

Cell Tower Issues: Placement, Leases and Municipal Regulation

Navigating HR 3630 and Other Siting Challenges, and Evaluating Revenue-Sharing Opportunities

TUESDAY, NOVEMBER 12, 2013

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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Cell Tower Issues: Placement, Leases and Municipal Regulation

PRESENTED BY

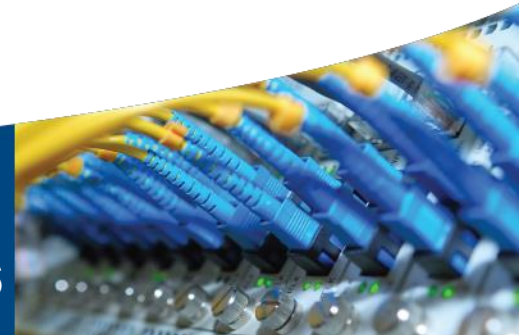
Joseph Van Eaton

Partner, Best Best & Krieger

November 12, 2013

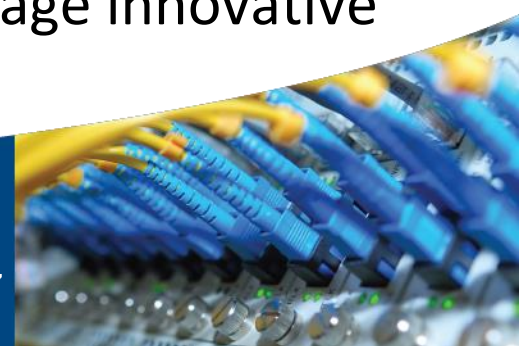


Telecommunications Law



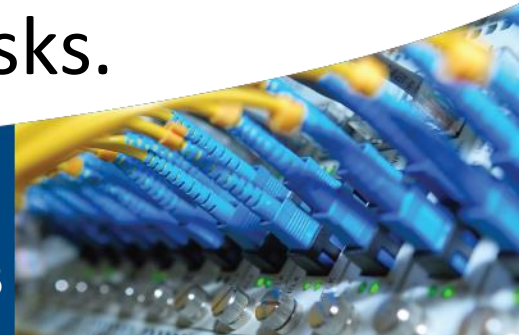
FCC Has Commenced New Rulemaking on Wireless

- Rulemaking issued Thursday, Sept. 26; 60-day initial comment period after Fed. Reg. publication (as of 11/7 – not published)
- Local authority is at risk:
 - Basic assumption underlying many local ordinances, that locality can limit the size of wireless facilities, is at risk.
 - Rulemaking also threatens ability to prevent harm to environmentally sensitive/historically significant areas.
- Rulemaking also presents risks for industry:
 - Unreasonable collocation rules could discourage innovative approaches to siting



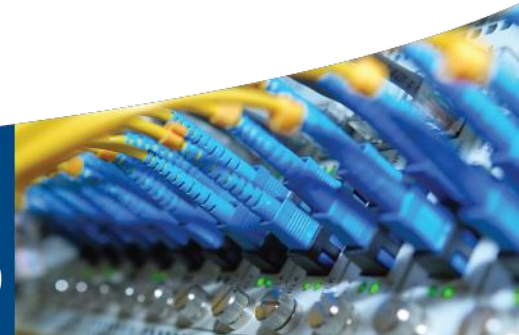
Background: Underlying Federal Laws

- 47 U.S.C. § 332 (c)(7)(B) Preserves Local Authority to Regulate Placement of Personal Wireless Service Facilities So Long As:
 - Locality does not prohibit or effectively prohibit the provision of service;
 - Locality does not unreasonably discriminate against functionally equivalent services;
 - Locality acts on an application within a reasonable period of time;
 - Locality makes a decision in writing; and
 - The decision is supported by substantial evidence.
- Locality cannot deny based on RF risks.



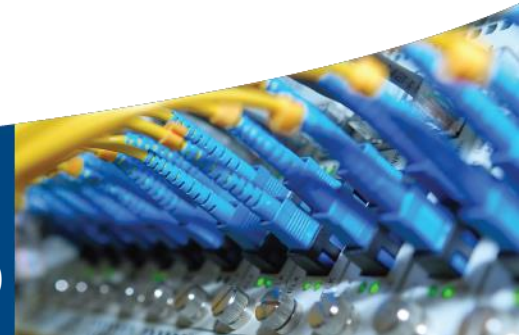
Background (Cont'd)

- Supreme Court ruled that FCC has authority to implement provisions of 47 U.S.C. § 332 (c)(7) in *Arlington v. F.C.C.*, 133 S. Ct. 1863 (2013).
- Decision leaves in place FCC rules that:
 - Established a shot clock for local action on a complete application (90/150 days depending on facility);
 - Concluded that absent agreement with applicant, a locality that fails to act has “presumptively” acted unreasonably; and
 - Provided that locality cannot deny an application merely because another provider already offers service within an area.



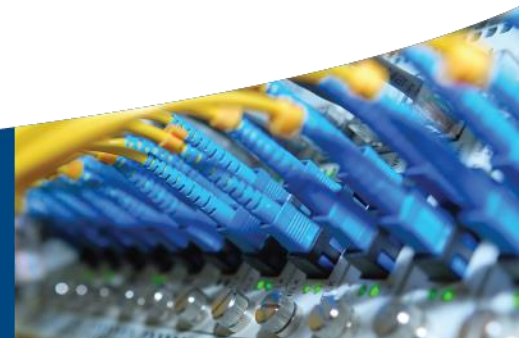
Background (Cont'd)

- **47 U.S.C. §1455(a)** – Modification of Towers/Base Stations
 - “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.
 - “eligible facilities request” means any request for modification “of an existing wireless tower or base station” involving collocation of new transmission equipment; removal of transmission equipment; or replacement of transmission equipment.
- FCC given authority to implement by 47 U.S.C. §1403
- Referred to in rulemaking as Sec. 6409.



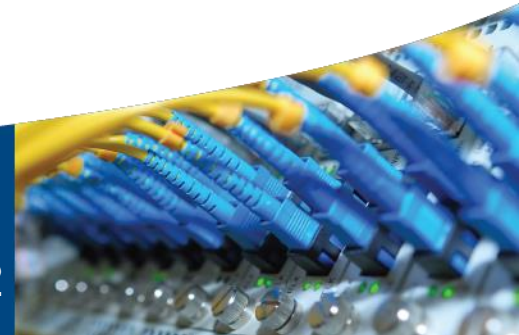
FCC Guidance (Jan 2013)

- Guidance Issued by FCC's Wireless Bureau.
 - Defines “substantially change” through criteria developed in a different context (historic preservation).
 - For example, no “substantial change” if an addition extends a facility less than 20 feet in any direction.
 - Offers broad definition of “base station” that could make statute apply to many facilities, including utility poles.
 - Is not intended to reach safety issues, proprietary property (light poles) or “non-zoning” rules that affect placement.
 - “Interpretive” guidance only – not binding on courts or local zoning authorities.



