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Section 6409(a) of the Middle Class Tax Relief Act is Unconstitutional

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August 30, 2012

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Section 6409(a) is Unconstitutional

Introduction: In February, 2012, the Middle Class Tax Relief and Job Creation Act of 2012 was enacted. Although commonly thought of as the legislation extending the payroll tax exemption, it contained numerous unrelated provisions, one in particular being Section 6409(a) ("Section 6409(a)" or "the Section") which basically states that states and local governments "shall approve" "modifications" of wireless facilities which do not "substantially change" their physical dimensions.

Section 6409(a)(1) is short and broad. It states that *"Notwithstanding section 704 of the Telecommunications Act of 1996 (Public Law 104–104) or 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."*

The term ‘‘eligible facilities request’’ is defined to mean *"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)(2).

Section 6409(a) in many respects is the latest in a decades-long push by the wireless industry to try to achieve Federal preemption of local zoning. And like many new statutes, Section 6409(a) raises many legal and practical issues. This is particularly the case due to its operating at the intersection of Federal and state relations, thus raising serious Federalism and related Constitutional issues.

Summary: Section 6409(a) will likely be held unconstitutional by the courts, for several reasons. As set forth in more detail below, these are:

1. The limitations on Congress' power under the Commerce Clause of the Constitution, including Congress' regulating "inactivity" in violation of the summer, 2012 U.S. Supreme Court decision generally upholding the Affordable Health Care Act;
2. The Federalism protections of the Tenth Amendment (all powers not given Congress are reserved to the states and people);
3. And perhaps most importantly, cases based on the preceding principles which strike down Federal statutes which "blur the lines of political accountability" by requiring local officials to take actions (and the blame) for which Federal officials are responsible.

The more broadly (and invasively on local powers) that Section 6409(a) is interpreted, the greater the likelihood of a successful Constitutional challenge. Courts are aware of this, and for that reason tend to interpret statutes narrowly so as to avoid Constitutional issues. So at minimum, Constitutional issues as to Section 6409(a) will likely result in it being interpreted narrowly - - certainly more narrowly than the interpretations currently being set forth by the cellular industry.

Until the Constitutional issues are resolved municipalities have several options:

- One is to proceed without reference to the Section (in effect to ignore it, but stating that this is because it is unconstitutional), thus inviting a challenge which would resolve the Constitutional issue.

- Another is to proceed by following Section 6409(a), but reserving all rights (such as to rescind or modify an approval, or require compliance with local law) if it is held unconstitutional.
- A third option is to follow Section 6409(a), but discontinue this if it is struck down.
- Finally, adopting local ordinances which implement Section 6409(a) has the advantage of providing some temporary clarity about a poorly drafted statute, but with the risks that (1) any reasonable municipal interpretation is unlikely to be acceptable to the cellular industry, and (2) the ordinance probably would need modification from time to time to keep up with FCC and court decisions interpreting Section 6409(a), and (3) the municipality may well lose the ability to challenge Section 6409(a) unless that is preserved by careful ordinance wording.

Constitutional Analysis: The constitutionality of Section 6409(a) is questionable under the Commerce Clause and Tenth Amendment of the U.S. Constitution. These provide in turn that "The Congress shall have the power: . . . (3) To regulate commerce with foreign nations, and among the several states, and with the Indian tribes," U.S. Const. Art. I, Section 8, and that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. Amend. X.

Recent U.S. Supreme Court cases have interpreted the 10th Amendment - - and the Commerce Clause - - in favor of states, municipalities and our "dual system of governance" so as to strike down Federal statutes which improperly intrude on state and local rights and authority. See, e.g. Solid Waste Agency of Northern Cook County v. Army Corps of Engineers, 531 U. S. 159, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001) ("SWANCC") (as discussed below, construing Federal Clean Water Act so as not to preempt state and local authority because statute would likely be unconstitutional if so construed); Gregory v. Ashcroft, 501 U.S. 452, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991); New York v. United States, 505 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992) ("New York") (invalidating the Low-Level Radioactive Waste Policy Act); U.S. v. Lopez, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995) (invalidating the Federal Gun Free School Zones Act); Printz v. U.S., 521 U.S. 898, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997) ("Printz") (invalidating portions of the Brady Handgun Violence Prevention Act).

One of the most relevant principles is that "[T]he Federal Government may not compel the States to enact or administer a federal regulatory program," New York, 505 U.S. at 188, due to the blurring of lines of political accountability that result. Section 6409(a) falls squarely afoul of this principle.

