



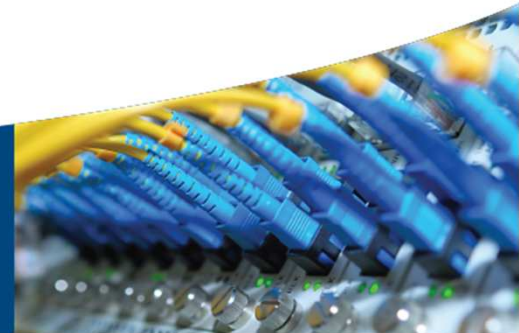
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FCC Wireless Rulemaking - 2013

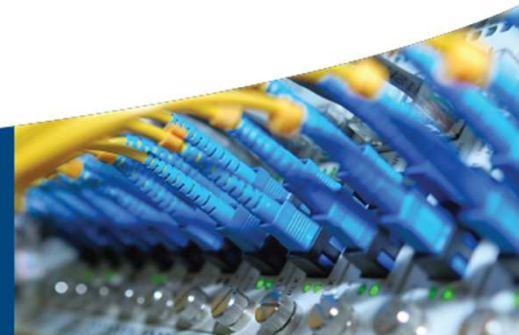
International Municipal Lawyers Association
September 30, 2013

PRESENTED BY
Joseph Van Eaton
Partner



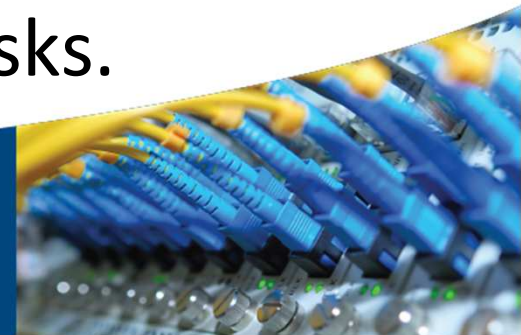
FCC Has Commenced New Rulemaking on Wireless

- Rulemaking issued Thursday, Sept. 26; 60-day initial comment period after Fed. Reg. publication.
- Local authority is at risk:
 - Basic assumptions underlying many local ordinances, that locality can grant a permit that limits the size of wireless facilities, is at risk.
 - Rulemaking also threatens ability to prevent harm to environmentally sensitive areas, as well as historically significant areas.
 - Industry will make a significant effort to limit local authority.
 - Localities will need to participate to protect their interests.



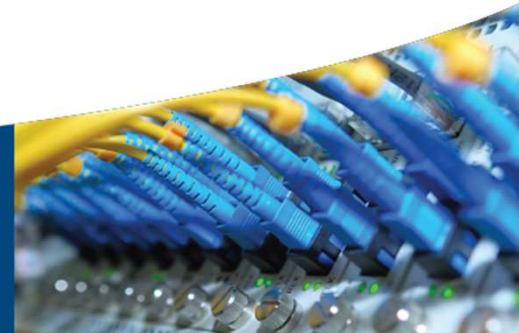
Background: Underlying Federal Laws

- 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 provision of service;
 - locality does not unreasonably discriminate against functionally equivalent services;
 - locality acts on an application within a reasonable period of time;
 - makes a decision in writing; and
 - the decision is supported by substantial evidence.
- Locality cannot deny based on RF risks.



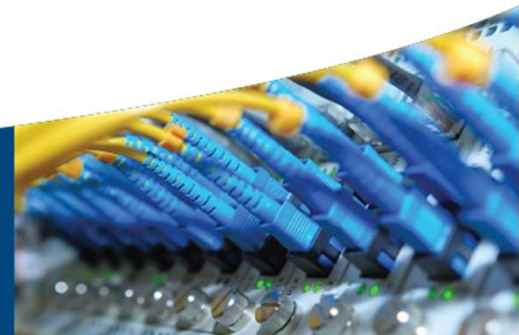
Background (Cont'd)

- 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.



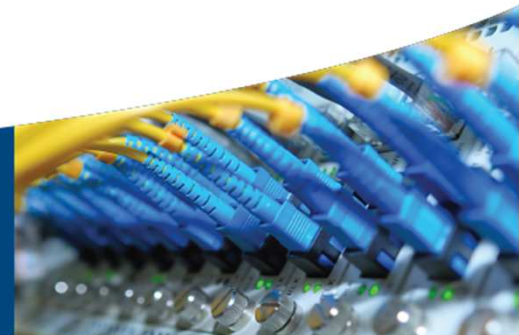
Background (Cont'd)

- **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.



