



Wireless Facility Siting: Model Chapter Implementing Section 6409(a) and

Wireless Facility Siting: Section 6409(a) Checklist

Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 mandates that a State or local government approve certain wireless broadband facilities siting requests for modifications and collocations of wireless transmission equipment on an existing tower or base station that does not result in a substantial change to the physical dimensions of such tower or base station. In October 2014, the Federal Communications Commission unanimously approved rules interpreting Section 6409(a).

In an effort to assist jurisdictions with limited resources to comply with the new rules, wireless industry associations PCIA and CTIA affirmatively committed to working with local government associations – the National League of Cities, the National Association of Counties, and the National Association of Telecommunications Officers and Advisors – to: 1) develop a model ordinance and application for reviewing eligible facilities requests under Section 6409(a); 2) distribute wireless siting best practices; 3) create a checklist that local government officials can use to help streamline the review process; and 4) hold webinars regarding the application process.

As we have made clear, neither the model ordinance nor checklist is intended to provide legal advice; we strongly encourage jurisdictions to consult with an attorney on legal matters. Further, neither the model ordinance nor checklist imposes any legal obligation whatsoever on any jurisdiction. These documents are meant only to provide a framework that jurisdictions may voluntarily use to determine if their current wireless siting review process complies with the FCC's new rules.

The FCC rules do not require jurisdictions to use or adopt these documents. Some localities may need to revise their existing local laws to the extent that they conflict with the new rules. Some localities with consistent local laws or no laws that regulate wireless deployments may not need to take any legislative action for compliance.

Some may view the model ordinance and checklist as overly broad or too narrow in scope. The presence or absence of any provision or item should not be seen as either an express endorsement or rejection of the provision or item. Again, these documents are not intended to provide legal advice.

Legal or regulatory action challenging the FCC's rules may be taken. In the event any such efforts result in a change in the rules, we will notify our members of such via websites, publications, and all other appropriate means.

Finally, if your jurisdiction has an ordinance or checklist implementing Section 6409(a) and the FCC's rules, please send it to Julia Pulidindi at: Pulidindi@nlc.org. We will make these materials available to our members. In addition, in preparation for the development of *voluntary* wireless broadband facilities siting best practices, we encourage you to share your experiences in dealing with the new rules with us. Tell us what works, what doesn't, and how the process could be made better.

Wireless Facility Siting: Model Chapter Implementing Section 6409(a)

Note: Use of this model chapter is voluntary. It is meant to provide a framework for those jurisdictions needing assistance in complying with Federal timeframes to act on Eligible Facilities Requests for modifications to existing wireless towers or base stations that do not substantially change the physical dimensions of such towers or base stations. This document is not intended to provide legal guidance; jurisdictions are encouraged to consult an attorney on legal matters. This document's authors hereby waive all copyright and related or neighboring rights together with all associated claims and causes of action with respect to this work to the extent possible under the law.

I. PURPOSE

This Chapter implements Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 ("Spectrum Act"),¹ as interpreted by the Federal Communications Commission's ("FCC" or "Commission") Acceleration of Broadband Deployment Report & Order,² which requires a state or local government to approve any Eligible Facilities Request for a modification of an existing tower or base station that does not result in a substantial change to the physical dimensions of such tower or base station.

II. DEFINITIONS³

For the purposes of this Chapter, the terms used have the following meanings:⁴

- a. *Base Station*. A structure or equipment at a fixed location that enables FCC-licensed or authorized wireless communications between user equipment and a communications network. The term does not encompass a tower as defined herein or any equipment associated with a tower. Base Station includes, without limitation:
 - i. Equipment associated with wireless communications services such as private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul.
 - ii. Radio transceivers, antennas, coaxial or fiber-optic cable, regular and backup power supplies, and comparable equipment, regardless of technological configuration (including Distributed Antenna Systems ("DAS") and small-cell networks).

¹ Middle Class Tax Relief and Job Creation Act of 2012, 112 Pub. L. 96, *codified at* 47 U.S.C. 1455.

² Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, *Report and Order*, 29 FCC Rcd 12865 (2014) ("2014 Infrastructure Order").

³ These definitions were adapted from the FCC's own definitions. *See generally* 47 CFR § 1.40001(b). For a discussion of these definitions, see 2014 Infrastructure Order ¶¶ 145-204.

⁴ A jurisdiction may wish to incorporate these definitions, which are specific to Section 6409(a), into its wireless facilities ordinance more broadly; alternatively, these can be stand-alone definitions solely for Eligible Facilities Requests under Section 6409(a).

- iii. Any structure other than a tower that, at the time the relevant application is filed with [jurisdiction] under this section, supports or houses equipment described in paragraphs (a)(i)-(a)(ii) that has been reviewed and approved under the applicable zoning or siting process, or under another State or local regulatory review process, even if the structure was not built for the sole or primary purpose of providing that support.

