Background

Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 mandates that a state or local government approve certain wireless broadband facilities siting requests for modifications and collocations of wireless transmission equipment on an existing tower or base station that does not result in a substantial change to the physical dimensions of such tower or base station. Section 6409 does not mandate approval for collocations and modifications when the support structure was constructed or deployed without proper local review, was not required to undergo local review or involves equipment that was not properly approved. This rule attempts to preserve the local government's authority to review wireless facilities in the first instance and withhold statutory benefits under Section 6409 in cases where the site operator deployed equipment without all required prior approvals.

In 2014, the FCC adopted regulations (referred to later as the "2014 Infrastructure Order") to interpret key terms in this statute and impose certain substantive and procedural limitations on local review. When an applicant requests approval pursuant to Section 6409, the state or local government (1) may only require the applicant to provide information reasonably related to the determination on whether the proposed project meets the criteria for an eligible facilities request; and (2) must approve or deny the application within 60 days from submittal. The shot clock may be tolled for incomplete applications or by mutual consent. If the local government fails to act within the 60-day shot clock, the applicant may deem the application granted by written notice. Local governments may then challenge the deemed-granted notice.

With respect to application requirements, the 2014 Infrastructure Order preserves local government flexibility in determining what information or documentation to require for a complete application. However, the FCC specifically prohibited requirements to demonstrate the need for the proposed modification. The FCC also **encouraged but did not require** local governments to combine the Section 6409 review with other permit review processes (such as entitlement and construction).

Industry Proposed Rulemaking

On August 27, WIA (a trade group that lobbies for the wireless industry) petitioned the FCC for a declaratory ruling to alter the 2014 Infrastructure Order and 6409 regulations. On September 9, CTIA filed a similar petition that piggybacks off WIA and requests essentially the same rule changes or clarifications.

Oregon Named Bad Actors

In the Petition of Rulemaking, over forty cities nationwide were named "bad actors" by the industry. Here is what the industry had complaints about in Oregon.

- Portland – WIA claimed that the city has an inappropriate fee for wireless site applications.
- Beaverton – WIA claimed the city's fees for modifications of wireless sites are too high and that it should not be allowed to issue conditional approvals to require conduit to be contained inside existing poles.
- Portland and Lane County – WIA claim that cities should not be allowed to require RF reports to ensure compliance with federal standards for local review and approval (note: this is legal but the industry wants to change the law because compliance is time consuming).

Declaratory Ruling at June 9th FCC Meeting

On June 9th, 2020 the Federal Communications Commission passed the "5G Upgrade Order" (referred throughout as "the Order"). The Order went into effect on June 10, 2020. Cities may need to review their wireless siting ordinances, regulations, processes and/or permit forms to comply with the Order. Additionally, the FCC provided a Notice of Proposed Rulemaking that seeks comments on proposed rules

that would expand must-approve placement of wireless facilities in locations that have never been reviewed or approved for wireless deployments.

The 5G Upgrade Order rules apply to 6409 wireless facilities (think macro towers and base stations). Some of the FCC Commissioners claimed that they wanted to update and "clarify" rules applying to non-small cells now that the small cell order has been in play for a few years. The major changes affect the following:

Shot Clocks

The Order explains "for purposes of our shot clock and deemed granted rules, an applicant has effectively submitted a request for approval that triggers the running of the shot clock when it satisfies both of the following criteria: (1) the applicant takes the first procedural step that the local jurisdiction requires as part of its applicable regulatory review process under section 6409(a), and, to the extent it has not done so as part of the first required procedural step, (2) the applicant submits written documentation addressing the applicable eligible facilities request criteria, including that the proposed modification would not cause a 'substantial change' to the existing structure." The following are key clarifications cities should be aware of:

- The first procedural step cannot be outside of the applicant's control and must be objectively verifiable. For example, the first step in the process could be a meeting with city staff. The applicant would satisfy this step and start the clock by making a written request for the meeting, if and only if they also provide the requisite documentation. **Note: the clock does not start when the meeting happens. It starts when the applicant asks for the meeting because the ask is within the applicant's control.**

- If there is a combination or a sequencing of steps, the shot clock would begin when the applicant starts taking any one of the actions required of them.

  Example: A city defines the first step of its process as separate consultations with a citizens' association, a historic preservation review board, and the local government staff, an applicant will trigger the shot clock by taking any one of those actions, along with providing the requisite documentation under our rules.