Historic Site – Now

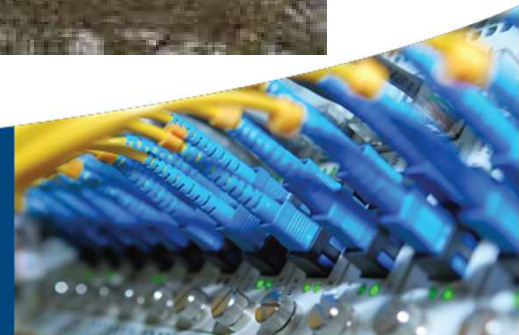
Historic 50'-high silos with approved attachment of six panel antennas painted to match exterior surface to minimize visual impact. Located at Dufief Mill Road and MD Route 28 (Darnestown Road) in Montgomery County, Maryland.



Photos by: Robert P. Hunnicutt, Columbia Telecommunications Corporation



Telecommunications Law

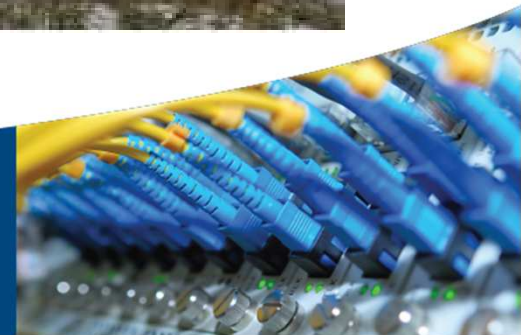


Historic Site – Post Guidance?

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



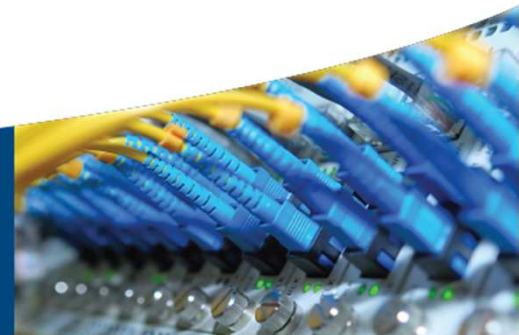
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Historic Site – Now



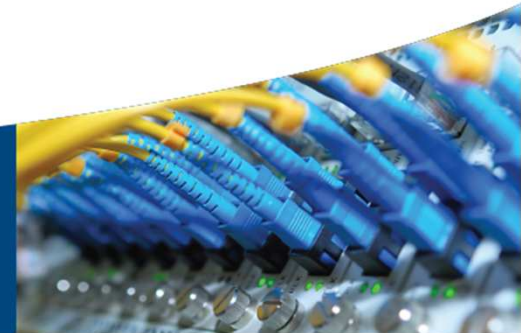
Photo of Simeon T. Toby's Bank Building, Columbia City Historic District, King County, WA. Blue arrows point to current location of cell towers. Building listed on National Registry of Historic Places



Historic Site – Post Guidance?



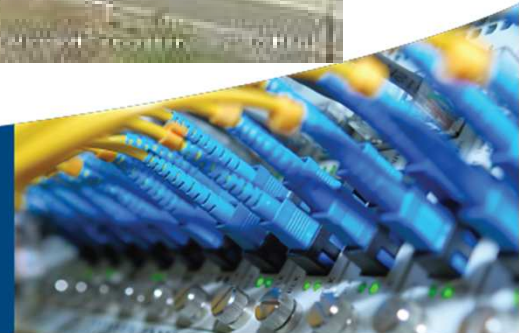
Illustration showing potential impact of co-location using photos of actual rooftop installations



Brickyard Rd. DAS Site – Neighborhood



Photos by: Robert P. Hunnicutt, Columbia Telecommunications Corporation

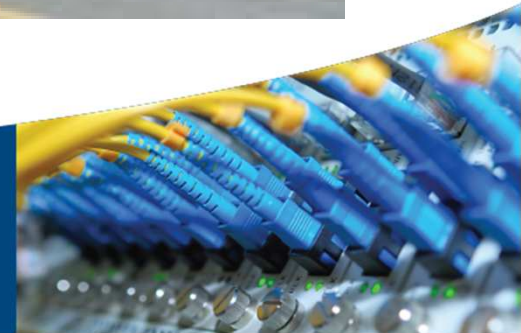


Brickyard Rd. DAS Site – Now

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

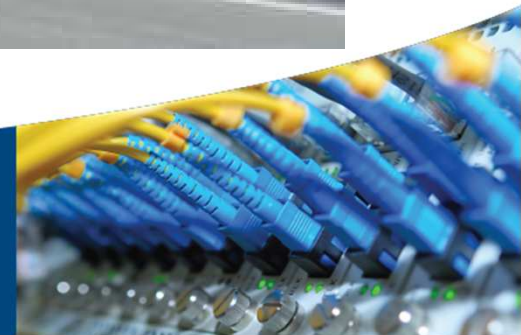


Brickyard Rd. DAS Site – Post Guidance?