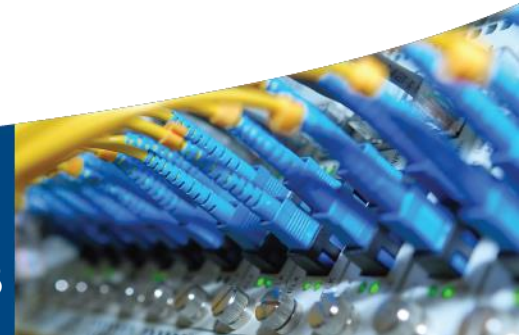
Proposed FCC Rule

- Largely repeats guidance
- “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.”



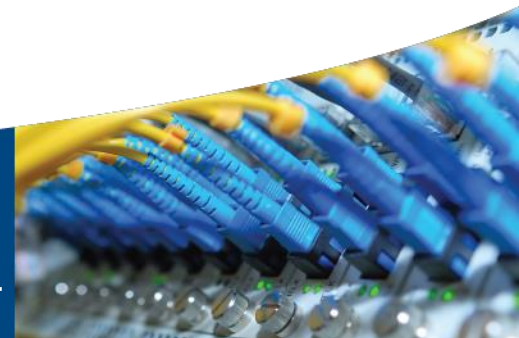
Proposed FCC Rule (Cont'd)

- A modification of an **eligible support structure** would result in a substantial change in the physical dimension of such structure if:
- (1) the proposed modification would increase the existing height of the support structure 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, except that the proposed modification may exceed the size limits set forth in this paragraph if necessary to avoid interference with existing antennas; or



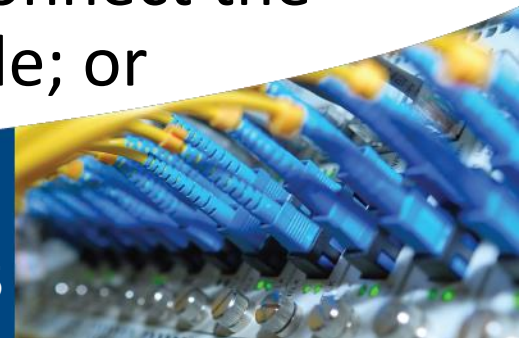
Proposed FCC Rule (Cont'd)

- (2) the proposed modification would involve the installation of more than the standard number of new equipment cabinets for the technology involved, not to exceed four, or more than one new equipment shelter; or



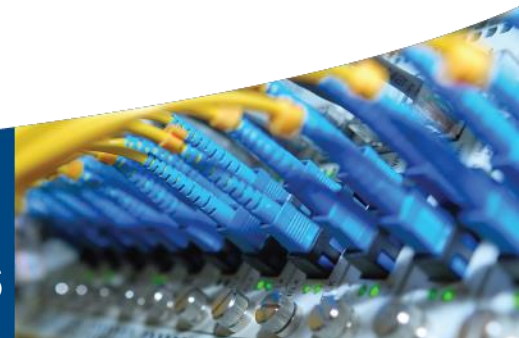
Proposed FCC Rule (Cont'd)

- (3) the proposed modification would involve adding an appurtenance to the body of the support structure that would protrude from the edge of the support structure **more than twenty feet**, or more than the width of the support structure at the level of the appurtenance, whichever is greater, except that the proposed modification **may exceed** the size limits set forth in this paragraph if necessary to shelter the antenna from inclement weather or to connect the antenna to the support structure via cable; or



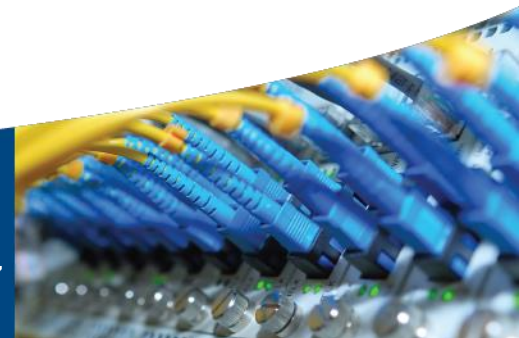
Proposed FCC Rule (Cont'd)

- (4) the proposed modification would involve excavation outside the current structure site, defined as the current boundaries of the leased or owned property surrounding the structure any access or utility easements currently related to the site.



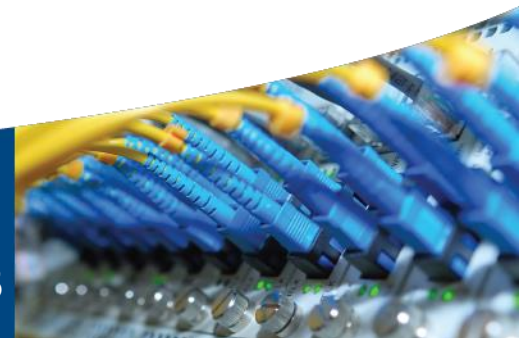
Proposed FCC Rule (Cont'd)

- “Eligible support structure”: “Any structure that meets the definition of a **wireless tower** or **base station**.”



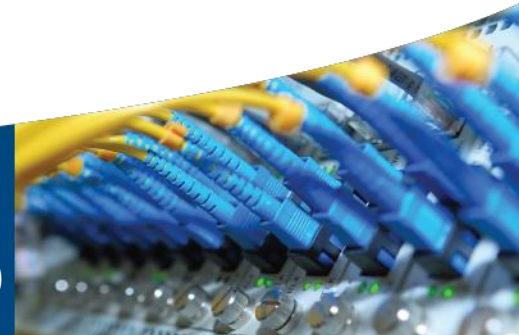
Proposed FCC Rule (Cont'd)

- “Wireless tower”: “Any structure built for the sole or primary purpose of supporting any FCC-licensed or authorized license-exempt antennas and their associated facilities, including the on-site fencing, equipment, switches, wiring, cabling, power sources, shelters, or cabinets associated with that tower. It includes structures that are constructed solely or primarily for any wireless communications service, such as, but not limited to, private, broadcast, and public safety services, as well as fixed wireless services such as microwave backhaul.



