards shall encourage facility design which minimizes the visual intrusion of facilities in all areas.

U 5.3 Encourage telecommunication utilities to use existing structures, such as existing towers and buildings, where feasible.

GOAL U 6. To ensure that new telecommunication carriers are appropriately reviewed at the local level.

GOAL U 8. To encourage community participation in the siting decisions of utility facilities within their community.

U 8.1. Community input, including responses from affected neighborhood groups, should be solicited prior to City or County

[50] For purposes of this memorandum, the term "wireless communications facilities" shall have the same meaning as that term is given in the uniform development code at OMC 18.02.180.

approval of private utility facilities which may significantly impact the surrounding community.

The foregoing goals and implementing policies promote colocation of wireless communication facilities and use of existing infrastructure, require minimization of impacts by ensuring that uses are compatible with surrounding properties, and encourage community participation by residents in significantly impacted neighborhoods.[51]

2. City Wireless Code. In June of 2005 the Olympia City Council imposed a moratorium[52] upon the siting of wireless communication facilities in order to assess the adequacy of the existing development regulations in accomplishing the goals and policies set forth in the Comprehensive Plan. Further, the City Council was concerned that existing wireless facility siting regulations contained in Title 11 of the Olympia Municipal Code were outdated and may not protect the community from potential adverse impacts of new wireless facility technology.

The City retained CityScape Consultants, Inc. to obtain input from the community and the wireless communications industry representatives and to develop proposed amendments to the existing City code together with a wireless telecommunications plan. The code amendments were adopted pursuant to City Ordinance No. 6395 in February 2005 after study by the planning commission and two public hearings. The wireless plan was adopted by resolution in April of 2006 and was intended to, (1) provide background on telecommunications technology and regulation; (2) reflect the policy choices supporting the amendments set forth in Ordinance No. 6395; and (3) identify the general locations where telecommunications service providers may site new telecommunications facilities consistent with the siting hierarchy set forth in the amendments to the City Code.

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[51] It should be noted that, the Planning Commission recently reviewed and recommended amendments to the Comprehensive Plan. The proposed amendments are currently under consideration by the City Council and include the following proposed goals and policies that are relevant here:

GU 17 Private utility facilities will be located in the same area.

PU 17.1 Promote the co-location of new utility distribution and communication facilities when doing so is consistent with utility industry practices and national electrical and other codes. (See policy PU3.6 that recommends a guidance drawing showing utility locations.)

GU 18 Adverse impacts of above-ground utility facilities such as sub stations and cellular towers on surrounding land uses are minimized.

PU 18.1 Locate private utility facilities near compatible adjacent land uses. City regulations will specify that approval of new private utility facilities shall be reasonably compatible with the development of the surrounding properties.

PU 18.2 Ensure that the City's zoning code includes standards that ensure that new private utility facilities are coordinated and integrated with surrounding land uses so they are reasonably compatible with the natural and built environment. These regulatory standards shall encourage facility design which minimizes the visual intrusion of facilities in all areas.

PU 18.3 Encourage telecommunication utilities to use existing structures, such as existing towers and buildings, where such use does not conflict with height restrictions.

The foregoing proposed amendments similarly encourage colocation, use of existing structures and compatibility with surrounding properties but lack an emphasis on community participation in the siting decision.

[52] Resolution No. M-1604 imposed a six month moratorium on June 5, 2005 which was later extended until March 4, 2006.

The Ordinance added, among other things, a new chapter to the City's unified development code. This chapter is codified at Chapter 18.44 (the "Wireless Code" or "WFC") of the Olympia Municipal Code ("OMC") and contains the substantive regulatory provisions governing siting of wireless communications facilities. However, other provisions affecting wireless siting decisions are also found at OMC Ch. 4.40 (Land Use Fees), OMC 11.08.010 (Wireless Facility Lease), OMC Ch. 11.10 (Right of Way Conditions); OMC Ch. 11.14 (Site Specific Charge), OMC Ch. 18.02 (Definitions), OMC 18.06.060(Z) (Temporary Uses), OMC Ch. 18.36 (Landscape Wireless), OMC Ch. 18.78 (Public Notice), and OMC Ch. 19.77.010 (Application Requirements).

The purpose of the wireless code is set forth at OMC 18.44.020 and emphasizes a balance between community protection and accommodation of the needs of the wireless communications industry. The wireless facilities siting code (the "WFC") balances these interests by encouraging collocation of facilities, hierarchical siting of facilities at locations and in a manner that minimizes community impacts, and establishing predictable and reasonably swift review of wireless siting applications.

