



May 5, 2014

TO: Planning Commission

FROM: Eric Feldt, CBJ Planner
Community Development Dept.

RE: TXT2009-00007: Draft Wireless Communication Facilities Ordinance + Master Plan

Attachments

- Draft WCF Ordinance
- Draft WCF Master Plan
- CityScape: Scope of Municipal Authority
- FCC Interpreting Regulations

The CDD, Law Dept., and CityScape used policies provided by the Planning Commission during the April 15 Commission meeting to produce the attached draft Ordinance. At that meeting, the Commission was tasked to provide additional policies to help the Law Department form the regulations, purposes, and processes stated within the Ordinance.

The following policies have guided the draft Ordinance and Master Plan:

- Protect the public's safety and general welfare by ensuring compliance with local, state, and federal building codes and regulations; and establishing processes to address abandoned towers.
 - Applicable Sections: *Purpose, Applicability, General Requirements-Security; General application submittal requirements for all WCFs; Extent and parameters of special use permit for WCFs; Interference with public safety equipment; Transfer of Ownership; Non-Use and abandonment; Conflict with other ordinances; and Violations*
- Preserve neighborhood harmony, view sheds and other sensitive environments by encouraging concealment designs, vegetation screening, and using natural terrain features; establishing a hierarchy of building designs and locations that guide the permitting processes; and enabling designs and processes to reduce conflict with residential neighborhoods and aesthetics.
 - Applicable Sections: *Location Preference for new WCFs; General Requirements; Permit application process for all WCFs; Special Use permit applications;*

- Encourage use of existing infrastructure and land use efficiency through incentivizing collocations for easier permitting, and require greater comprehensive review for new tower builds.
 - Applicable Sections: *Location Preference for new WCFs; General Requirements-Concealed and non-concealed antenna; General Requirements-Design Criteria; Permit application process for all WCFs; Collocation and other modifications...*;
- Respond to the needs of the industry and user demands in providing seamless cell and data network coverage by establishing pre-approved locations and designs for guaranteed development and expectations for the industry and public.
 - Applicable Sections: *Purpose; Permit application process for all WCFs-Table 1; Collocation and other modifications...*

The draft Master Plan contains an implementation chapter that provides relevant policies from the 2013 Comprehensive Plan. The following Standard Operating Procedures were missing from the Master Plan and shall be included for the final draft Master Plan.

Standard Operating Procedures

- 12.11 – SOP1 Facilitate the provision of high quality, consistent wireless communication services to residents, businesses, and visitors.
- 12.11 – SOP2-(Already in Master Plan)
- 12.11 – SOP3 Accommodate the growing need and demand for wireless communication services.
- 12.11 – SOP4 Encourage coordination between suppliers and providers of wireless communication services.
- 12.11 – SOP5 Minimize the potential for WCFs to cause interference to other radio services.

The CBJ Law Department provided two documents in the packet to 1) Better understand what authority local municipalities have in regulating wireless communication facilities, and 2) How to interpret Federal regulations pertaining to wireless communication facilities.

STAFF'S RECOMMENDATION

The CDD recommends the Planning Commission endorse the new draft Ordinance and Master Plan for Assembly approval.

Presented by: The Manager
Introduced:
Drafted by: A. G. Mead

ORDINANCE OF THE CITY AND BOROUGH OF JUNEAU, ALASKA

Serial No. 2014-____

**An Ordinance Amending the Land Use Code of the City and Borough
to Provide for the Regulation of Wireless Communication Facilities**

NOW, THEREFORE, BE IT ENACTED BY THE ASSEMBLY OF THE CITY AND BOROUGH OF
JUNEAU, ALASKA:

Section 1. Classification. This ordinance is of a general and permanent nature
and shall become a part of the City and Borough of Juneau Municipal Code.

