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FCC's Wireless Facility Rules Implementing Section 6409(a)

League of California Cities – City Attorneys' Conference
Monterey, May 6, 2015

PRESENTED BY

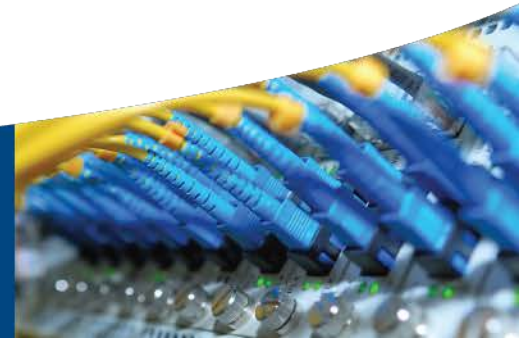
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Telecommunications Law



FCC Report and Order

Federal Communications Commission

FCC 14-153

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Acceleration of Broadband Deployment by)	WT Docket No. 13-238
Improving Wireless Facilities Siting Policies)	
)	
Acceleration of Broadband Deployment:)	WC Docket No. 11-59
Expanding the Reach and Reducing the Cost of)	
Broadband Deployment by Improving Policies)	
Regarding Public Rights of Way and Wireless)	
Facilities Siting)	
)	
2012 Biennial Review of)	WT Docket No. 13-32
Telecommunications Regulations)	

REPORT AND ORDER

Adopted: October 17, 2014

Released: October 21, 2014

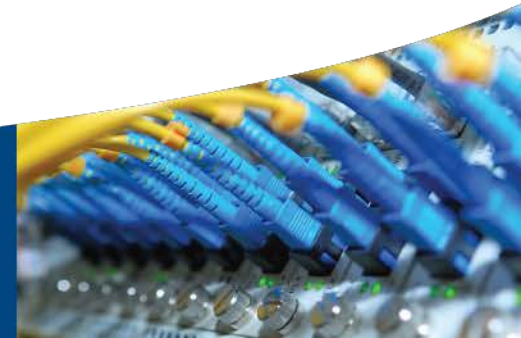
By the Commission: Chairman Wheeler and Commissioners Clyburn, Rosenworcel, Pai, and O'Rielly
issuing separate statements.

155 Page Report and Order

- Adopted October 17,
- Released October 21,
- Published in Fed. Register on January 9, 2015
- <http://www.bbknowledge.com/land-use/new-fcc-rules-will-require-new-approach-to-siting-of-wireless-facilities/>

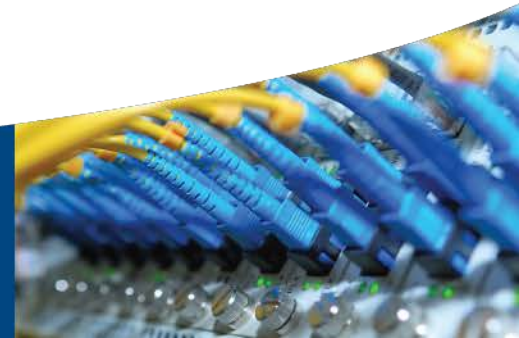


Telecommunications Law



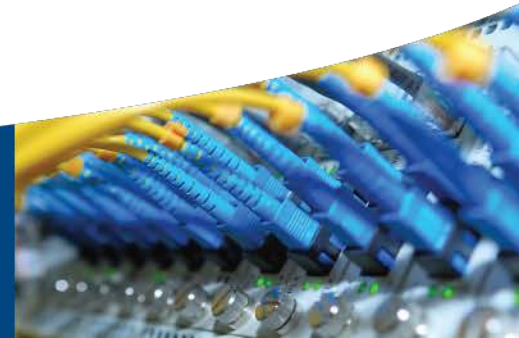
FCC Report and Order

- Modifications to Shot Clock
- Mandatory 6409(a) collocations
- NEPA/Historic Preservation
- Temporary Towers



Overview

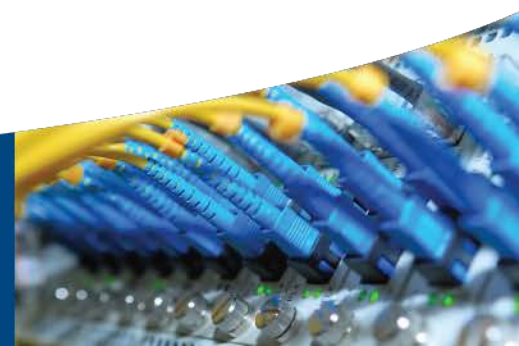
- Wireless deployment is accelerating and changing
 - Towers v. DAS/Small Cells
- Shot Clock
- 6409(a) Collocations



Traditional Towers

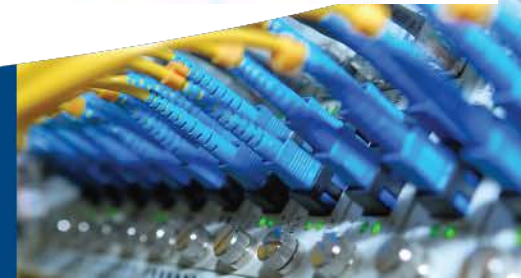
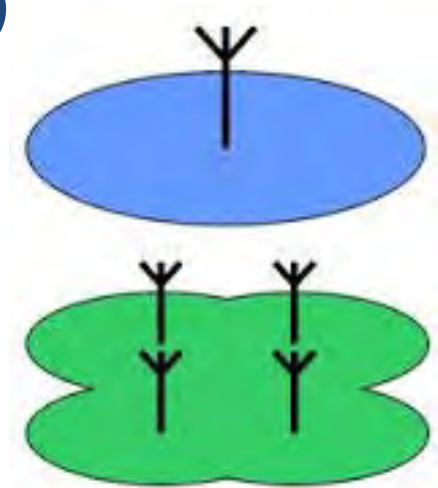