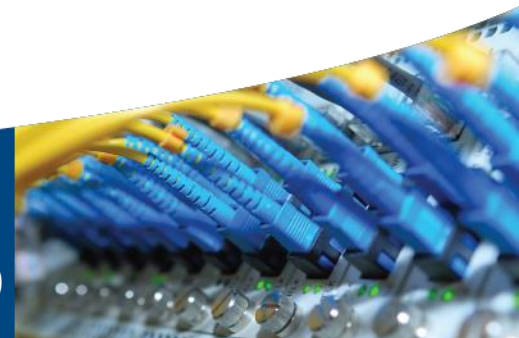
Proposed FCC Rule (Cont'd)

- “Base Station”: “A station at a specified site that enables wireless communication between user equipment and a communications network, including any associated equipment such as, but not limited to, radio transceivers, antennas, coaxial or fiber-optic cable, and regular and backup power supply. It includes a structure that currently supports or houses an antenna, transceiver, or other associated equipment that constitutes part of a base station. It may encompass such equipment in any technological configuration, including distributed antenna systems and small cells.”



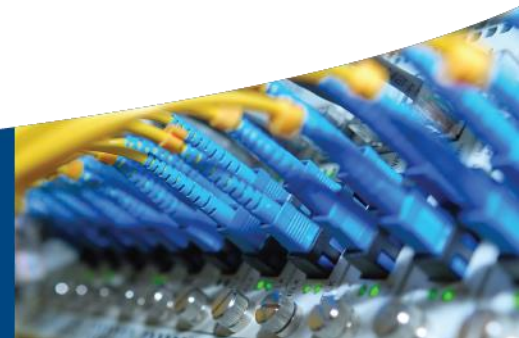
Proposed FCC Rule (Cont'd)

- “Eligible Facilities Request”: Any request for modification of an existing wireless tower or base station involving (a) **collocation** of new **transmission equipment**; (b) removal of **transmission equipment**; or (c) replacement of **transmission equipment**.
- “Transmission Equipment”: Any equipment that facilitates transmission for wireless communications, including all the components of a **base station**, such as, but not limited to, radio transceivers, antennas, coaxial or fiber-optic cable, and regular and backup power supply, but not including support structures.



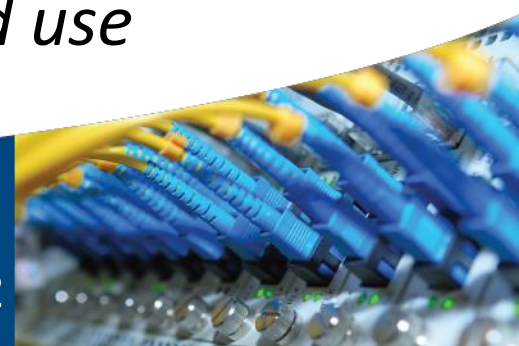
Proposed FCC Rule (Cont'd)

- “Collocation”: “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.”



Bottom Line

- If proposed rules were actually adopted as is, the rules would undermine legitimate local land use planning, historical preservation and environmental protection.
 - *Proposed rules don't clearly protect against unsafe installations*
 - *Proposed rules don't clearly distinguish between leases of proprietary property and land use regulation*

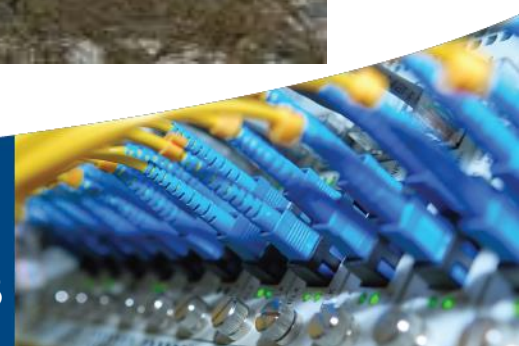


Historic Site – Now

Historic 50'-high silos with approved attachment of six panel antennas painted to match exterior surface to minimize visual impact. Located at Dufief Mill Road and MD Route 28 (Darnestown Road) in Montgomery County, Maryland.



Photos by: Robert P. Hunnicutt, Columbia Telecommunications Corporation

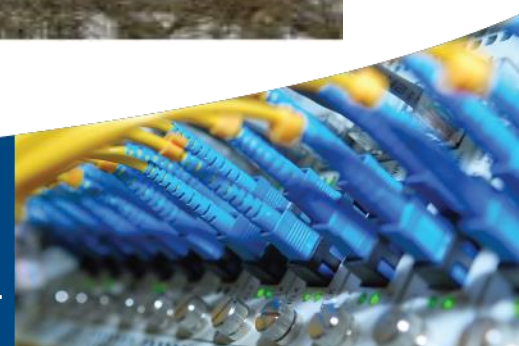


Historic Site – Post Guidance?

Illustration showing potential impact of co-location of an additional approximately 20'-high pole mounted antenna array.



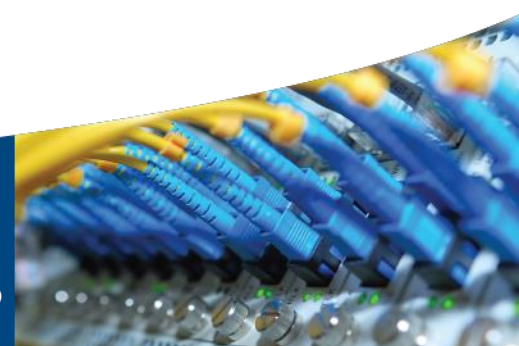
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Historic Site – Now



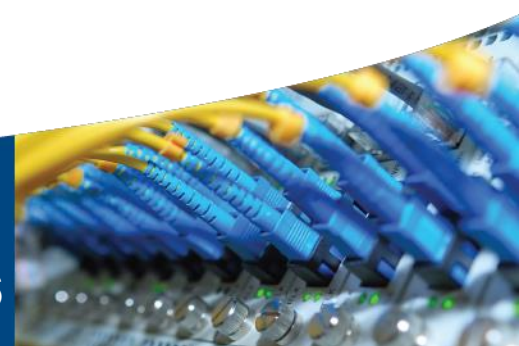
Photo of Simeon T. Toby's Bank Building, Columbia City Historic District, King County, WA. Blue arrows point to current location of cell towers. Building listed on National Registry of Historic Places



Historic Site – Post Guidance?