The term does not include any structure that, at the time the relevant application is filed with [jurisdiction] under this section, does not support or house equipment described in (a)(i)-(ii) of this section.

- b. *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.
- c. *Eligible Facilities Request.* Any request for modification of an existing tower or base station that does not substantially change the physical dimensions of such tower or base station, involving:
 - i. Collocation of new transmission equipment;
 - ii. Removal of transmission equipment; or
 - iii. Replacement of transmission equipment.
- d. *Eligible support structure.* Any tower or base station as defined in this section, provided that it is existing at the time the relevant application is filed with [jurisdiction] under this section.
- e. *Existing.* A constructed tower or base station is existing for purposes of this section if it has been reviewed and approved under the applicable zoning or siting process, or under another State or local regulatory review process, provided that a tower that has not been reviewed and reviewed because it was not in a zoned area when it was built, but was lawfully constructed, is existing for purposes of this section.
- f. *Site.* For towers other than towers in the public rights-of-way, the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site, and, for other eligible support structures, further restricted t that area in proximity to the structure and to other transmission equipment already deployed on the ground.
- g. *Substantial Change.* A modification substantially changes the physical dimensions of an eligible support structure if it meets any of the following criteria:
 - i. For towers other than towers in the public rights-of-way, it increases the height of the tower 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, whichever is greater; for other eligible support structures, it increases the height of the structure by more than 10% or more than ten feet, whichever is greater;⁵

⁵ Changes in height should be measured from the original support structure in cases where deployments are or will be separated horizontally, such as on buildings' rooftops; in other circumstances, changes in height should be measured from the dimensions of the tower or base station, inclusive of originally approved

- ii. For towers other than towers in the public rights-of-way, it involves adding an appurtenance to the body of the tower that would protrude from the edge of the tower more than twenty feet, or more than the width of the Tower structure at the level of the appurtenance, whichever is greater; for other eligible support structures, it involves adding an appurtenance to the body of the structure that would protrude from the edge of the structure by more than six feet;
 - iii. For any eligible support structure, it involves installation of more than the standard number of new equipment cabinets for the technology involved, but not to exceed four cabinets; or, for towers in the public rights-of-way and base stations, it involves installation of any new equipment cabinets on the ground if there are no pre-existing ground cabinets associated with the structure, or else involves installation of ground cabinets that are more than 10% larger in height or overall volume than any other ground cabinets associated with the structure;
 - iv. It entails any excavation or deployment outside the current site;
 - v. It would defeat the concealment elements of the eligible support structure; or
 - vi. It does not comply with conditions associated with the siting approval of the construction or modification of the eligible support structure or base station equipment, provided however that this limitation does not apply to any modification that is non-compliant only in a manner that would not exceed the thresholds identified in paragraphs (g)(i)-(g)(iv) of this section.⁶
- h. *Transmission Equipment.* Equipment that facilitates transmission for any FCC-licensed or authorized wireless communication service, including, but not limited to, radio transceivers, antennas, coaxial or fiber-optic cable, and regular and backup power supply. The term includes equipment associated with wireless communications services including, but not limited to, private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul.
- i. *Tower.* Any structure built for the sole or primary purpose of supporting any FCC-licensed or authorized antennas and their associated facilities, including structures that are constructed for wireless communications services including, but not limited to, private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul, and the associated site.

appurtenances and any modifications that were approved prior to the passage of the Spectrum Act. 47 CFR § 1.40001(b)(7)(i)(A).

⁶ See 2014 Infrastructure Order ¶ 200. This section identifies the limited number of prior conditions of site approval that may not be used to determine whether a modification qualifies as a substantial change. *Id.*

III. APPLICATION REVIEW⁷

- a. *Application.* [Jurisdiction] shall prepare and make publicly available an application form which shall be limited to the information necessary for [jurisdiction] to consider whether an application is an Eligible Facilities Request. The application may not require the applicant to demonstrate a need or business case for the proposed modification.
- b. *Type of Review.* Upon receipt of an application for an Eligible Facilities Request pursuant to this Chapter, [identify appropriate department– e.g., Public Works, Planning] shall review such application to determine whether the application so qualifies.⁸
- c. *Timeframe for Review.* Within 60 days of the date on which an applicant submits an application seeking approval under this Chapter, [jurisdiction] shall approve the application unless it determines that the application is not covered by this Chapter.
- d. *Tolling of the Timeframe for Review.* The 60-day review period begins to run when the application is filed, and may be tolled only by mutual agreement by [jurisdiction] and the applicant, or in cases where [jurisdiction’s reviewing body] determines that the application is incomplete. The timeframe for review is not tolled by a moratorium on the review of applications.
 - i. To toll the timeframe for incompleteness, [jurisdiction] must provide written notice to the applicant within 30 days of receipt of the application, specifically delineating all missing documents or information required in the application.
 - ii. The timeframe for review begins running again when the applicant makes a supplemental submission in response to [jurisdiction’s] notice of incompleteness.
 - iii. Following a supplemental submission, [jurisdiction] will notify the applicant within 10 days that the supplemental submission did not provide the information identified in the original notice delineating missing information. The timeframe is tolled in the case of second or subsequent notices pursuant to the procedures identified in paragraph (d) of this section. Second or subsequent notices of incompleteness may not specify missing documents or information that were not delineated in the original notice of incompleteness.
- e. *Interaction with Section 332(c)(7).*⁹ If [jurisdiction] determines that the applicant’s request is not covered by Section 6409(a) as delineated under this Chapter, the