In language that could have been written with Section 6409(a) specifically in mind, the U. S. Supreme court has ruled that:

> "[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished . . . . . [W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation." New York at 168-169 (citations omitted).

As is obvious, the direction in Section 6409(a) that "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" falls squarely within the type of impermissibly "coercive" conduct prohibited by New York.

More generally in the Federalism context, and determining the proper spheres of local and Federal authority, the courts resist attempts by the Federal government to usurp the general police powers traditionally reserved to the states. The tend to recognize zoning as a matter of particularly local concern, into which the Federal government is generally restricted from intruding. According to the Supreme Court:

> "As Madison expressed it: '[T]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.'" Printz, 117 S. Ct. at 2377.

Given the broad sweep of Section 6409(a) and its purported attempts to override "any" and all provisions of state and local law, including (apparently) environmental laws as well as building and other safety codes, the courts are likely to reject the section on traditional Federalism grounds.

In these types of cases, the scope of Congress' powers under the Commerce Clause becomes an issue, as was well illustrated in the Supreme Court's health care decision in the summer of 2012. *See* National Federation of Independent Business et al. v. Sebelius, 567 U.S. ____, discussed below.

But first, in its SWANCC decision, the U. S. Supreme Court affirmed that Congress' authority under the Commerce Clause is limited vis-a-vis traditional state and local land use. In SWANCC several municipalities proposed to build a landfill on property which included a wetland. Due to the presence of wetlands the Army Corps of Engineers refused to issue a permit needed under the Clean Water Act for landfills that effect the "waters of the United States."

The U.S. Supreme Court upheld the municipalities' contention that the Corps was acting beyond the reach of Federal jurisdiction, stating that it feared that any other ruling would extend the Corps' jurisdiction far beyond "navigable waters" (a traditional test of Commerce Clause jurisdiction) to farmyard ponds and other isolated pools of water that were not adjacent to open water.

While the Court technically ruled against the government on the basis of rules of statutory construction, it clearly intimated that, were it compelled to do so, it would have significant constitutional concerns about the Corps' efforts to "push the limit of Congressional authority." 531 U.S. at 173. Its concern, said the Court, "is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." Id., citing United States v. Bass, 404 U.S. 336 at 349, 30 L Ed. 2d 488, 92 S. Ct. 515 (1971) ("Unless Congress conveys its purposes clearly, it will not be deemed to significantly change the federal-state balance"). The Court concluded that there was "nothing approaching a clear sign from Congress" that it intended federal power to reach so invasively into the area of land use regulation. To rule in favor of the Corps, said the Court, "would result in a significant impingement of the states' traditional and primary control over land and water use." Id. at 174 (emphasis supplied).

The SWANCC decision is part of a trend to apply a much more restrictive construction to the Commerce Clause and thus restrict the powers of the Federal government. See, e.g. U.S. v. Lopez, supra (Federal Gun Free School Zones Act invalidated as exceeding Federal power under the Commerce Clause); Printz v. U.S., supra (invalidating portions of Brady Handgun Violence Prevention Act); U.S. v. Morrison, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000) (portion of Federal Violence Against Women Act providing Federal civil remedy for certain gender-based assaults exceeded Federal authority under Commerce Clause and Fourteenth Amendment).

And, most recently and notably, Section 6409(a) is questionable under the Supreme Court's recent narrowing of the Commerce Clause in its decision upholding (on other grounds) the Patient Protection and Affordable Care Act, notably by striking Congress' attempt to use that clause to regulate "inactivity" (the failure to purchase health insurance).

> "People, for reasons of their own, often fail to do things that would be good for them or good for society. Those failures—joined with the similar failures of others—can readily have a substantial effect on interstate commerce. Under the Government's logic, that authorizes Congress to use its commerce power to compel citizens to act as the Government would have them act.
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> "That is not the country the Framers of our Constitution envisioned." National Federation of Independent Business et al. v. Sebelius, 567 U.S. ____, slip opinion at 23, (opinion of Chief Justice Roberts) (2012).

State and local governments can easily argue that Section 6409(a) falls within the preceding, because it compels activity (the approval of modifications of wireless facilities) which might not otherwise occur, viz. "a State or local government may not deny, and shall approve" eligible facilities requests for modification. Providers will likely argue that as to zoning and regulatory practices, they are activities which are already occurring.

Conclusion: The courts will likely hold Section 6409(a) unconstitutional on Federalism, Commerce Clause and "blurring the lines of political accountability" grounds. Municipalities may wish to be careful to preserve their rights, should this occur.