Section 2. New Article. Article IX. – Wireless Communication Facilities, is
created to read:

ARTICLE IX. – WIRELESS COMMUNICATION FACILITIES

49.65.900 Purpose.

It is the purpose of this article to establish reasonable regulations for the placement,
construction and modification of wireless communication facilities (WCF) consistent with
the Telecommunications Act of 1996 and applicable law and:

- (a) Promote the health, safety, and general welfare of the public and the City and
Borough;

Draft Ordinance

1
2 (b) Minimize the impacts of WCFs by establishing standards for siting, design
3 and screening and by requiring consistency with the City and Borough's Wireless
4 Telecommunications Master Plan;

5 (c) Encourage the collocation of antennas on existing structures thereby
6 minimizing new visual impacts and reducing the need for new towers;

7 (d) Maintain the natural surroundings and character of the City and Borough;

8 (e) Preserve neighborhood harmony and scenic viewsheds and corridors as
9 indicated in the Comprehensive Plan of the City and Borough of Juneau;

10 (f) Accommodate the growing need and demand for wireless communications
11 services;

12 (g) Respond to the policies embodied in the Telecommunications Act of 1996 in
13 such a manner as not to unreasonably discriminate between providers of functionally
14 equivalent personal wireless services or to prohibit or have the effect of prohibiting personal
15 wireless services; and
16 wireless services; and

17 (h) Respond to the policies embodied in Section 6409(a) of the Middle Class Tax
18 Relief and Job Creation Act of 2012.

19 **49.65.910 Applicability.**

20
21 (a) This article shall apply to the development activities including installation,
22 construction, or modification of all WCFs including, but not limited to, existing towers,
23 proposed towers and collocated facilities on existing structures.

24 (b) All applications for WCF are subject to the standards in this article to the
25 extent that they do not violate Federal limitations on local siting standards and are not
otherwise inconsistent with Federal law. The provisions of this article are not intended to
and shall not be interpreted to prohibit or to have the effect of prohibiting personal wireless

1
2 services. This article shall not be applied in such a manner as to unreasonably discriminate
3 between providers of functionally equivalent personal wireless services.

4 (c) Exempt Facilities. The following are exempt from this article:

5 (1) Noncommercial, FCC licensed amateur (ham) radio antennas;

6 (2) Satellite earth stations and/or antennas used for private television
7 reception;

8 (3) A government-owned or temporary, commercial WCF installed upon
9 the declaration of a state of emergency by federal, state, or local government, or a written
10 determination of public necessity by the director; except that such facility must comply with
11 all federal and state requirements. The WCF shall be exempt from the provisions of this
12 article for up to one week after the duration of the state of emergency; and

13 (4) A temporary, commercial WCF installed for providing coverage of a
14 special event such as news coverage or sporting event, subject to approval by the director.
15 The WCF shall be exempt from the provisions of this article for up to one week after the
16 duration of the special event.

17 (d) All WCFs existing on or before the effective date of this article shall be
18 allowed to continue as they presently exist, provided, however, that any proposed
19 modification to an existing WCF, including collocation, must comply with this article.

20 **49.65.920 Location Preference for new WCFs.**

21 (a) Locating a new antenna array or new tower shall be in accordance with the
22 following location preferences, one being the highest priority and six being the lowest
23 priority:
24

25 (1) Collocated antenna on existing WCF;

(2) Attached concealed antenna;

- (3) Attached non-concealed antenna;
- (4) Concealed freestanding new WCFs;
- (5) Nonconcealed freestanding new WCFs;
- (6) Any WCF requiring air navigation lighting.

(b) If the proposed location is not the highest priority listed above, then a detailed explanation justifying why a site of a higher priority was not selected must be submitted with the WCF application, as required by section 49.65.960. Any application seeking approval to locate a WCF in a lower-ranked location may be denied unless the applicant demonstrates to the satisfaction of the director or planning commission the following:

- (1) That despite diligent efforts to adhere to the established hierarchy, doing so is not technically feasible or is commercially impractical;
- (2) The reason or reasons why the application should be approved for the proposed location; and
- (3) The hardship that would be incurred by the applicant if the application is not approved for the proposed location.

49.65.930 General Requirements.

- (a) *Concealed and non-concealed antenna.*

(1) Antennas shall be mounted on WCFs so as to present the smallest possible silhouette, profile, or cross-section, unless applicant provides sufficient evidence that doing so would prohibit the applicant from properly deploying the network. New antenna mounts shall be flush-mounted onto existing WCFs, unless it is demonstrated through RF propagation analysis that flush-mounted antennas will not meet the network objectives of the desired coverage area.

