

## New FCC Rule Impacting Proposed Modifications to Wireless Facilities

### *Prepared for the 2015 Massachusetts Municipal Association Annual Meeting*

Due to a recent Federal Communications Commission (“FCC”) ruling interpreting the federal Telecommunications Act of 1996, 47 U.S.C. §332(c)(7) (“TCA”), cities and towns are likely to see an increasing number of requests to modify existing wireless telecommunications facilities.

In 2012, the TCA was amended to give special protection to certain proposed modifications to existing personal wireless service facilities. State and local governments must approve requests to modify existing wireless towers or base stations where the modifications would not substantially change the physical dimensions of such towers or base stations. On October 21, 2014, the FCC issued a rule-making decision, FCC 14-153 (“FCC Rule”), establishing criteria for determining if a wireless facility qualifies for this special protection. Significantly, the FCC Rule is not limited to personal wireless service facilities and imposes a constructive grant if the governmental entity fails to approve a project application within a so-called 60-day “Shot Clock” period. An executive summary and the full text of the FCC Rule can be found at: [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-14-153A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-153A1.pdf). It is expected that the FCC Rule will be effective by March 2015.

#### Background

The Federal Middle Class Tax Relief and Job Creation Act of 2012 (also known as the “Spectrum Act”), contained an amendment to the TCA intended to advance wireless broadband service for both public safety and commercial users. This amendment, colloquially referred to as “Section 6409(a)”, and codified at 47 U.S.C. §1455(a), provides that “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.” An “eligible facilities request” was defined as “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.” Although, as noted in our March 12, 2012 Memorandum to Municipal Clients, Section 6409(a) failed to define many important terms, the FCC Rule has now addressed these outstanding issues.

#### The FCC Rule

The FCC Rule establishes that the term “**wireless broadband infrastructures**” for purposes of Section 6409(a) includes retrofitting of outdated TV or radio towers for broadband signal, modification of existing wireless broadband infrastructure, “collocation” (the addition of equipment to existing wireless infrastructure), and

replacement or removal of existing equipment. Further, the term **“equipment”** is broadly defined to include power generators and back-up generators.

The FCC Rule also establishes objective criteria to determine if a proposed change to a tower or base station is a **“substantial change”** which would render the project ineligible for Section 6409(a) protection, including measurable ways to calculate substantial changes to size, physical appearance, or matters exceeding the scope of the original approval. A full list of these objective criteria and discussion of the critical issues is available on pages 80-86 of the FCC Rule.

Importantly, a wireless provider cannot render itself subject to the protection of Section 6409(a) simply by applying for a permit for multiple small changes. Instead, the changes are measured cumulatively, with each small change added to the total, and the total measured against the dimensions of the tower or structure as it previously existed.

Under the FCC Rule, the term **“eligible facilities request”** excludes changes to a structure other than a tower or base station. Thus, the following would not qualify under Section 6409(a): when a proposed modification to an existing antenna placed on a building requires changes to the building itself; where a building or structure does not already support or house base station equipment; or where a building or structure’s sole or primary purpose is not supporting covered transmission equipment (e.g., a wireless tower). Further, the FCC Rule provides that Section 6409(a) does not apply to the initial installation of transmission equipment on structures that have not already been approved by state or local government as being suitable for a wireless facility. If such approval has not already been granted, then the work at issue is not an **“eligible modification”**.

#### Application of the FCC Rule to the 60-Day “Shot Clock”

The TCA provides that local permitting authorities must act on a wireless facility application within a “reasonable time.” Prior rulings of the FCC established, and courts have upheld, a 90-day “Shot Clock” for collocations generally and a 150-day “Shot Clock” for new tower applications, with such periods beginning when an application is complete.

The FCC Rule establishes a new 60-day “Shot Clock” for those applications meeting the Section 6409(a) criteria. Critically important for local officials, if the permitting authority does not act on a completed application for a Section 6409(a) eligible project within that period, a constructive grant will result. The applicant may then notify the municipality of the constructive grant and begin the proposed work. This constructive grant provision is a major change with significant consequences.

#### Limited Safeguards for Municipalities

Neither the FCC Rule nor Section 6409(a) eliminates the responsibility of a local permitting authority to determine if Section 6409(a) is applicable to a particular project. If the permitting authority finds that a project is not eligible, the application may be denied, or the permit authority may request that the applicant change its application to a non-6409(a) permit request.

Additionally, Section 6409(a) does not trump applicability or enforcement of building and safety-related code conditions and tower structural safety. The FCC Rule expressly provides that local authorities can and should “continue to enforce and condition approval on compliance with generally applicable building, structural, electrical, and safety codes with other laws codifying objective standards reasonably related to health and safety.” This means that local “fall zone” requirements in zoning bylaws and ordinances, as well as provisions of federal law implemented locally may continue to be enforced, including but not limited to, the Americans with Disabilities Act, National Flood Insurance Program, FEMA Floodplain Management, Federal Environmental Policy Act and Historic Preservation Act.

#### Practical Implications of Section 6409(a) on Local Ordinances/Bylaws and Regulation

The Massachusetts Attorney General’s office, reviewing a wireless facilities zoning bylaw for the Town of Mount Washington, opined that under the TCA and Section 6409(a), a request for modification to an existing facility that does not substantially change the physical dimensions of the tower or base station must be approved and cannot be subject to a discretionary special permit.

Thus, any bylaw, ordinance, or special permit condition requiring a new special permit for “collocation” or for removal and/or replacement of equipment would not be enforceable under Section 6409(a), unless the modification would “substantially change the physical dimensions of [the] existing tower or base station.” In evaluating a modification request, the building inspector, in the first instance, should determine if the modification would constitute a substantial change to an existing tower or base station based on the FCC Rule.

At present, no case law or administrative ruling bars non-discretionary site plan review for “eligible facilities.” Reasonable conditions imposed as part of site plan approval may therefore be an effective tool to regulate the effects of by-right modifications to existing wireless telecommunications facilities, so long as the site plan review does not become, in effect, a discretionary special permit proceeding. Importantly, the 60-day “Shot Clock” begins after submission of the completed application, and therefore the site plan review process must be completed within that time frame to avoid a constructive grant.

Where the FCC Rule applies only when a governmental authority acts in a regulatory capacity, Section 6409(a) and the FCC Rule are inapplicable to applications for modifications affecting public rights of way, or in circumstances when a municipality is otherwise acting in a proprietary fashion (as owner of the building serving as a support structure, for example).

This is a complex and continuously developing area of the law. If you have any questions regarding the new FCC Rule or application of Section 6409(a), please contact Attorney Patricia Cantor or Attorney Katherine Laughman by e-mail at [pcantor@k-plaw.com](mailto:pcantor@k-plaw.com) or [klaughman@k-plaw.com](mailto:klaughman@k-plaw.com), respectively, or by phone at 617.556.0007.

**Disclaimer:** This information is provided as a service by Kopelman and Paige, P.C. This information is general in nature and does not, and is not intended to, constitute legal advice. Neither the provision nor receipt of this information creates an attorney-client relationship with Kopelman and Paige, P.C. You are advised not to take, or to refrain from taking, any action based on this information without consulting legal counsel about the specific issue(s).