

Wireless Facilities Siting in the Wake of the Spectrum Act and *Roswell*

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I. INTRODUCTION

The Telecommunications Act of 1996 (“TCA”) preserved most state and local zoning authority over the siting of personal wireless service facilities while preempting certain exercises of that authority in order to balance local concerns with a growing need for wireless deployment. With the Middle Class Tax Relief and Job Creation Act of 2012, Congress enacted another provision, Section 6409(a),¹ to promote wireless siting by further restricting a local government’s ability to deny certain wireless applications that seek to modify existing wireless facilities.

Over the past year, the Federal Communications Commission (“FCC” or “Commission”) and the Supreme Court have spoken on wireless siting issues, and local governments may need to adapt their practices to conform to those actions. This paper discusses the FCC’s recent rulemaking to implement Section 6409(a) and clarify Section 332(c)(7)² of the TCA, as well as the Supreme Court’s decision in *T-Mobile South, LLC v. City of Roswell*.³

II. THE FCC’S WIRELESS SITING REPORT AND ORDER

On October 21, 2014, the Commission released a Report and Order in its wireless siting rulemaking proceeding.⁴ This rulemaking primarily addressed the implementation of Section 6409(a), but also addressed the operation of Section 332(c)(7), five years after the FCC’s *Shot Clock Ruling*.⁵

¹ 47 U.S.C. § 1455(a) (“Spectrum Act”).

² 47 U.S.C. § 332(c)(7).

³ *T-Mobile S., LLC v. City of Roswell*, 135 S. Ct. 808 (2015).

⁴ *In re Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, Report and Order*, FCC 14-153, Oct. 21, 2014, WT Docket No. 13-238, 29 FCC Rcd. 12,842, 80 Fed. Reg. 1238 (Jan. 8, 2015), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db1021/FCC-14-153A1.pdf (“Order”).

⁵ *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, Declaratory Ruling*, FCC 09-99, Nov. 18, 2009, WT Docket No. 08-165, 24 FCC Rcd. 13,994, 74 Fed. Reg. 67,871 (Dec. 21, 2009) (“*Shot Clock Ruling*”), *petition for review denied in part and dismissed in part, City of Arlington, Tex. v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff’d* 133 S. Ct. 1863 (2013).

A) Background on the Rulemaking

In early 2014, the FCC sought comment on a proposed rulemaking directed at wireless facilities siting policies.⁶ The FCC proposed rules to clarify and implement Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, to address implementation of the *Shot Clock Ruling*, and to expedite its own environmental and historic preservation review of certain wireless deployments.

1. Section 6409(a)

The Spectrum Act was enacted as part of the Middle Class Tax Relief and Job Creation Act of 2012. The Spectrum Act was generally intended to “advance wireless broadband service” for public safety and commercial purposes and provided for the creation of a broadband communications network (known as “FirstNet”) for first responders, as recommended by the 9/11 Commission.⁷ Section 6409(a) of the Spectrum Act provides, in pertinent part, 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.”⁸

While Section 6409(a) has applied to all local governments since its enactment in 2012, the language’s ambiguity has led to different interpretation by industry and local governments. What is an “eligible facilities request”? What is a “substantial change to the physical dimensions of a tower or base station”? What is an existing “tower or base station”? Is Section 6409(a) even constitutional? In its September 26, 2013, NPRM, the Commission tentatively found that it would serve the public interest to establish “rules clarifying the requirements of section 6409(a) to ensure that the benefits of a streamlined review process for collocations and other minor facility modifications are not unnecessarily delayed.”⁹

⁶ In re Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, Notice of Proposed Rulemaking, FCC 13-122, Sept. 26, 2013, WT Docket No. 13-238, 28 FCC Rcd. 14,238, 78 Fed. Reg. 234 (Dec. 5, 2013), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-13-122A1.docx (“NPRM”).

⁷ H.R. Rep. No. 112-399, at 136 (2012), reprinted in 2012 U.S.C.C.A.N. 186, 220.

⁸ 47 U.S.C. § 1455(a).

⁹ NPRM ¶ 95.

In its rulemaking, the Commission proposed defining various terms in Section 6409(a), clarifying Section 6409(a) application procedures, deciding whether Section 6409(a) applies to local governments as property owners, and possible remedies.