- Cities may use conditional use permits, variances, or similar types of authorizations under standard zoning or siting rules, but these cannot be used to delay the start of the shot clock. The clock will begin to run when the applicant takes the first step in the jurisdiction's 6409(a) approval process and will not be paused (tolled) for incompleteness based on requirements for these other types of authorizations. **Note: This means that the city will need to process all permits and other authorizations in the 60-day shot clock window or else the facility will be deemed granted.**

Separation of Towers

A facility would qualify as an eligible facilities request, and a locality would be required to approve it, if a modification on a tower outside of the public rights-of-way if the change **does not** increase 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 twenty feet, whichever is greater. For towers outside the rights of way under Section 1.6100(b)(7)(i), the phrase "separation from the nearest existing antenna" means "the distance from the top of the highest existing antenna on the tower to the bottom of the proposed new antenna to be deployed above it." **Note: the height of the new antenna itself should not be included when calculating the allowable height increase.**

Equipment Cabinets

The new order defines what an "equipment cabinet" is and makes clear that there is no cumulative limit

on equipment cabinets they are only a maximum number of additional cabinets under each separate eligible facilities request. That maximum number of additional cabinets per each eligible facilities request is four.

Concealment Elements

The order defines a concealment element as "elements of a stealth-designed facility intended to make the facility look like something other than a wireless tower or base station." (For example, the facility is made to look like a tree or a clock tower). For the concealment element to apply to the modification or eligible facilities request, it must have been part of the facility that the locality approved in its prior review. Concealment is defeated if the proposed modification would "cause a reasonable person to view the structure's intended stealth design as no longer effective after the modification."

Conditions of Siting Approvals

Conditions associated with the siting approvals may relate to improving the aesthetics, or minimizing the visual impact, of non-stealth facilities but there must be express evidence that at the time of approval the city required the feature and conditioned approval upon its continuing existence for noncompliance with the condition to disqualify a modification from being an eligible facilities request.

The Order gives a few specific examples:

- "For example, a local government's condition of approval that requires a specifically sized shroud around an antenna could limit an increase in antenna size that is otherwise permissible under section 1.6100(b)(7)(i). Under section 1.6100(b)(7)(vi), however, the size limit of the shroud would not be enforceable if it purported to prevent a modification to add a larger antenna, but a local government could enforce its shrouding condition if the provider reasonably could install a larger shroud to cover the larger antenna and thus meet the purpose of the condition."
- "If a city has an aesthetic-related condition that specified a three-foot shroud cover for a three-foot antenna, the city could not prevent the replacement of the original antenna with a four-foot antenna otherwise permissible under section 1.6100(b)(7)(i) because the new antenna cannot fit in the shroud. As described above, the city could enforce its shrouding condition if the provider reasonably could install a four-foot shroud to cover the new four-foot antenna. The city also could enforce a shrouding requirement that is not size-specific and that does not limit modifications allowed under sections 1.6100(b)(7)(i)-(iv)."
- Existing walls and fences around towers are not concealment elements, but rather aesthetic conditions under section 1.6100(b)(7)(vi). "[I]f there were express evidence that the wall or fence were conditions of approval to fully obscure the original equipment from view, the locality may require a provider to make reasonable efforts to extend the wall or fence to maintain the covering of the equipment."
- "If an original siting approval specified that a tower must remain hidden behind a tree line, a proposed modification within the thresholds of section 1.6100(b)(7)(i)-(iv) that makes the tower visible above the tree line would be permitted under section 1.6100(b)(7)(vi), because the provider cannot reasonably replace a grove of mature trees with a grove of taller mature trees to maintain the absolute hiding of the tower."

Environmental Assessments

While environmental assessments were not originally addressed in Section 6409, the FCC included it in the Order. The FCC explains "that an environmental assessment is not needed when the FCC and applicants have entered into a memorandum of agreement to mitigate effects of a proposed undertaking on historic properties, consistent with 36 CFR § 800.6(b), if the only basis for the preparation of an environmental assessment was the potential for significant effects on such properties."

Notice of Proposed Rulemaking

The Commission is also seeking comment on changes to rules regarding excavation or deployment outside the boundaries of an existing tower site, including the definition of the boundaries of a tower site, which would affect whether certain modifications of existing structures qualify for streamlined section 6409(a) review. Comments will be due 20 days after publication in the Federal Register and replies comments are due 10 days after the comment deadline.