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.

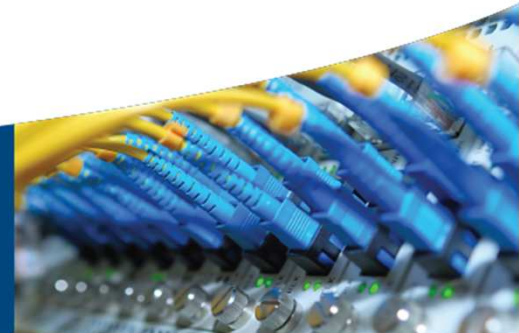


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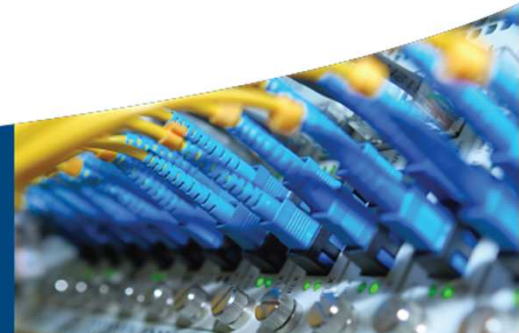
The FCC Rulemaking

- Provides a real opportunity to address the deficiencies in the Guidance.
- Presents a real risk that FCC will exceed authority and undo many state and local laws that protect neighborhoods, the environment and historical areas.
- Importance compounded by industry push to write Guidance into state law.



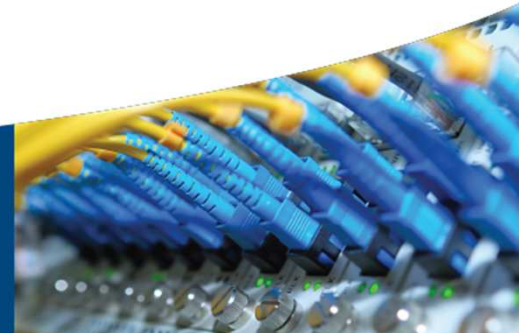
Rulemaking Structure

- *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:
 - 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?



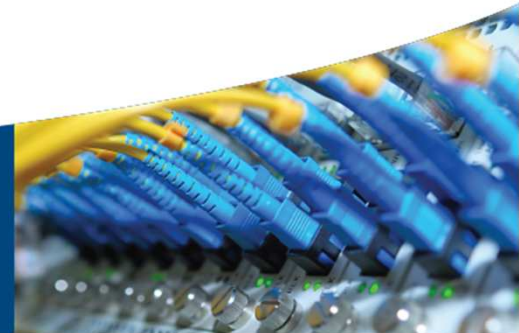
Rulemaking Structure

- Four areas addressed (cont'd)
 - Should FCC exempt temporary antenna structures from fed. review?
 - Should FCC adopt rules re: Section 6409? What rules?
 - 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.



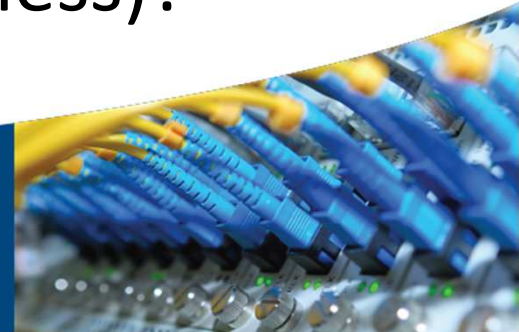
Implementation of Sec. 6409

- 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)?



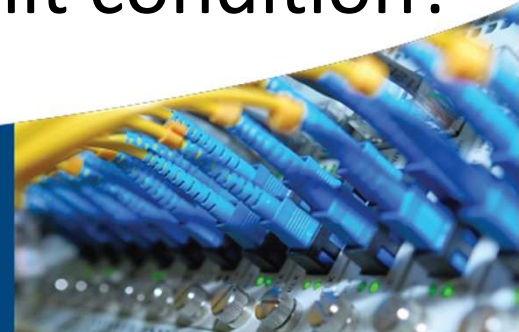
Implementation of Sec. 6409

- 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 services are reached? (tentative conclusion, any licensed or unlicensed wireless service).
- What is an existing tower or base station (must something actually be in use for wireless)?