2. Section 332(c)(7) and the *Shot Clock Ruling*

Section 332(c)(7) provides for limited preemption of state and local zoning authority in the siting of personal wireless service facilities. The statute disallows unreasonable discrimination “among providers of functionally equivalent services”¹⁰ and local government actions that “prohibit or have the effect of prohibiting the provision of personal wireless services.”¹¹ State or local governments may not regulate wireless facilities on the basis of the environmental effects of radio frequency emissions to the extent that a facility complies with FCC regulations on such emissions.¹² State or local governments are also required to act on “any request for authorization to place, construct, or modify personal wireless service facilities within a *reasonable period of time*.”¹³ The statute requires denials to be in writing and supported by substantial evidence¹⁴ and provides for expedited judicial review.¹⁵

For more than a decade after its 1996 enactment, interpretation and application of Section 332(c)(7) was the province of the courts—Section 332(c)(7)(B)(v) provides for judicial review. In response to a 2008 industry petition, the Commission took up the question of what constitutes

¹⁰ 47 U.S.C. § 332(c)(7)(B)(i)(I). See *AT&T Wireless PCS, Inc. v. City Council of Va. Beach*, 155 F.3d 423, 426-28 (4th Cir. 1998) (finding no unreasonable discrimination).

¹¹ 47 U.S.C. § 332(c)(7)(B)(i)(II). See *New Cingular Wireless PCS, LLC v. Fairfax Cnty. Bd. of Supervisors*, 674 F.3d 270, 275-77 (4th Cir. 2012) (discussing what constitutes a prohibition under Section 332(c)(7)(B)(i)(II)); *APT Pittsburgh Ltd. P’ship v. Penn Twp. Butler Cnty.*, 196 F.3d 469, 480 (3d Cir. 1999).

¹² 47 U.S.C. § 332(c)(7)(B)(iv). But see *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 420-21 (2d Cir. 2002) (upholding governmental entity’s lease provision addressing radiofrequency emissions).

¹³ 47 U.S.C. § 332(c)(7)(B)(ii) (emphasis added).

¹⁴ 47 U.S.C. § 332(c)(7)(B)(iii). See H.R. Rep. No. 104-458, at 208 (1996), reprinted in 1996 U.S.C.C.A.N. 124, 223 (“The phrase ‘substantial evidence contained in a written record’ is the traditional standard used for judicial review of agency actions.”). See also *MetroPCS, Inc. v. City and Cnty. of S.F.*, 400 F.3d 715, 721-23 (9th Cir. 2005) (discussing how different Courts of Appeal have interpreted the “in writing” requirement); *Sw. Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 58-59 (1st Cir. 2001) (describing substantial evidence standard).

¹⁵ 47 U.S.C. § 332(c)(7)(B)(v). See H.R. Rep. No. 104-458, at 209 (1996), reprinted in 1996 U.S.C.C.A.N. 124, 223-24 (noting that the party making the appeal may choose to seek judicial review in the appropriate Federal district court or a State court of competent jurisdiction). Courts have held that the appropriate remedy is an injunction ordering the local government to issue the permit. See, e.g., *Omnipoint Corp. v. Zoning Hearing Bd.*, 181 F.3d 403, 409-10 (3d Cir. 1999); *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 497 (2d Cir. 1999).

a “reasonable period of time” for the purpose of Section 332(c)(7)(B)(ii).¹⁶ The Commission defined a “presumptively ‘reasonable period of time’ beyond which inaction on a personal wireless service facility siting application will be deemed a ‘failure to act’” as 90 days for collocation applications, and 150 days for applications other than collocations.¹⁷ These timeframes take into account whether applications are complete, and the local government must notify the applicant within 30 days if it finds an application to be incomplete.¹⁸

Although several cities sought judicial review of the FCC’s decision, *City of Arlington, Tex. v. FCC*, 668 F.3d 229, 236 (5th Cir. 2012), *aff’d*, 133 S. Ct. 1863, 1873 (2013), the courts granted the FCC deference and upheld the FCC’s decision. This left local governments in the position of having to challenge the presumed reasonableness of the “shot clock” in a particular case, at which point the presumption of reasonableness would disappear and the reviewing court would evaluate competing evidence.

In its new rulemaking, the Commission considered several aspects of Section 332(c)(7), post-*Shot Clock Ruling*. The Commission evaluated municipal property siting preferences, determinations that applications are complete, local moratoria, application of the *Shot Clock Ruling* to distributed antenna systems (“DAS”) and small cell deployments, the definition of collocation, and remedies.

