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MEMORANDUM

TO: Florida League of Cities
FROM: Gary I. Resnick
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SUBJECT: New Federal Regulations Regarding Regulating Wireless Facilities

The Middle Class Tax Relief and Job Creation Act of 2012 contained provisions to facilitate the deployment of wireless broadband infrastructure deemed necessary for economic development. In particular, **Section 6409(a)**¹ mandates States and local governments approve certain requests to collocate equipment on existing wireless towers and base stations. Section 6409(a) provides that State and local governments: “may not deny, and **shall approve**” an “eligible facilities request” so long as it does not “substantially change the physical dimensions of the existing wireless tower or base station.”²

On October 17, 2014, the Federal Communications Commission (“FCC”) adopted an Order pursuant to Section 6409(a) with new regulations (“FCC Regulations”).³ The FCC Regulations become effective April 8, 2015, and significantly impact how States and local governments may process requests to construct such wireless facilities.⁴

Florida law also contains a policy of encouraging collocation and provides that local governments may only conduct a building permit review for requests to collocate antennas on existing structures.⁵ The FCC Regulations are more restrictive on local governments than Florida law

¹ Public L. No. 112-96 §6409(a), codified at 47 U.S.C. §1455(a).

² *Id.*

³ FCC Report and Order: *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies (WT Docket Nos. 13-238)*; *Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting (WC Docket No. 11-59)*; and *2012 Biennial Review of Telecommunications Regulations (WT Docket 13-32)* (hereinafter “Order”).

⁴ Because the Office of Management and Budget has not completed its review, the effectiveness of certain aspects of the FCC Regulations may be delayed. In addition, several local governments around the country, including Montgomery County, MD and Los Angeles, have filed appeals challenging the FCC Regulations. These have been consolidated in the U.S. Court of Appeals for the 4th Circuit. Such appeals do not operate to stay the FCC Regulations.

⁵ Florida law governing local governments’ regulatory authority over “wireless communications facility” is set forth in Section 365.172(13), *Florida Statutes* (“F.S.”)

March 30, 2015
Page 2

for such requests that are covered. In addition, there are key differences between the FCC Regulations and Florida law.

We prepared this Memorandum to assist local governments understand the FCC Regulations and key differences from Florida law. The FCC as well as national associations representing local governments have advised local governments to re-examine their codes and more importantly, their procedures for processing requests for wireless facilities. Most local governments may want to consider revising their application procedures and their codes, particularly the timeframes to address such requests. Accordingly, this Memorandum discusses the substantive and procedural provisions under the FCC Regulations and Florida law, and includes suggested application items as well as practical advice.

A. Section 6409(a) and the FCC Regulations Are Limited to Certain Applications

Generally, the FCC Regulations and Section 6409(a) apply only to applications to collocate antennas on an existing tower or to alter equipment on an existing base station on private property or in public rights-of-way.⁶ While every application needs to be reviewed individually, the FCC Regulations would not apply generally to the following:

- Applications to construct a new tower;
- Applications to construct a new base station;
- Applications to install antennas or to alter equipment that would “substantially change” an existing tower or base station;
- Applications to install antennas on a building or rooftop;
- Applications to install antennas on utility poles in rights-of-way; and
- Applications pertaining to facilities on property owned by a local government such as a water tower or other government owned property.

For such applications, Florida law and existing federal law continue to apply. For example, an application by subsequent providers to install subsequent antennas on a rooftop may be considered a collocation under Florida law, and subject only to building permit review. Such an application, however, would not be covered by the FCC Regulations since a rooftop would not be a tower. In addition, the FCC adopted procedures governing local governments that differ from Florida law. Thus, local governments may want to create new procedures to address those applications that fall within Section 6409(a) and the FCC Regulations as opposed to Florida law.