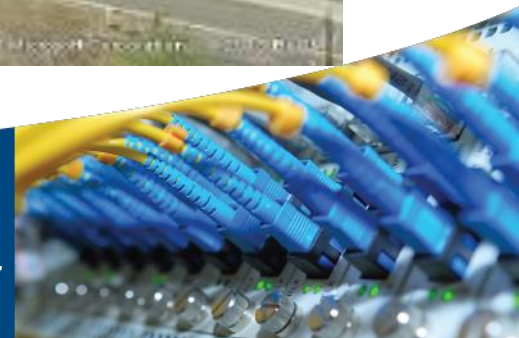
Illustration showing potential impact of co-location using photos of actual rooftop installations



Brickyard Rd. DAS Site – Neighborhood



Photos by: Robert P. Hunnicutt, Columbia Telecommunications Corporation

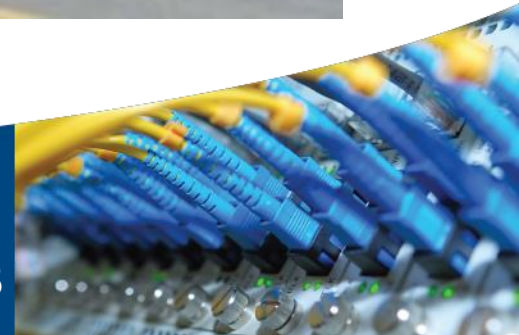


Brickyard Rd. DAS Site – Now

Pole to support DAS antennas (68' high) now at Brickyard Road in Montgomery County (part of a multi-node installation that extends down Brickyard Road)



Photos by: Robert P. Hunnicutt, Columbia Telecommunications Corporation

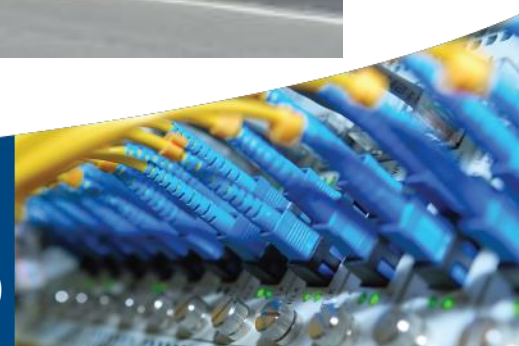


Brickyard Rd. DAS Site – Post Guidance?

Illustration of an extension to existing utility pole with additional structural bracing and guy wires to support the extension, which rises approximately 20' above existing DAS antennas. Blocks at bottom reflect related typical pole-mounted equipment cabinets.

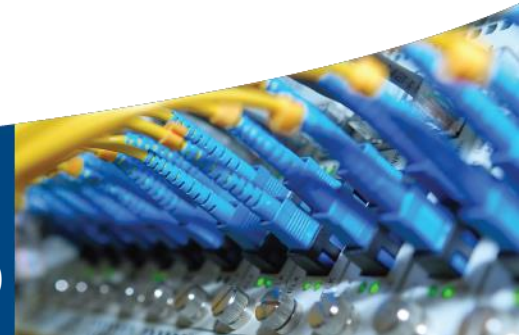


Photos by: Robert P. Hunnicutt, Columbia Telecommunications Corporation



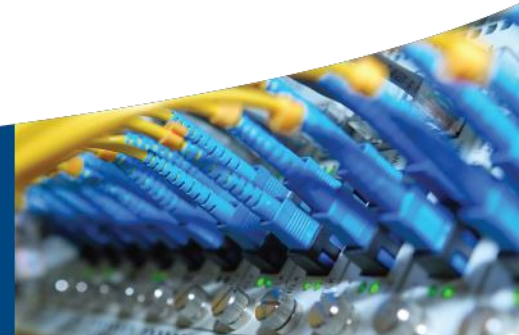
...But Proposed Rules *Won't Necessarily Be Adopted*

- Rulemaking provides opportunity to address issues raised by the Guidance and Proposed Rules.



Rulemaking Structure

- *In re Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket No. 13-238, FCC 13-122 (9/26/2013).
- Four areas addressed:
 1. Should FCC expedite National Environmental Policy Act and National Historical Preservation review processes for DAS and small cells, and categorically exclude these deployments from review?



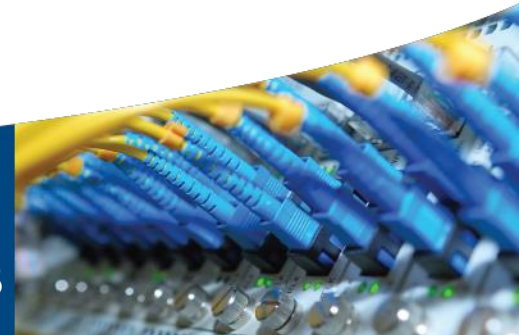
Rulemaking Structure

2. Should FCC exempt temporary antenna structures from federal review?
3. Should FCC adopt rules re: Section 6409? What rules?
4. Should FCC alter its shot clock rules, to, *e.g.*
 - determine when an application is complete and address remedies if shot clock not met;
 - address DAS;
 - address moratoria, muni siting preferences.



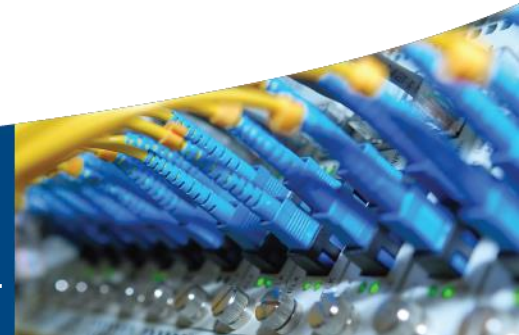
Implementation of Sec. 6409

- Should the FCC make rules in this area?
(alternatives: give localities first opportunity; or provide for a transition period).
- What services are reached? (tentative conclusion, any licensed or unlicensed wireless service).
- What is “transmission equipment” (does it include power supplies)?



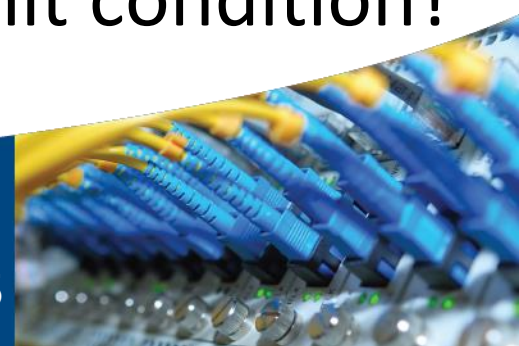
Implementation of Sec. 6409

- What is a wireless tower or base station?
 - “Towers” and base stations as those terms are normally understood?
 - Buildings, water towers, utility poles, etc.?
- What is an existing tower or base station (must something actually be in use for wireless)?



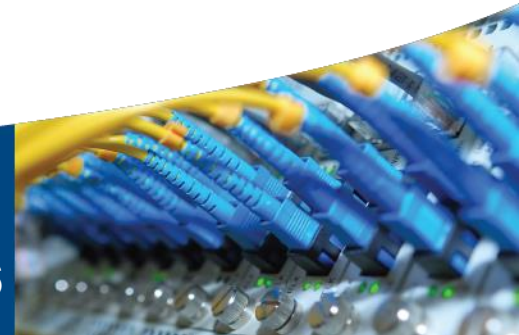
Implementation of Sec. 6409

- What are collocation, removal and replacement (only changes to the existing facility, or additions of facilities and equipment *associated* with the existing facility)?
- How does the law affect non-conforming uses (and why are non-conforming uses needed)?
- Must a government approve a modification that does not conform to an existing permit condition?