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2 (2) Attached, concealed feed lines and antennas shall be designed to
3 architecturally match the facade, roof, wall, or structure on which they are affixed so that
4 they blend with the existing design, color, and texture of the structure.

5 (b) *Security of WCFs.* All WCFs shall be located, fenced or otherwise secured in a
6 manner that prevents unauthorized access.

7 (1) All antennas, towers and other supporting structures, including guy
8 wires, shall be made inaccessible to individuals and constructed or shielded in such a
9 manner that they cannot be climbed or accessed.

10 (2) Transmitters and telecommunications control points must be installed
11 in a manner to be readily accessible only to persons authorized to operate or service them.

12 (c) *Signage.* WCFs shall contain a sign no larger than four square feet with text
13 in a sufficient font size to provide adequate notification to persons in the immediate area of
14 the presence of an antenna that has transmission capabilities. The sign shall contain the
15 name(s) of the owner(s) and operator(s) of the facility, an emergency phone number(s), and
16 FCC registration number, if applicable. The sign shall be on the equipment shelter or shed
17 of the applicant and be visible from the access point of the site. The sign shall not be lighted
18 unless authorized by the City and Borough or unless applicable provisions of law require
19 such lighting. No other signage, including advertising, shall be permitted on any WCF,
20 unless required by law.
21

22 (d) *Lighting.* Notice is required to be provided to the FAA, on a form prescribed
23 by the FAA, if the facility falls under notification requirements mentioned in 14 CFR Part
24 77. The applicant is responsible for determining whether notification is required. Any
25 lighting required by the FAA must be of the minimum intensity and number of flashes per

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2 minute (i.e., the longest duration between flashes) allowable by the FAA. Dual lighting
3 standards. Strobe lights at night are prohibited unless required by the FAA. The lights
4 shall be oriented so as not to project directly onto surrounding property, consistent with
5 FAA requirements.

6 (e) *Design criteria.*

7 (1) All freestanding WCFs up to 120 feet in height shall be engineered and
8 constructed to accommodate no fewer than four antenna arrays. All WCFs between 121 feet
9 and 150 feet shall be engineered and constructed to accommodate no fewer than five
10 antenna arrays. All WCFs between 151 feet and taller shall be engineered and constructed
11 to accommodate no fewer than six antenna arrays.
12

13 (2) All utilities at a WCF site shall be installed underground and in
14 compliance with all ordinances, rules and regulations of the City and Borough, including,
15 but not limited to, the National Electrical Code where appropriate. The director may waive
16 or vary the requirements of underground installation of utilities whenever, in the opinion of
17 the director, such variance or waiver shall not be detrimental to the health, safety, or
18 general welfare of the community or the environment, or the visual and scenic
19 characteristics of the area.
20

21 (3) All appurtenant or associated facilities of a WCF shall maximize use of
22 building materials, colors and textures designed to blend with the structure to which it may
23 be affixed, or to harmonize with the natural surroundings, which shall include the
24 utilization of concealed or concealment technology. If located in or abutting a Residential,
25 Commercial or Mixed-Use district, the appurtenant or associated facility shall either be

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2 placed inside an enclosed structure, fenced, or screened with sight-obscuring foliage as tall
3 as the structure.

4 (4) Use of ground or guy-wires shall only be permitted in the Rural
5 Reserve (RR) and Industrial (I) zoning districts, and only on roof-tops in the Light
6 Commercial (LC), General Commercial (GC), Waterfront Commercial (WC), and Waterfront
7 Industrial (WI) districts.

8 (f) *Setbacks.*

9 (1) Unless otherwise provided, a WCF tower shall be setback from the
10 nearest property line a distance equal to the height of the tower except that this setback
11 may be reduced to one-half of the height of the tower if the applicant submits a report
12 stamped by a professional engineer registered in the State of Alaska that certifies that the
13 tower is designed and engineered to collapse upon failure within the distance from the tower
14 to the property line. Other setback reductions, to the minimum required by the applicable
15 zoning district, may be had by obtaining written agreement from the adjacent property
16 owner(s).
17

18 (2) Setbacks may be modified by the director to no less than 20 feet from a
19 property line only if there is significant existing vegetation, topography, or some other land
20 feature that will provide a higher level of screening of the WCF.

