

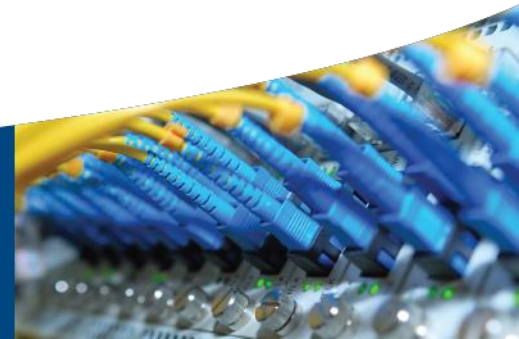


**BB&K**

**BEST BEST & KRIEGER <sup>LLP</sup>**  
ATTORNEYS AT LAW

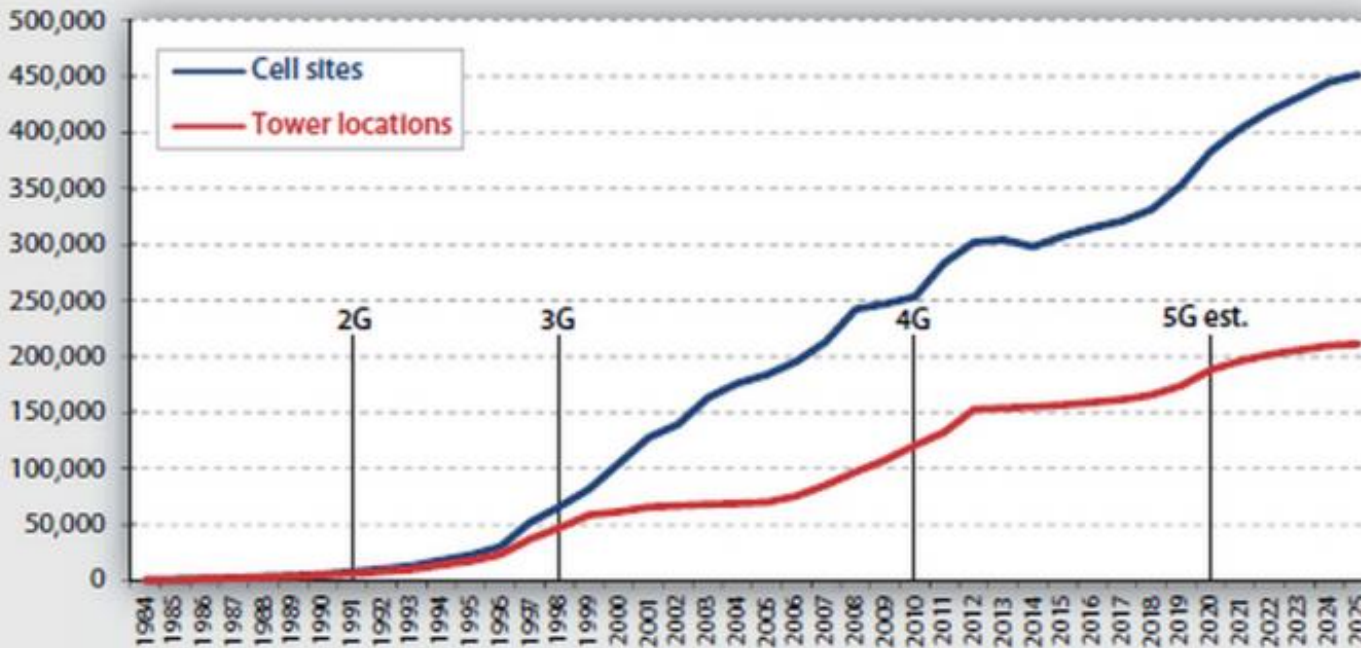
# **The Row over R.O.W.: Siting Wireless Facilities within the Rights of Way**