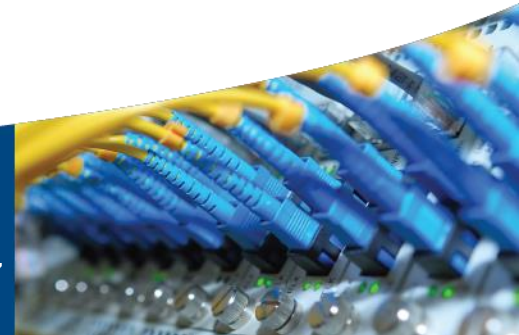
Implementation of Sec. 6409

- What is a substantial change in physical dimension?
 - Just size or something more?
 - Is it an absolute or relative standard?
 - Does same test apply to all structures or are different tests appropriate for light and utility poles, buildings, etc.? To stealth facilities?
 - Are changes measured from original structure or from structure as modified?



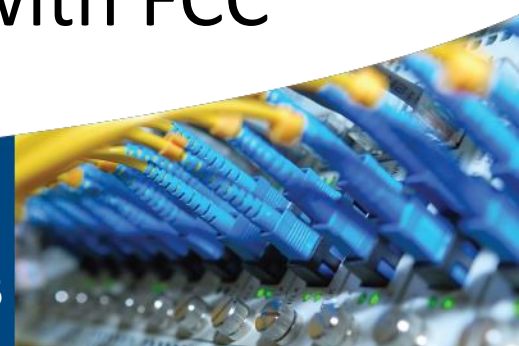
Implementation of Sec. 6409

- What does “shall not deny and shall approve” mean?
 - Are there any special circumstances where an application may be denied?
 - Does it require approval where a structure violates safety codes, or otherwise places persons and property at risk?
 - Can it be read to allow imposition of conditions?



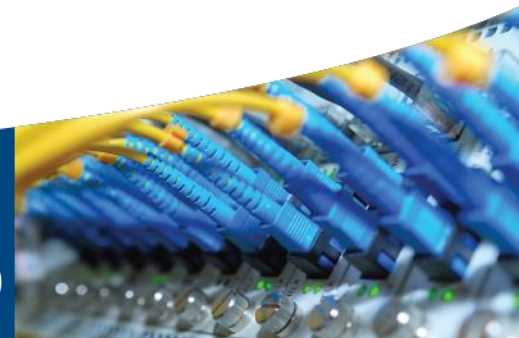
Implementation of Sec. 6409

- Does the statute apply where gov't is acting as a proprietor and not as a regulator? (tentative answer: no).
- What application process may be required if any, and before what entity? (tentative: an application can be required).
- What remedy is appropriate and constitutional? (tentative answer: deemed granted with FCC review).



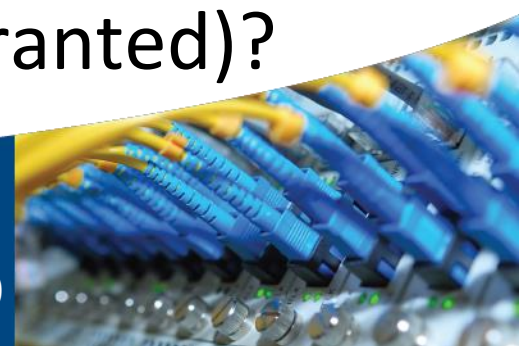
Revisions To Shot Clock (332(c)(7))

- Rulemaking does not invite or propose wholesale revision of existing rules.
- Should FCC change definition of collocation?
- Should FCC clarify when an application is complete?
- Do moratoria pause the shot clock? (tentative answer, “no”).



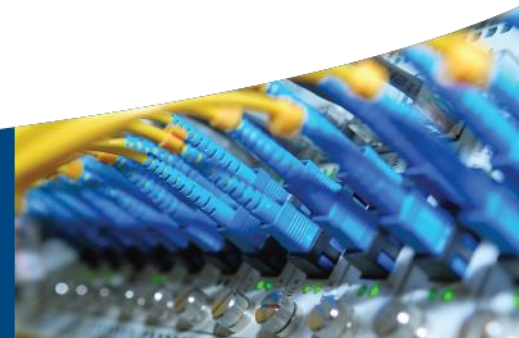
Revisions To Shot Clock (332(c)(7))

- Does shot clock apply to DAS and to small cells? (tentative answer, “yes”).
 - note: this is probably not the most critical issue; issue is how one determines whether an ordinance is or is not prohibitory.
- Are preferences for siting on muni property unreasonably discriminatory?
- Should FCC revisit remedies (deem granted)?



Approaching the NPRM

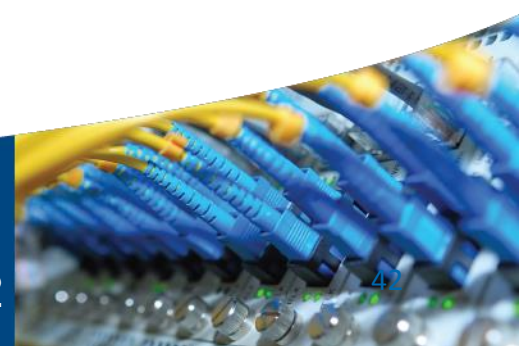
- NPRM is likely to significantly affect industry and localities.
- NPRM **asks the right questions.**
- NPRM could result in fair rules that balance interest in rapid approval of minor mods, while preventing overreaching by providers.
- Rulemaking could also create uncertainties that discourage rational deployment.
- Participation is critical.



QUESTIONS?



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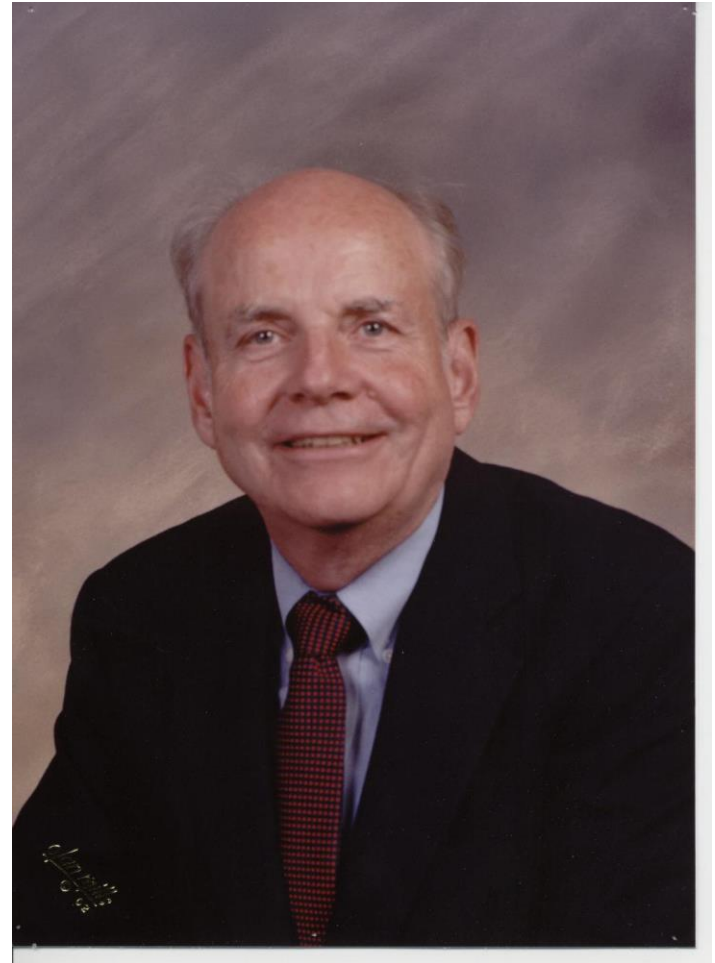
CELL PHONE TOWER TECHNOLOGY