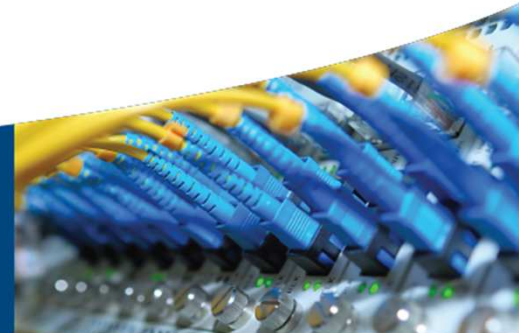
Implementation of Sec. 6409

- 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?



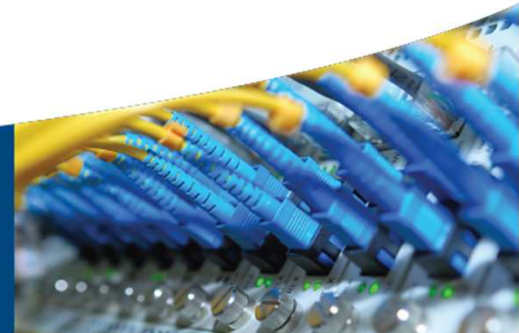
Implementation of Sec. 6409

- 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?



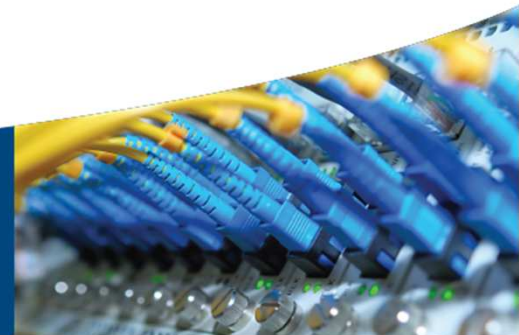
Implementation of Sec. 6409

- 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).



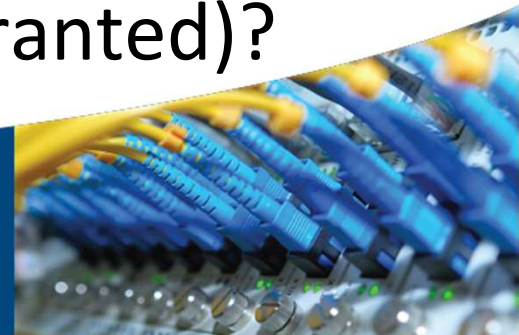
Revisions To Shot Clock (332(c)(7))

- 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”).



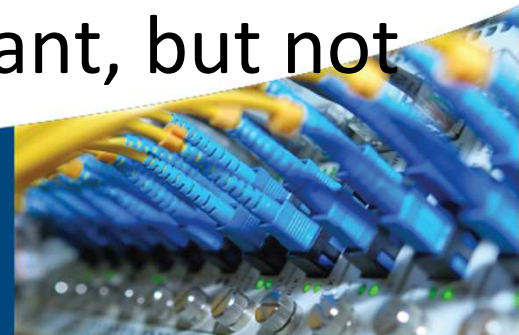
Revisions To Shot Clock (332(c)(7))

- 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)?



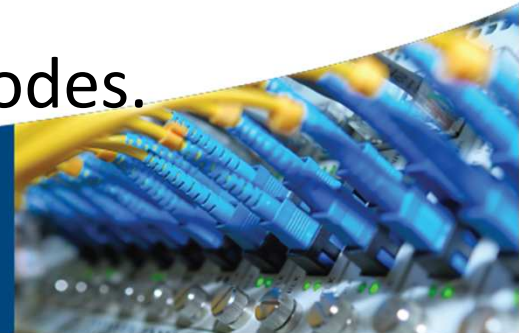
Approaching the NPRM

- NPRM is likely to significantly affect localities.
- NPRM asks the right questions.
- Provides an opportunity to deter state adoption of January FCC Guidance.
- If local governments participate, it could result in fair rules that balance interest in rapid approval of minor mods, and overreaching by providers.
- Participation by national orgs important, but not sufficient.

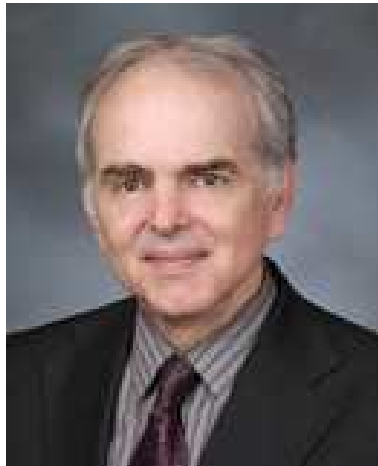


Approaching the NPRM

- Industry can be expected to attack many communities directly.
- For local practitioners:
 - If placement is an issue for your community, you will need to protect their interests through this proceeding.
 - The pending proceeding could affect approach to pending applications.
 - It is likely to require revision of zoning codes.



QUESTIONS?



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