

Federal Law Issues Relating to Wireless Facilities Leases on Municipal Property

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Table of Contents

I.	Introduction	2
II.	Section 332(c)(7)	3
	A) Statutory Background	3
	B) FCC Implementation of Section 332(c)(7)	5
	C) Application to Municipal Property	6
	1. Distinguishing Between Regulatory and Proprietary Action	7
	2. Municipal Property Siting “Preferences”	9
III.	Section 6409(a)	12
	A) The Spectrum Act	12
	B) Rulemaking to Implement Section 6409(a)	13
IV.	Conclusion	16
V.	Appendix	17
	A) Text of Section 332(c)(7)	17
	B) Text of Section 6409(a)	18

I. INTRODUCTION

Demand for wireless services and the development and deployment of new technologies are increasing. The siting of wireless facilities is governed by federal, state, and local laws. In 1996 Congress enacted the Telecommunications Act of 1996 (“TCA”) that preserved most state and local zoning authority in 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. The Federal Communications Commission (“FCC” or “the Commission”) is charged with interpreting and implementing the TCA. Notably, though, “the TCA does not federalize telecommunications law[,]”¹ and state and local governments have a significant role to play.

As part of the Middle Class Tax Relief and Job Creation Act of 2012, Congress enacted another provision, Section 6409(a), to advance wireless siting. The scope of the preemption of

¹ *Sw. Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 57 (1st Cir. 2001).

state and local authority by the TCA and Section 6409(a), as well as the overall implementation of Section 6409(a), is the subject of a current Commission rulemaking. This paper discusses how the two statutory provisions affect the siting of wireless facilities on municipal property.²

II. SECTION 332(c)(7)

A) *Statutory Background*

Section 704(a) of the TCA added Section 332(c)(7) to the Communications Act of 1934, as amended.³ Section 332(c)(7) provides for limited preemption of state and local zoning authority in the siting of personal wireless service facilities. As part of an overall goal of promoting competition and encouraging rapid deployment of new wireless telecommunications technologies, Section 332(c)(7) aimed to reduce what were perceived to be local zoning impediments to the installation of facilities for wireless communications.⁴ The provision “prevents Commission preemption of local and State land use decisions and preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement.”⁵ The provision “is a deliberate

² An additional issue may be raised by the interaction between 47 U.S.C. §§ 253(a) and 332(c)(7). *See, e.g., Sprint Telephony PCS, L.P. v. Cnty. of San Diego*, 543 F.3d 571, 579 (9th Cir. 2008) (en banc) (discussing meaning of prohibition under two statutory provisions). Section 253(a) provides: “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.” 47 U.S.C. § 253(a). Section 332(c)(7)(A), however, preserves general local zoning authority, stating “[e]xcept as provided in this paragraph, nothing in this chapter shall limit or affect the authority” of local governments over the “placement, construction, and modification of personal wireless service facilities.” 47 U.S.C. § 332(c)(7)(A). Arguably, this provision precludes the application of Section 253(a) to an exercise of local zoning authority covered by Section 332(c)(7). The Section 253 issue will not be addressed in further detail in this paper, but it is an issue that municipal attorneys should keep in mind in dealing with wireless siting issues.

³ Telecommunications Act of 1996, Pub. L. No. 104-104, § 704(a), 110 Stat. 56 (1996) (codified at 47 U.S.C. § 332(c)(7)). Section 332(c)(7) was the first provision of the federal Communications Act to explicitly address local land use and zoning authority over wireless facilities.

⁴ *See Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005).

⁵ H.R. Conf. Rep. No. 104-458, at 207-08 (1996), U.S. Code Cong. & Admin. News 1996, pp. 207-208 (“Conference Report”).

compromise between two competing aims—to facilitate nationally the growth of wireless telephone service and to maintain substantial local control over siting of towers.”⁶

The provisions of Section 332(c)(7)(B) set limits on the general principle of the preservation of local authority established in Section 332(c)(7)(A).⁷ The statute disallows unreasonable discrimination “among providers of functionally equivalent services”⁸ and local government actions that “prohibit or have the effect of prohibiting the provision of personal wireless services.”⁹ 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.¹⁰ 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*.”¹¹ The statute requires denials to be in writing and supported by substantial evidence¹² and provides for expedited judicial review.¹³

⁶ *Town of Amherst, N.H. v. Omnipoint Commc 'ns Enters., Inc.*, 173 F.3d 9, 13 & n.3 (1st Cir. 1999) (discussing initial House version of provision that would have charged the FCC with developing a uniform national policy for the deployment of wireless communication towers that was rejected in favor of a bill that “rejected such a blanket preemption of local land use authority”).