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Lee Afflerbach, PE

Engineering Issues

- Coverage
- Backhaul interconnection
- Facility issues
 - Access
 - Power
 - Security
- RF emission
- Master Planning Your Community

Typical New Structures

- Typically 70 to 200 ft.
- Support multiple service providers
- Room for expansion
- Shared equipment areas
- Location issues
 - Height above terrain
 - Vehicle traffic
 - Cost

Types of Structures

- Dedicated towers
 - New monopoles
- Shared towers
 - Utility, broadcast, local government
- Stealth installations
 - Disguised as flagpole, tree, chimney
- Distributed antenna systems (DAS)
 - Low-profile
 - Targeted service area
 - Handle high-traffic corridors

Towers and Monopoles

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Self-Supporting Lattice Tower



Monopole with Equipment



Stealth Installations/Disguised Monopoles

Tree



Flagpole



Stealth Installations/Disguised Monopoles

“Unipole” or “Slick Stick” Light Pole



Religious Structures



Shared Towers

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Active AM radio tower with 800 MHz public safety, cellular, and FM antennas



Former AM radio tower with cellular and commercial radio antennas



Existing Structures

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Antennas Mounted on Silos



Church Bell Tower



Stealth Installations

Church Steeple

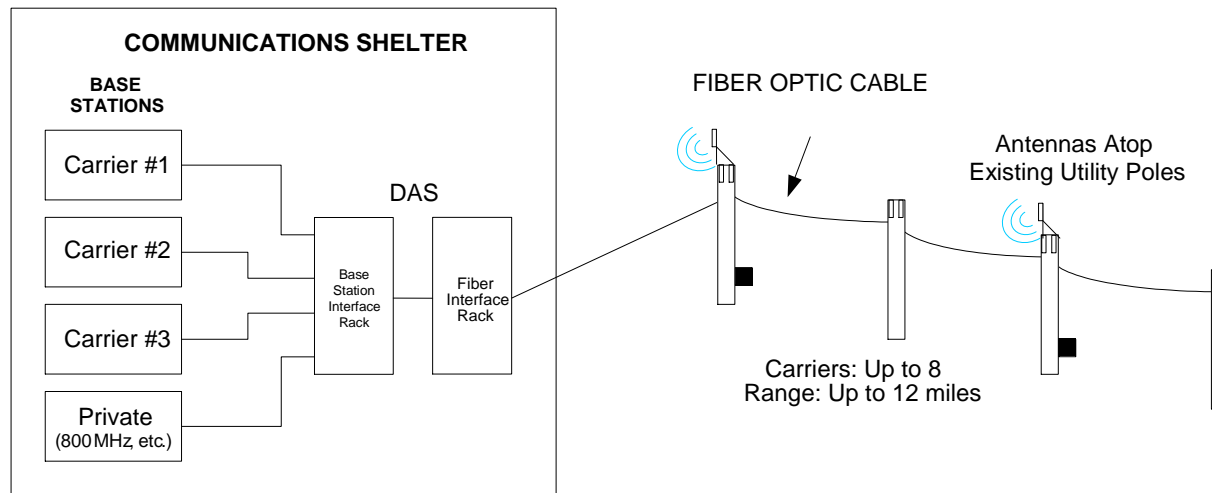


Faux Chimneys

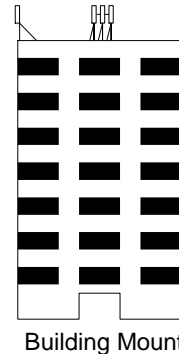
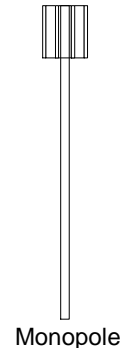
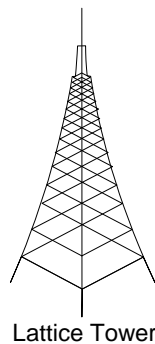


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Distributed Antenna Systems (DAS)



REPLACES



Distributed Antenna Systems (DAS)

More Obtrusive Design



Less Obtrusive Design



Coverage Issues

- Target Area
- Antenna height above terrain
- RF Frequency band (700 to 2,500 MHz)
- Technology (3G/4G)
- User location (open coverage, in vehicle, in building)
- Providers have their own in-house RF propagation software modeling and standards.
- Models often validated through in-field testing

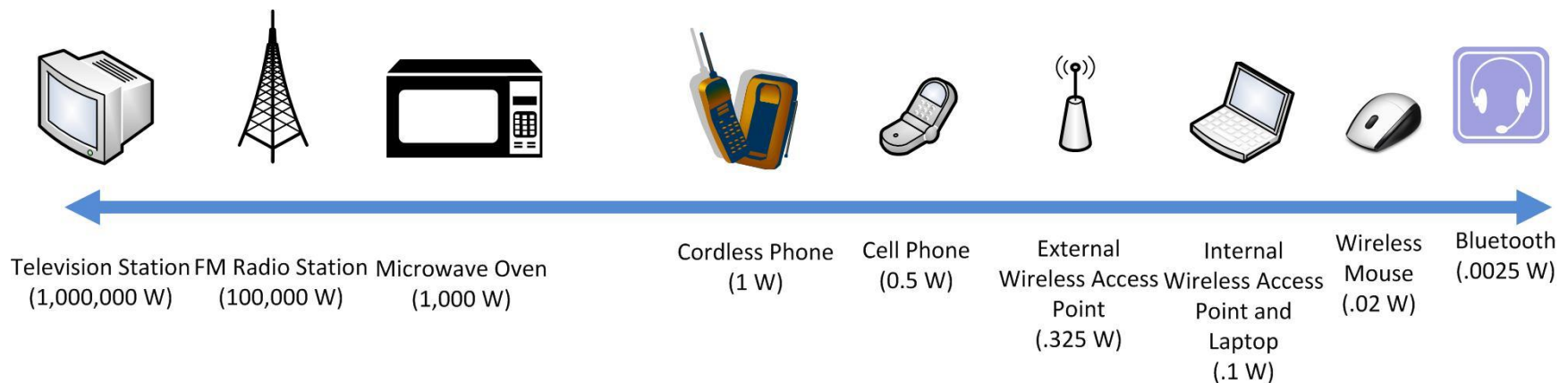
RF Guideline Standards

- National Environmental Policy Act of 1969 (NEPA) requires the Federal Government to evaluate and set standards
- FCC has been assigned the responsibility to set standards for human exposure to RF energy emitted by FCC-regulated equipment
- FCC adopted first set of guidelines in 1985
- Current FCC guidelines: OET Bulletin 65 Edition 97-01
- GAO requested in July 2012 (GAO-12-771) that FCC re-examine radiation impact of closely held cell phones
- Every Community has some degree of concern about radiation

How Were the Standards Derived?

