Section 6409(a): Federal Preemption on Cell Tower Collocations - A Municipal View

By John W. Pestle
prepared for
International Municipal Lawyer’s Association
August 14, 2012 Seminar
Varnum Law Firm

- One of Michigan’s largest firms, over 100 years old
- Corporate law firm with significant communications and municipal law practice
- Represents municipalities on cell tower zoning
- Represents municipalities and private property owners on cell tower leases
- Offers model cell and WiMAX tower leases, drafted from property owners’ perspective at www.varnumlaw.com/lease
- Cell tower blog at www.varnumblogs.com/category/cell-phone-tower-leasing-and-zoning/
John Pestle

- Over 25 years experience in communications, utility and energy law
- Partner in firm, heads Varnum’s communications practice
- Graduate of Harvard College, Yale Graduate School and the University of Michigan Law School
- Admitted in Arizona and Michigan
- Past Chair of Municipal Lawyers Section of Michigan Bar and Legal Section of American Public Power Association
- Held FCC license to work on radio, TV, ship radar transmitters
- jwpestle@varnumlaw.com and 616-336-6725
Introduction

- Three sets of Federal laws and orders applicable to cell tower zoning
  - 47 U.S.C. Sec. 332(c)(7), a/k/a Section 704, added in 1996
  - Shot clock orders in 2009 and 2010
  - Section 6409(a) of Middle Class Tax Relief Act, added on February 22, 2012
- Federal law now divides cell towers into two classes:
  - New towers - - Mainly Section 704
  - Modifications - - Mainly Section 6409(a)
Major Points on Section 704

- Adds to, overlay on, state and local zoning law
  - Have to comply with both
- In general good news for municipalities
  - Section 704 preserves local zoning
- But remedy for violations is often an order approving tower as applied for, not a remand
- No attorneys fees, damages for successful challenges
- Procedural rules often different than state law
  - Written decision, written record, etc.
- RF emissions preclusion, to extent tower complies with FCC emissions rules
Major Points on Section 704 (cont’d)

- Local zoning principles generally not affected, such as decision between
  - Fewer, higher towers
  - More, shorter towers
- Allowable grounds include standard items
  - Aesthetics
  - Number and height
  - Safety
  - Environmental
  - Impact on residential area, historic areas
  - Effect on property values
- Zoning conditions increasing cost generally OK
Major Points on Section 704 (cont’d)

- Only “unreasonable” discrimination prohibited by Act
  - Some discrimination, different treatment, is allowed
- Generally cannot “prohibit or have the effect” of prohibiting service, i.e. gap in service
  - BUT Federal law and cases allow small gaps
  - Exact legal standard varies with Federal Circuit Courts
    - Alternate site analysis
    - Fill by least intrusive means
Shot Clock Orders

- Collocations
  - 90 days to act. Reasoning
  - Not a collocation if:
    - More than 10% increase in height
    - More than 4 equipment cabinets (or 1 shelter)
    - New antenna extends more than 20' from the tower
    - Excavation needed outside current site

- New Towers
  - 150 days to act presumed reasonable.
Section 6409(a) on Modifications

- Part of February, 2012 Middle Class Tax Relief Act (which extended the payroll tax cut)
  - “Notwithstanding section 704 . . . or any other provision of law, a State or local government [1] may not deny, and shall approve, any [2] eligible facilities request for a modification of an existing wireless tower or base station that does not [3] 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 that involves ---
    - (A) collocation of new transmission equipment;
    - (B) removal of transmission equipment; or
    - (C) replacement of transmission equipment."
Section 6409(a) Background

- Latest in long series of industry efforts to preempt local cell tower zoning. At least six major attempts:
  - 1995 FCC Rulemaking to preempt local zoning, stopped by 1996 Act
  - Industry position in initial cases on Section 704, largely rejected by courts
  - San Diego case challenging all local cell tower zoning under 47 USC 253, rejected by courts 543 F.3d 571
  - Shot clock orders
  - Various proposed Federal bills
Is Section 6409(a) Constitutional?