**Gerard Lavery Lederer  
Best Best & Krieger LLP**



# Why Wireless 2016 and Beyond Presents New Local Challenges

U.S. wireless towers and sites, 1984-2025



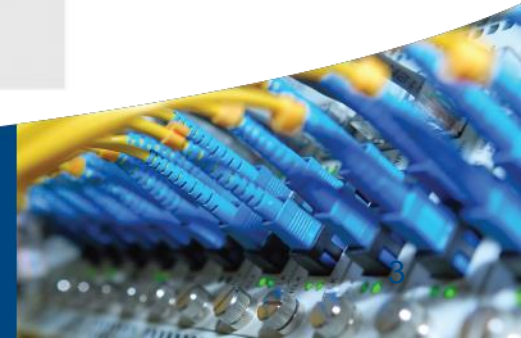
2014:  
150K towers,  
300K sites

2025  
200K towers  
400K sites

NOT including  
small cells

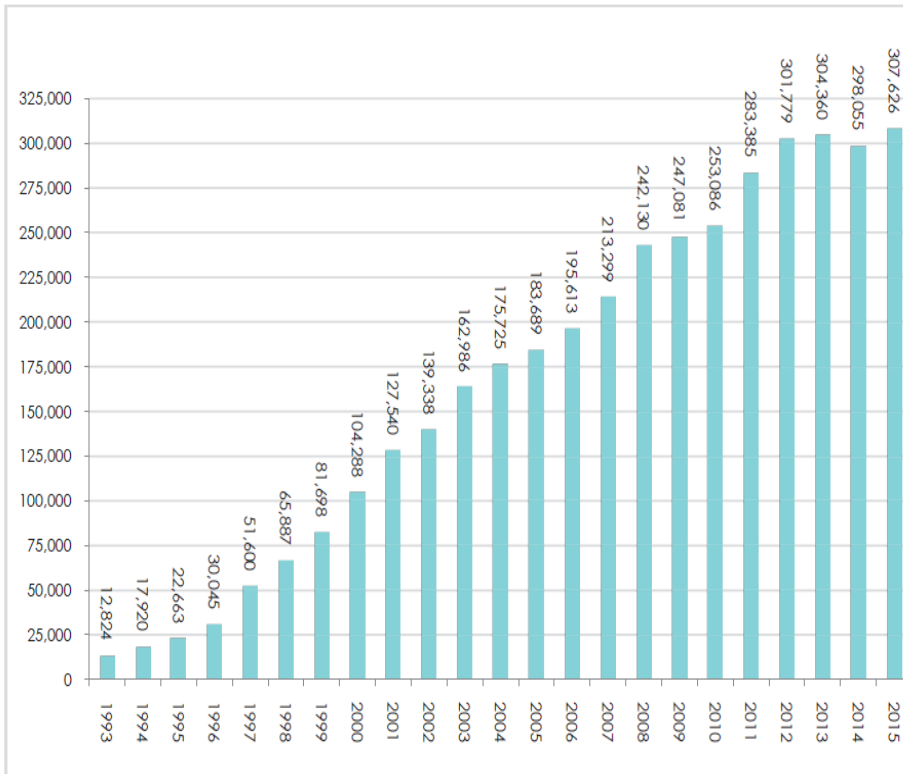
A "tower" is a physical structure. A "cell site" refers to a carrier's equipment on a tower.  
Active towers. Includes poles, rooftops and DAS. Excludes Small Cells.  
Excludes broadcast-only sites and "available" locations without equipment like empty rooftops.  
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Source: SNL Kagan 2015



# Steady Growth/Explosive Demand/IOT?

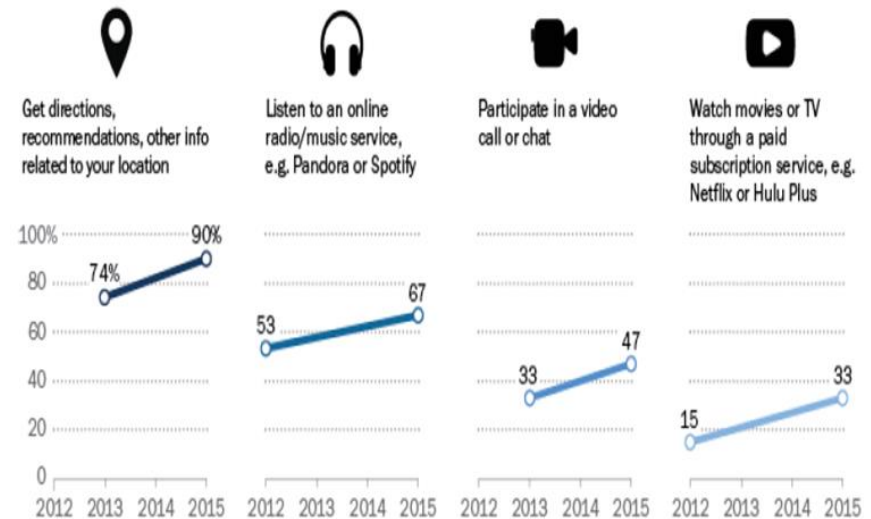
Cell Sites in Service Rise 3.2% Year-to-Year



Source: Background on CTIA's Wireless Industry Survey (May 2016).

## Americans increasingly use smartphones for more than voice calls, texting

% of U.S. smartphone owners ages 18 and over who have ever used their phone to ...