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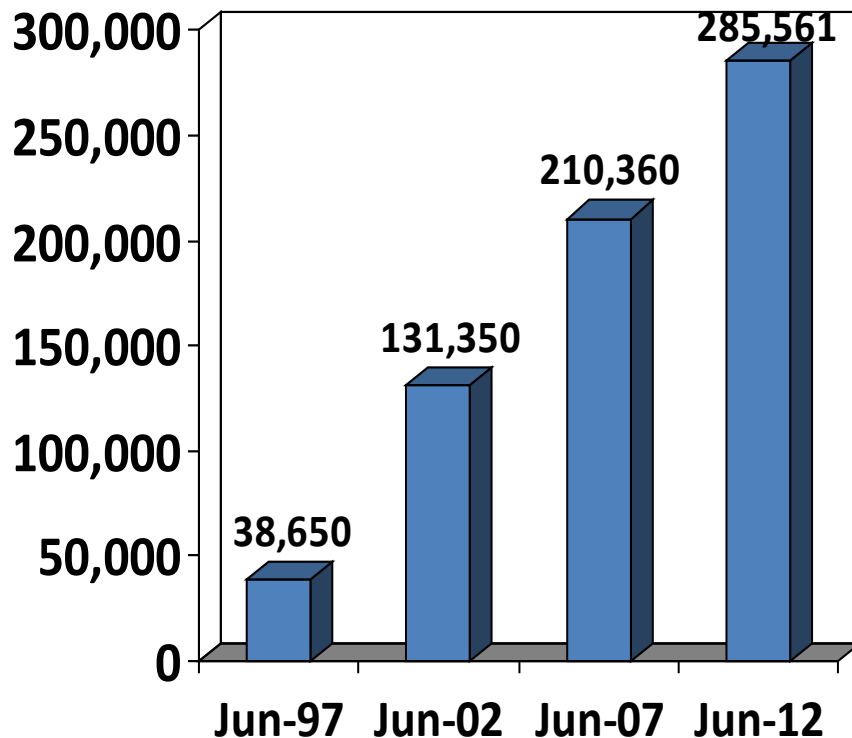


Small cells and Distributed Antenna Systems (DAS)



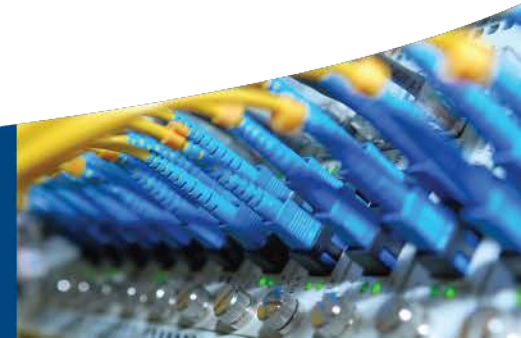
Siting Challenges Are Increasing

Cell Sites



Source: CTIA Wireless Quick Facts ctia.org

- AT&T Wireless *alone* has plans to deploy over 1,000 Distributed Antenna Systems and over 40,000 small cells.

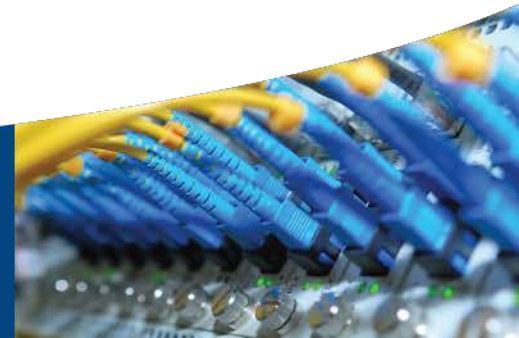


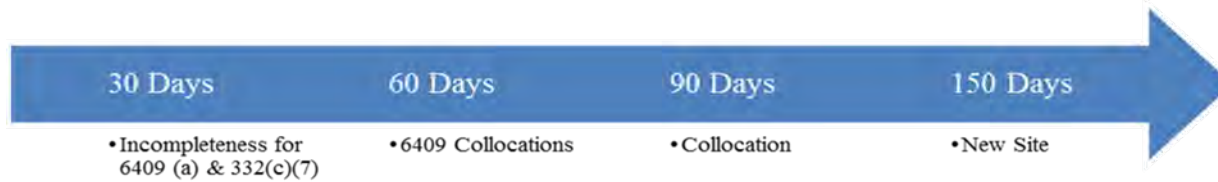




Shot Clock

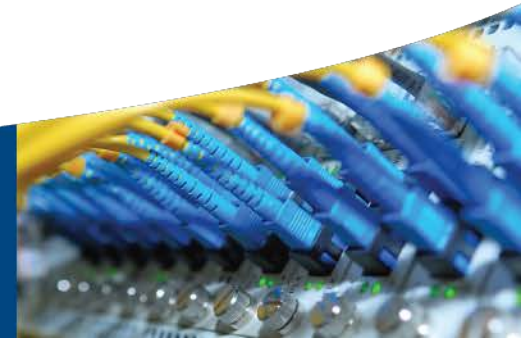
- Existing law:
 - 90 days to process collocations
 - 150 days for new towers
 - Shot Clock exists independently of Permit Streamlining Act
- FCC Order
 - New 60 day shot clock for 6409(a) collocations