- Serious issues on its Constitutionality, affected by how broadly Section 6409(a) is interpreted. Some of issues:
  - Commerce Clause limitations on Federal authority, especially after Affordable Care Act decision preventing Congress from compelling activity under the Clause.
  - Federalism, Tenth Amendment (all powers not given Congress reserved to states) concerns in light of court decisions preferring, upholding localism on zoning and similar issues, e.g. Printz v U.S., 52 U.S. 898; SWANCC v. Corps of Engineers, 531 U.S. 159.
  - Impermissibly blurring of lines of political accountability, especially given directive to states, cities to “approve” qualifying modification requests, e.g. - -New York v U.S., 505 U.S. 144.
Is 6409(a) Constitutional? (cont’d)

- Some similar Constitutional issues raised about Section 704
  - Issues here much more acute, serious

- Possible actions:
  - Raise, preserve Constitutional issues in response to provider claims about Section 6409(a), such as need not apply for approvals, applications must be granted as applied for, etc.
  - Local reps, contractors for providers generally unaware of these serious issues.
  - Essential to raise in any court, legal challenge by providers based on Section 6409(a)
    - May aid settlement, as providers basically can only lose from a court ruling on these issues
Matters Affected by Section 6409(a)

- Zoning and land use approvals
- Building and safety codes, e.g. ANSI/TIA 222-G-2 on tower structural safety?
  - PCIA says not covered by Section 6409(a). Unclear how they square that with language of 6409(a)
  - Risk of Constitutional invalidation of 6409(a) much greater if does apply
- Environmental and historic preservation laws
  - Section 6409(a) preserves Federal Environmental Policy Act and Historic Preservation Act.
Matters Affected (cont’d)

- Outer boundaries of 6409(a) - - Can private (e.g. cellular) companies use it to compel collocation of their antennas on municipal police, fire towers?
  - Key barrier - - Takings clause (no taking of property w/o just compensation) of 5th Amendment applies to protect states, cities as well as private parties. See, e.g. U.S. v 50 Acres of Land, 469 U.S. 24.
  - And is a taking to benefit private party here permissible under Kelo v New London, 545 U.S. 469 condemnation case?
- Cell companies made similar “takings” claims under Section 704, see e.g. Omnipoint v Port Authority of New York, 1999 WL 494120 (2d Cir. 1999) (basically rejecting claim).
Matters Affected (cont’d)

- Can cell companies use “shall approve” provision to compel modifications of tower leases so as to allow collocation?
  - With units of government?
  - With private parties?
  - Similar Constitutional issues - - And condemnation power rarely implied.

- Conversely, can states, cities compel collocation of their antennas (police, fire) on private towers under Section 6409(a)?
  - Better Constitutional arguments due to public purpose
  - Fits better with other (911) provisions of Middle Class Tax Relief Act
  - But probably academic, as states and cities already have condemnation power.
Section 6409(a) Definitional Issues

- Key terms in Section 6409(a), which are undefined
  - Existing
  - Wireless tower
  - Base station
  - Substantially change the physical dimensions
    - Especially of concern for camouflaged towers
- Industry argues that prior FCC definitions apply
  - Section doesn’t state that
  - Many of FCC definitions are of different terms
  - In different contexts, for different purposes
Some Definitional Issues (cont’d)

- “Wireless tower”
  - Are AM, FM, TV, amateur radio and other radio towers covered? Archaic British use of term “wireless” needed to reach that result (“what’s on the wireless tonight?”)
    - Does it correspond to “personal wireless facilities” in Section 704?
  - Are water towers, utility ‘towers’, light standards/towers, windmill ‘towers’ covered?
    - FCC definitions say tower’s “primary purpose” must be telecommunications
Some Definitional Issues (cont’d)

- “Substantially change the physical dimensions”
  - Standards from shot clock orders applicable? Industry claims they are. Not a collocation under them if:
    - More than 10% increase in height
    - More than 4 equipment cabinets (or 1 shelter)
    - New antenna extends more than 20' from the tower
    - Excavation needed outside current site
  - If so, are the FCC shot clock standards a **floor** or a **ceiling**?
    - E.g. - - can a provider argue that a 15% height increase or 6 equipment cabinets qualifies under 6409(a)?
  - Or is “substantiality” measured by the impact of the modification on the neighborhood, safety, environment, etc.?
Some Definitional Issues (cont’d)

- “Substantially change the physical dimensions” (cont’d).
  - Is “substantiality” measured by
    - Physical dimensions alone, or
    - The impact of the modification on visuals, the neighborhood, safety, environment, etc.? Especially important for
      - Camouflaged towers
      - Non-conforming (grandfathered) uses
Some Definitional Issues (cont’d)

