

Streamlined Wireless Facilities Deployment:

Federal Regulation in the Middle Class Tax Relief and Job Creation Act of 2012

Section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012 mandates that state and local governments must approve an eligible facilities request for the modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station. The Act was signed into law February 22, 2012. The section mandating streamlined modification and collocation approval ensures the timely deployment of wireless services.

Section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012ⁱ

(a) Facility Modification.—

(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.

(2) Eligible facilities request.—For purposes 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.

(3) Applicability of environmental laws.—nothing in paragraph (1) shall be construed to relieve the Commission from the requirements of the National Historic Preservation Act or the National Environmental Policy Act of 1969.

The Act applies to eligible facilities requests for modification of existing wireless towers and base stations:

- ☞ The Act defines “eligible facilities request” as any request for modification of an existing wireless tower or base station that involves:
 - Collocation of new transmission equipment;
 - Removal of transmission equipment; or
 - Replacement of transmission equipment.
- ☞ The Federal Communications Commission (“FCC”) defines “collocation” as “the mounting or installation of an antenna on an existing tower, building or structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes.”ⁱⁱ
- ☞ The FCC defines a “substantial change” as:
 - The mounting of a proposed antenna on the tower that would increase the existing 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, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to avoid interference with existing antennas; or
 - The mounting of a proposed antenna that would involve 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, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to shelter the antenna from inclement weather or to connect the antenna to the tower via cable.ⁱⁱⁱ
- ☞ The FCC defines a “tower” as “any structure built for the sole or primary purpose of supporting FCC-licensed antennas and their associated facilities.”^{iv}
- ☞ The federal regulations define a “base station” as “[a] station at a specified site authorized to communicate with mobile stations;” or “[a] land station in the land mobile service.”^v

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Federal Regulation of Wireless Siting in the Middle Class Tax Relief and Job Creation Act of 2012, cont.

The Act requires approval for all eligible facilities requests that do not substantially change the physical dimensions of such tower or base station and:

- ☞ Applies despite section 704 of the Telecommunications Act of 1996, which preserves the authority of a state or local government or instrumentality thereof over decisions regarding the placement, construction, and *modification* of personal wireless service facilities;^{vi}
- ☞ Preempts zoning review and conditional approvals of eligible facilities requests;^{vii}
- ☞ Requires eligible facilities requests only be subject to administrative review processes and not discretionary review processes that allow a state or local government to deny or condition an eligible facilities request.
- ☞ Requires that eligible facilities requests for the modification of legal, non-conforming towers must be approved.

The FCC's Wireless Facility Siting "Shot Clock" applies to eligible facilities request for collocation:

- ☞ State and local governments have 90 days to act on an application to collocate wireless facilities on existing structures.^{viii}
- ☞ Under the Act, state and local governments *must* approve within 90 days any eligible facilities requests for collocation or replacement of transmission equipment on existing towers that do not substantially change the physical dimensions of such tower.

ⁱ For the full text of the Act and its legislative history, see Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, §6409 (2012), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr3630enr/pdf/BILLS-112hr3630enr.pdf>; see also H.R. Rep. No. 112-399 at 132-33 (2012) (Conf. Rep.), available at <http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt399/pdf/CRPT-112hrpt399.pdf>.

ⁱⁱ Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (2001), 47 C.F.R. Part I, Appendix B, available at <http://wireless.fcc.gov/releases/da010691a.pdf> ("Collocation Agreement"); see also *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, 14021 ¶ 71 (2009) ("Shot Clock Ruling"), recon. denied, 25 FCC Rcd 11157 (2010), *aff'd*, City of Arlington, Tex., et al. v. FCC, 2012 U.S. App. LEXIS 1252 (5th Cir. 2012), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-99A1_Rcd.pdf.

ⁱⁱⁱ Collocation Agreement.

^{iv} *Id.*

^v See, e.g., 47 C.F.R. §§24.5, 90.7.

^{vi} 47 U.S.C. §332(c)(7)(A). The Telecommunications Act of 1996 defines "personal wireless service facilities" as facilities for the provision of personal wireless services, including commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services. 47 U.S.C. §332(c)(7)(C).

^{vii} See 158 CONG. REC. E237-239 (daily ed. Feb. 24, 2012) (statement of Rep. Upton), available at <http://www.gpo.gov/fdsys/pkg/CREC-2012-02-24/pdf/CREC-2012-02-24-pt1-PgE237-5.pdf>. Zoning review and/or conditional approvals of eligible facilities request can have the effect of denying such requests as a conditional approval is not an approval *per se*; therefore it is a denial and a violation of the Act.

^{viii} *Shot Clock Ruling*.

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