B. FCC Definitions VS. Florida Definitions

There was a great deal of confusion under Section 6409(a) because Congress did not define key terms. Section 6409(a)(2) defines an “eligible facilities request” as a request for a modification that involves “collocation, removal, or replacement of transmission equipment” at an “existing wireless tower or base station.”⁷ However, key terms, such as “collocation” and “existing wireless

⁶ In addition to imposing new restrictions on traditional local land-use authority over wireless facilities, the FCC Regulations expand exemptions for wireless sites from review under the National Environmental Policy Act (“NEPA”) and the National Historic Preservation Act (“NHPA”).

⁷ 47 U.S.C. §1455(a)(2).

March 30, 2015
Page 3

tower or base station” were not defined, and thus, created confusion on the part of both the wireless industry and local governments. The FCC-supplied definitions below, differ in many instances from Florida law.

- “**wireless**” means “any Commission-authorized wireless communications service.”⁸ This is a broader category of services than under existing law and includes for example, WiFi, which is not covered by the Telecom Act, which applies only to “personal wireless service” (e.g., mobile phones). This is also a key difference from Florida law which defines “wireless services” as “commercial mobile radio service,” including “personal communications service.”⁹ Florida law would not include WiFi. Thus, an application to install an antenna on a tower for WiFi service would not be covered by Florida law, but may be covered under the FCC Regulations.
- “**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.”¹⁰ Florida law does not define “transmission equipment” and while it includes antennae and “other equipment associated with the location and operation of the antennae,” it may not include backup power supply.
- “**wireless tower**” means “any structure built for the sole or primary purpose of supporting any Commission-licensed or authorized antennas and their associated facilities.”¹¹ Florida law allows for a “collocation” on existing towers as well as “all other existing structures” and thus, antennas on a building or rooftop may be covered by Florida law.¹²
- “**base station**” means “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.”¹³ A “non-tower support structure” means any structure (whether built for wireless purposes or not) that supports wireless transmission equipment under a valid permit at the time the applicant submits its application.¹⁴
- “**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 communications purposes.”¹⁵ Under Florida law, collocation means when a second or subsequent wireless provider locates a second or subsequent antenna on an existing

⁸ Order ¶ 149.

⁹ Section 365.172(3)(ii), *F.S.*.

¹⁰ Order ¶ 160.

¹¹ Order ¶ 166.

¹² Section 365.172(13)(b), *F.S.*.

¹³ Order ¶ 167.

¹⁴ Order ¶ ¶169, 174.

¹⁵ Order ¶ 178.

March 30, 2015
Page 4

structure.¹⁶ Thus, the FCC Regulations may apply to requests to locate the first antenna, where Florida law would provide that such application would be considered a new facility.

- “**modification**” “includes collocation, removal, or replacement of an antenna or any other transmission equipment associated with the supporting structure.”¹⁷

C. Substantial Change Under FCC Regulations vs. Florida Law

Section 6409(a) and FCC Regulations mandate approval for all eligible facilities requests that do not “substantially change the physical dimensions of the existing wireless tower or base station.” The FCC Regulations provide specific limits to a request that causes a “substantial change” including, if it increases the height of the tower on private property by more than 10% or one additional antenna array with separation from the nearest existing antenna of more than 20 feet, or more than 10% or 10 feet for towers in the public rights-of-way and all base stations.¹⁸ Further, a request causes a substantial change if it involves more than the “standard number of new equipment cabinets for the technology involved” not to exceed four, or if in the public rights-of-way, it involves installing of new equipment cabinets on the ground if there are no pre-existing ground cabinets. An eligible facilities request causes a substantial change when it involves excavation outside the area of the current site or would defeat the existing concealment elements of the tower or base station.¹⁹

Under Florida law, an applicable collocation may not increase the height of the existing structure, measured from the highest point of the structure or any existing antenna attached to the structure. Further, an applicable collocation may not increase the ground space area, otherwise known as the compound.²⁰ Thus, under Florida law, facilities that increase the height of a tower would not be considered collocations subject to only a building permit review, while the FCC Regulations may apply to such collocations. Florida law similarly provides that collocation must be of a “design and configuration consistent with” restrictions and regulations that applied to the initial antennae placed on the tower and if applicable, the tower, such as camouflage.²¹

D. Procedural Rules and Remedies under Section 6409(a) Vs. Florida Law

Local governments may require a permit application and fees for facilities potentially governed under Section 6409(a). However, to avoid a “deemed granted” remedy, such reviews must occur in a faster timeframe, commonly known as the “shot clock,” than under Florida law.

