

REGULATION OF WIRELESS TOWERS

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Introduction

- Telecommunications Act of 1996: 47 U.S.C. § 332 (c) (7)
 - 2009 FCC Declaratory Ruling
 - "Shot-Clock"
- Middle Class Tax Relief and Job Creation Act: 2012
 - 2014 FCC Report and Order
 - Mandatory approval in for minor amendments



Section 6409(a)

Section 6409(a) (codified at 47 U.S.C. 1455(a)):

(a) Facility modifications

(1) In general

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.



Section 6409(a)

(2) Eligible facilities request

For purposes of this subsection, the term "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.

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Section 6409(a)

Existing Wireless Tower or Base Station

- Tower: any structure built for the sole or primary purpose of supporting any FCC-licensed or authorized antennas and their associated facilities.
- Base Station: includes not only the equipment that communicates with user equipment, but also the "structure" that supports or houses that equipment.
- Must have been previously approved under the applicable zoning or siting process or have received another form of affirmative state or local regulatory approval.

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Substantially Change the Physical Dimensions

- Objective Test:
 - Height
 - Width
 - Cabinets
 - Excavation
 - Stealth
 - Noncompliance



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- Height:
 - More than 10% or one additional antenna array not more than 20 feet higher
 - Private property
 - More than 10% or 10 feet (whichever is greater)
 - Public rights-of-way and all base stations
 - Measured from the structure originally approved or from the last approved modification prior to the adoption of 6409(a) in February of 2012.
 - Cumulative limit



Section 6409(a)

- Width:
 - More than 20 feet or more than the width of the tower structure at the level of the appurtenance (whichever is greater).
 - Private property
 - More than 6 feet
 - Public rights-of-way and all base stations



Section 6409(a)

- Cabinets
 - Request involves more than the "standard number of new equipment cabinets for the technology involved." (More than 4 cabinets = substantial change).
 - Private property
 - If no preexisting ground cabinets: any addition of ground cabinet is a substantial change.
 - If preexisting ground cabinets: substantial change if new cabinet(s) exceed 10% of the height or volume of the existing cabinets.
 - In rights-of-way and all base stations



Section 6409(a)

- Excavation
 - Excavation or deployment outside the current site of the tower or base station.
 - Outside the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site for towers.
 - Private property
 - Outside the area in proximity to the structure already deployed on the ground for towers.
 - Public rights-of-way

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TOWER OVERSIGHT AND SUSTAINABLE EVALUATION

Section 6409(a)

- Stealth
 - Defeat the existing concealment elements of the tower or base station.
 - Even if requested change does not alter the dimensions at all, it could still violate concealment requirements.
 - Example, failure to paint the new equipment to match the old equipment.

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TOWER OVERSIGHT AND SUSTAINABLE EVALUATION

Section 6409(a)

- Noncompliance
 - Violate a prior condition of approval that does not conflict with FCC standards for substantial change.
 - Example: requested change would violate lawfully enacted city regulations related to parking space allocations, site maintenance, site access, lighting, fencing, drainage, insurance, indemnification, signage, and landscaping.

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TOWER OVERSIGHT AND SUSTAINABLE EVALUATION

City Process

- Change policies, ordinances, or processes to memorialize the city's effort to comply with 6409(a).
- Example ordinance language contemplates an application process and mandates approval of requests that meet the standards of 6409(a).



City Process

- Application
 - Only include information reasonably related to determining whether request falls under 6409(a).
 - May not require documentation proving the business need for the modification.
 - Should include questions tailored to determine whether the request qualifies for mandatory granting under 6409(a).
 - Should include specific instructions for completion and process for city review.



City Process

- Suggested Application Information:
 - Questions designed to determine whether the applicant holds a valid property interest in the site.
 - Request for documentation designed to determine or confirm what property interest the applicant holds in the site.
 - Questions designed to determine whether the structure meets the definition of an existing wireless tower or base station.



City Process

- Suggested Application Information:
 - Questions designed to determine whether the request qualifies as an eligible facilities request.
 - Questions designed to determine whether the request will cause a substantial change in the physical dimensions of the site.
 - Questions or request for documentation related to the specific scope of the change requested.



City Process

- Be able to articulate the relationship between the question asked or information requested and the specific issue within Section 6409 to which that question relates.
- Keep these justifications handy to defend yourself if a provider challenges the application process as being too burdensome and thus preempted under Section 6409.



Timeliness of Review

- Deemed granted if not acted on within **60 days**.
- 60 days may be tolled:
 - by agreement between city and provider/applicant; or
 - by notification to applicant that the information required to be included with or in the application is incomplete.



Timeliness of Review

- Incomplete Notices:
 - CITY MUST CITE ALL INCOMPLETE ASPECTS OF AN APPLICATION IN THE FIRST INCOMPLETE NOTICE OR FORFEIT THE CHANCE TO TOLL THE 60 DAY DEADLINE.
 - The first incomplete notice must cite to an application defect in some "code provision, ordinance, application instruction or otherwise publically stated procedure."

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Timeliness of Review

- Applicant has the opportunity to respond to city's first incomplete notice.
- If after applicant response the application is still incomplete, the city must send a second incomplete notice within 10 days of applicant's response.
- City cannot deem an application incomplete for a reason not cited in the first notice.

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Timeliness of Review

- Applicant must notify the city of the deemed grant in writing if the city fails to act within 60 days and the deadline is not tolled.
- City can challenge within 30 days in a court of competent jurisdiction (local federal district courts).

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Conditional Approval of a 6409 Request

- City "may continue to enforce and condition approval on compliance with generally applicable building, structural, electrical, and safety codes and with other laws codifying objective standards reasonably related to health and safety."
- For example: conditions on parking space allocations, site maintenance, site access, lighting, fencing, drainage, compliance with all laws, insurance, indemnification, collocation, signage, and landscaping.



Antennas on City Owned Facilities

- Section 6409(a) does not apply when a city acts in a proprietary capacity.
- If city enters into a lease agreement to allow a provider to place antennas on a water tower, the city may regulate those facilities pursuant to its capacity as a landowner.
- No requirement to grant approval of any change (substantial or otherwise) to a site located on city property.



It's not all bad news...

- A complete overhaul of wireless regulations is not required.
- Only preempted from denying an amendment to an existing wireless tower or base station if the requested amendment does not substantially change the physical dimensions of what was already approved.
- Still permitted to regulate new sites and any requested change that is considered to be a substantial change as the city sees fit.