A key feature of this approach is the siting alternatives hierarchy found at OMC 18.44.080. These provisions require that the applicant must engage in a siting hierarchy analysis to support its choice of location, the type of facility to which the antenna is attached, whether the antenna is concealed or non-concealed, and whether the antenna is collocated or combined with another facility. If the applicant does not chose the highest ranking alternative, the applicant must provide a technical analysis showing why each higher ranking alterative is not technologically feasible, practical or justified given the location of the proposed facility.[53]

The highest priority is given to wireless communications facilities that are concealed/attached and located on City owned property, other public property or right of way, and then on private property. The WFC therefore requires all wireless communications facilities to be concealed and sited on City owned property unless the applicant can establish that it is not technologically feasible, practical or justified to do so.[54] The current structure of the siting hierarchy also favors concealed attached wireless communication facilities over collocation or combining of wireless communication facilities. The lowest priority is given to non-concealed freestanding wireless facilities on privately owned property. An applicant would have to establish that no other alternatives in the siting hierarchy are technologically feasible, practical or justified before it would be allowed to erect a new wireless communications tower on private property and attach a non-concealed antenna.

The WCF also establishes zoning by district for wireless communications facilities based upon the type of installation, e.g. concealed, collation, replacement, etcetera. The proposal will either be permitted outright, subject to a conditional use permit or not allowed. Finally, the WCF establishes development standards/regulations governing such things as height, setbacks, antenna profile, lighting, signage, landscaping, fencing, buffers, equipment cabinets, and safety.

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[53] The wireless communications facilities code does not define what these terms mean or how to measure them.

[54] As discussed infra, such requirements may violate federal law and are subject to current rulemaking proceedings by the FCC.

II. PROPOSED AMENDMENTS

The amendments proposed by AT&T (1) add new subsection (c) to OMC 18.44.090 (Permitted Wireless Communications Facilities by Zoning District); (2) amend the land use table 44.01; and (3) amend OMC 18.44.100 (development standards).

1. Amendments to OMC 18.44.090. AT&T proposes to add new subsection (c) to OMC 18.44.090 that would permit outright installations of wireless communication facilities that are at the top of the siting hierarchy (1.a and 1.b) regardless of zone or overlay district. The only exception would be for attachment to structures that are listed on the local, state and/or federal historic registries.

The effect of this amendment would be to permit concealed/attached installations in neighborhood zones (Group 4) and within 300 feet of neighborhood zones, and in historic districts. Currently, a conditional use permit is required for neighborhood zones, within 300 feet of neighborhood zones, and for zoning district groups 1-3 within national historic districts. Installations within neighborhood zones in historic districts are not allowed. The intent of these changes is to make it easier for applicants to site wireless communications facilities that are ranked highest on the siting hierarchy. Presumably, the concealed nature of the wireless communications facility minimizes the impact and need for prohibition or a public hearing process required for issuance of a conditional use permit.

2. Substantial Change. AT&T has suggested that it serves no compelling purpose for the City to differentiate between applications seeking to replace an antenna element, to mitigate an existing wireless communication facility or to expand an existing antenna array as long as the code addresses whether or not such "modification" constitutes a substantial change. AT&T believes that the City has no authority to make such applications subject to a conditional use permit because, it claims, Section 6409 removes all discretion. Therefore, AT&T has proposed modifications that would revise the table to exclude such applications and to eliminate regulations in the WFC relating to mitigation. It has also proposed the following new section that would make such modifications permitted uses in any zone:

> Modifications to existing facilities: Modifications to previously-approved or legally existing facilities that involve the addition, removal, and/or replacement of transmission equipment that does not substantially change the physical dimensions of an existing or replacement tower, antenna support structure, and base station are permitted (P) in any zone or overlay district. . . .

AT&T has also proposed a definition of substantial change in physical dimension that mirrors the definition proposed by the FCC and contained in the Collocation Agreement.

The proposed amendments raise a number of issues. First, the amendments to the table and removal of the standards for mitigation remove references to applications proposing to replace an antenna element, expand an existing antenna array or mitigate an existing wireless

communications facility. These amendments do not address whether or not and how applications that constitute a substantial change will be processed. The City Code would be silent.

Second, the proposed new section lacks clearly defined limitations. The terms "modification", "existing facility", and "transmission equipment" are not defined, making it unclear how to apply the proposed language. The term "modification" does not modify the term "transmission equipment" but rather modifies the term "existing facilities". Thus, the size and scope of proposed modifications to an existing antenna (i.e., antenna element replacement, expansion of an existing antenna array, or even mitigation of existing wireless communications facilities) are not considered when determining if the modification constitutes a substantial change. The term that it modifies is "existing facilities". Thus, a modification means a modification of an "existing facility".