21 (3) Any appurtenant structure shall be located so as to comply with the
22 applicable minimum setback requirements for the property on which it is situated.

23 (4) With respect to collocation on an existing nonconforming building or
24 structure, the existing permitted nonconforming setback shall prevail.
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2 (g) WCF shall not significantly affect the Natural Areas identified in the
3 Comprehensive Plan of the City and Borough of Juneau.

4 (h) WCFs shall be consistent with the City and Borough's Wireless
5 Telecommunications Master Plan.

6 (i) *Visibility.*

7 (A) WCF shall be configured and located in a manner that shall minimize
8 adverse effects including visual impacts on the landscape and adjacent properties and shall
9 be maintained in accordance with the requirements of this article.

10 (B) WCFs shall be designed to either resemble the surrounding landscape
11 and other natural features where located in proximity to natural surroundings, or blend in
12 with the urban environment, through matching or complementing existing structures and
13 specific design considerations such as architectural designs, height, scale, color, and texture.

14 (j) *Structural assessment.* The owner of a freestanding WCF tower shall have a
15 structural assessment of the tower by a professional engineer, licensed in the State of
16 Alaska, if the tower is adjacent to a dwelling, parking lot, playground, or right-of way, and
17 shall submit the structural assessment report, signed by the engineer who conducted the
18 assessment, to the director by July 1 every fifth year from the date of issuance of the
19 building permit.
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22 **49.65.940 Permit application process for all WCFs.**

23 (a) Applications, on a form specified by the director, and site plans for all WCFs
24 shall be submitted to the director.

25 (b) At the time that a person submits an application for a permit for any type of
WCF, such person shall pay a nonrefundable application fee to the CBJ, as set forth in

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2 Chapter 49.85.100. In addition to the application fee, the director may require a technical
3 review by a third party expert, the actual costs of which shall be borne by the applicant. The
4 technical expert review may address some or all of the following, at the discretion of the
5 director:

6 (1) The accuracy and completeness of the items submitted with the
7 application;

8 (2) The applicability of analysis and techniques and methodologies
9 proposed by the applicant;

10 (3) The validity of conclusions reached by the applicant;

11 (4) Whether the proposed WCF complies with applicable approval criteria
12 set forth in this article; and

13 (5) Other matters deemed to be relevant to determining whether a
14 proposed WCF complies with the provisions of this article.

15 (6) Based on the results of the technical review, the director may require
16 changes or additional documentation before the application will be considered complete.

17 (c) *Permit types.*

18 (1) A special use permit, in addition to any applicable building permits,
19 are required of all WCFs, unless otherwise provided. When a special use permit is
20 required, an applicant must obtain the special use permit approval prior to issuance of a
21 building permit.
22

23 (2) Unless lighting of the completed WCF will be required by the FAA or
24 FCC, applications for those WCF listed in Table 1, which meet the performance criteria
25 identified in section 49.65.930, shall be approved or denied by the director.

TABLE 1

<u>WCF Type</u>	<u>Zoning Districts</u>	<u>Maximum Height</u>	<u>Min. Distance to D-1 – D-18 Districts</u>
Eligible Collocation, Removal or Replacement of Transmission Equipment as provided in CBJ 49.65.950	All	Not more than 10% of existing structure or 20 feet (unless the increased height requires an existing unlit WCF to become lit)	N/A
Concealed Attached	All	≤ 20 Feet ¹	N/A
Non-concealed Attached	D-1 – D-18	≤ 5 Feet ¹	N/A
Non-concealed Attached	Non-Residential and Mixed Use	≤ 20 Feet ¹	N/A
New Concealed Tower	WI, WC, GC, LC, and RR	≤ 10 Feet above Max. Height of Zoning District	N/A
New Concealed Tower	I	≤ 90 Feet	> 500 Feet
New Concealed Tower	D-1 – D-18	Compliant with Max Height of Zoning District	N/A
New Non-Concealed Tower	RR & I	≤60 Feet	>500 Feet

Note: (fn. 1) Rooftop and attachment heights are identified as above the highest point of the existing structure.

(d) *Director’s decision.* Except for applications eligible for the streamlined process in section 49.65.950 or those applications requiring a special use permit, applications shall be approved or denied, in writing, by the director.