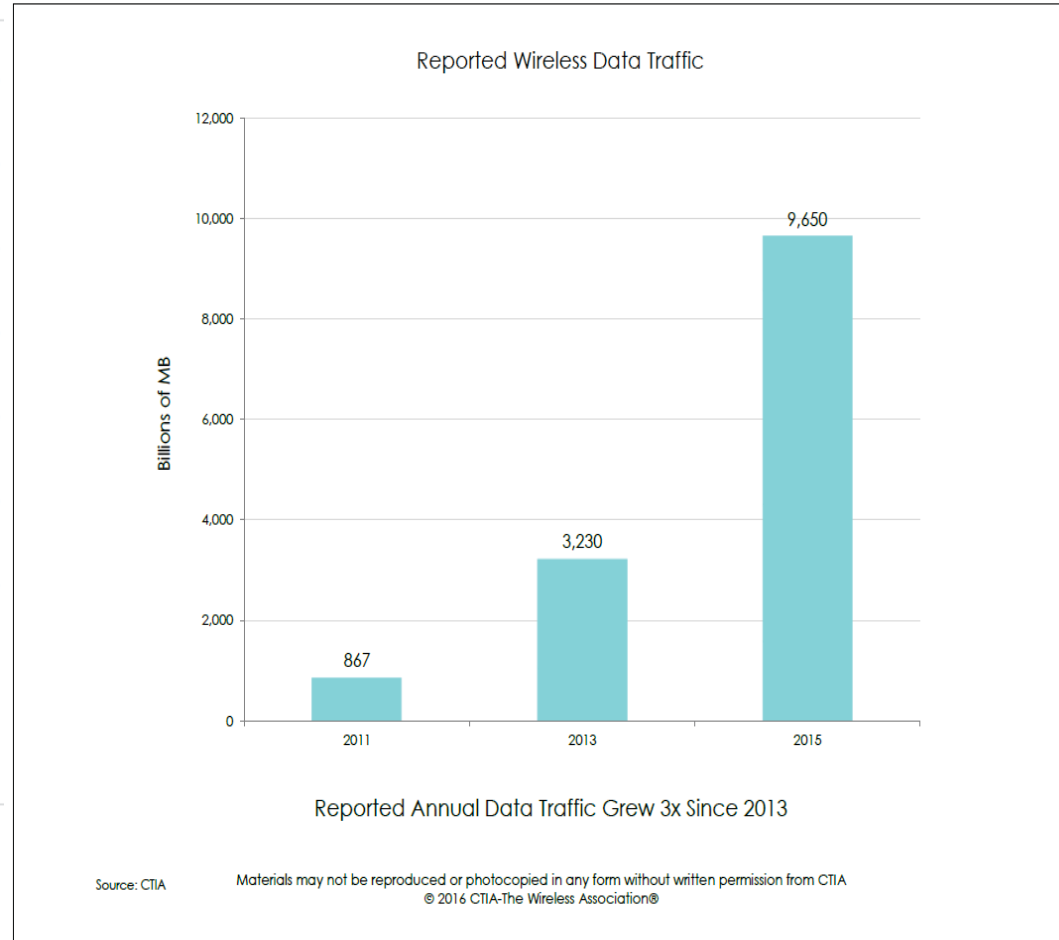
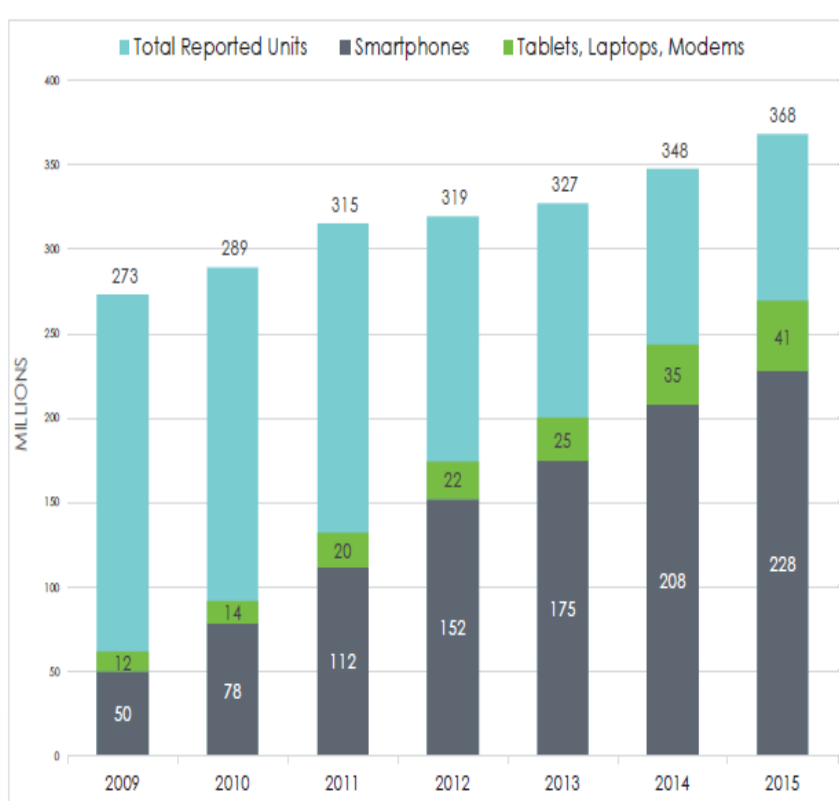
Note: In 2012, the survey question was asked of cellphone owners who use the internet or email on their cellphone or download apps to their cellphone. In 2013, item wording was "Get directions, recommendations, or other information related to a location where you happen to be."

