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## LOCAL GOVERNMENT AND WIRELESS FACILITIES SITING POLICIES: WHAT THE LATEST ACTION BY THE FCC MEANS FOR YOUR COMMUNITY

by Tim Lay

Webinar

National Association of Counties  
National League of Cities

National Association of Telecommunications Officers and Advisors

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## I. *City of Arlington, Texas, et al. v. FCC*, 133 S. Ct. 1863 (2013).

- Review of Fifth Circuit’s decision upholding FCC’s Cell Tower “Shot Clock” Ruling, *City of Arlington et al. v. FCC*, 668 F.3d 229 (5th Cir. 2012).
- Cert. granted as to only one of two issues raised:  
Whether, contrary to the decisions of at least two other circuits, and in light of this Court’s guidance, a court should apply *Chevron* to review an agency’s determination of its own jurisdiction.
- SCOTUS affirmed the 5<sup>th</sup> Circuit by a 6-3 vote, thereby upholding the FCC’s “Shot Clock” Ruling.
- But majority and dissenting opinions spent little time analyzing the language of §332(c)(7).
- Instead, entire focus was on *Chevron* issue, divorced from §332(c)(7)’s actual language and legislative history. Majority saw no meaningful line to draw between “jurisdictional” and “non-jurisdictional” agency rulings.

## II. Section 6409(a) of the 2012 MCTRJCA (47 U.S.C. § 1455(a)).

### “(a) Facility modifications

#### (1) In general

Notwithstanding [47 U.S.C. § 332(c)(7)] 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.

#### (3) Applicability of environmental laws

Nothing in paragraph (1) shall be construed to relieve the Commission from the requirements of the National Historic Preservation Act or the National Environmental Policy Act of 1969.”

### III. Wireless Bureau's Jan. 25, 2013, Public Notice construing § 6409 (a) of MCTRJCA of 2012.

- §6409 (a) applies to all wireless services (including broadcast, microwave and public safety), *not* just “personal wireless services” like § 332(c)(7).
- “Substantially change the physical dimension” based on Nationwide Collocation Agreement (“NCA”) test: (1) a height increase of more than 10% or 20 feet, whichever is greater; (2) would involve installation of extra-standard number of new cabinets or a new shelter; (3) adding an appurtenance to edge of tower greater than 20 feet, or more than the tower’s width, whichever is greater; or (4) would involve excavation outside current tower site.
- “Wireless tower or base station” based on NCA definitions.
- 90 days is the maximum presumptively reasonable time with which locality “shall approve” § 6409 (a) application.
- PN is interpretive guidance only; not binding on courts.

# Wireless Siting NPRM

## IV. FCC's New Wireless Siting NPRM, WT Docket No. 13-238 (rel. Sept. 26, 2013).

### A. Seeks comment in 4 areas:

1. Streamlining FCC's NEPA & NHPA review of DAS/small cell deployments.
2. Proposed exemption of temporary towers from FCC/FAA antenna registration and notification requirements.
3. Proposed binding rules to clarify § 6409(a).
4. Proposed supplementation of "Shot Clock" Ruling.

### B. FCC's NEPA & NHPA review of DAS/small cells.

1. Extend exclusion for collocations on buildings to utility poles, light poles, and road signs.
2. Adopt new NEPA & NHPA categorical exclusions for DAS/small cell deployments.

# Wireless Siting NPRM (cont'd)

## C. Implementation of §6409(a).

1. Proposes to codify, and expand, much of Jan. 25 PN into rules.
2. What is an “existing wireless tower or base station”? FCC now suggests that buildings, water towers and poles may be.
3. Should “substantial change” in “physical dimensions” depend on type of structure involved?
4. May localities condition “approval” on compliance with building codes and land use laws?
5. Should § 6409 application be “deemed granted” if locality fails to act within a specified period of time?
6. Does “shall approve” raise constitutional federalism concerns?

# Wireless Siting NPRM (cont'd)

## D. Further Implementation of § 332(c)(7).

1. New, expanded definition of “collocation” subject to shorter, 90-day “shot clock.”
2. Applicability of “shot clocks” to DAS.
3. Whether ordinances establishing preference for siting facilities on muni property violate § 332(c)(7)(B)(i)(I)’s anti-discrimination requirement.
4. Whether FCC should adopt a “deemed granted” remedy for “shot clock” rule violations.

## E. Schedule.

- Comments due 60 days after *Fed Reg.* publication.
- Reply comments due 90 days after *Fed. Reg.* publication.



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# Questions?

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