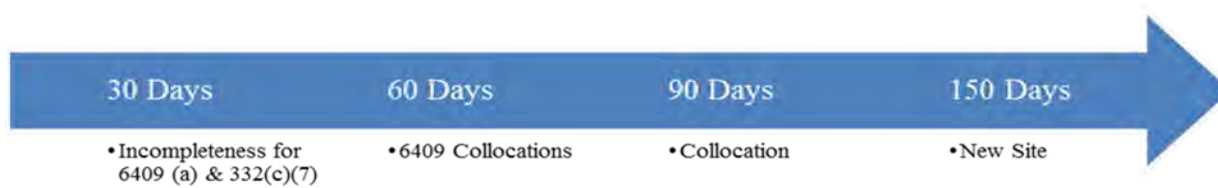




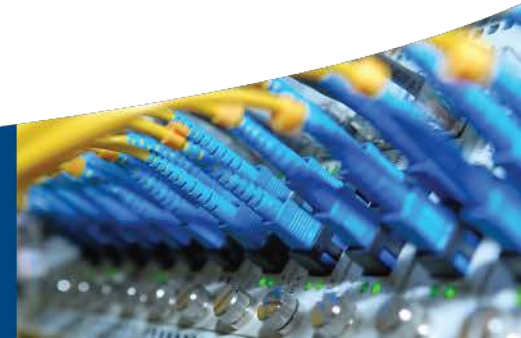
In addition, “Shot Clocks” operate in five new ways:

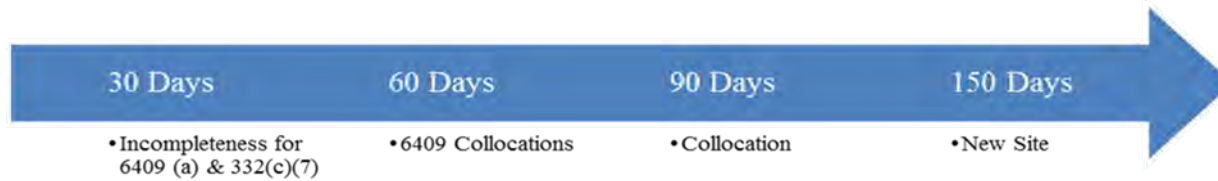
1. Clock starts to run when application submitted, not when deemed complete



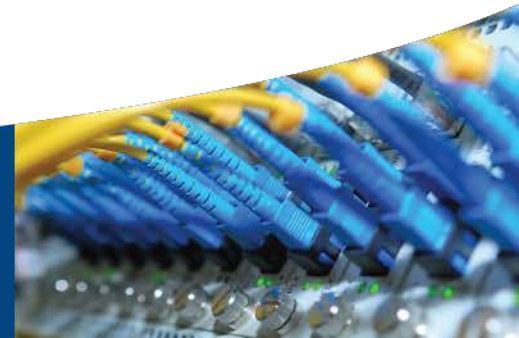


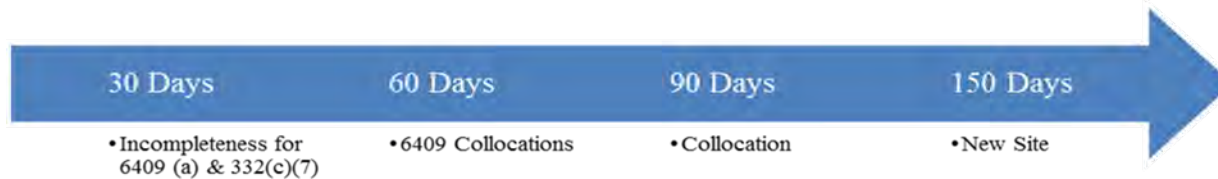
2. After incompleteness notice and response, local governments have 10 days to notify applicant of requested information still missing
3. Local government must specify the code provision, ordinance, or other publically-stated procedure that requires missing info.



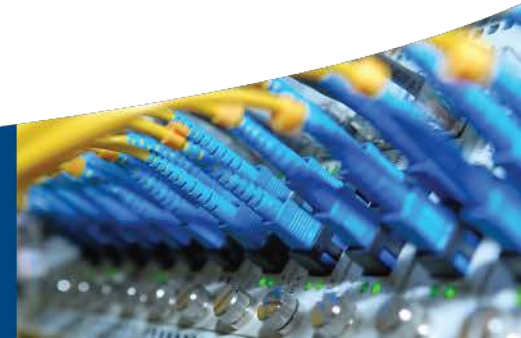


4. Shot clocks run regardless of local moratoria
5. Shot clocks apply to DAS and small cells, if they are used for personal wireless service