⁷ *See Omnipoint Commc 'ns, Inc. v. City of Huntington Beach*, 738 F.3d 192, 196 (9th Cir. 2013) (concluding that the preemptive scope of Section 332(c)(7) is that “(1) it preempts local land use authorities’ regulations if they violate the requirements of § 332(c)(7)(B)(i) and (iv); and (2) it preempts local land use authorities’ adjudicative decisions if the procedures for making such decisions do not meet the minimum requirements of § 332(c)(7)(B)(ii) and (iii).”).

⁸ 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).

⁹ 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. v. Penn Twp. Butler Cnty.*, 196 F.3d 469, 480 (3d Cir. 1999).

¹⁰ 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).

¹¹ 47 U.S.C. § 332(c)(7)(B)(ii) (emphasis added). *See* Section II(B), *infra*.

¹² 47 U.S.C. § 332(c)(7)(B)(iii). *See* Conference Report at p. 208 (“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 San Francisco*, 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.*, 24 F.3d at 58-59 (describing substantial evidence standard).

¹³ 47 U.S.C. § 332(c)(7)(B)(v). *See* Conference Report at p. 209 (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).

B) FCC Implementation of Section 332(c)(7)

For more than a decade after its 1996 enactment, interpretation and application of Section 332(c)(7) was the province of the courts, just as Congress envisioned by including a specific court remedy in Section 332(c)(7)(B)(v). In 2008, however, CTIA – The Wireless Association filed a petition requesting the Commission to address, among other things, what constitutes a “reasonable period of time” for the purpose of Section 332(c)(7)(B)(ii).¹⁴ In response to the petition, the Commission defined what constitutes a “presumptively ‘reasonable period to 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.¹⁵ 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.¹⁶

Several cities sought review of the *Shot Clock Ruling*.¹⁷ The Fifth Circuit granted the Commission deference with respect to its exercise of authority to implement Section 332(c)(7).¹⁸ The Fifth Circuit then rejected the cities’ argument that the FCC’s timeframes improperly place the burden on a state or local government, creating a “presumption *for* preemption,” finding

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). In a recent rulemaking that remains ongoing, however, the Commission solicited comment on whether to adopt additional remedies. Notice of Proposed Rulemaking ¶ 162, WT 13-238, WC 11-59, RM 11688 (terminated), WT 13-32, FCC 13-122 (Sept. 26, 2013) (“*NPRM*”).

¹⁴ 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, 24 FCC Rcd 13994 ¶ 2 (2009) (“*Shot Clock Ruling*”), *recon. denied*, 25 FCC Rcd 11157, *aff’d sub nom., City of Arlington, Tex. v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff’d*, 133 S.Ct. 1863 (2013).

¹⁵ *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.

¹⁶ *Id.* ¶ 53.

¹⁷ *City of Arlington, Tex. v. FCC*, 668 F.3d 229, 236-36 (5th Cir. 2012), *aff’d*, 133 S.Ct. 1863, 1873 (2013) (considering whether “a court should apply *Chevron* to review an agency’s determination of its own jurisdiction”).

¹⁸ *City of Arlington*, 668 F.3d at 254.

instead that this was not the effect of the presumptively reasonable time periods.¹⁹ The court explained that a presumption in a civil proceeding operates according to a “bursting-bubble” theory of presumption, and “the *only* effect of a presumption is to shift the burden of producing evidence with regard to the presumed fact.”²⁰ Applying this theory to the *Shot Clock Ruling*, the court stated:

True, the wireless provider would likely be entitled to relief if it showed a state or local government’s failure to comply with the time frames and the state or local government failed to introduce evidence demonstrating that its delay was reasonable despite its failure to comply. But, if the state or local government introduced evidence demonstrating that its delay was reasonable, a court would need to weigh that evidence against the length of the government’s delay—as well as any other evidence of the unreasonable delay that the wireless provider might submit—and determine whether the state or local government’s actions were unreasonable under the circumstances.²¹

The state or local government must produce evidence challenging the presumed reasonableness of the FCC’s “shot clock” period in a particular case, and then the presumption disappears, leaving the reviewing court to judge competing evidence.