(1) The director shall review the submitted application for completeness and shall notify the applicant within 30 days of receipt of the initial submission whether the

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2 application is deemed complete. If rejected as incomplete, the director shall identify the
3 deficiencies in the application, which if cured, would make the application complete.

4 (2) The director shall review all completed applications for compliance
5 with the requirements of section 49.65.930. The director may notify an applicant of a failure
6 to comply with section 49.65.930 and may allow the applicant to resubmit a revised
7 application. Any period of time from when the director notifies the applicant to the date the
8 revised application is received shall not count for the purposes of calculating the 120 day
9 deadline in subsection (3).

10 (3) Applications not meeting the requirements of this article shall be
11 rejected. The director's decision to approve or deny an application shall be in writing and
12 supported by substantial evidence. The director's decision shall be postmarked to the
13 applicant by the 120th calendar day from the date of receipt of the final application.
14

15 (4) If the director denies an application, the applicant may, within 20 days
16 from the postmarked date of the notice of denial, appeal the director's denial in accordance
17 with section 49.20.110.

18 **49.65.950 Collocations and other modifications to existing facilities pursuant to**
19 **Section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012.**
20

21 (a) Modifications to facilities that involve the collocation, removal or replacement
22 of transmission equipment on an existing wireless tower or base station that do no
23 substantially change the physical dimensions of the existing tower or base station, shall be
24 eligible for a streamlined application process.

25 (b) For the purposes of this section, "substantial change" means:

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2 (1) The mounting of the proposed antenna would increase the existing
3 height of the WCF by more than 10%, or by the height of one additional antenna array with
4 separation from the nearest existing antenna not to exceed twenty feet, whichever is
5 greater, except that the mounting of the proposed antenna may exceed the size limits set
6 forth in this subsection if necessary to avoid interference with existing antenna or unless the
7 increased height requires an existing unlit WCF to become lit;

8 (2) The mounting of the proposed antenna would involve the installation
9 of more than the standard number of new equipment cabinets for the technology involved,
10 not to exceed four, or more than one new equipment shelter;

11 (3) The mounting of the proposed antenna would involve adding an
12 appurtenance to the body of an existing WCF that would protrude from the edge of the
13 existing WCF more than twenty feet, or more than the width of the WCF at the level of the
14 appurtenance, whichever is greater, except that the mounting of the proposed antenna may
15 exceed the size limits set forth in this subsection if necessary to shelter the antenna from
16 inclement weather or to connect the antenna to the structure via a cable; or

17 (4) The mounting of the proposed antenna would involve excavation
18 outside the existing WCF site, defined as the current boundaries of the leased or owned
19 property surrounding the WCF and any access or utility easements currently related to the
20 site.
21

22 (c) The following streamlined process shall be used for eligible applications:

23 (1) The director shall review the submitted application for completeness
24 and shall notify the applicant within 30 days of receipt of the initial submission whether the
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2 application is deemed complete. If rejected as incomplete, the director's shall identify the
3 deficiencies in the application, which, if cured, would make the application complete.

4 (2) The director shall review all completed applications for compliance
5 with the requirements of section 49.65.930. The director may notify an applicant of a failure
6 to comply with section 49.65.930 and may allow the applicant to resubmit a revised
7 application. Any period of time from when the director notifies the applicant to the date the
8 revised application is received shall not count for the purposes of calculating the 90 day
9 deadline in subsection (3).

10 (3) Applications not meeting the requirements of this article shall be
11 rejected. The director's decision to approve or deny an application shall be in writing and
12 supported by substantial evidence. The director's decision shall be postmarked to the
13 applicant by the 90th calendar day from the date of receipt of the final application.

14 (4) If the director does not respond in writing to the applicant within the
15 specified timeframe, then the application shall be deemed approved.

16 (5) If the director denies an application, the applicant may, within 20 days
17 from the postmarked date of the notice of denial, appeal the director's denial in accordance
18 with section 49.20.110.

19 (d) Applications that are not eligible for the streamlined process shall be
20 processed in accordance with 49.65.940(d).