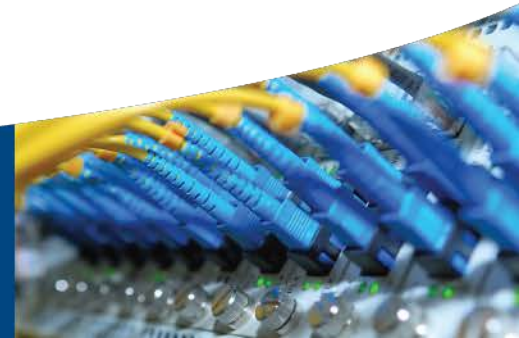
- Remedies for Shot Clock violations
 - Towers and Collocations
 - Presumption of reasonableness
 - 30-day SOL for carriers
 - 6409(a) Collocations
 - “Deemed granted”
 - Tolling available



Shot Clock

Takeaways

- Need to ensure staff is accurately calendaring and calculating timelines
- Check your application forms to ensure they specify all required information
- Create record of “reasonableness” for towers and traditional collocations
- Coordinate with staff early (“fast track” wireless projects?)



Section 6409(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.

(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—

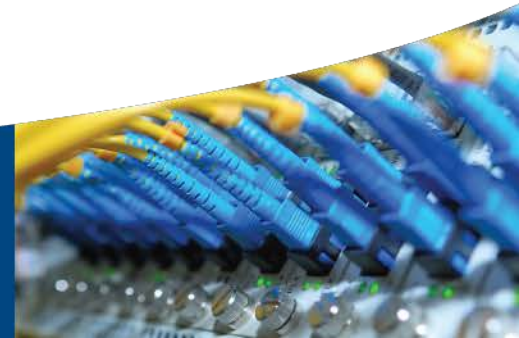
- (A) collocation of new transmission equipment;
- (B) removal of transmission equipment; or
- (C) replacement of transmission equipment.

(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.

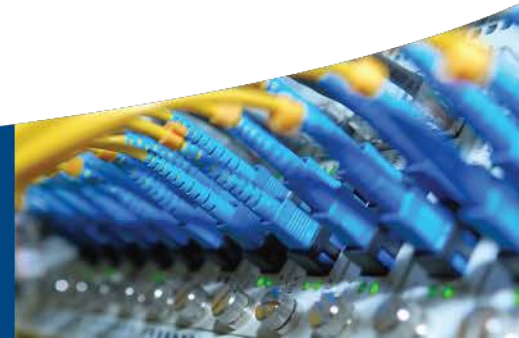


Section 6409(a)

State and local governments “may not deny, and shall approve, any [request that involves collocation, removal, or replacement of transmission equipment] of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.”

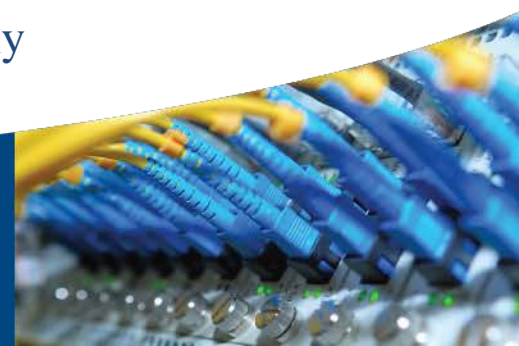


Understanding the Rule by Parsing it



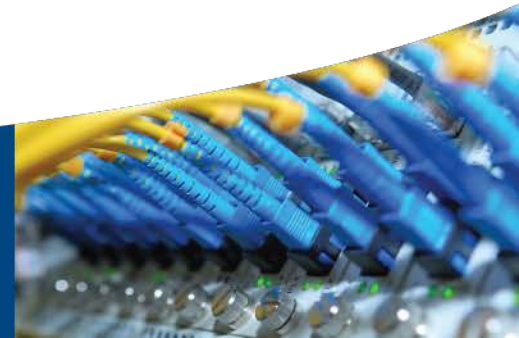
Existing wireless tower or base station

may not deny, and shall approve, any [request that involves collocation, removal, or replacement of transmission equipment] 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

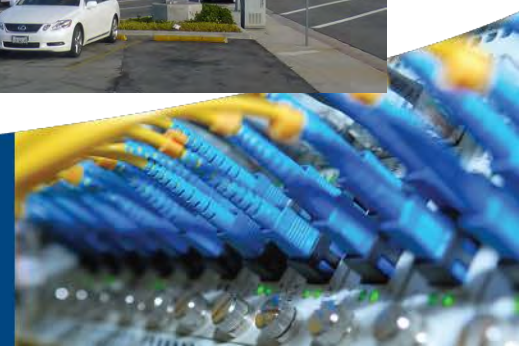


Wireless Tower

- **DEFINED AS:** “any structure built for the sole or primary purpose of supporting any Commission-licensed or authorized antennas and their associated facilities.”



Wireless Tower



Base Station

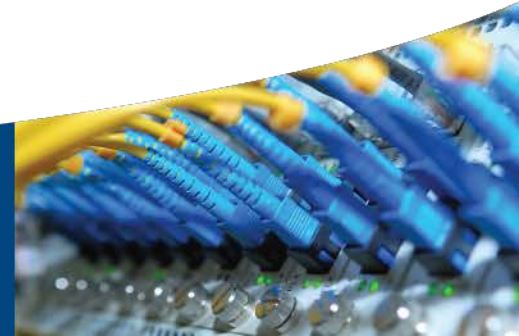
- **DEFINED AS:** “the equipment and non-tower supporting structure at a fixed location that enable Commission-licensed or authorized wireless communications between user equipment and a communications network.”
- **IN ENGLISH:** the transmission equipment itself and any non-tower structure that supports transmission equipment under a valid permit for a wireless use.



