

Q&A for Jurisdictions: Section 6409

What is 6409?

Section 6409 of the Spectrum Act is a federal law passed in 2012 that limits the ability of state and local governments to review, condition, or deny modifications to existing cell sites on both towers and non-tower structures (e.g., buildings and utility poles). The FCC adopted implementing regulations in 2014, which were clarified in 2020. Those rules require review and approval of a covered application within 60 days or the request is deemed granted.

What type of structures fall under this rule?

Any legal structures (including legal non-conforming uses) where wireless facilities are currently located. This includes rooftops, water tanks, utility poles, towers and any other structure that currently supports wireless equipment.

What makes a proposed modification eligible for coverage under 6409?

There are a host of factors that should be understood – if there is any confusion, consult the statute ([47 U.S.C. § 1455\(a\)](#)) or the FCC Rules ([47 C.F.R. § 1.6100](#)). For brevity, below is a synopsis of most common factors:

- It must be at an existing site (i.e., the existing wireless equipment must have been reviewed and approved under the applicable process if there was a process at the time of the original installation)
- The proposed modification must not involve a substantial change. For brevity a substantial change is:
 - No more than 10% or 20' whichever is greater on towers
 - No more than 10% or 10' on non-towers and sites in the ROW
 - No excavation more than 30' from the existing approved site boundary (not including access/utility easements)
 - No more than 4 new equipment cabinets
 - Must comply with prior conditions of approval except for height and width
 - Must not defeat the “concealment elements” of an existing facility

What types of sites are not eligible?

Substantial modifications (see below)

- Tower swap or replacement (structural hardening, however, is allowed)
- New sites

What may the jurisdiction require for an Eligible Facility?

- Anything necessary to determine whether the site is an eligible facility including:
 - Site plans
 - Application
 - Application fee

What may not be required because of the federal rule?

- Coverage maps
- RF justification
- Photo sims (except to show continued concealment)
- Business case analysis
- Alternative site analysis
- Any requirement not already published

Does 6409 apply to a jurisdiction-owned pole?

Yes, however, it depends on the lease and pole location. If the jurisdiction is acting in its proprietary capacity as a landlord, it may have other rights because of its lease. These rights are granted by the lease or license covering the pole, so if there is nothing in the lease that covers modifications, 6409 would control.

What is a “concealment element”?

The reasoning behind the concealment element was to prevent stealth sites from becoming non-stealth. For example – if an existing site is screened it must still be screened but the screen can be larger. A monopine can be increased in height but must include branches etc. so it still looks like a monopine, despite the fact that it might be taller and wider. Facilities designed to look like some feature other than a wireless facility must still look like something other than a wireless facility. However, just because a facility’s dimensions are changing does not mean concealment is defeated.

What is a “prior condition of approval”?

Conditions associated with original siting approval can still be applied if it is reasonable to do so-- as long as there is express evidence (actual conditions of approval or other written explanation) that the approval was conditioned on some aesthetic or other goal (e.g., requiring extension of fences to keep ground equipment hidden would be reasonable, but a condition of hiding a site behind a tree line would not be reasonable because it would require replacing trees to extend the tree line. Also, prior conditions cannot be used to deny an application if the modification otherwise meets the substantial change criteria. (e.g., a prior condition of allowing a maximum number of nine antennas cannot be used to disqualify a modification to 12 antennas if it otherwise meets the 6409 criteria).

Does this limit the process that can be used to approve the modification?

Technically no. As long as the process can and will be completed within the 60-day time period, the jurisdiction can follow any process. However, public hearing and notification processes are very difficult to complete in this time-period and invite more frustration from constituents when the outcome must be approval. It is also an unnecessary expense on the part of the jurisdiction since the outcome cannot be changed. Also note that the shot clock on starts to run *all* concurrently filed permits as soon as the applicant takes the first procedural step required (including mandatory pre-application meetings).

What about changes to the code since the original approval?

They do not apply to eligible facilities, apart from building code safety updates. The rule’s purpose is to streamline modifications that are not substantial changes so new technologies can be upgraded and deployed more quickly.

Couldn’t you just come in with a small cell and then change it to a bigger site?

Theoretically, maybe, but not in practice. First, macro sites are much bigger and heavier than a small cell.

- Pole replacements and new ground disturbance would typically be required to upgrade to a macro site. Pole replacements are not covered under 6409.
- Second, from an RF perspective, small cells are intended to do different things than macro sites. For T-Mobile, this means primarily offloading traffic on the macro sites in areas where there is too much capacity. Another macro site would cover too large an area and interfere with surrounding sites.

What about building permits?

Eligible Facilities Requests must comply with all building, structural, electrical and safety codes. However, the 60-day shot clock includes all permits. The shot clock starts when the applicant takes the first procedural step required, no matter how many additional steps are in the process, the review must be completed in 60 days.

For more information, go to HowMobileWorks.com or contact us at NatExtAffairs@T-Mobile.com