Source: Survey conducted June 10-July 12, 2015. Trend data is from previous Pew Research Center surveys.

PEW RESEARCH CENTER



# Devices and Data Use Drive Need For Sites = Local Challenges



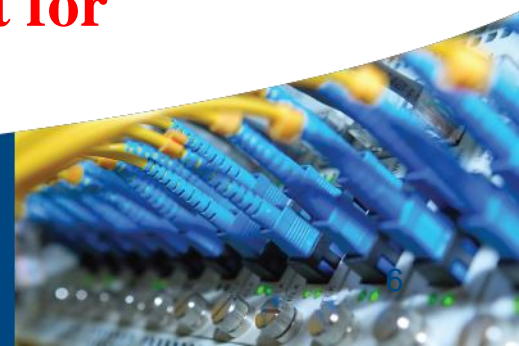
Source: Background on CTIA's Wireless Industry Survey (May 2016).



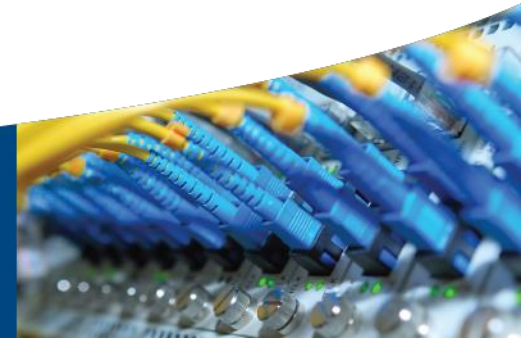


# Why Wireless 2016 and Beyond Presents New Local Challenges

- Delivering higher speed wireless data services requires “denser” networks – more antennas
- SNS Research: “significant shift in investments towards small cells, C-RAN, DAS and carrier Wi-Fi infrastructure. By 2020, these four submarkets, together with their fronthaul and backhaul segments, will account for over 50% of all wireless network infrastructure spending.”
- Billions expected to be invested in infrastructure, creating \$80 billion market for LTE by 2020
- **Public property (including RoW) a major target for deployment**

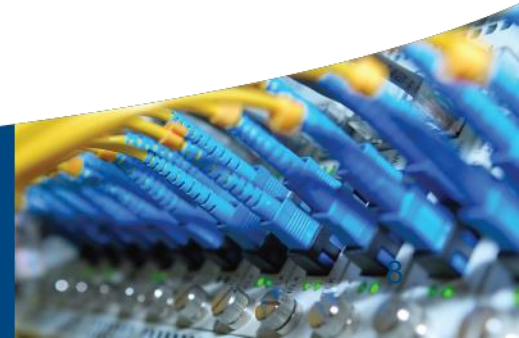


# Examples:



# The Legal Framework

- Federal law
  - Section 332(c)(7) (47 U.S.C. §332(c)(7))(applies to initial installations and modifications of personal wireless facilities)
  - Section 6409 (47 U.S.C. §1455)(applies only to insubstantial modifications of wireless facilities)
  - Possibly? Section 253(c) (47 U.S.C. §253)(prohibition of telecom services)
  - FCC Regulations <https://www.fcc.gov/general/tower-and-antenna-siting>
- State law and constitutional provisions
- Local law (planning/zoning/franchising/leasing)





# Section 332(c)(7)

- **47 U.S.C. § 332(c)(7)** (Preservation of Local Zoning Authority)
- Section 332(c)(7) applies to “personal wireless service (PWS) facilities,” which includes commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services
- Generally preserves local zoning authority, with five limitations.
  - Shall not “unreasonably discriminate” among providers of functionally equivalent services (332(c)(7)(B)(i)(I))
  - Prohibit or effectively prohibit provision of PWS (332(c)(7)(B)(i)(II))
  - Locality must act on request within “reasonable period of time”...(FCC Order provides for 90 days for significant collocation, 150 for new site)



## Section 332(c)(7) (cont'd)

- Generally preserves local zoning authority...
- Decision to deny must be “in writing” and supported by “substantial evidence”
- Supreme Court has recently ruled on meaning of “in writing” requirement:
  - Denial and substantial evidence need not be in same document, but must be essentially contemporaneous. See, *T-MOBILE SOUTH, LLC v. CITY OF ROSWELL* \_\_U.S.\_\_, 135 S.Ct. 808 (2015).
- No RF regulation; may require applicant to satisfy FCC rules
- Limitations do not apply to proprietary property.