Base Station

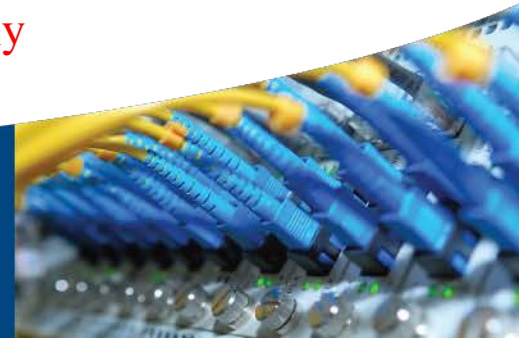


Non-tower structures with legally permitted wireless transmission equipment



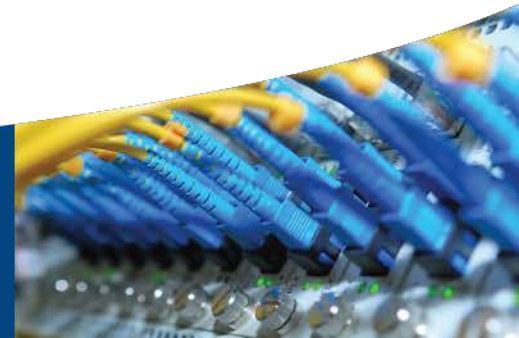
FCC adopts modified “objective” standard that evaluates 6 factors

may not deny, and shall approve, any [request that involves collocation, removal, or replacement of transmission equipment] 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



1. Height
2. Width
3. New Equipment Cabinets
4. Deployment/Excavation
Beyond Site
5. Concealment Elements
6. Other Conditions

may not deny, and shall approve, any [request that involves collocation, removal, or replacement of transmission equipment] 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



A “substantial change” occurs only if:

Height:

For towers other than towers in the rights-of-way:

If the modification increases the tower by:

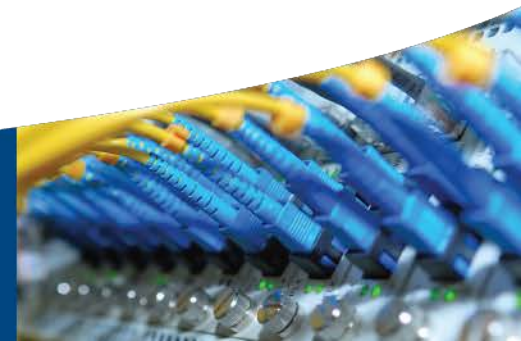
More than 10%;

or

The height of one additional antenna array with separation from the nearest existing antenna not to exceed 20 feet,

... whichever is **greater**.

may not deny, and shall approve, any [request that involves collocation, removal, or replacement of transmission equipment] 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



A “substantial change” occurs only if:

Height:

For towers in the rights-of-way and all base stations:

If the modification increases the facility by:

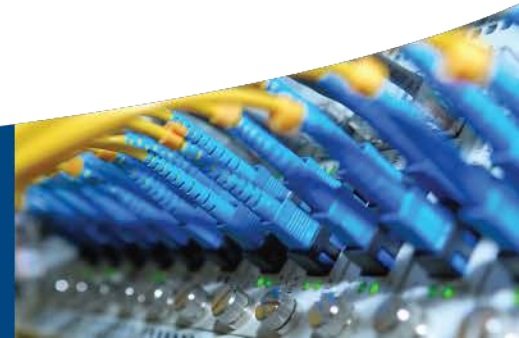
More than 10%;

or

More than 10 feet,

. . . whichever is **greater**.

may not deny, and shall approve, any [request that involves collocation, removal, or replacement of transmission equipment] 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

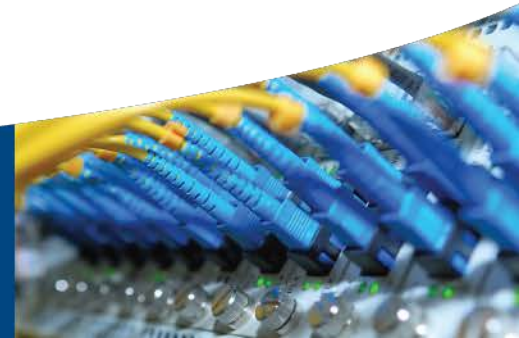


A “substantial change” occurs only if:

Height:

Baseline for measurement: In both cases, height is measured from the dimensions of the tower or base station (as it had been previously lawfully modified) on February 22, 2012, except for deployments separated horizontally, for which height is measured from the original support structure only.

may not deny, and shall approve, any [request that involves collocation, removal, or replacement of transmission equipment] 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



A “substantial change” occurs only if:

Width:

For towers other than towers in the rights-of-way:

It involves adding an appurtenance that would protrude from the edge of the tower:

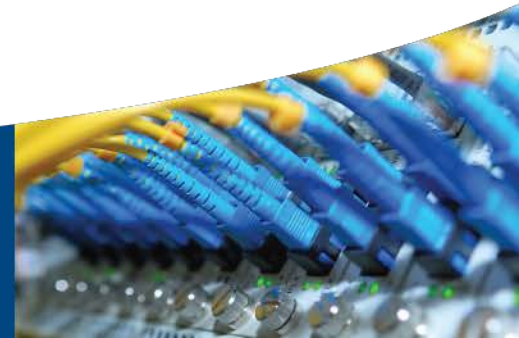
More than 20 feet;

or

More than the width of the tower structure at the level of the appurtenance,

. . . whichever is **greater**.

may not deny, and shall approve, any [request that involves collocation, removal, or replacement of transmission equipment] 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



A “substantial change” occurs only if:

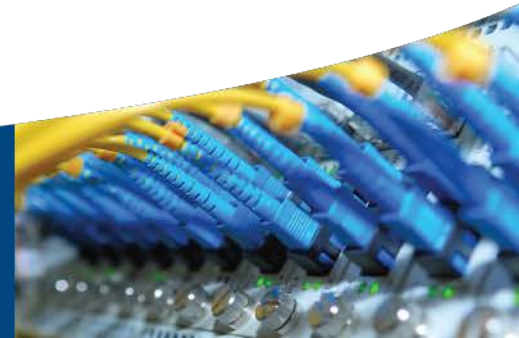
Width:

For other towers and all base stations:

It involves adding an appurtenance that would protrude from the edge of the structure:

More than 6 feet.

may not deny, and shall approve, any [request that involves collocation, removal, or replacement of transmission equipment] 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



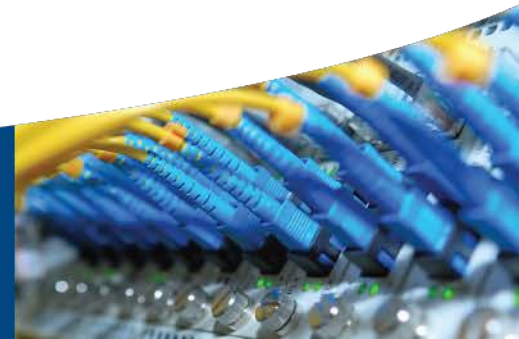
A “substantial change” occurs only if:

Equipment Cabinets:

Generally:

If it involves installing more than the standard number of cabinets for the technology involved, not to exceed four cabinets.

may not deny, and shall approve, any [request that involves collocation, removal, or replacement of transmission equipment] 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



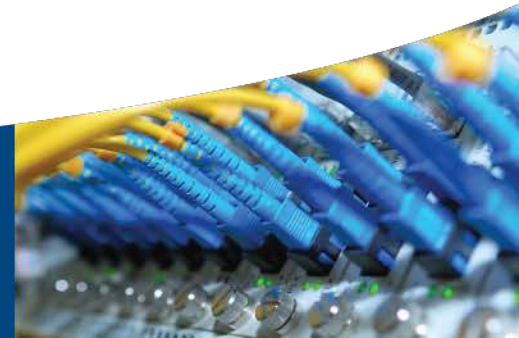
A “substantial change” occurs only if:

Equipment Cabinets:

For towers in the rights-of-way and all base stations:

If it involves installation of *any* cabinets if there are no pre-existing cabinets, or involves installation of ground cabinets that are more than 10% larger in height or overall volume than any other associated ground cabinets

may not deny, and shall approve, any [request that involves collocation, removal, or replacement of transmission equipment] 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



A “substantial change” occurs only if:

Excavation/Deployment Beyond Site

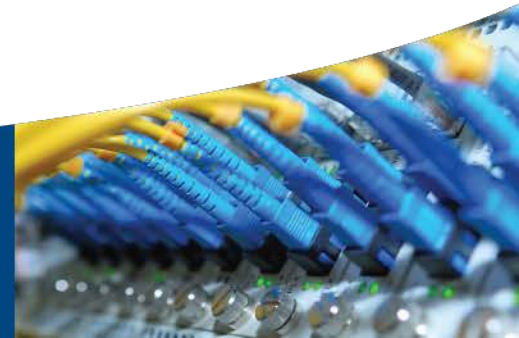
The request involves excavation or deployment outside the current “site.”

“Site” is:

For towers other than those in the rights-of-way:

the current boundaries of the leased or owned property surrounding the tower and any access or utility easements

may not deny, and shall approve, any [request that involves collocation, removal, or replacement of transmission equipment] 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



A “substantial change” occurs only if:

Excavation/Deployment Beyond Site

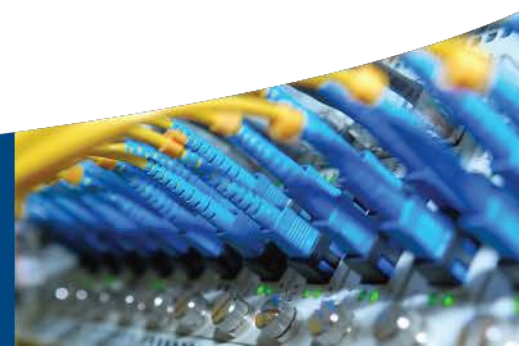
The request involves excavation or deployment outside the current “site.”