3. Historic Preservation and Environmental Reviews

The Commission proposed to refine its environmental and historic preservation review processes under the National Environmental Policy Act (“NEPA”) and the National Historic Preservation Act (“NHPA”) with the aim of ensuring that rapid, efficient, and affordable radio communications services are widely available. In particular, the Commission sought to address new wireless technologies, including DAS and small cell systems.

B) The FCC’s Final Rules

The Commission’s Report and Order was somewhat of a mixed bag for local governments. While wireless providers did not get everything on their list, there are some areas

¹⁶ *Shot Clock Ruling* ¶ 2.

¹⁷ *Shot Clock Ruling* ¶ 19. The Commission found that defining timeframes would lend clarity to Section 332(c)(7) and “ensur[e] that the point at which a State or local authority ‘fails to act’ is not left so ambiguous that it risks depriving a wireless siting applicant of its right to redress.” *Id.*, ¶ 41.

¹⁸ *Id.*, ¶ 53.

where local governments will likely need to revise their practices to conform to the new rules. The Order was published in the *Federal Register* on January 8, 2015. The new Section 6409(a) rules took effect on April 8, 2015, 90 days after publication.¹⁹

1. Section 6409(a)

a) Definitions

The Commission generally interpreted terms in Section 6409(a) broadly.

Transmission equipment means “any equipment that facilitates transmission for any Commission-licensed or authorized wireless communication service, including, but not limited to, radio transceivers, antennas and other relevant equipment associated with and necessary to their operation, including coaxial or fiber-optic cable, and regular and backup power supply.”²⁰

Tower includes “any structure built for the sole or primary purpose of supporting any Commission-licensed or authorized antennas and their associated facilities.”²¹ **Base station** is “the equipment and non-tower supporting structure at a fixed location that enable Commission-licensed or authorized wireless communications between user equipment and a communications network” and includes any equipment associated with wireless communications service.²² An **existing** base station is a structure supporting or housing, at the time of the application, an antenna, transceiver, or other associated equipment that constitutes part of a “base station,” even if the particular structure was not built for the sole or primary purpose of providing such support.²³ This should preserve state and local authority to review the *first* base station deployment that would bring any non-tower support structure (such as a building, utility or light pole, or water tower) within the scope of Section 6409(a).²⁴

Collocation means “the mounting or installation of transmission equipment on an eligible support structure for the purpose of transmitting and/or receiving radio frequency signals for

¹⁹ Order ¶ 242.

²⁰ *Id.*, ¶ 160.

²¹ *Id.*, ¶ 166.

²² *Id.*, ¶ 167.

²³ *Id.*, ¶ 168.

²⁴ *Id.*, ¶ 174.

communications purposes.”²⁵ **Eligible support structure** means any structure that is a “tower” or “base station.”²⁶ However, the definition of “collocation” does *not* “require local governments to approve deployments on anything that could house or support a component of a base station” but which does not currently do so.²⁷ **Eligible facilities request** includes “hardening through structural enhancement where such hardening is necessary for a covered collocation, replacement, or removal of transmission equipment, but does not include replacement of the underlying structure.”²⁸ It also includes any “modification of an existing wireless tower or base station that involves collocation, removal, or replacement of transmission equipment.”²⁹

A modification **substantially changes the physical dimensions** of a tower or base station (and thus falls outside of Section 6409(a)) if it meets any of the following:

1. For towers outside of public rights-of-way (“ROW”), it increases the 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 20 feet, whichever is greater;
2. For towers in the ROW and all base stations, it increases the height of the tower or base station by more than 10% or 10 feet, whichever is greater;
3. For towers outside the ROW, it protrudes from the edge of the tower more than 20 feet, or more than the width of the tower structure at the level of the appurtenance, whichever is greater;
4. For towers in the ROW and all base stations, it protrudes from the edge of the structure more than 6 feet;
5. It involves installation of more than the standard number of new equipment cabinets for the technology involved, but not to exceed four cabinets;
6. It entails any excavation or deployment outside of the current site of the tower or base station;³⁰

²⁵ *Id.*, ¶ 178.

²⁶ *Id.*

²⁷ *Id.*, ¶ 179.

²⁸ *Id.*, ¶ 180.