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23 **49.65.960 General application submittal requirements for all WCFs.**

24 An application for a special use permit for a WCF shall be signed on behalf of the
25 applicant by the person preparing the same and with knowledge of the contents and
representations made therein and attesting to the truth and completeness of the

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2 information. The landowner, if different than the applicant, shall also sign the application.
3 All information submitted in an application shall be provided by a person qualified to
4 provide the information. All applications for the construction or installation of a new WCF
5 shall be accompanied by the following documentation, except applications for collocation or
6 modification under section 49.65.950 are exempt from providing the documentation required
7 by subsections (o), (p), or (q):

8 (a) In addition to the information required by 49.65.920(b), an affidavit
9 demonstrating compliance with 49.65.920. If a lower ranking alternative is proposed the
10 affidavit must address why higher ranked options are technically infeasible or commercially
11 impracticable given the location of the proposed wireless communications facility;

12 (b) A signed statement from a qualified person, together with a statement of that
13 person's professional qualifications, certifying that radio frequency emissions from the
14 antenna array(s), both individually and cumulatively considering any other facilities located
15 on or immediately adjacent to the proposed facility, complies with FCC standards;

16 (c) Name, address, email address, and phone number of all persons preparing the
17 application and any required submittals;

18 (d) Name, address and phone number of the property owner, operator, and
19 applicant;

20 (e) Postal address and tax map parcel number of the property;

21 (f) Zoning designation of the property on which the proposed WCF will be
22 situated;

23 (g) Size of the property stated both in square feet and lot line dimensions, and a
24 diagram showing the location of all lot lines;

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2 (h) Locations of any dwellings within a radius equal to the height of the proposed
3 tower from its base;

4 (i) Location, size and height of all structures on the property which is the subject
5 of the application;

6 (j) Location, size and height of all proposed and existing antennae and all
7 appurtenant structures;

8 (k) Type, locations and dimensions of all proposed and existing landscaping and
9 fencing;

10 (l) The number, type and design of the WCFs proposed and the basis for the
11 calculations of the WCFs capacity to accommodate multiple collocations;

12 (m) A detailed description of the proposed WCF and all related fixtures,
13 structures, appurtenances and apparatus, including height above preexisting grade,
14 materials, color and lighting;

15 (n) Certification that the applicant is in compliance with all applicable laws
16 pertaining to the type of service offered;

17 (o) Certification that a geotechnical study has been conducted, and a statement
18 that, taking into account the subsurface and substrata and the proposed drainage plan, the
19 site is adequate to assure the stability of the proposed WCF on the proposed site;

20 (p) Propagation studies of the proposed site and all adjoining in-service or
21 existing sites;

22 (q) Applicant shall disclose in writing any agreement in existence prior to
23 submission of the application that would limit or preclude the ability of the applicant to
24 share any new WCF that it constructs;
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2 (r) Applicant shall furnish written certification by a professional engineer,
3 licensed in the State of Alaska, that the WCF, foundation and appurtenant attachments are
4 designed and will be constructed to meet EIA/TIA 222 G (as amended) and local building
5 code structural requirements for loads, including wind, snow and ice loads for the specified
6 number of collocations required in section 49.65.930(c)(1).

7 (s) Certification by a professional engineer licensed in the State of Alaska that
8 the WCF was constructed, repaired, modified or restored in strict compliance with all
9 current applicable technical, safety and safety-related laws adopted by the City and
10 Borough, state, or federal government, and in compliance with accepted and responsible
11 workmanlike industry practices and recommended practices of the National Association of
12 Tower Erectors; and

13
14 (t) Proof of FAA compliance with 14 CFR Part 77, if applicable.

15 **49.65.970 Special use permit applications.**

16 No person shall be permitted to site, place, build, construct, modify, or prepare any site
17 for the placement or use of WCF, except for those WCF identified in section 49.65.940, Table
18 1, as of the effective date of this article without having first obtained a special use permit.
19 All applicants for a special use permit and any modification of such facility shall comply
20 with the requirements set forth in this section.

21 (a) *Pre-application meeting.* Prior to submission of an application, the applicant
22 shall meet with the director for the purpose of discussing the site and development proposal,
23 and to address any issues that will help to expedite the review and permitting process,
24 including the scope of the visual assessment the applicant will be required to provide as part
25 of the special use permit process. A pre-application meeting may also include a site visit, as

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2 determined by the director. No statement by either the applicant or director shall be
3 regarding as binding or authoritative for purposes of this section.