“Site” is:

For towers in the rights-of-way and base stations:

Further restricted to the area “in proximity” to the structure and to other transmission equipment already deployed on the ground

may not deny, and shall approve, any [request that involves collocation, removal, or replacement of transmission equipment] 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



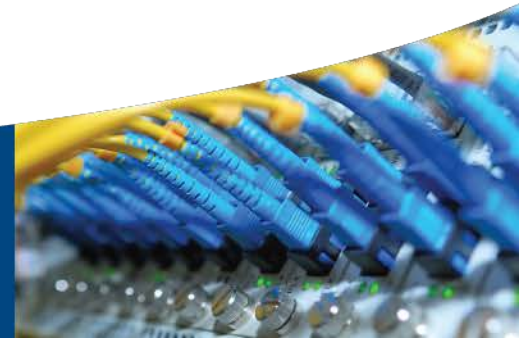
A “substantial change” occurs only if:

Defeat Concealment Elements

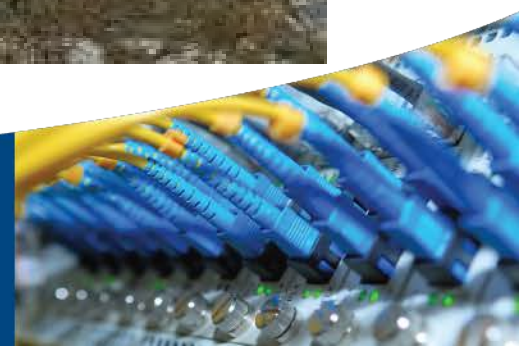
For “concealed or ‘stealth-designed facilities,” if a modification would:

“defeat the concealments elements of”
the wireless tower or base station.

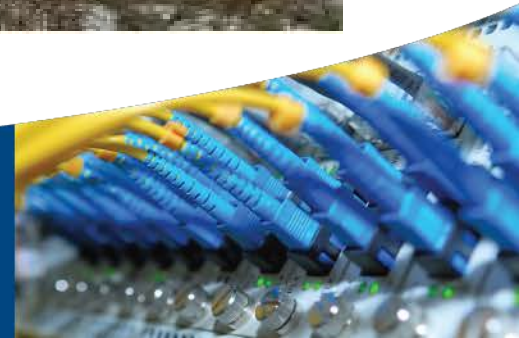
may not deny, and shall approve, any [request that involves collocation, removal, or replacement of transmission equipment] for a modification of an existing wireless tower or base station that **does not substantially change the physical dimensions** of such tower or base station



Stealth



Stealth Defeated



A “substantial change” occurs only if:

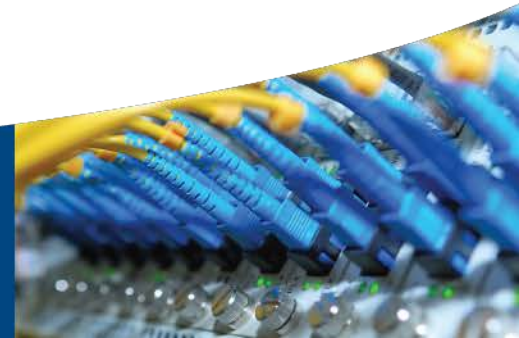
Defeat Other Conditions

The modification would not comply with other conditions imposed on the applicable wireless tower or base station, “unless the non-compliance is due to an increase in height, increase in width, addition of cabinets, or new excavation that does not exceed the ‘substantial change’ thresholds.”

Examples:

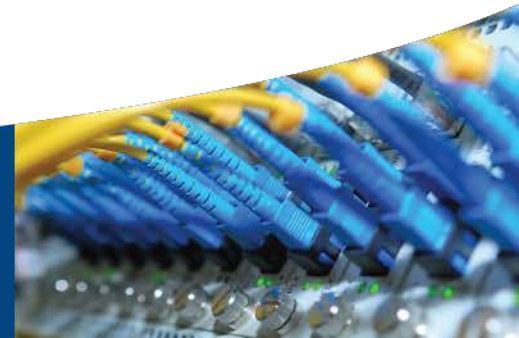
Fencing, access to the site, drainage

may not deny, and shall approve, any [request that involves collocation, removal, or replacement of transmission equipment] 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



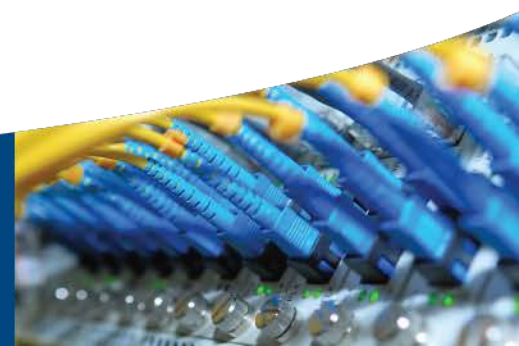
All modifications remain subject to “building codes and other non-discretionary structural and safety codes.”

may not deny, and shall approve, any [request that involves collocation, removal, or replacement of transmission equipment] 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



Requests must still comply with “any relevant Federal requirement,” including FAA, NEPA, and NHPA requirements