²⁹ *Id.* Note, “replacement” only refers to the replacement of transmission equipment, not the replacement of an existing wireless tower or the support structure on which base station equipment is located. *Id.*, ¶ 181.

³⁰ For towers outside the ROW, “site” is 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. *Id.*, ¶ 198. For other towers and all base stations, the “site” is further restricted to that area in proximity to the structure and to other transmission equipment already deployed on the ground. *Id.*

7. It would defeat the existing concealment/camouflage elements of the tower or base station; or
8. It does not comply with conditions associated with the locality's prior zoning approval of construction or modification of the tower or base station, unless the non-compliance is due to an increase in height, increase in width, addition of cabinets, or new excavation that does not exceed the corresponding "substantial change" thresholds.³¹

In addition, "modifications of an existing tower or base station that occur after the passage of the Spectrum Act will not change the [pre-Spectrum Act] baseline for purposes of measuring substantial change."³² Where the deployments will be separated horizontally (e.g., on a rooftop), changes in height should be measured from the original support structure.³³

b) Application Review Process and Remedies

Local review must be finished within 60 days, including any review to determine whether an application is complete.³⁴ The only exceptions are where (a) there is mutual agreement to an extension of time, or (b) the locality informs the applicant within 30 days of the submission that the application is incomplete.³⁵

If the locality determines that Section 6409(a) does not apply to a particular siting application, then the presumptively reasonable timeframe under the Section 332(c)(7) *Shot Clock Ruling* will begin to run from the issuance of the locality's decision that the application is not covered by Section 6409(a).³⁶ In cases where both provisions apply, Section 6409(a) governs.³⁷

³¹ *Id.*, ¶ 187. Note, this is informed by, but has some differences from, the Collocation Agreement's definition of "substantial increase in size." *Id.*, ¶¶ 190-93.

³² *Id.*, ¶ 197.

³³ *Id.*, ¶ 188.

³⁴ *Id.*, ¶ 215. The timeline continues to run regardless of any local moratoria. *Id.*, ¶ 219.

³⁵ *Id.*, ¶ 217.

³⁶ *Id.*, ¶ 220.

³⁷ *Id.*

When informing a Section 6409(a) applicant that its application is incomplete, a local government may only require the applicant to provide documentation that is “reasonably related to determining whether the request meets the requirements of [Section 6409(a)].”³⁸

A Section 6409(a) request will be “deemed granted” if not approved within the 60-day period, accounting for any tolling.³⁹ The deemed grant will not become effective, however, until the applicant notifies the locality that the application has been deemed granted.⁴⁰ A local government may challenge an applicant’s written notification of a deemed grant in court.⁴¹

In approving a Section 6409(a) request, a local government may require a request to comply with “generally applicable building, structural, electrical, and safety codes or with other laws codifying objective standards reasonably related to health and safety.”⁴² Additionally, because of how the Commission defined “substantially changes the physical dimensions,” a local government may impose existing camouflage requirements on a Section 6409(a) request.

c) Non-Application to Municipalities in their Proprietary Capacities

The Commission concluded that Section 6409(a) only applies to state and local governments acting in their role as land use regulators and *not* in their proprietary capacities.⁴³ The Commission declined to elaborate on the application of this principle to particular circumstances under Section 6409(a), noting that the Section 332(c)(7) case law can provide guidance.⁴⁴ However, there is an open question around applications for collocations in the ROW because of the status of the ROW and the Commission’s Section 6409(a) definitions for collocations in the ROW.

³⁸ *Id.*, ¶ 214. Although the Order is somewhat ambiguous on this point, the Commission stated that, when seeking further information on an incomplete application, a locality *cannot* require the wireless provider to furnish the locality with documentation proving the need for the proposed modification. *Id.*

³⁹ *Id.*, ¶ 216. Unlike the case with the Section 332(c)(7) shot clocks, a municipality may not rebut a claim of failure to act under Section 6409(a) by demonstrating that a longer review period was reasonable.

⁴⁰ *Id.*, ¶ 226.

⁴¹ *Id.*, ¶ 231.

⁴² *Id.*, ¶ 202.

⁴³ *Id.*, ¶ 239.

⁴⁴ *Id.*, ¶ 240.