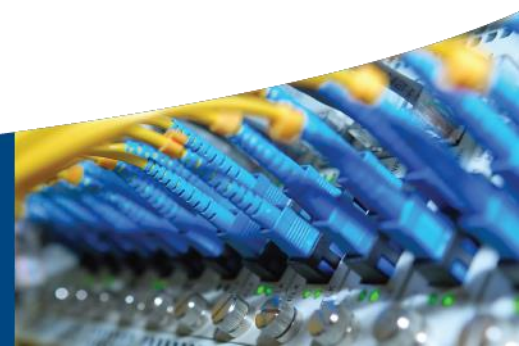
# Section 6409(a) (47 U.S.C. §1455)

## (a) Facility modifications.

(1) **In general.** Notwithstanding... 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.



# FCC Rules 47 CFR § 1.40001 – Definitions

1. Tower: structure built for sole or primary purpose of supporting FCC licensed or authorized antennas and associated facilities.
2. Base Station
  - Equipment associated with wireless comm. service
  - Antennas, coax, backup power supplies
  - “any structure other than a tower” that at time of application was supporting or housing the above.
3. Existing: A constructed tower or base station that has been “reviewed and approved under the applicable zoning or siting process or under another State or local” process, except towers not in a zoned area when built, but lawfully constructed (non-conforming uses?).

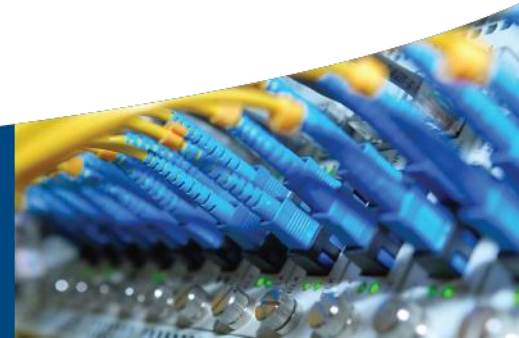




# FCC Rules 47 CFR § 1.40001 – Definitions

## 4. Substantial Change

- Towers other than RoW towers, modification:
  - Increases height by more than 10% or 20 feet whichever is greater
  - Appurtenance added protrudes from body of structure more than 20 feet or width of tower at pt. of attachment
- All other support structures, modification
  - Increases height by 10 feet or 10%, whichever is greater
  - Appurtenance added protrudes more than 6 feet
- Height measured from facility as it exists as of date of passage of Act (2012)

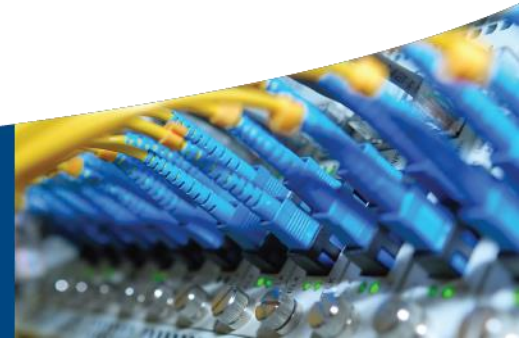


# FCC Rules 47 CFR § 1.40001 – Definitions

(cont'd)

## 4. Substantial Change (cont;d)

- For all eligible support structures:
  - Installation of more than four equipment cabinets
- For towers and base stations in RoW:
  - New equipment cabinets if there are none, or placement of cabinets 10% greater in height or overall volume than other cabinets associated with structure
- It entails any excavation or deployment outside of site

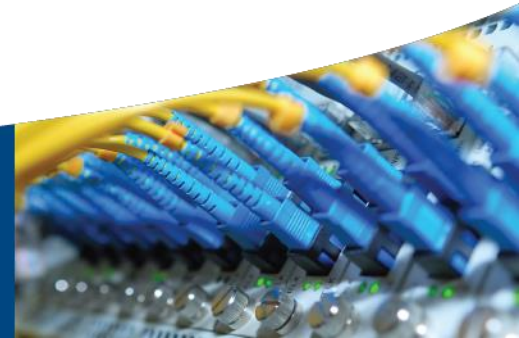


# FCC Rules 47 CFR § 1.40001 – Definitions

(cont'd)

## 4. Substantial Change (cont'd)

- It would defeat “concealment elements” of the “eligible support structure”
- It does not comply with conditions associated with siting approval...but limitation does not apply to any modification that is non-compliant only in a manner that would not exceed thresholds identified in first five bullets (items (i)-(iv) in regs).