C) Application to Municipal Property

Preemption doctrines generally apply only to state regulation and not when a state owns and manages property.²² Accordingly, courts have generally ruled that Section 332(c)(7) does not apply to local government actions or decisions relating to the siting of wireless facilities on municipal property. A related issue is whether ordinances or practices that incentivize in some way wireless facility siting on municipal property (as opposed to neighboring private property) run afoul of Section 332(c)(7).

¹⁹ *Id.* at 256.

²⁰ *Id.* (emphasis in original) (internal quotation marks and citation omitted).

²¹ *Id.* at 257.

²² See *Bldg. & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 226-27 (1993) (“When a State owns and manages property ... it must interact with private participants in the marketplace. In doing so, the State is not subject to pre-emption by the [federal statute], because pre-emption doctrines apply only to state *regulation.*” (emphasis in original)).

1. Distinguishing Between Regulatory and Proprietary Action

The Ninth Circuit recently addressed the application of Section 332(c)(7) to municipal property. In this case, T-Mobile and the City of Huntington Beach entered into lease agreements for the siting of wireless facilities in City parks.²³ The City Council then determined that notwithstanding T-Mobile's lease agreement with the City and valid land use and building permits, T-Mobile also had to obtain voter approval under a city charter measure that gave voters authority over construction on public lands.²⁴ T-Mobile sought relief in federal court, arguing that Section 332(c)(7) barred the application of the voter approval measure to the proposed project; the district court found that the measure, as applied to T-Mobile's wireless siting application, ran afoul of Section 332(c)(7), and remanded to the City, at which point the City followed Section 332(c)(7) procedures to revoke the permits.²⁵

On appeal, the Ninth Circuit reversed. It determined that the city charter measure at issue "is not the sort of local land use regulation or decision that is subject to the limitations of § 332(c)(7), but rather is a voter-enacted rule that the City may not lease or sell city-owned property for certain types of construction unless authorized by a majority of the electors."²⁶ Because the charter provision "simply provides a mechanism for the City, through voters, to decide whether to allow construction on its own land,"²⁷ it is not a form of local zoning or land use regulation to which Section 332(c)(7)(B) applies. The court held: "By its terms, the TCA applies only to local zoning and land use decisions and does not address a municipality's property rights as a landowner."²⁸ As a rule dealing with the City's management of its own property, the measure was therefore outside the scope of Section 332(c)(7) preemption.

²³ *Omnipoint Commc'ns, Inc.*, 738 F.3d at 198.

²⁴ *Id.* at 196, 198.

²⁵ *Id.* at 198-99.

²⁶ *Id.* at 199.

²⁷ *Id.*

²⁸ *Id.* at 201.

The Second Circuit has similarly found that Section 332(c)(7) does not limit proprietary actions of a municipality and concluded that Congress intended Section 332(c)(7)'s preemption to be narrow and its preservation of local governmental authority to be broad.²⁹ Examining the language of the statute, the court observed that the preservation of local governmental “authority” in Section 332(c)(7)(A) refers to “decisions,” whereas the limitations on local authority in Section 332(c)(7)(B) language refer to “regulation.”³⁰ These contrasting terms highlight that the limitations of Section 332(c)(7)(B) apply to a different, and more limited, set of local government actions than what is covered, and preserved, in Section 332(c)(7)(A). The court also noted that a municipality or an instrumentality thereof—in this case a school district—has “the same right in its proprietary capacity as [a private] property owner to refuse to lease” its property, and Section 332(c)(7) does not preempt a governmental body’s right to refuse to lease its property.³¹ Further, a public entity, just like a private party, is permitted to decline to lease its property except subject to agreed-upon conditions, and the party seeking a lease may look for other eligible sites if it does not accept those conditions.³²

It is also worth noting that compelling local governments to allow applicants access to municipal property to site wireless facilities would run afoul of the Fifth Amendment as a taking of municipal property with no mechanism for determining or awarding just compensation.³³ This is an additional argument against wireless providers that seek access, or unconditional access, to municipal property.

²⁹ *Sprint Spectrum L.P. v. Mills*, 283 F.3d at 420.

³⁰ *Id.*

³¹ *Id.* at 421. *Accord Omnipoint Commc’ns Enters., L.P. v. Twp. of Nether Providence*, 232 F.Supp.2d 430, 435 (E.D. Pa. 2002) (“[T]he Township had no duty under the TCA to negotiate or ultimately to lease portions of municipal property to Omnipoint for the purpose of installing an antenna.”).