- Expert Professional:
 - National Council on Radiation Protection and Measurement
 - Institute of Electrical and Electronic Engineers (IEEE)
 - American National Standards Institute (ANSI)
- Comments to the FCC public rule-making proceeding
 - Environmental Protection Agency (EPA)
 - Food and Drug Administration (FDA)
 - Federal Safety and Health Agencies
 - Others

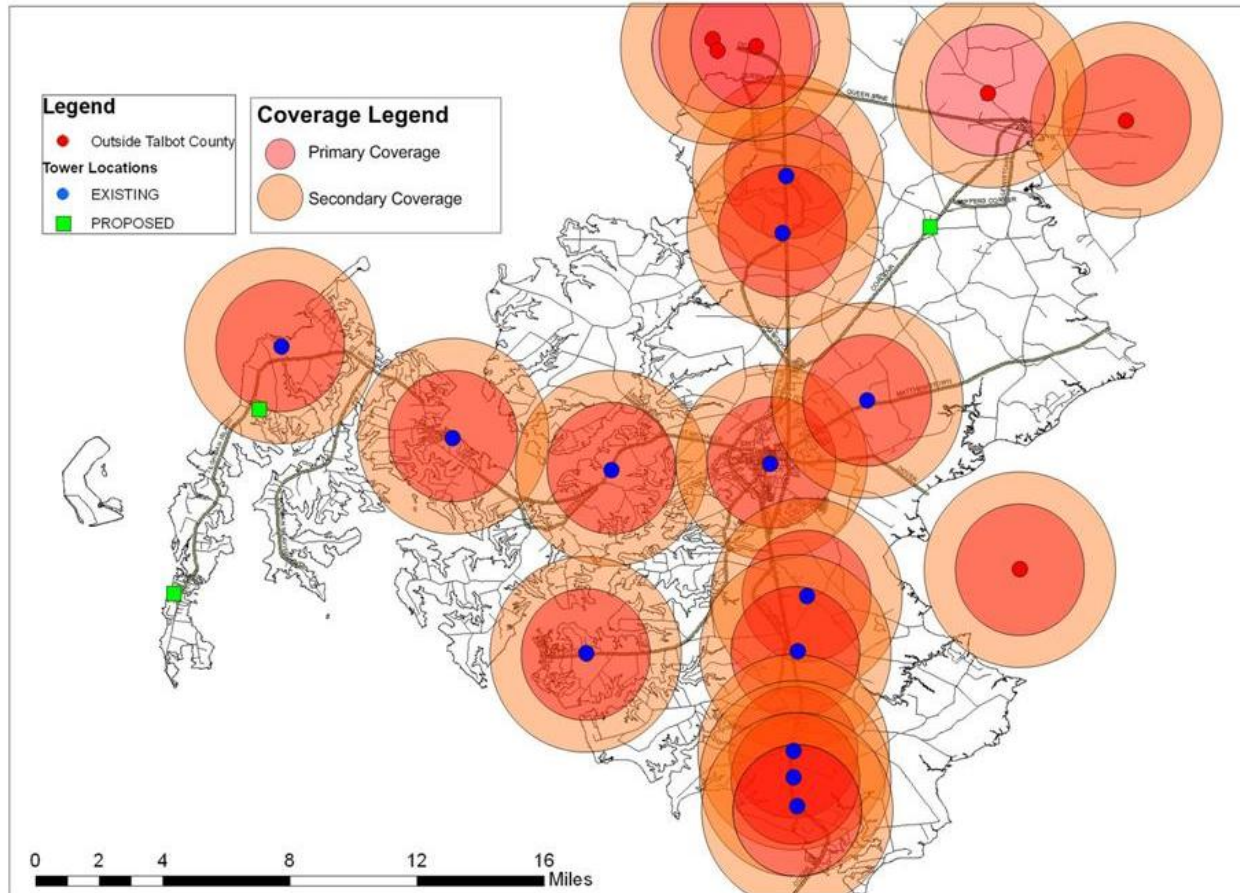
Typical RF Power Levels



Getting Ahead of the Issue

- Develop a database of existing wireless facilities
- Inventory municipal assets
 - Communications towers
 - Buildings
 - Water towers
 - Land
- Proactive planning
 - Baseline existing coverage
 - Define potential fill-in area
 - Develop a marketing and work with Carrier agents

Wireless Allocation Planning



Leveraging Community Assets

(examples)

- **Land Parcels**
 - Elevation
 - Zoning
 - Structures
 - Towers
 - Water Towers
 - Utility Substations
 - Utility Poles
- **Telecommunications infrastructure**
 - Dark fiber
 - Active broadband networks



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ATTORNEYS AT LAW

CELL TOWER ISSUES: PLACEMENT, LEASES AND MUNICIPAL REGULATION

MAXIMIZING THE RETURN ON YOUR CELL LEASES/LICENSES

Gerard Lavery Lederer
Best Best & Krieger LLP

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CONTACT INFORMATION



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TELECOMMUNICATIONS LAWS

- **NO** obligation to rent your facilities for wireless uses
 - acting as landlord, not regulator
 - FCC “shot clock” does not apply to requests to lease land.
 - Don’t Believe that 6409(A) applies to proprietary interests.
- Wireless sites will be subject to city/county land use regulatory authority
 - 47 U.S.C. 337(c)(2) preserves local land use authority subject to limitations
 - Cannot prohibit “or have the effect of prohibiting” wireless services

TELECOMMUNICATIONS LAWS

TWO PRELIMINARY THOUGHTS

- Understand that there are potential limits on regulatory authority that may influence your licensing decisions.
- Recognize that small-cell and distributed antenna system (DAS) deals may require a different framework.