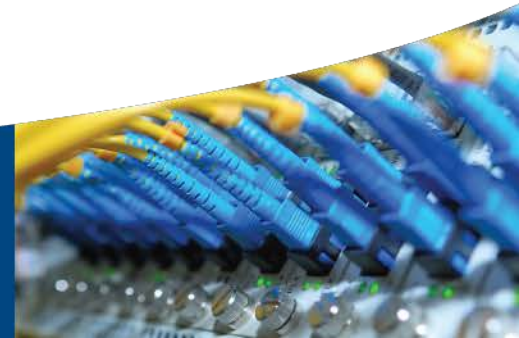
may not deny, and shall approve, any [request that involves collocation, removal, or replacement of transmission equipment] for a modification of an existing wireless tower or base station that **does not substantially change the physical dimensions** of such tower or base station



May Not Deny, and Shall Approve

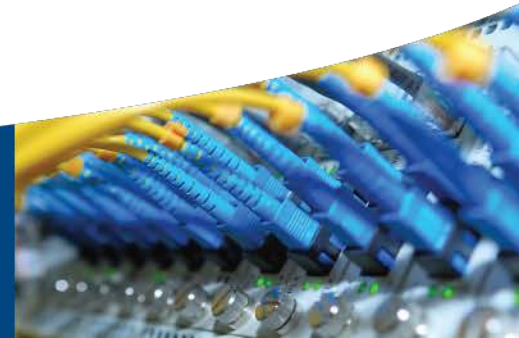
CONDITIONAL APPROVAL NOT TANTAMOUNT TO A DENIAL

- Generally prohibits/invalidates conditions of approval that:
 - set **limits lower than the criteria for a substantial change**, or
 - impose **subjective standards**
- Probably still valid conditions include drainage, landscaping, maintenance, lighting, fencing, access, indemnification, compliance with all generally applicable laws, etc.



6409(a): Other Items of Note

- FCC refused to apply different standards for legal non-conforming use
 - No amortization or restrictions on expansion
- 6409(a) does not apply to proprietary rights
- FCC declined to determine whether preference for locating on municipal property was legal (But see Gov. Code sec 65964)



6409(a): Other Items of Note

- **OBJECTIVE:** based on height, width, # of cabinets, excavation, camouflage and compliance with certain prior conditions of approval
 - Provides generally lower thresholds for sites in the ROW and mounted on buildings.
 - Effectively creates an invisible envelope around a structure within which wireless infrastructure can freely modify their transmission equipment
- **DISJUNCTIVE:** must comply with all measures (violate one and it's a substantial change)
- **CUMULATIVE:** establishes a lifetime cumulative limit.



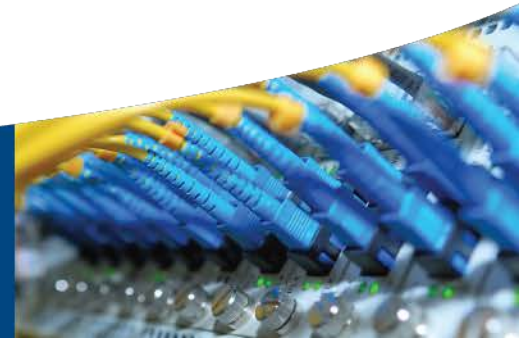
6409(a): Is this really legal?

- Majority of the rules went into effect on April 8th
- The “deemed grant” rules and the time frames for action on an application remain under OMB
- City of Arlington, VA et al. (including LA, Ontario, Redwood City, San Jose, Burlingame and Apple Valley) have challenged the regulations in the 4th Cir. (Case No. 15-1240)



6409(a): Suggested Responses

- Review your wireless ordinance
 - 50-foot height limit is now 60 or 70-foot limit (reduce permitted height?)
- Utilize proprietary rights to the extent possible
 - Outside ROW: generally towers
 - Inside ROW: generally DAS, small cell (Public Utilities Code Sec 7901)



6409(a): Suggested Responses

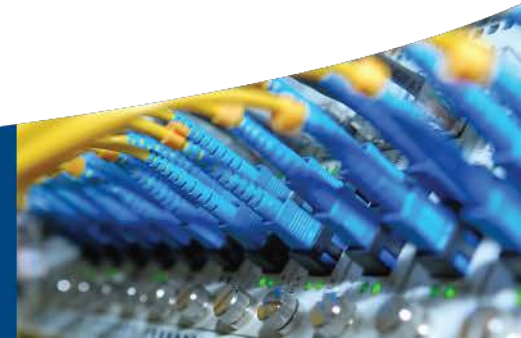
Review Your Application Form and Process

Do's

- Require applicants to claim 6409(a) status
- Require information to show that 6409(a) applies (including building and safety code compliance)
- Include citations to application requirements by code, etc.

Don'ts

- Require applicants to demonstrate the business case for the facility
- Require coverage information
- Miss the Shot Clock deadlines (completeness and decision)



6409(a): Things to Ponder

- 6409(a) only applies to facilities approved by a state or local agency
 - Distinction between by right and exempt facilities?
- What about stealthing?
 - Increase height of stealthing to avoid defeating concealment
- Do 6409(a) collocations have federal rights, state rights, federal and state rights, no rights? Does it matter?
 - Is a 6409(a) collocation non-conforming if 6409(a) is overturned or modified?



6409(a): California Concerns

- Gov. Code sec 65850.6, 65964 govern wireless deployment (i.e., generally permits must be 10-years)
 - Is 6409(a) “approval” a permit? What about when permit for underlying facility expires?
- CEQA Review of New Facilities and 6409(a) Collocations
 - 6409(a): non-discretionary?
 - New Towers: assume post-6409(a) collocation as whole of the project?



Thank you for attending.

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