³² *Sprint Spectrum L.P. v. Mills*, 283 F.3d at 421 (“We see no indication that Congress meant the TCA to apply any different set of principles to a telecommunications company’s negotiated agreement with a public property owner.”).

³³ See *Ark. Game & Fish Comm’n v. United States*, 133 S.Ct. 511, 518 (2012); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Gulf Power Co. v. United States*, 187 F.3d 1324, 1328-29 (11th Cir. 1999). The law is clear that local governments, no less than private landowners, are entitled to the protection of the Takings Clause of the Fifth Amendment. See, e.g., *United States v. 50 Acres of Land*, 469 U.S. 24, 31 & n.15 (1984).

2. Municipal Property Siting “Preferences”

Some wireless providers have expressed concern over municipal ordinances or practices that create a so-called “preference” for siting on municipal property rather than private property and have questioned whether such ordinances or practices rise to the level of unreasonable discrimination prohibited by Section 332(c)(7)(B)(i)(I).³⁴ These preferences may arise in at least two ways. First, local land use and zoning ordinances may not apply, or apply to a lesser extent, to municipal property, creating a natural incentive to site there.³⁵ Second, the wireless industry has alleged that some local governments may have ordinances that more directly favor siting facilities on municipal property.

At the wireless industry’s behest, the issue of whether so-called “preferences” for siting on municipal property violate the anti-discrimination provision of Section 332(c)(7)(B)(i)(I) has been raised in the pending FCC rulemaking discussed in Section III(B) below. Local governments have responded in the rulemaking, arguing that industry’s municipal “preference” discrimination argument is wrong as a matter of policy and law.

As a practical matter, allowing wireless facilities to be sited on municipal property in areas (such as residential zones) where they are not allowed on private property promotes the deployment of wireless facilities. For example, in many municipalities, wireless towers are generally not permitted in areas zoned residential. Fire or police stations in these residential areas, which already typically contain public safety wireless facilities, may be the only eligible property on which wireless facilities are permitted. If this municipal property had to be treated the same as the surrounding residential properties in the area, then either no wireless deployment would be permitted in the area (including the fire or police station), or every home in the area would become a potential site for a wireless tower. The absurdity of this result reveals the fallacy of industry’s position and makes clear the positive effects of encouraging facilities to be sited on municipal property.

³⁴ See, e.g., Comments of PCIA and DAS Forum at 43-44, WC Docket No. 11-59 (filed July 18, 2011).

³⁵ Local land use law is typically directed at placing limits on private property owners’ use of their property. The control and use of public property, in contrast, is subject to direct public oversight by voters—who essentially own public property indirectly through their municipal government.

Moreover, legislative history and subsequent case law interpreting Section 332(c)(7) do not support the argument that a preference for siting on municipal property would be unreasonable discrimination. The Conference Report used “functionally equivalent services” to refer only to personal wireless service providers that directly compete against one another.³⁶ A preference for siting on municipal property, as long as it is applied equally to all wireless providers, is thus not even “discrimination,” much less “unreasonable discrimination,” within the meaning of Section 332(c)(7)(B)(i)(I).³⁷

Further, the Conference Report sets forth Congress’ intent that local governments must have “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.”³⁸ As an example, the conferees stated that they did “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.”³⁹ This recognizes the legitimate goals of zoning and that a local government can distinguish between types of property.⁴⁰

Put simply, Section 332(c)(7)(B)(i)(I) prohibits unreasonable discrimination among wireless providers. It does *not* prohibit discrimination among the different kinds of property on which a wireless provider may seek to place its facilities. A provider that challenges the application of a municipal preference cannot show that it has been “treated differently from other providers whose facilities are *similarly situated* in terms of the *structure, placement or*

³⁶ Conference Report at p. 208.

³⁷ *But see New Cingular Wireless PCS, LLC v. City of W. Haven, Conn.*, No. 3-11-cv-1967, 2013 U.S. Dist. LEXIS 95321 at * 17 (D. Conn. July 9, 2013) (finding that although new zoning regulations apply equally to all carriers, they have the effect of discriminating in favor of wireless providers that have existing facilities and against providers that do not).

³⁸ Conference Report at p. 208.