2. Section 332(c)(7)

a) Completeness of Applications

The Commission provided some guidance as to how local governments should handle incomplete wireless siting applications. The *Shot Clock Ruling*'s presumptively reasonable timeframe begins to run when the application is first submitted, not when it is deemed complete.⁴⁵ To toll the shot clock, any request by a locality for additional information must specify the city code provision, ordinance, application instruction, or otherwise publicly-stated procedures that require the information to be submitted.⁴⁶ Once an applicant submits additional information, the shot clock begins to run again; the reviewing authority has 10 days to notify the applicant that the additional submission did not complete the application.⁴⁷ Any subsequent determination by a locality that an application remains incomplete may be based only on the applicant's failure to supply the information that the locality requested within the first 30 days.⁴⁸

b) Local Moratoria

The Commission clarified that the presumptively reasonable timeframes of the *Shot Clock Order* run regardless of any applicable local moratorium on wireless siting applications.⁴⁹ Thus, local moratoria on siting applications to, for example, update applicable zoning regulations, do not stop the shot clock.

c) Application to DAS and Small Cell Deployments

The Commission found that the *Shot Clock Ruling*'s timeframes apply to DAS and small cell applications.⁵⁰ The Commission noted that some jurisdictions did not apply the shot clocks to these deployments and wanted to clarify this issue. If a deployment requires new poles,

⁴⁵ *Id.*, ¶ 258.

⁴⁶ *Id.*, ¶ 260. The *Shot Clock Ruling* required such requests to be made within 30 days.

⁴⁷ *Id.*, ¶ 259.

⁴⁸ *Id.*

⁴⁹ *Id.*, ¶ 265.

⁵⁰ *Id.*, ¶ 270 (“to the extent DAS or small-cell facilities, including third-party facilities such as neutral host DAS deployments, are or will be used for the provision of personal wireless services, their siting applications are subject to the same presumptively reasonable timeframes that apply to applications related to other personal wireless service facilities”).

however, that will be subject to the 150-day shot clock for new construction (not the 90-day collocation shot clock).

d) Preferences for Deployments on Municipal Property

The Commission found that municipal property preferences are not *per se* discriminatory or otherwise a violation of Section 332(c)(7).⁵¹ Any such violation would need to be argued on a case-by-case basis.⁵²

e) Definition of Collocation

The Commission declined to make any changes or clarifications to the standard for determining what is a “collocation” subject to the 90-day shot clock.⁵³ The Commission also noted that some collocation applications that are covered by Section 332(c)(7) are not “eligible facilities requests” for the purposes of Section 6409(a), and there is a rationale for preserving distinct standards for the two provisions.⁵⁴

f) Remedies

The Commission declined to adopt a “deemed granted” remedy for state or local government failures to act within the Section 332(c)(7) shot clocks.⁵⁵ However, the Commission did observe that absent some compelling need for additional time to review the application, it would be appropriate for a reviewing court to treat a locality’s failure to comply with the presumptively reasonable shot clock as “significant factors weighing in favor of such [injunctive] relief.”⁵⁶

3. Historic Preservation and Environmental Reviews

a) National Environmental Policy Act

“Antenna,” as used in the Commission’s existing Note 1 categorical exclusion (the “mounting of antenna(s) on existing buildings and antenna towers”), encompasses all on-site equipment associated with the antenna, including transceivers, cables, wiring, converters, power

⁵¹ *Id.*, ¶ 280. Any such violation would be determined on a case-by-case basis.

⁵² *Id.*

⁵³ *Id.*, ¶ 276.

⁵⁴ *Id.*, ¶ 277.

⁵⁵ *Id.*, ¶ 284.

⁵⁶ *Id.*

supplies, equipment cabinets and shelters, and other comparable equipment.⁵⁷ Leaks or spills resulting from generator maintenance are not federal actions subject to NEPA.⁵⁸

The NEPA exclusion for mounting antennas “on” existing buildings applies to installations in the interior of existing buildings.⁵⁹

The FCC extended the NEPA categorical exclusion for collocations on towers and buildings to collocations on other existing man-made structures.⁶⁰ This includes collocations on utility poles, light poles, road signs, and water towers.⁶¹

There is a new exclusion for certain wireless facilities deployed in above-ground utility and communications ROWs.⁶² This exclusion includes deployments on new or replacement poles if: (1) the facility is located in a ROW designated by a federal, state, local, or tribal government for communications towers, above-ground utility transmission or distribution lines, or any associated structures and equipment; (2) the ROW is in active use for such designated purposes; and (3) the facility will not constitute a substantial increase in size over existing support structures that are located in the ROW within the vicinity of the proposed construction.⁶³

b) National Historic Preservation Act

There is a new exclusion from FCC NHPA review for collocations on existing utility structures, including utility poles and electric transmission towers.⁶⁴ This exclusion only applies where the deployment meets specified size limitations and involves no new ground disturbance.⁶⁵ It also only applies to collocations on utility structures where historic preservation

⁵⁷ *Id.*, ¶ 41.