1. Timeframes to Act Under FCC Regulations Compared with Florida Law

The FCC Regulations provide that within 60 days of the date on which an applicant submits an application seeking approval, the local government shall approve the application unless it determines that the application is not covered by Section 6409(a). The 60-day review period begins to run when the application is filed, and may be tolled only by mutual agreement with the applicant,

¹⁶ Section 365.172(3)(f), *F.S.*.

¹⁷ Order ¶ 178.

¹⁸ Order ¶ 192. There are similar limits on increasing the width of the tower or base station.

¹⁹ Order ¶ 191

²⁰ Section 365.172(13)(a)(1)(a)(I) and (II), *F.S.*.

²¹ Section 365.172(13)(a)(1)(a)(III), *F.S.*.

March 30, 2015
Page 5

or in cases where the application is incomplete. The timeframe for review is not tolled by a moratorium on the review of applications. To toll the timeframe for incompleteness, the local government must provide written notice to the applicant within 30 days of receipt of the application, specifically delineating all missing documents or information required in the application. The timeframe for review begins running again when the applicant makes a supplemental submission in response to such notice of incompleteness. Following a supplemental submission, the local government must notify the applicant within 10 days that the supplemental submission did not provide the information identified in the original notice delineating missing information. The timeframe is similarly tolled in the case of second or subsequent notices.

Under Florida law, a local government has 20 business days to notify an applicant if an application is complete or is deficient. This process continues for subsequent submissions and the local government may establish a reasonable timeframe for submission of missing materials, which if not met, may allow the local government to consider the application withdrawn or closed.²² Florida law will continue to apply to applications not covered by Section 6409(a).

2. Effect of Not Acting Within the Timeframes

In the event a local government fails to approve or to deny a request seeking approval under Section 6409(a) within the timeframe for review, the request shall be deemed granted. The deemed grant does not become effective until the applicant notifies the local government in writing after the review period has expired (accounting for any tolling) that the application has been deemed granted. Local governments may challenge a “deemed granted” permit in a court of competent jurisdiction within 30 days after the applicant delivers the deemed-granted notice.

Florida law provides that a local government shall grant or deny each properly completed application for collocation in no later than 45 business days after the application is determined to be properly completed.²³ Further, if the local government does not act within such timeframe, the application is deemed automatically approved and the applicant may install such facilities.²⁴ As a practical matter, applicants will rarely install such facilities without a building permit.

3. Conditional Approvals Permitted

Although the statute says a state or local government “may not deny, and shall approve” a covered project, a conditional approval of a Section 6409(a) request does not necessarily amount to an unlawful denial. Local governments may approve a request subject to conditions that do not conflict with the Commission rules include “compliance with generally applicable building, structural, electrical, and safety codes and with other laws codifying objective standards reasonably related to health and safety.”

4. Fees for Permit Review

Local governments may continue to collect fees and require deposits from wireless permit applicants, both under the FCC Regulations and Florida law.

²² Section 365.172(13)(d)(3)(a), *F.S.*

²³ Section 365.172(13)(d)(1), *F.S.*

²⁴ Section 365.172(13)(d)(3)(b), *F.S.* Florida law allows extensions under limited circumstances.