CONTROL THE DRAFTING PROCESS

- Try to avoid using anyone else's standard form
- Wireless carriers' standard forms are unbelievably lopsided
- Wireless carriers can and will take advantage of you if you aren't careful
- Developing and using a standard form saves time and helps avoid overlooking issues

PREMISES & GRANT OF AUTHORITY

- Include an exhibit with legal descriptions, drawings and/or photos.
- More detail you have, the easier it is to police the agreement, especially regarding illegal collocations and subleases.
- Use of common areas and access points
- Control signage

LICENSE/LEASE NOT EASEMENT

- Granting an easement may be granting others access to same property.
- License is all the legal authority a wireless carrier needs.
- Lease structure is also an acceptable alternative (but grants exclusive use, not shared use).

TERM

- For general leases, define term and renewal options
- For wireless sites, typically series of 5 year terms --- 20 to 30 years total
- Strategic decision re auto renewals or affirmative notice required
 - If notice is required, keep a database of renewal dates

TERM

- Beware of “options to lease” tying up sites with no guarantee of rent
- Avoid long delivery or construction periods for permitting with no rent – begin term immediately and add construction period to overall term
- 30-60 days or commencement of construction, whichever comes first

DUE DILIGENCE PERIOD

- Limited time in which wireless carrier has to obtain legal clearances and ensure that site works for them.
- DON'T give this time away for free.
- Be sure to get indemnity for any activities on site by licensee/consultants and require prior consent for any borings; require copies of any consultant reports be provided to you.

RENT/LICENSE FEE

- Basic fee
- Collocation fees (or address this later)
- Late Fees, Interest and Hold Over fees
 - Late fees are what you can get
 - Interest limited by law (be sure to include savings clause to avoid usury claim)
 - Hold-over rent should be in the range of 150 to 200% of then-current rent.

WIRELESS SITE BASE RENT

- \$1.8k per month to \$5K per month, paid in advance
- Offer a direct deposit option.
- Carriers typically offer low escalators – e.g. 15% every 5 years
- Try for at least 4%, maybe ask for 5% or greater of 5% or CPI

ASSIGNMENT

- Require landlord approval
 - Wireless carriers usually want to be able to shift sites to related corporate entities without landlord approval
 - Beware of assignments to “affiliates”, tower operating companies
- No release of original entity

ASSIGNMENT OR SUBLETTING

- No sublicensing without permission.
 - Have licensee waive rights under Civil Code §§ 1995.260, 1995.270
 - §6409/47 U.S.C. § 1455 regarding collocations does not affect contractual restrictions
- Licensors may refuse to consent to any proposed sublicense that involves the collocation of another carrier's facilities.
 - Additional rent for sublicensees.

INTERFERENCE

- Ensure that you do not cause any challenges for your existing public safety uses, or any existing tenants.
- Ensure that subsequent tenants/collocators do not cause interference.
- Burden is on newcomers to cure interference caused by their arrival (not existing users).
- Be sure licensor is not responsible for interference or cure.

IMPROVEMENTS

- Detailed plans with prior approval
 - Do not agree to “approval not be unreasonably withheld, delayed or conditioned”
 - Control appearance of improvements
- All work by licensee shall be performed in compliance with applicable laws and ordinances
- Licensee is not authorized to contract for or on behalf of licensor or impose any additional expense

IMPROVEMENTS & UTILITIES

- Be sure improvements will be maintained and upgraded to comply with laws, but any new installations must not be heavier, greater in capacity or more space than originally granted
- Licensee pays for utilities; licensor not responsible for any interruptions
- Do not agree to allowing licensee to use your electric connection with a submeter

REMOVAL OF IMPROVEMENTS

- Think about how to handle this – may depend on facility type
- Immediate ownership (e.g. of light pole)
- Automatic conveyance of ownership to licensor
- Option for licensor to retain improvements or require removal
- Require removal of footings and foundations

TECHNICAL STANDARDS

- Licensee agrees to comply with all applicable governmental laws and regulations and with such technical standards as may from time to time be established by licensor for the premises, including, without limitation, technical standards relating to frequency compatibility, radio interference protection, antenna type and location and physical installation

LIMIT ACCESS

[THINK POST 9/11]

- 24 hour notice
- Escort
- Emergency conditions for access

ACCESS RIGHTS/SECURITY

- If installation on roof, limit access to certain specific areas; require your roof contractor to approve; avoid roof penetrations which may invalidate roof warranties; limit cabling access to common shafts
- Limit size, weight and frequency of access to roof
- If installation across private or limited access land, limit access and protect fencing, private or municipal property or animals
- Put burden to maintain secure fencing on licensee

EVENTS OF DEFAULT / TERMINATION BY LICENSOR

- Non-payment
- Habitual late payments
- Violation of any term, including non-permitted collocations
- Bankruptcy

TERMINATION BY LICENSEE

- Carefully define when licensee can terminate
- Wireless carriers want ability to terminate for “technological, economic, or environmental” reasons
- Either prohibit volitional terminations or require payment (e.g. rent for remainder of term or 12-24 months of rent)

CASUALTY/INSURANCE/ INDEMNITY

- Make sure to run by your risk assessment folks
- Typical insurance is general liability, auto liability, employer's liability, all-risk property, and workers' comp
- Make sure insurance requirements apply to contractors and subs
- Don't accept reciprocal indemnity

TAXES

- Make sure it is clear that taxes due are in addition to rent.
- Address possessory interest tax (Revenue and Taxation Code 107.6) liability for licensee.

NOTICES

- All notices, requests, demands and other communications to be in writing and delivered to specified addresses
- Make sure to have your counsel copied.

QUIET ENJOYMENT, TITLE AND AUTHORITY

- Traditional obligation of the landlord.
- Make sure you have authority – ie make sure such use is permitted under your governing documents.

HAZARDOUS SUBSTANCES

- Strict language to prohibit any such uses.
- Batteries for back up and generators can trigger these terms.
- Check with your environmental folks for most recent terms – pay special attention that these substances do not prejudice your ability to use the site.

MISCELLANEOUS

- Attorney fees
- Entire agreement
- No liability for broker/agent fees
- Governing law and venue
- Severability

MISCELLANEOUS

- Mortgage subordination
- Limitation on liability
- RF signage and notices
- Amendments
- No relocation assistance
- Time IS OF THE ESSENCE

SELLING YOUR WIRELESS LEASES

- Numerous tower operators seeking to buy landlord lease rights
- Typically offer fraction of NPV of lease payments
- Will emphasize threat of nonrenewal, certainty of being paid
- May ask for amendments allowing unlimited collocations

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About BB&K

Best Best & Krieger LLP is a full-service law firm with more than 200 attorneys in California and Washington, D.C. delivering effective, timely and service-oriented solutions to complex legal issues facing public agencies, businesses and individuals. BB&K lawyers serve as city attorney to 30 California cities and as general and special counsel to special districts, school districts, cities, counties and other public agencies. The firm has been helping businesses, from local to international, achieve their goals for more than 100 years.