⁵⁸ *Id.* The Order does not explain how the Commission’s construction of Section 6409(a), which provides that generally applicable public safety and health requirements apply to Section 6409(a) applications, squares with this statement.

⁵⁹ *Id.*, ¶ 48.

⁶⁰ *Id.*, ¶ 52.

⁶¹ *Id.*, ¶ 54.

⁶² *Id.*, ¶ 60 (incorporated into FCC rules as Note 4 to Section 1.1306).

⁶³ *Id.*, ¶ 61.

⁶⁴ *Id.*, ¶ 90.

⁶⁵ *Id.*

review is currently required under existing rules solely because the structures are more than 45 years old.⁶⁶

There also is a new exclusion for collocations on buildings and other non-tower structures.⁶⁷ To qualify for this exclusion, several conditions must be met, including: (1) there must be an existing antenna on the building or structure; (2) one of several criteria to mitigate antenna visibility must be satisfied; (3) the new antenna must comply with all zoning conditions and historic preservation conditions applicable to existing antennas in the same vicinity that directly mitigate or prevent adverse visual effects, such as camouflage requirements; and (4) the deployment must involve no new ground disturbance.⁶⁸

C) Summary

The Report and Order places significant new restrictions on local government land use and zoning authority over wireless facilities and it will require many localities to modify their procedures, and potentially local ordinances, to comply. Some local governments have sought Court of Appeals review of the Report and Order, but the effective date of the rules has not been stayed.

III. T-MOBILE SOUTH, LLC v. CITY OF ROSWELL

On January 14, 2015, the Supreme Court issued its decision in *T-Mobile South, LLC v. City of Roswell*.⁶⁹ This case has implications for the procedures that local governments must use in denying a wireless siting application under Section 332(c)(7).

⁶⁶ *Id.* If a wireless deployment would trigger historic preservation review for other reasons—such as being within the boundary of a historic district or within 250 feet of the boundary of a historic district—this exclusion would not apply. *Id.*

⁶⁷ *Id.*, ¶ 97.

⁶⁸ *Id.* Like the new exclusion for collocations on existing utility structures, this new targeted exclusion applies only to collocations where historic preservation review would otherwise be required under existing rules solely because the structures are more than 45 years old. *Id.*

⁶⁹ 135 S. Ct. 808 (2015). Oral argument recording and all briefs are available at <http://www.scotusblog.com/case-files/cases/t-mobile-south-llc-v-city-of-roswell/>.

A) Background

This case arose from the City's 2010 denial of T-Mobile's application to construct a cell tower. Following a public hearing to consider the application, the City sent T-Mobile a short letter notifying it of the denial and providing instructions for obtaining the written minutes of that hearing. T-Mobile filed suit challenging the City's decision in district court, and that court held that the City failed to satisfy the "in writing" requirement of 47 U.S.C. § 332(c)(7)(B)(iii), which provides:

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.

After finding that the City failed to comply with the "in writing" requirement, the district court imposed the draconian remedy of granting an injunction requiring the City to grant T-Mobile's application. Both this harsh remedy, as well as the court's excessive focus on the "in writing" language (as opposed to the substantial evidence requirement or other substantive requirements of Section 332(c)(7)), marked this case as unusual.

The City appealed to the Eleventh Circuit, which reversed and remanded.⁷⁰ Citing its earlier decision in *T-Mobile South, LLC v. City of Milton*, 728 F.3d 1274 (11th Cir. 2013), the court found that the collection of documents available to T-Mobile—the City Council meeting minutes, the transcript of the meeting, and the denial letter—satisfied the "in writing" requirement. The Eleventh Circuit sent the case back to the district court to consider T-Mobile's merits challenges.