4 (b) *Additional required application submittals.*

5 (1) In addition to the fee required in 49.65.940(b), the applicant shall pay
6 an additional special use permit application fee as set forth in 49.85.100.

7 (2) In addition to the documentation required by section 49.65.960, the
8 following additional documentation must be submitted with any special use permit
9 application:

10 (A) Certification of compliance with the design criteria listed in
11 section 49.65.930;

12 (B) *A visual impact assessment.* The scope of the required
13 assessment will be reviewed at the pre-application meeting, but the planning commission
14 may require submission of a more detailed visual analysis after submittal of the following
15 required information. The visual impact assessment must include:

16 (i) A "zone of visibility map" which shall be provided in
17 order to determine locations where the tower may be seen;

18 (ii) An analysis demonstrating that the WCF will be sited so
19 as to have the least adverse visual impact on the environment and its character, on existing
20 vegetation, and on the properties in the area; and

21 (iii) Pictorial representations of "before and after" views from
22 key viewpoints as may be appropriate, including but not limited to roadways, parks, public
23 lands, historic districts, and any other location where the site is visible to a large number of
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2 visitors, travelers or residents. Guidance will be provided concerning the appropriate key
3 sites at the pre-application meeting;

4 (iv) Description of the visual impact of the tower base, guy
5 wires (if applicable) and accessory buildings from abutting properties and streets;

6 (v) The applicant shall demonstrate in writing and/or by
7 drawing how it shall effectively screen from view the base of its proposed WCF tower and all
8 related facilities and structures; and

9 (C) The applicant shall provide evidence that the proposed facility
10 is designed to meet the minimum height requirement necessary for effective functioning of
11 the provider's network.
12

13 (c) *Director's Review.*

14 (1) The director shall review the application for completeness.

15 (2) Incomplete applications shall be rejected and the applicant notified in
16 writing within 30 days of receipt of the initial submission. If rejected, the director's decision
17 shall identify the deficiencies in the application, which, if cured, would make the application
18 complete.

19 (3) Once an application is deemed complete, the director shall schedule it
20 for a hearing before the planning commission, and shall give notice to the applicant and the
21 public in accordance with subsection (d).
22

23 (d) *Public notice.* Public notice of planning commission consideration of a special
24 use permit shall be provided as follows:

25 (1) Permit consideration shall be included as an item in the posted
agenda.

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2 (2) Notice of the hearing and the agenda item shall be published in a
3 newspaper of general circulation in the City and Borough a minimum of ten days prior to
4 the date of the meeting.

5 (3) The applicant shall post a sign on the site at least 14 days prior to the
6 hearing at a location determined by the director. The sign shall be between four square feet
7 and 32 square feet in area, shall have a red background, and shall indicate in white
8 lettering, 216-point or larger, that a special use permit for a WCF has been sought for the
9 site, the date of the hearing thereon, and that further information is available from the
10 director. The applicant shall maintain the sign and shall remove it within 14 days after final
11 action on the application.
12

13 (4) The director shall mail notice of the application and the public hearing
14 to the owners of record of all property located within 500 feet of the site.

15 (e) *Planning Commission determination.* The planning commission is authorized
16 to review, analyze, evaluate and make decisions with respect to reviewing special use
17 permits for WCFs.

18 (1) The planning commission may impose any conditions on a special use
19 permit:

20 (A) Required to ensure compliance with the design criteria specified
21 in section 49.65.930; and
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23 (B) That are consistent with the purposes of this article, which may
24 include conditions related to the aesthetic effect of the WCF and compatibility with other
25 WCFs. Factors relevant to aesthetic effects are: the protection of the view in sensitive or
particularly scenic areas, scenic corridors/viewsheds identified in the Comprehensive Plan of

1
2 the City and Borough of Juneau, and in historic sites; the concentration of WCFs in the
3 proposed area; and whether the height, design, placement or other characteristics of the
4 proposed facility could be modified to have a less intrusive visual impact.

5 (2) The planning commission may deny an application for any of the
6 following reasons.