⁷ This section was adapted from the FCC’s rules. *See generally* 47 CFR § 1.40001(c). For a discussion of application review processes, see 2014 Infrastructure Order ¶¶ 205-236.

⁸ The jurisdiction may wish to review whether existing processes meet the requirements of the 2014 Infrastructure Order. *See, e.g.,* 47 CFR § 1.40001(c)(1); 2014 Infrastructure Order ¶ 214.

⁹ *See* 47 U.S.C. § 332(c)(7); *In re* Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, *Declaratory Ruling*, 24 FCC Rcd 13994 (2009) (“Shot Clock Ruling”), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-99A1_Rcd.pdf.

presumptively reasonable timeframe under Section 332(c)(7), as prescribed by the FCC's Shot Clock order, will begin to run from the issuance of [jurisdiction's] decision that the application is not a covered request. To the extent such information is necessary, [jurisdiction] may request additional information from the applicant to evaluate the application under Section 332(c)(7)¹⁰, pursuant to the limitations applicable to other Section 332(c)(7) reviews.¹¹

- f. *Failure to Act.* In the event [jurisdiction] fails to approve or deny a request seeking approval under this Chapter within the timeframe for review (accounting for any tolling), the request shall be deemed granted. The deemed grant does not become effective until the applicant notifies the applicable reviewing authority in writing after the review period has expired (accounting for any tolling) that the application has been deemed granted.
- g. *Remedies.* Applicants and [jurisdiction] may bring claims related to Section 6409(a) to any court of competent jurisdiction.

¹⁰ See 2014 Infrastructure Order ¶ 220. For example, an applicant may submit a request for review under Section 6409(a) asserting the modification does not substantially change the physical dimensions of the facility, when in fact the application proposes a substantial change and is therefore not covered under Section 6409(a). See *id.*

¹¹ See 2014 Infrastructure Order ¶¶ 258-260 (prescribing limits on application review and tolling for applications under Section 332(c)(7)).

Wireless Facility Siting: Section 6409(a) Checklist

Note: Use of this checklist is voluntary. It is meant to provide a framework for those jurisdictions needing assistance in complying with Federal timeframes to act on Eligible Facilities Requests for modifications to existing wireless towers or base stations that do not substantially change the physical dimensions of such towers or base stations. This document is not intended to provide legal guidance; jurisdictions are encouraged to consult an attorney on legal matters. This document's authors hereby waive all copyright and related or neighboring rights together with all associated claims and causes of action with respect to this work to the extent possible under the law.

Section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012, 47 U.S.C. § 1455(a), reads in pertinent part:

“...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.” (emphasis added).

Initial Application Review

- A jurisdiction should contemplate three types of wireless facility applications:
 - o Collocation or modification that is not a substantial change (“Eligible Facilities Request”);
 - o Collocation or modification that is a substantial change; OR
 - o New facility
- If the application is for a collocation or modification, the documentation provided by the applicant must state whether the collocation or modification is a substantial change. – See Appendix A for definition of “substantial change.”
 - o Note: The FCC has clarified that “collocation” includes the first placement of transmission equipment on a wireless tower or base station.¹
- Appropriate application fee should be in place, if applicable.
- Check application for completeness
 - o Note: Must notify applicant in writing of incomplete application **within 30 days** of submission. This tolls the clock (i.e. stops 60 day deadline from running) provided it identifies the specific material missing from the application and cites the basis for requiring the submission of such material. Once applicant submits supplemental materials, the clock again may be tolled if the state or local government notifies applicant in writing **within 10 days** that supplemental submission is also incomplete. If the application is deemed incomplete, the written notice must specify

¹ See 2014 Infrastructure Order ¶ 179.

the missing information and the code, provision, ordinance, application instruction or other publically-stated procedures that requires the information.