The term "existing facility" is not defined, but clearly is intended to include more than a tower, antenna support structure and base station. Otherwise the proposed language would have made reference to these defined terms rather than referencing the term "existing facility." The implication is that an "existing facility" includes these terms as well as a building or other structures that do not fit within the definition of tower, base station or antenna support structure. Nothing in the proposed language would limit the term "existing facilities" to wireless communications facilities. Thus, an "an existing facility" could include an office building, a water tower, a high tension transmission tower, an apartment building, or a single family residence.

The proposed language includes the caveat that the modification to an existing facility must involve the addition, removal and/or replacement of "transmission equipment". The term "transmission equipment" is not defined. However, as discussed previously, the commission has proposed a broad definition of this term that includes antennas and other equipment associated with and necessary to their operation, including, for example, power supply cables and a backup power generator. The only thing that may not be included in the definition of "transmission equipment" would be the tower, pole or structure upon which the transmission equipment may be attached. Accordingly, a modification would include adding a new antenna to an existing building regardless of whether or not the building already includes an attached antenna.

The term "substantial change" does not modify "existing facilities" or "transmission equipment". Instead, it modifies an existing or replacement tower, antenna support structure and base station. In other words, an application for a modification will be permitted as long as there is not a substantial change to an existing or replacement tower, antenna support structure and base station. Two of these terms are defined in the City Code. "Antenna support structure" is a purpose built antenna tower and thus would not include high tension towers, buildings or utility poles. A "base station" is the transmission equipment and not the structure that may house the equipment. "Tower" would most likely be interpreted to mean any one of the towers that are described in the definition of antenna support structure. These terms do not encompass all of the structures that may be included within the term "existing facilities."

Whether intended by the drafters or not, the proposed language would allow any modification regardless of size or impact as long as there was not a substantial change to the

physical dimensions of an antenna support structure. This would mean that an application to attach an antenna to a single family residence in an historic district would be a permitted use because such a modification would have no impact upon an existing or replacement tower, antenna support structure or a base station. It would modify an "existing facility" but the proposed language does not ask whether or not the physical dimensions of the existing facility would substantially change, it only asks whether or not an antenna support structure (tower) would substantial change. A single family home is not an antenna support structure.

Finally, the proposed definition of "substantial change" follows the definition adopted in the Collocation Agreement and proposed to be adopted by the FCC for purposes of implementation of Section 6409. This definition raises a number of issues.

First, the proposed definition is purely quantitative, limiting consideration solely to a change in physical dimensions of the antenna support structure or base station. This narrow definition excludes consideration of other factors that may result in a determination that a physical change in dimension is substantial. For example, if the City's development regulations require "flush mounted" antennas, any change to an antenna that no longer meet the definition of a "flush mounted" antenna would be substantial because the modification would no longer be compliant with City Code. A stealth antenna support structure approved pursuant to a conditional use permit would no longer meet the requirements of the conditional use permit if a visible antenna was added. This would constitute a substantial change.

The definition of "substantial change" is specific to towers and nothing else and may actually be too narrow in scope. The proposed definition was taken from the Collocation Agreement and applies solely to modifications of purpose built antenna towers. Simply incorporating this definition into the City Code would unnecessarily limit consideration of what constitutes a substantial change to attachments to a purpose built tower. In other words, the proposal could be construed as allowing carriers access to all zones of the city to install new or larger antennas on any structure, except when the attachment is for a purpose built antenna tower and the attachment would require a substantial change in physical dimension of the tower.

III. CONCLUSION

Enactment of Section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012 has created a challenge for local governments. The lack of legislative history describing the congressional intent and the potentially far reaching scope of this legislation has caused the Federal Communications Commission to consider exercising its rule making authority. If the FCC goes too far in pursuit of its rule making, local governments will most certainly bring constitutional and other legal challenges. Further, even though the FCC may take action to establish interpretative rules, local governments must in the interim comply with Section 6409.

The proposed amendments are an effort to achieve partial compliance with Section 6409 but are inconsistent with the current policy and regulatory framework adopted by the City. AT&T's proposed modifications lay the ground work for what the FCC has opined should be a ministerial administrative decision to approve applications for modifications meeting the requirements of Section 6409. However, it is not at all clear that Section 6409 should be interpreted as broadly as AT&T has proposed or as the FCC has preliminarily determined in its Notice of Proposed Rule Making.

A more narrow view of Section 6409 is appropriate because a broad sweeping preemption of local government zoning authority must be clear and unequivocal.[55] Further, until rules are in place or there is binding judicial precedent interpreting Section 6409, local governments may individually assess and implement Section 6409.

[55] A number of papers have been written regarding this subject by attorneys that represent primarily local governments in telecommunications and cable issues.