Questions About Scope of Local Authority May Come to Fore Given Expanded Opportunities for Unlicensed Deployments

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The Federal Communications Commission continues to pave additional avenues for building out wireless broadband networks and installing other high speed links, but questions linger over the authority of state and local governments to review and even block wireless infrastructure trying to capitalize on the FCC decisions. For example, on August 12, the Commission revised its Part 15 rules, releasing a Report and Order in ET Docket No. 07-113 that, among other things, allows unlicensed transmitters at 57-64 GHz to operate outdoors at higher power levels provided the equipment meets certain threshold requirements. The Commission envisions these regulatory changes will better support very high speed wireless data transfer and multimedia streaming over longer distances than previously could be achieved at these frequencies, as well as make the 60 GHz millimeter wave band more useful for 4G wireless backhaul connections.

As operators deploy these outdoor links, depending on state and local codes, they will have to obtain approval from state and local authorities. It is no secret that this approval process has often been a source of delay for wireless operators. As we reported in May, the U.S. Supreme Court upheld Commission's antenna siting shot clock earlier this year. But the scope of a statutory provision adopted by Congress over a year ago designed to ease the deployment of advanced wireless facilities, such as those that may now be used more frequently in the 60 GHz band, has not yet been tested in the courts. Tucked into the Middle Class Tax Relief and Job Creation Act of 2012 ("Spectrum Act"), is a provision that strips local and state governments of authority to deny qualifying wireless tower and base station modifications. Section 6409(a) of the Spectrum Act, 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," including requests to "collocat[e] new transmission equipment."

Section 6409(a), on its face, appears to pare back the state and local authority preserved in Section 332(c)(7) of the Communications Act of 1934, as amended, 47 U.S.C. §332(c)(7). Section 332(c)(7) preserved local zoning authority over antenna siting for "personal wireless services" – *i.e.,* commercial mobile wireless services, unlicensed wireless services, and common carrier wireless exchange access services – but bars local and state regulations that discriminate among applicants

or have the effect of prohibiting the deployment of such services. Section 6409(a) does precisely the opposite, *mandating* state and local approval in the face of qualifying facilities modification requests, and not just for "personal wireless services," but ostensibly for all wireless operations. But significant questions still remain under Section 6409(a) – for example, when does a modification "substantially change the physical dimensions of such tower or base station. Thus far, eighteen months after Section 6409(a) became law, the courts have been silent on its provisions.

In January 2013, the Wireless Telecommunications Bureau offered operators, as well as state and local governments, some informal, non-binding "interpretive guidance" in a Public Notice examining Section 6409(a). In the Public Notice, DA 12-2047, the Bureau stated its "belief" that it is appropriate to interpret the phrase "substantially change the physical dimensions" in Section 6409(a) by looking at the "closely analogous" definition of "substantial increase in the size of the tower" in the *Nationwide Collation Agreement* the FCC reached with the Advisory Council on Historic Preservation and the National Conference of State Historic Preservation Officers. The Bureau also suggested, looking at several sources, that it would be reasonable to interpret "base station," as used in Section 6409 to include "a structure that currently supports or houses an antenna transcriber, or other associated equipment . . . in any technological configuration, including distributed antenna systems and small cells." This guidance is no doubt welcome by providers, but it has only persuasive value at best.

A recent federal court decision is the first to offer any commentary regarding Section 6409, although the court decided the case completely under Section 332(c)(7). Last month, in *New Cingular Wireless PCS, LLC a/k/a AT&T v. City of West Haven, et al,* No. 11-cv-01967 (D. Conn. Jul. 9, 2013), a federal district court found that West Haven unreasonably discriminated against AT&T when it denied the construction of an antenna on a building that already housed several other antennas. The Court invited briefing from the parties on Section 6409(a) and, although it noted that Section 6409 had no direct application to the matter at hand because it post-dated the local government action, it suggested that the statute "buttressed" the court's finding against the City under Section 332(c)(7) by providing "further evidence of a clear congressional policy demanding the prompt removal of locally imposed, unreasonably discriminatory obstacles to modifications of existing facilities that would further the rapid deployment of wireless technology . . .." Apart from finding Section 6409(a) did not have retroactive effect and suggesting that Section 6409(a) embodies the principle of discrimination, despite not using the term, the court offered no further insight how it might interpret Section 6409 more generally. (The Court's failure to conclude that, as AT&T argued, it must apply Section 6409(a) because it was effective as of the date of the Court's decision, did not affect the ultimate outcome in favor of AT&T.)

An optimist might contend that the Bureau's interpretive guidance in its Public Notice somehow will steer local governments and antenna siting applicants away from the need for court intervention regarding collocation and other eligible modification requests potentially covered by Section 6409(a). Whether the Public Notice has such a conciliatory effect remains to be seen, but it is more likely that further proliferation of wireless deployments, in part the result of the Commission's action promoting further deployment of unlicensed 60 GHz devices on August 12, will bring these issues before the bench for resolution before long.