# FCC Rules 47 CFR § 1.40001 – Definitions

(cont'd)

## 5. Eligible Support Structure is any Tower or Base Station

### Key Notes:

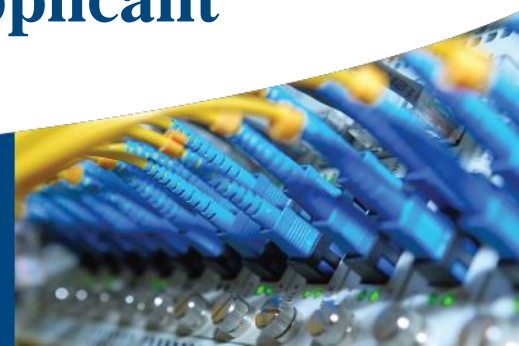
- Does not preempt generally applicable safety and health codes
- Does not apply to proprietary property of community
- Reaches *all* wireless facilities – including Wi-Fi deployments
- Does reach Distributed Antenna Systems (DAS) & Small Cells



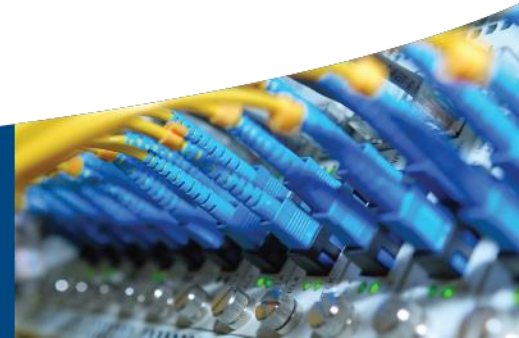


# Application Review

- General rule: “may not deny and shall approve” any eligible facilities request that does not substantially change physical dimensions
- Can require “documentation reasonably related” to determining whether request meets requirements of section
- Sixty days to approve UNLESS locality determines facility is not covered
- Time frame tolled by agreement; or if notice provided of incompleteness (30/10) with detailed citation to requirements
- Failure to Act = application deemed granted
- **Deemed grant becomes effective after applicant notifies community that time has passed**



# Putting Time Frames Together...



30 Days

• Incompleteness for  
6409 (a) & 332(c)(7)

60 Days

• 6409 Collocations

90 Days

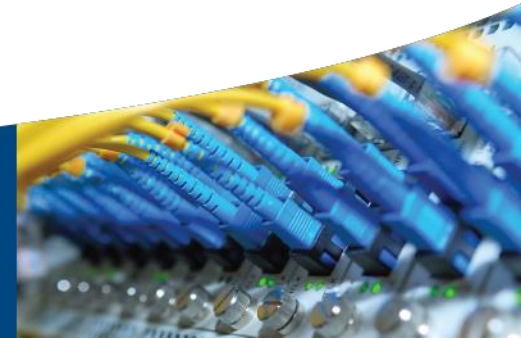
• Collocation

150 Days

• New Site

# Do's

- Examine whether your laws and forms are consistent with new order (Hint: Probably not).
- Consider enactment of an ordinance that prefers government property for cell locations.
- Ensure everyone in your organization understands that this order does not grant right of free collocations on government property.
- Ensure that you don't grant that right in your leases /licenses.



30 Days

• Incompleteness for  
6409 (a) & 332(c)(7)

60 Days

• 6409 Collocations

90 Days

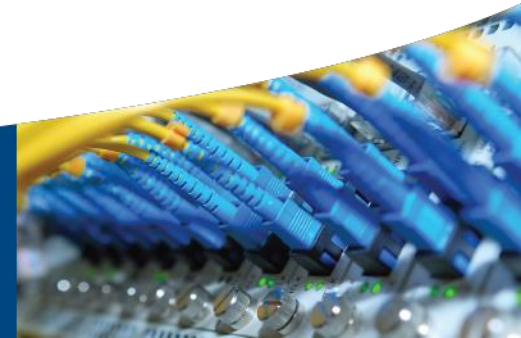
• Collocation

150 Days

• New Site

# Don't

- Impose a moratorium –
  - Commission is specific that moratoria will not toll 6409(a) or 332(c)(7) applications.
- Approve without understanding how a facility may expand – the smallest facility may grow an additional 10 feet up and 6 feet out.
- Demand documentation for the business need for an insubstantial modification (Different rules apply for initial installation or substantial).





