

# FCC Issues New Order for Modifying Telecommunication Sites

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**M**unicipalities that are reviewing requests to modify existing wireless communication facilities now face a strengthened federal mandate for promptly considering and approving these requests.

An October 2014 Federal Communications Commission (FCC) order implements provisions of the 2012 federal Tax Relief Act requiring approval “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.” Municipalities now have only 60 days, subject to certain extensions, to approve such requests once they have received all materials to determine whether the proposed modification is an “eligible facilities request.”

In practice, this means that most requests for collocation of additional wireless equipment on cell towers and base stations must be not only considered by the municipality, but approved within this 60-day period, unless the municipality can identify substantial changes to the existing facility. The new order is the latest sign that the FCC means business with its Broadband Acceleration Initiative’s goal of boosting deployment of towers, distributed antenna systems and small cells.

## Local Control with a “Shot Clock”

The Telecommunications Act of 1996 set the stage for an ongoing federal push to expand telecom facilities. Section 332 of the Act retained local control over the “placement, construction and modification of personal wireless service facilities,” subject to limitations that prohibited municipalities from considering the health effects of radio waves, and required that all applications for telecom facilities must be acted on within a “reasonable period of time.” Although this language limited the grounds upon which municipalities could consider or deny such applications, delays in municipal review still caused much disagreement.

In 2009, the FCC addressed this conflict with its “Shot Clock Order,” so named because—like a shot clock in basketball—once a municipality gained possession of a complete application, penalties awaited for failure to reach a decision in time (within 90 days of a complete collocation application, or within 150 days for other complete wireless facilities applications). The Shot Clock Order also provided a 30-day period for determining whether an application was “complete” before the clock started. An extension of this period was allowed if the municipality was waiting for additional information on an incomplete application. Notably, however, once the clock ran out, an applicant could only seek relief in court.

## Congress Acts Again: The Tax Relief Act

In 2012, Congress passed the Tax Relief Act (TRA) which addressed various economic reforms. Section 6409(a) of the TRA strengthened the power of telecommunications companies when dealing with municipalities by providing that local governments must not only review requests to modify existing wireless facilities within the reasonable period (as calculated under the Shot Clock Order), but adding that these governments “may not deny, and shall approve” any request that does not substantially change the physical dimensions of the facility. These “requests” included collocation, removal and replacement of transmission equipment.

## The FCC’s Automatic Approval Order

In October 2014, the FCC implemented the TRA with an Order clarifying that Section 6409(a) applies to all wireless transmissions authorized by the FCC, broadly defining “transmission equipment” to include any equipment facilitating any wireless communication licenses authorized by the FCC. The Order also defined “tower” to include any structure built to support antennas and associated facilities, while “base station” was defined broadly to encompass a structure supporting or housing antennas, transceivers and associated equipment.



Both applicants and municipalities should remember that existing towers or base stations being modified must have been reviewed and approved already under applicable local zoning and siting laws, or under another form of affirmative state or local regulatory approval. However, the FCC noted that a wireless facility which was not required to obtain a permit when built, but was lawfully constructed, is considered as "existing." Similarly, a legal, non-conforming facility may still be modified, unless such modification would "substantially change" the physical dimensions. The Order confirms that Section 6409(a) only applies to modification of existing towers and base stations that already have transmission equipment on them.

The FCC Order also discusses what constitutes a "substantial change," and should be consulted in order to assess the particular features of any request. Slightly different standards apply, depending on whether towers or base stations are located in a public right-of-way. The Order provides that "substantial changes" include increases in height of more than 10% for towers outside of public rights-of-way, or increases of more than 10% or 10 feet—whichever is greater—for towers in a public right-of-way, as well as all base stations.

Protrusions are "substantial" outside of public rights-of-way if they exceed the greater of 20 feet, or the width of the tower at the level of the addition, and in rights-of-way, "substantial" protrusions are those over 6

feet. Installation of equipment cabinets is "substantial" if the number is greater than 4 or "more than the standard number of new equipment cabinets for the technology involved." Other substantial changes include excavation or deployment outside the current site, any modifications which defeat existing concealment features, or any lack of compliance with conditions associated with prior approval, unless the non-compliance is within the height, width, cabinets and new excavation limits.

The FCC Order also continued the "Shot Clock" regime, requiring that states and municipalities review applications within 60 days from the date of filing, still subject to the "tolling" provisions for incomplete applications within the 30-day determination of completeness phase. The Order reminds local governments that determinations of incompleteness must be in writing, and must clearly and specifically delineate the missing information.

If an applicant's responses fail to supply the missing information that has been requested, additional 10-day tolling periods are available to the municipality, but these are only available to obtain information that was determined to be missing in the initial determination of incompleteness. In other words, municipalities must undertake thorough, timely reviews of applications in order to identify all missing information at the outset of their review. In addition, the Shot Clock continues to click regardless of

any local moratoria.

Finally, and most dramatically, the FCC Order implements the TRA Section 6409(a) "shall approve" provision by implementing a "deemed granted" rule. Under this rule, an application must be approved within the 60-day time frame (subject to applicable tolling), or the request will be "deemed granted." The applicant has only to notify the municipality in writing of the violation of Section 6409(a) and may then seek judicial approval of such action, perhaps in a declaratory judgment action, which the FCC Order provides a 30-day window for commencing.

In summary, the FCC has continued its "Shot Clock" approach to speeding up wireless tower and base station modification requests. It has also implemented the even more aggressive approach of Congress by making the penalty at the end of the period not just a potential judicial challenge, but an automatic approval.

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