³⁹ *Id.*

⁴⁰ *See, e.g., T-Mobile Ne. v. Fairfax County Bd. Of Supervisors*, 672 F.3d 259, 272 (4th Cir. 2012) (finding no unreasonable discrimination where local government’s denial was based on “legitimate, traditional zoning principles” and facilities that had been approved for other providers “can be distinguished on several grounds”).

cumulative impact as the facilities in question.”⁴¹ A local government may distinguish among different kinds of property without being unreasonably discriminatory.⁴² A municipality’s decision to encourage wireless siting on municipal property is therefore not unreasonable discrimination within the meaning of Section 332(c)(7)(B)(i)(I).

As mentioned above, however, the Commission is currently considering this issue in a Notice of Proposed Rulemaking issued September 26, 2013 (“*NPRM*”).⁴³ The *NPRM* requested comment on whether “ordinances establishing preferences for the placement of wireless facilities on municipal property are unreasonably discriminatory under Section 332(c)(7).”⁴⁴ Initial industry comments advocated a “deployment at all costs” position where anything that makes siting on municipal property more attractive is permissible, but to the extent that any such preference makes siting on private property less attractive, a municipal preference is an impermissible impediment.⁴⁵ Local governments argued that having different processes for siting on municipal property versus private property, applying equally to all functionally equivalent providers, is not “unreasonable discrimination.”⁴⁶ To the extent a municipal preference might raise an issue, commenters urged the Commission that a rule was unnecessary due to the fact-specific inquiry that would be necessary in those instances.⁴⁷

⁴¹ *MetroPCS, Inc.*, 400 F.3d at 727 (internal quotation marks omitted) (emphasis in original). *See also Omnipoint Commc’n Enters., L.P. v. Zoning Hearing Bd. of Easttown Twp.*, 331 F.3d 386, 395 (3d Cir. 2003) (stating that plaintiff must first show that the relevant providers are functionally equivalent and must then show that the government body unreasonably discriminated).

⁴² *See, e.g., id.; Sprint Spectrum L.P. v. Willoth*, 176 F.3d 630, 639 (2d Cir. 1999) (“[L]ocal governments may reasonably take the location of the telecommunications tower into consideration when deciding whether: (1) to require a more probing inquiry, and (2) to approve an application for construction of wireless telecommunications facilities, even though this may result in discrimination between providers of functionally equivalent services.”); *Sprint Spectrum L.P. v. Bd. of Zoning Appeals of Brookhaven*, 244 F.Supp.2d 108, 117 (E.D.N.Y. 2003).

⁴³ Notice of Proposed Rulemaking, WT 13-238, WC 11-59, RM 11688 (terminated), WT 13-32, FCC 13-122 (Sept. 26, 2013) (“*NPRM*”).

⁴⁴ *NPRM* ¶ 160.

⁴⁵ Comments of PCIA – The Wireless Infrastructure Ass’n and the HetNet Forum at 5 n.21, WT Docket No. 13-238 (filed Feb. 3, 2014).

⁴⁶ Comments of Fairfax County, Virginia at 26, WT Docket No. 13-238 (filed Feb. 3, 2014).

⁴⁷ *See, e.g.,* Comments of the City of Alexandria, Virginia *et al.* at 57, WT Docket No. 13-238 (filed Feb. 3, 2014); Reply Comments of the City of San Antonio, Texas at 25, WT Docket No. 13-238 (filed March 5, 2014).

While we believe local governments have the better of the arguments before the FCC, this does not necessarily mean they will prevail on this issue. The *NPRM* therefore warrants local governments' attention and continued participation.

III. SECTION 6409(a)

A) The Spectrum Act

The Spectrum Act was enacted as part of the Middle Class Tax Relief and Job Creation Act of 2012. The Spectrum Act, generally, was 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 per the recommendation of the 9/11 Commission.⁴⁸ 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.”⁴⁹

Section 6409(a) applied to all local governments upon its enactment in 2012. However, there has been little precedent construing Section 6409(a) to date, and the ambiguity of the statute's language has resulted in differing interpretation by industry and local governments. For example, the statute does not define what constitutes a “substantial[] change.” It is unclear exactly what Section 6409(a) requires, or if it is even constitutional.⁵⁰ One district court treated Section 6409(a) as “further evidence of a clear congressional policy demanding the prompt

⁴⁸ H.R. Rep. 112-399 at 136 (2012), U.S. Code Cong. & Admin. News 2012, p. 220.