T-Mobile sought *certiorari* on the "in writing" requirement issue, which the Court granted. Arguments were held in November 2014. Industry *amici* were heavily stacked on T-Mobile's side; on the City's side, Spiegel attorneys Tim Lay, Katharine Mapes, and Jessica Bell, through the State and Local Legal Center, filed an *amicus* brief on behalf of the National League of Cities, the National Association of Counties, the U.S. Conference of Mayors, the International Municipal Lawyers Association, the International City/County Management Association, and the

⁷⁰ *T-Mobile S., LLC v. City of Roswell*, 731 F.3d 1213 (11th Cir. 2013).

American Planning Association. The Solicitor General filed an *amicus* brief in support of neither party.

B) *The Court's Decision*

In a 6-3 split,⁷¹ the Court reversed the Eleventh Circuit and held that, to enable judicial review, a locality must provide reasons for denying a wireless siting application, but that these reasons may be contained in a document separate from the written denial. Thus, all members of the Court disagreed with T-Mobile's argument that the reasons for a locality's decision must be set forth in the document denying a wireless provider's application (thus resolving a circuit split in favor of the City). The Court also held, however, that if the reasons for a locality's decision are not contained in a decision denying the application but are instead supplied by an accompanying document (or collection of documents), such as council meeting minutes, that document must be "essentially contemporaneously" available with the denial letter.

This "contemporaneous" requirement was the position urged by the Solicitor General as *amicus curiae*, although it had no bearing on the facts of this case. That is, T-Mobile did not allege that the City's minutes, which were available 26 days after the written denial and 4 days before the expiration of T-Mobile's time to seek judicial review under Section 332(c)(7), frustrated its efforts to seek judicial review.

As Chief Justice Roberts pointed out in his dissent (joined by Justices Ginsburg and Thomas)—and as *amici* argued in support of the City—a reviewing court does not need contemporaneous reasons in order to carry out substantial evidence review, and that issue was not even raised in the courts below. Further, the dissent noted the lack of harm to providers: "cell service providers are not Mom and Pop operations. As this case illustrates, they participate extensively in the local government proceedings, and do not have to make last-second, uninformed decisions on whether to seek review."⁷² The dissent authored by Chief Justice Roberts (and joined in relevant part by Justice Ginsburg) would have found that Section 332(c)(7) requires nothing more than "a written document that communicates the town's denial"

⁷¹ Justice Sotomayor authored the majority opinion, joined by Justices Kennedy, Breyer, Alito, and Kagan. Justice Alito filed a concurring opinion. Chief Justice Roberts filed a dissenting opinion in which Justice Ginsburg joined, and Justice Thomas joined as to one part. Justice Thomas also filed a separate dissenting opinion.

⁷² 135 S. Ct. at 820 (Roberts, C.J., dissenting).

and would thus have affirmed the Eleventh Circuit’s decision to remand to the district court for consideration on the merits.⁷³

Justice Thomas shared the Chief Justice’s “concern about the Court’s eagerness to reach beyond the bounds of the present dispute” in creating the “contemporaneously available” requirement.⁷⁴ Justice Thomas would afford municipalities “at least as much respect as a federal agency” in this case, and criticized the Court majority’s treatment of municipalities as “conscripts in ‘the national bureaucratic army.’”⁷⁵

The Court remanded the case to the Eleventh Circuit for further proceedings consistent with its opinion. Collectively, the Court’s opinions leave the City room to argue on remand that its failure to comply with the new “contemporaneously available” requirement was harmless error, and that therefore the case should be remanded to the district court to consider T-Mobile’s additional arguments. (That, of course, was what the Eleventh Circuit had ordered in the first place.)

In fact, the majority opinion leaves open this possibility, stating, “We do not consider questions regarding the applicability of principles of harmless error or questions of remedy, and leave those for the Eleventh Circuit to address on remand.”⁷⁶ And Justice Alito wrote a separate concurrence in which he first emphasized that there was no “opinion-writing requirement” in Section 332(c)(7), and then went on to stress the availability of the harmless error doctrine to the City on remand.⁷⁷ He wrote: “I have trouble believing that T-Mobile South, LLC—which actively participated in the decisionmaking process, including going so far as to transcribe the public hearing—was prejudiced by the city of Roswell’s delay in providing a copy of the minutes.”⁷⁸ He concluded by emphasizing that nothing in the Court’s opinion should be taken to mean that “when a locality has erred, the inevitable remedy is that a tower must be built.”⁷⁹

⁷³ *Id.* at 821 (Roberts, C.J., dissenting).