- Parties are likely to refer to various FCC documents and definitions, although none are specifically referenced in Section 6409(a) - - and often the definitions are of somewhat different terms adopted for different purposes. E.g. - -
  - FCC 2001 Nationwide Programmatic Agreement for the Collocation of Wireless Antennas
  - Definitions in Section 704
  - Definitions of base station, etc. in FCC Rules for Personal Communications Service and Private Land Mobile Radio Services
Interpretations of Not Deny, Shall Approve

- Provider need not even apply
  - Supported by cellular industry - - PCIA
  - But not what statute says

- Must apply, but only with information to show that facility qualifies under Section 6409(a)
  - Cities at minimum have to be able to make determination whether application falls within Section 6409(a)

- Must apply, but application has to be approved as submitted (no changes by state or municipality)
  - Also supported by PCIA - - but based on language not in Section 6409(a) (but which is in Section 704 and 47 U.S. C. 253) that local change might have “effect of denying”.

Interpretations (cont’d)

- Provider must apply, application has to be approved (even if violates state, local law), BUT can be changed or conditioned by state or local government
  - Better reading of Section 6409(a)
  - Reduces Constitutional problems
- No effect - - Section 6409(a) is unconstitutional
- Practical comment
  - The broader the preemption that is sought, the more likely Section 6409(a) will be found unconstitutional
State Collocation Statutes Preempted?

- Some states (e.g., California, Michigan) have collocation statutes, roughly similar to 6409(a)
  - Providers may push for more such statutes
- Are state collocation statutes preempted by Section 6409(a)?
  - Good arguments for same, e.g. under “field preemption” (Federal statute preempts entire field, no state statutes allowed)
  - Industry will argue to the contrary under narrower preemption doctrines (e.g., conflict preemption).
  - And see also *Nixon v. Missouri*, 541 U.S. 125 (no intent of Congress to free subordinate units of government from state restrictions) and related Federalism concerns (Feds improperly intruding on state local relations).
Section 6409(a) - - Practical Considerations

- Obvious impacts on cell tower modifications, collocations
- Shot clocks still apply
- One major impact will be on new tower applications
  - Cities have to consider tower not just as proposed, but under cumulative impact of Section 6409(a) changes
  - Especially sensitive for camouflaged towers
- May result in initial approval either
  - Being for very small tower, or
  - Specifying conditions for multiple, larger antennas, etc.
- Municipalities still retain authority
  - To choose between more shorter or fewer taller towers
  - To require monitoring for RF emissions
Section 6409(a) - - Practical (cont’d)

- Effect (if any) of Section 6409(a) on mixed applications - - where project includes items inside and items (e.g. diesel generator or substantial change in physical dimensions) outside 6409(a)
  - Is whole project outside 6409(a)?
  - Or does 6409(a) still apply to conforming elements? With non-conforming elements still subject to
    - Separate application?
    - Denial?
- Effect on grandfathered (non-conforming) towers?
- Is “Jack and the beanstalk” result possible, where tower can grow indefinitely, as long as does so in small (e.g.) 10% increments?
Many cases can be easily resolved, due to general local preference for collocations

Compromises possible until dust (Constitutional, statutory construction) settles

  E.g. - - Go forward with local proceeding, both parties reserving rights under 6409(a)

    City to rescind for unconstitutionality

    Provider to compel automatic approval

Municipalities should raise, preserve Constitutional claims in all events
Section 6409(a) - - Practical (cont’d)

- Are in very early days of implementation of Section 6409(a)
  - As of late July, 2012 no reported decisions yet on Westlaw, although motions citing 6409(a) have been filed in some pending cases.
- Be alert to preceding issues, concerns
  - Many cases likely can be easily resolved, due to local preference for collocations in many cases
- Be on lookout for FCC, court cases interpreting Section 6409(a)
Conclusion

- Comply with both state law and Federal law on cell tower zoning, to extent possible
- Be alert to Section 6409(a) claims, shot clocks and Section 704’s procedural limitations (typically not present in local law), e.g.
  - Written decision on written record
  - Frequent Federal remedy of approval, not remand
- Level the playing field
  - Cell tower zoning involves technical, Federal legal issues which most municipalities are not familiar with
  - Municipalities should obtain technical, legal assistance, especially if it can be done at provider expense