30 Days

• Incompleteness for  
6409 (a) & 332(c)(7)

60 Days

• 6409 Collocations

90 Days

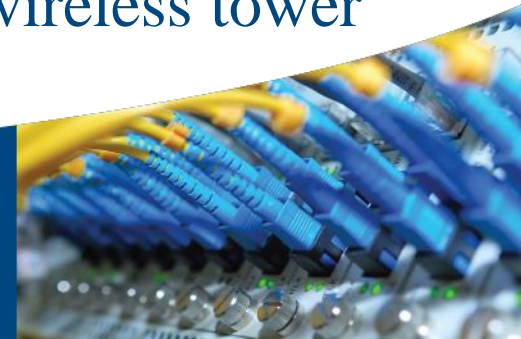
• Collocation

150 Days

• New Site

# Changes to Your Applications/Process

- More stealth?
- Require applicant provide documentation that is “reasonably related to determining whether the eligible facilities request meets the requirements of Section 6409(a).”
  - Meets size change – including cumulative limit
  - Meets any stealth obligations
  - Meets any building code/safety/non-discretionary structural code
  - Complies with any condition of approval of construction or modification imposed on the applicable wireless tower or base station



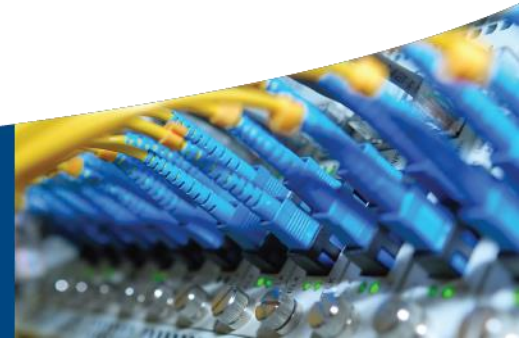
# Consider an Acknowledgement Ordinance

- “Community is aware of new 6409 (a) standard as established by Federal Communications Commission in *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 80 Fed. Reg. 1238 (Jan. 8, 2015) (amending C.F.R. Part 1 and 17). (“Report & Order”).”
- Staff is directed to act in compliance with the timeframes and limitations outlined in the Report and Order.
  - Might empower 1 person to review; nothing requires process to be ministerial or nondiscretionary;
  - Might allow staff to require applicants to comply with extensive notice requirements and/or other procedural hurdles
- Should any part of the Order be struck down by a court of competent jurisdiction, staff are directed to amend community practices accordingly.



# What You Need To Consider

- Federal law give you greatest authority to control design and deployment where:
  - Government proprietary property is used (open question: is right of way proprietary property?)
  - On initial installations
  - Facility is subject to concealment requirements
- You may have different avenues for controlling placement/design of wireless.



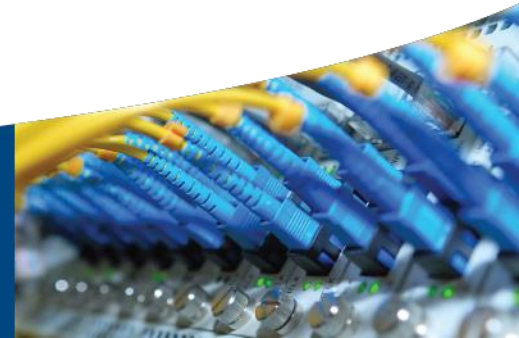
# What You Need To Consider

- Avenues:
  - Franchising authority (where you have it – depends on state law, and on local authority to issue franchises)
  - Leasing authority (for light poles and other facilities you own and control)
  - Zoning authority (common question: does it apply to RoW, or utility facilities?)
  - Other police power authority (t, p, m control of utility placements)



# FCC Rules Create Practical Problems

- Densification can encourage third party lessors to file permits to “lock up” key real estate.
- Densification may require installation of structures where all other utilities are underground; 332(c)(7) plus 6409 create issues if any facilities are allowed aboveground.
- How do you deal with competing but inconsistent stealth proposals?



# Examples:

- Localities receiving requests for placement of 120-foot tower in “verge” between sidewalk and RoW

<http://www.bbknowledge.com/telecommunications/cell-siting-dilemmas/>

- How do you deal with multiple requests for same areas: first come first served? Bids?
- How do you protect ongoing local interests in, e.g.: energy-saving lighting/solar/ADA/WiFi?