⁷⁴ *Id.* at 823 (Thomas, J., dissenting).

⁷⁵ *Id.* at 824 (Thomas, J., dissenting).

⁷⁶ *Id.* at 819.

⁷⁷ *Id.* (Alito, J., concurring).

⁷⁸ *Id.* (Alito, J., concurring).

⁷⁹ *Id.* (Alito, J., concurring).

C) What Roswell Means for Local Governments

In light of the Court’s holding that denials under Section 332(c)(7) must include reasons, local governments that include these reasons in separate documents—usually, council meeting minutes or transcripts—are strongly advised to wait to issue the denial letter until the accompanying documents are ready so that they are all issued together. The 30-day period in which the provider may seek judicial review begins to run from the issuance of the denial letter, and the Court held that the reasons need to be available around the same time as this 30-day period begins to run. The local government must still issue the denial within the limits of the FCC’s shot clock (90 days for collocations and 150 days for other siting applications).

The Court agreed with the Solicitor General’s suggestion that “the local government may be better served by including a separate statement containing its reasons.”⁸⁰ The Court believes that by issuing “a short statement providing its reasons, the locality can likely avoid prolonging the litigation . . . while the parties argue about exactly what the sometimes voluminous record means.”⁸¹ According to the Court, this would also avoid the risk that a reviewing court could not determine the locality’s reasons or mistakenly ascribe to the locality a rationale that did not actually motivate the decision.

Although this is probably good advice, it is doubtful whether a locality’s issuance of such a written decision setting forth reasons would actually prevent a wireless provider from alleging that a local government acted for impermissible reasons or would otherwise reduce litigation expense. A written decision setting forth reasons could, however, strengthen a locality’s ability to defend against those allegations.

D) Summary

The “contemporaneously available” requirement was not an issue on the facts of *Roswell*, but it is now law, and local governments should be aware of it and alter their practices accordingly. One hopes that compliance with the requirement will not require substantial additional effort or expense, and that the post-*Roswell* world will be relatively easy for local governments to adapt to. As the Chief Justice observed in dissent, “At the end of the day, the

⁸⁰ *Id.* at 816.

⁸¹ *Id.*

impact on cities and towns across the Nation should be small, although the new unwritten [‘contemporaneously available’] requirement could be a trap for the unwary hamlet or two.”⁸²

Wireless providers, on the other hand, may not like the new normal. With local governments delaying written decisions until the reasons are prepared—either in a separate written decision or in meeting minutes/transcripts—the likely result is that a wireless provider will now have to wait longer after a council vote denying its application before it can go to court. The written denial—not a vote at a meeting—constitutes the “final action” on which judicial review is available. For many wireless siting applications, *Roswell* may ultimately serve to (1) prompt localities to provide more thorough reasoning for their denials, and (2) require wireless providers to cool their litigation heels while the locality is doing so.

IV. CONCLUSION

The FCC’s Report and Order and the Supreme Court’s decision in *Roswell* will require many local governments to revise their practices with respect to wireless siting applications. Although the FCC’s aim in the Order was to expedite wireless siting, the practical effect of the Order may be to prompt local governments to more critically scrutinize initial applications for new wireless facilities. Once approval is granted to a new wireless facility, Section 6409(a) greatly restricts local oversight of any subsequent modifications to that facility. In light of the Supreme Court’s *Roswell* decision, local governments will also likely need to spend more time drafting reasons for the denial of an application before issuing the denial within the *Shot Clock Ruling*’s deadlines.

⁸² *Id.* at 823.

V. APPENDIX

A) *Text of Section 332(c)(7)*

Sec. 332. Mobile Services.⁸³

...

(7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions 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 of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) 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

⁸³ Telecommunications Act of 1996, Pub. L. No. 104-104, § 704(a), 110 Stat. 56 (codified at 47 U.S.C. § 332(c)(7)).

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.

(C) Definitions

For purposes of this paragraph—

- (i) the term “personal wireless services” means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;
- (ii) the term “personal wireless service facilities” means facilities for the provision of personal wireless services; and
- (iii) the term “unlicensed wireless service” means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v) of this title).

B) Text of Section 6409(a)

Sec. 6409. Wireless Facilities Deployment.⁸⁴

(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.

⁸⁴ Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6409(a), 126 Stat. 156 (codified at 47 U.S.C. § 1455(a)).

(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.