⁴⁹ Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6409(a), 126 Stat. 156 (2012) (“Spectrum Act”) (codified at 47 U.S.C. § 1445(a)).

⁵⁰ A federal law that compels a state or local government to approve an application or take other specific action may impermissibly commandeer state and local government in violation of the Tenth Amendment. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2602 (2012); *Printz v. United States*, 521 U.S. 898, 933 (1997).

removal of locally imposed, unreasonably discriminatory obstacles to modifications of existing facilities that would further the rapid deployment of wireless technology[.]”⁵¹

B) Rulemaking to Implement Section 6409(a)

In the September 26, 2013, *NPRM*, the Commission issued multiple proposals to interpret and implement Section 6409(a).⁵² As an initial note, local governments and industry disagree on the need for a rulemaking to implement Section 6409(a) at this point. The FCC 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.”⁵³

The *NPRM* proposes to clarify and implement Section 6409 in a variety of ways. Recognizing that the scope of Section 6409(a) depends on what its terms mean, the *NPRM* seeks comment on, among other things, how to interpret the terms “transmission equipment,” “existing wireless tower or base station,” “substantially change the physical dimensions,” and “collocation” as they apply to an “eligible facilities request.”⁵⁴ If these terms are defined broadly, that would greatly extend the preemptive reach of Section 6409(a).

The scope of Section 6409(a) will also affect whether and how it applies to different sorts of property. In particular, wireless industry commenters in the proceeding argue that Section 6409(a) should apply to access to utility or light poles or to municipal rights-of-way (“ROW”). Utility and light poles are often municipally owned, and local ROW is almost always public property. Industry argues that ROW and poles in the ROW are desirable locations to deploy distributed antenna systems (“DAS”) and small cell facilities. This leads to the question of whether Section 6409(a) applies to wireless providers’ requests for access to municipal property.

⁵¹ *New Cingular Wireless PCS*, 2013 U.S. Dist. LEXIS 95321 at * 27.

⁵² See note 43, *supra*. Opening comments were due February 3, 2014, and reply comments were due March 5, 2014.

⁵³ *NPRM* ¶ 95.

⁵⁴ *Id.* ¶ 102.

The Commission's *NPRM* proposes to interpret Section 6409(a) to apply only to state and local governments acting as land use regulators and *not* as property owners.⁵⁵ This is in accordance with the suggestion of the FCC's Intergovernmental Advisory Committee ("IAC").⁵⁶ This interpretation would be consistent with court decisions holding that Section 332(c)(7) does not apply to a municipality's decisions as a property owner rather than as a zoning authority,⁵⁷ as well as the broader principle that "pre-emption doctrines apply only to state *regulation*."⁵⁸

This market participant doctrine is well-established and distinguishes between actions that a municipality takes as a regulator and actions it takes as a market participant.⁵⁹ In the case of Section 6409(a), there is no indication that Congress intended to impose restrictions on a state or local government managing its own property that are not imposed on analogous private conduct.⁶⁰ In examining a municipal action to determine if it is proprietary rather than an attempt to regulate, the Fifth Circuit focused on two questions:

First, does the challenged action essentially reflect the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstance? Second, does the narrow scope of

⁵⁵ *Id.* ¶ 129.

⁵⁶ Intergovernmental Advisory Committee to the FCC: Advisory Recommendation Number 2013-9, "Response to Wireless Telecommunications Bureau's Guidance on Interpretation of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012" at 3-4, dated July 31, 2013, available at <http://transition.fcc.gov/statelocal/recommendation2013-09.pdf>.

⁵⁷ *See, e.g., Omnipoint Commc'ns, Inc.*, 738 F.3d at 200 (holding that a decision whether or not to allow construction on a municipality's own land "does not regulate or impose generally applicable rules on the placement, construction, and modification of personal wireless service facilities ... and so the substantive limitations imposed by [Sections 332(c)(7)(B)(i) and (iv)] are inapplicable" (quotation marks omitted)).

⁵⁸ *Bldg. & Constr. Trades Council*, 507 U.S. at 227 (emphasis in original).

⁵⁹ *See Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1040-42 (9th Cir. 2007) (discussing market participant doctrine and its application to proprietary action by states' political subdivisions). *See also Cardinal Towing & Auto Repair v. City of Bedford, Tex.*, 180 F.3d 686, 693 (5th Cir. 1999) ("Courts have similarly shielded contract specifications from preemption when they applied to a single discreet contract and were designed to insure efficient performance rather than advance abstract policy goals.").