Site/Attachment Information

- Summary of site location (address) and ownership of structure to which collocation or modification applies
 - o Examine: Ownership of support structure, dimensions of support structure prior to collocation (to measure whether collocation or modification would constitute a “substantial change”)
 - o Property boundaries, setbacks, elevation and dimensions of collocation or modification project
- Summary and scope of work to be completed on site
- Changes to current site
 - o Examine: Will collocation or modification defeat the effect of existing concealment elements? Concealment elements include, but are not limited to, artificial tree branches or painting to match a supporting façade.²

Equipment Specifications

- Equipment type
- Equipment specifications (Example: dimensions and weight)
- Installation status: E.g., removing, updating, collocating
- Equipment mount type
- FCC antenna structure registration number (if applicable)
- Will collocation equipment require lighting?

Compliance with Federal, State and Local Ordinances and Codes

- Conformance with local zoning and building and safety codes should be reviewed by the jurisdiction’s building or planning department
 - o Examine: E.g., setback requirements, electrical power safety, wind resistance safety
 - o Ensure that facility was lawfully constructed
- Post-installation maintenance schedule
- Any required certifications
 - o Example: Applicant will comply with all applicable federal, state, and local building codes supported by structural analysis

Legal

- Ensure jurisdiction’s applicable insurance/surety bond/other financial requirements are satisfied for installation

² See 2014 Infrastructure Order ¶ 200.

Contact Information

- Primary and secondary contact information for wireless facility project coordinators (local government and industry)
- Emergency contact information in case of tower/collocation disruption

Timeframe³

- Within 60 days of the application filing, accounting for tolling, a state or local government shall approve the application if covered by Section 6409(a).
- Tolling period may commence by (1) mutual agreement, or (2) upon written notice to applicant that application is incomplete within the first 30 days following an application submission, as long as notice identifies the missing information, as well as the code provision, ordinance, or application instruction that requires the submission of the information.
- Local jurisdictions have 10 days to notify the applicant that the supplemental submission (after notification of incomplete application) did not provide the information identified in the original notice that specified the missing information.
- The failure to approve an application within the time for action will result in a deemed grant of the application.
 - o A state or local authority may challenge an applicant's written assertion of a deemed grant in any court of competent jurisdiction when it believes the underlying application did not meet the criteria in Section 6409(a) for mandatory approval, would not comply with applicable building codes or other non-discretionary structural and safety codes, or for other reasons is not appropriately "deemed granted."

³ All provisions of the rule implementing Section 6409(a), as stated in the 2014 Infrastructure Order and 47 CFR § 1.40001 ("Wireless Facilities Modifications") became effective May 18, 2015.

APPENDIX A

How does the FCC define “substantial change”?

The FCC has determined that a modification substantially changes the physical dimension of a wireless tower or base station if it meets ANY of the following criteria:

- ❖ Towers outside public rights of way⁴
 - Increases height by more than 20 feet or 10 percent, whichever is greater;
 - Protrudes from edge of tower more than 20 feet or more than the width of the tower structure at the level of the appurtenance, whichever is greater;

- ❖ Towers in public rights of way and for all base stations
 - Increases height of tower or base station by more than 10 percent or 10 feet, whichever is greater;
 - Protrudes from the edge of the structure more than 6 feet;

- ❖ Involves installation of more than the standard number of new equipment cabinets for the technology involved, but not to exceed four cabinets;

- ❖ Entails any excavation or deployment outside the current site of the tower or base station;

- ❖ Would defeat existing concealment elements of the tower or base station; or

- ❖ Does not comply with conditions associated with the prior approval of the tower or base station unless non-compliance is due to an increase in height, increase in width, addition of cabinets, or new excavation that does not exceed the corresponding “substantial change” thresholds.

⁴ Section 6409(a) applies only to state and local governments acting in their role as land use regulators and does not apply to such entities acting in their proprietary capacities, e.g., as owners of support structures or real property. *See* 2014 Infrastructure Order ¶ 239.

APPENDIX B

Application Elements that May Voluntarily be Adopted by Local Jurisdictions

A jurisdiction should review whether existing application processes meet the requirements of the FCC's 2014 Infrastructure Order. A jurisdiction may consider including the following elements in its application form for an Eligible Facilities Request:

1. Applicant's certification that they have the legal authority to collocate/modify support structure which may include approvals from the jurisdiction authorizing the initial placement of transmission equipment on the tower or other structure.
2. The identity of the owner of the parcel.
3. Detailed site plan. Except where the facility will be located entirely within an existing structure or an existing building, a detailed site plan should show:
 - (a) Existing and proposed improvements. The location and dimensions of the existing facility and the maximum height above ground of the facility (also identified in height above sea level).
 - (b) Elevation. The benchmarks and datum used for elevations.
 - (c) Design. The design of the facility, including the specific type of support structure and the design, type, location, size, height and configuration of applicant's existing and proposed antennas and other equipment. The method(s) by which the antennas will be attached to the mounting structure should be depicted.
 - (d) All existing setbacks.
 - (e) Location of accessways. The location of all existing accessways and the location and design of all proposed accessways.