# Addendum of Recent Cases

## ***Montgomery County v. FCC, 811 F.3d 121 (4<sup>th</sup> Cir. 2015)***

Upheld FCC rules implementing 47 U.S.C. § 1455

## ***Global Tower Assets, LLC v. Town of Rome (1st Cir. 2016) 2016 U.S. App. LEXIS 280***

On January 8, the First Circuit concluded that a “final action” under the Telecommunications Act means that the applicant must exhaust the administrative process. In the context of the case involving an application for a site, the planning commission denied the application, but an appeal of that decision was available within the administrative process to a board of appeals. In other words, the administrative process had not ended and the decision was not a “final action” under 47 U.S.C.S. § 332(c)(7)(B)(v). Additionally, the term “final action” in the Telecommunications Act was properly construed as similar to the requirement in the Administrative Procedure Act under 5 U.S.C.S. § 704, such that it incorporated a potential two-step administrative process prior to being final.

## ***T-Mobile S., LLC v. City of Roswell (Supreme Court 2015) 135 S. Ct. 808, 190 L. Ed. 2d 679, 2015 U.S.LEXIS 612, 83 U.S.L.W. 4047, 25 Fla. L. Weekly Fed. S 31, 61 Comm. Reg. (P & F) 1336***

The Telecommunications Act of 1996, 47 U.S.C.S. § 332(c)(7)(B)(iii), requires that any decision to deny an application must be in writing and supported by substantial evidence in a written record. Court holds: the Act's requirement that the locality's decision be supported by substantial evidence necessarily implied that local authorities had to state reasons for denial, clearly enough to allow judicial review. The reasons did not have to appear in the same writing that conveyed the locality's denial of the application, but could instead appear in some other written record issued essentially contemporaneously. But in the case where a city provided its reasons for denial in the acceptable form of detailed minutes of a city council meeting – and those minutes were provided 26 days after the date of the written denial – they were therefore not provided essentially contemporaneously with the denial. As a result, the judgment was reversed and case remanded. 6-3 Decision; one concurrence; two dissents.

## ***Sprint Spectrum, L.P. v. Zoning Bd. of Adjustment of Paramus N.J., (3rd Cir. 2015) 606 Fed. Appx. 669***

The Third Circuit upheld a 2014 district court ruling that had overturned a New Jersey zoning board decision denying an application to build a wireless telecommunications tower because the applicant had not considered an alternative, distributed antenna system (DAS.) Court found that the Paramus Zoning Board of Appeal's denial of appellants' application for a variance to build a wireless monopole tower was not supported by substantial evidence, as the DAS was not a feasible alternative to the monopole proposed by applicants.

Therefore, the district court correctly found that the ZBA's ruling constituted an effective prohibition of wireless service in violation of 47 U.S.C.S. § 332(c)(7)(B) of the Telecommunications Act of 1996.

## ***Indus. Tower & Wireless, LLC v. Haddad (D. Mass. 2015), 109 F. Supp. 3d 284, 2015 U.S. Dist. LEXIS 64566***

This case involves a local zoning dispute over the construction of a cell phone tower. On July 29, 2014, the Zoning Board of Appeals for the Town of Falmouth denied Plaintiff Industrial Tower & Wireless, LLC's application for a Special Permit to construct a wireless communications tower. Plaintiff filed a Complaint with this Court, arguing that the ZBA's decision violates the Telecommunications Act of 1996 on two independent grounds. First, the ZBA's decision denying the application was not supported by “substantial evidence,” as required by 47 U.S.C. § 332(c)(7)(B)(iii). Second, even if the ZBA's decision was supported by substantial evidence, denying the application has the practical effect “of prohibiting the provision of personal wireless services,” in contravention of 47 U.S.C. § 332(c)(7)(B)(i)(II). Plaintiff sought to vacate the ZBA's decision, and requested an injunction ordering the ZBA to issue the necessary permitting and authorize construction of the cell tower. The motion for summary judgment was allowed and the zoning board's decision denying the application for a special permit was vacated.

## ***PI Telecom Infrastructure (M.D. Fla. 2015), LLC v. City of Jacksonville, 104 F. Supp. 3d 1321, 2015 U.S. Dist. LEXIS 60598, 62 Comm. Reg. (P & F) 974***

In a lawsuit brought under 47 U.S.C.S. § 151 et seq., in which PI Telecom Infrastructure challenged a city's denial of its application to construct a cell tower, the court held that the city's written order met the Act's “in writing” requirement because the written order identified the reasons for the denial and the company had access to the written transcript of the city commission's meeting 26 days before the deadline to seek judicial review. Additionally, substantial evidence supported the city's ruling because documented visibility of the proposed cell tower from a public park, which, by ordinance, the city was trying to protect and keep pristine, rose above mere generalized concerns regarding aesthetics

# Addendum of Recent Cases

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