⁶⁰ *See Engine Mfrs. Ass'n*, 498 F.3d at 1041 ("In the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction." (quoting *Bldg. & Constr. Trades Council*, 507 U.S. at 231-32)).

the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem?⁶¹

Local government leases of municipal property for wireless facility siting fall squarely within the first question.⁶²

Several municipal commenters in the *NPRM* discussed the practical, and inappropriate, consequences if Section 6409(a) were to apply to wireless providers' requests to locate their facilities on municipal property. Several water districts described the control they must exercise over their facilities for safety, operational, and other reasons, stressing that they can only allow wireless facilities to be placed at a location on a case-by-case basis, which would be defeated by an FCC rule requiring mandatory collocation.⁶³ Another water district similarly described the efforts it undertakes to strictly control and secure its facilities that would be incompatible with mandatory collocation under Section 6409(a).⁶⁴

In addition to highlighting the distinction between regulatory actions and proprietary actions, local governments commenting on the *NPRM* argued that construing Section 6409(a) to apply to municipal property—essentially requiring local governments to grant access to municipal property—would be a taking within the meaning of the Fifth Amendment.⁶⁵ By restricting what sorts of activity a local government may allow or prohibit on its property, Section 6409(a) would rise to the level of a taking, and lacking a provision for determining or awarding just compensation, would be unconstitutional.

⁶¹ *Cardinal Towing & Auto Repair*, 180 F.3d at 693.

⁶² See *Chamber of Commerce of U.S. v. Lockyer*, 463 F.3d 1076, 1084 (9th Cir. 2006), *rev'd sub nom on other grounds Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60 (2008) (“Each question constitutes a separate method of determining whether the state action at issue actually constitutes regulation, and a state need not satisfy both questions to be deemed to act as a market participant.”).

⁶³ Comments of the Valley Center Municipal Water District at 4, WT Docket No. 13-238 (filed Feb. 3, 2014); Comments of the Sweetwater Authority at 4, WT Docket No. 13-238 (filed Feb. 3, 2014).

⁶⁴ Comments of the Padre Dam Municipal Water District at 2-3, WT Docket No. 13-238 (filed Feb. 3, 2014).

⁶⁵ Comments of the City of San Antonio, Texas at 8, in WT Docket No. 13-238 (filed Feb. 3, 2014); Comments of the City of Eugene, Oregon at 6, in WT Docket No. 13-238 (filed Feb. 3, 2014).

Industry commenters largely agreed with the IAC's recommendation that Section 6409(a) does not apply to municipalities acting as property owners. However, several wireless industry commenters sought to distinguish between the ROW and other public property on the ground that the ROW is held in trust for the public rather than in a proprietary capacity.⁶⁶ These arguments are vulnerable to rebuttal on state property law grounds.

But the issue of whether Section 6409(a) can, or should, be applied to municipal property—and especially to ROW access—remains open in the pending Commission *NPRM* proceeding. Local governments would be well-advised both to monitor and participate in that proceeding.

IV. CONCLUSION

Properly read, neither Section 332(c)(7) nor Section 6409(a) evidences any congressional intent to restrict the decisions that local governments make regarding the siting of wireless facilities on public property. The FCC, however, is considering these issues in a pending rulemaking. Although many local governments and governmental entities have argued in that proceeding against any attempt at applying these federal wireless siting provisions to municipal property, local government lawyers should be alert to the issue and keep a sharp eye on Section 332(c)(7) and Section 6409(a) case law and the FCC's pending *NPRM*.

⁶⁶ Reply Comments of PCIA – The Wireless Infrastructure Ass'n and the HetNet Forum at 22, in WT Docket No. 13-238 (filed March 5, 2014); Reply Comments of T-Mobile USA, Inc. at 20, in WT Docket No. 13-238 (filed March 5, 2014).

V. APPENDIX

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

Sec. 332. Mobile Services.⁶⁷

...

(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

⁶⁷ Telecommunications Act of 1996, Pub. L. No. 104-104, § 704(a), 110 Stat. 56 (1996) (codified at 47 U.S.C. § 332(c)(7)).

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.

(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.⁶⁸

(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.

⁶⁸ Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6409(a), 126 Stat. 156 (2012) (codified at 47 U.S.C. § 1445(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.