March 30, 2015
Page 6

E. Application Materials

Local governments may define the application contents, so long as all information and materials required by the application reasonably relate to issues within the scope of local authority. State and local governments retain “considerable flexibility in determining precisely what information or documentation to require” to illuminate these issues.²⁵ Applications submitted under Section 6409(a) cannot require the applicant to demonstrate a “need” or “business case” for the modification. This is consistent with Florida law which provides local governments may only address land development or zoning issues, and may not require information on or evaluate a provider’s business decisions or demand for service from a particular area or site, unless related to a zoning issue. For example, for applications for new towers, Florida law allows a local government to inquire into whether an existing structure could reasonably accommodate an antenna instead of requiring a new tower.²⁶

The FCC Regulations do not explicitly set forth what information local governments may require in such requests. It is recommended that applications for an Eligible Facilities Request that the applicant maintains is subject to the FCC Regulations, require at a minimum, the following:

- Applicant and Property Owner information, including the applicant’s valid property interest in the site (i.e. a lease), or location in the public rights-of-way;
- Property Information including size and zoning district;
- Description of the existing tower or base station;
- Description of the current site;
- Information showing that the existing structure has received land use approval and any conditions upon such approval;
- Description of request including if collocation of new equipment, removal and/or replacement of existing equipment;
- Height of existing structure and alteration to height;
- Other changes to the physical dimension of the structure;
- Any conditions impacted such as concealment or noise levels;
- Photo simulations of the new facilities;
- Any excavation and if so, where;
- Number and dimensions of equipment cabinets;
- Equipment type, model number and manufacturer specs including weight for equipment and cabinets;
- Engineering report to demonstrate the structure can accommodate the facilities taking into considering all existing facilities and pending facilities requests;
- Application fees.

All application requirements should state the format for submissions and how many copies. For example, a requirement for “site plans” should state the requirement in specific terms such as:

²⁵ *Id.*

²⁶ Section 365.172(13)(b)(1), *F.S.*

March 30, 2015
Page 7

“three (3) full-size construction quality plans with an exact PDF copy on disk, stamped by a professional engineer, showing the entire proposed structure in plan and elevation views, all proposed changes in plan and elevation views.” Local governments cannot rely on “catch-all” clauses that allow staff to require additional information on a case-by-case basis. Such requests may not stop the Shot Clock.

F. Practical Suggestions

Since Section 6409(a) was adopted, many local governments received requests to install facilities, claiming that such local governments were mandated to approve such requests pursuant to Section 6409(a). Upon closer examination of such requests, it was clear that Section 6409(a) did not apply. Perhaps the FCC Regulations will put an end to such confusing efforts, but local governments should be prepared to raise issues with requests claiming to fall within Section 6409(a) and which do not, and to do so in a very quick timeframe.

In addition, because of Section 6409(a) mandating approval of such covered requests, local governments must be very careful as to which new towers and facilities they approve as well as the conditions placed upon such approvals. If a local government approves a new tower, it may be mandated to approve subsequent antennas and base station equipment that seek to locate on such site. More importantly, local governments should consider carefully whether to approve towers and base stations in public rights-of-ways as well as the conditions placed upon such facilities. As with towers on private property, if a local government approves a tower in the public rights-of-way, it may be mandated to approve additional antennas and equipment. Also, all new sites should be evaluated for camouflage requirements.

The substantive and procedural differences between the FCC Regulations pursuant to Section 6409(a) and Florida law likely justify entirely separate applications and processes. Local governments should also determine which department will review such applications and may need to alter their review and decision-making processes to meet the FCC Regulations timeframes. Further, if the local government will seek assistance from an outside engineer or other expert, it should include an appropriate deposit to cover such fees. The local government may want to require pre-scheduled appointments for all submittals where a staff member can check the materials for completeness. It can also develop a form incomplete notice with check-the-box line items for each required application item.

Finally, local governments should demonstrate their support for broadband services through their procedures. Local governments are not only regulators of such facilities, but their residents, businesses and employees rely on the services provided by such facilities. For example, if a request submitted under Section 6409(a) does not satisfy the criteria, the local government may seek to convert the application to an application and process it under Florida law, rather than merely deny the application. The FCC Regulations allow for such conversion.