7 (A) Conflict with safety and safety-related codes and requirements;

8 (B) Conflict with traffic needs or traffic laws, or definitive plans for
9 changes in traffic flow or traffic laws;

10 (C) Conflict with the historic nature of a neighborhood;

11 (D) The use or construction of a WCF that is contrary to an already
12 stated purpose of a specific zoning or land use designation;

13 (E) Presence of another approved WCF application within the
14 geographic search area;

15 (F) The proposed site is on, or eligible to be on, the National
16 Register of Historic Places;

17 (G) With respect a new concealed or non-concealed tower, the
18 applicant fails to demonstrate that no existing structure or tower can accommodate the
19 applicant's proposed use without increasing the height of the existing tower or structure or
20 otherwise creating a greater visual impact; or that use of such existing facilities would
21 prohibit or have the effect of prohibiting personal wireless services in the search area to be
22 served by the proposed tower; and
23

24 (H) Conflicts with the provisions of this article.
25

1
2 (3) The planning commission shall deny any application for WCF in the
3 following locations:

4 (A) State or local wildlife refuges;

5 (B) In any area designated as a public park, unless screened so as
6 to minimize visual and noise impacts, and as long as public use will not be disrupted, as
7 determined by the planning commission; and

8 (C) Any area designated as a Scenic Corridor/Viewshed identified in
9 the Comprehensive Plan of the City and Borough of Juneau.

10 (4) The planning commission shall condition a permit on a requirement to
11 construct WCF within a reasonable period of time, which may not exceed 18 months.

12 (f) Any and all representations made by the applicant to the planning
13 commission on the record during the application process, whether written or verbal, shall be
14 deemed a part of the application and may be relied upon in good faith by the commission.

15 (g) A holder of a special use permit granted under this article shall obtain, at its
16 own expense, all permits and licenses required by applicable law, rule, regulation or code,
17 and must maintain the same, in full force and effect, for as long as required by the City and
18 Borough or other governmental entity or agency having jurisdiction over the applicant.

19 (h) The planning commission's decision shall be in writing and mailed to the
20 applicant, postmarked by the 150th day of receipt of a completed application. A decision to
21 deny a request to place, construct or modify a WCF shall be supported by substantial
22 evidence.
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1
2 (i) If the planning commission denies a request to place, construct or modify a
3 WCF, the applicant may, within 20 days from the postmarked date of the decision, appeal
4 the planning commission's decision in accordance with section 49.20.110.

5 **49.65.980 Extent and parameters of special use permit for WCFs.**

6 (a) Special use permits may not be assigned or transferred without providing
7 prior notice to the City and Borough, on a form acceptable to the director.

8 (b) Special use permits may, following a hearing upon prior notice to the
9 applicant, be revoked, canceled, or terminated for a violation of the conditions and
10 provisions of the special use permit for WCFs or for a material violation of this article after
11 prior written notice to the applicant and the holder of the special use permit.

12 (c) The holder of a special use permit shall notify the City and Borough of any
13 intended modification of a WCF and shall apply to the director to modify, relocate or rebuild
14 any WCF.

15 (d) A special use permit shall become void 18 months after its effective date if no
16 substantial construction progress has been made. A new application must be submitted for
17 a voided permit, including the payment of any required fees, and a new permit obtained. No
18 permit shall be renewed more than once.

19
20 **49.65.990 Interference with public safety equipment.**

21 In order to facilitate the regulation, placement, and construction of antenna, and to
22 ensure that all parties are complying to the fullest extent possible with the rules,
23 regulations, and/or guidelines of the FCC, each owner of an antenna, antenna array or
24 applicant for a collocation shall agree in a written statement to the following:
25

1
2 (a) Compliance with "good engineering practices" as defined by the FCC in its
3 rules and regulations;

4 (b) Compliance with FCC regulations regarding susceptibility to radio frequency
5 interference, frequency coordination requirements, general technical standards for power,
6 antenna, bandwidth limitations, frequency stability, transmitter measurements, operating
7 requirements, and any and all other federal statutory and regulatory requirements relating
8 to radio frequency interference (RFI);

9 (c) In the case of an application for collocated telecommunications facilities, the
10 applicant, together with the owner of the subject site, shall use their best efforts to provide a
11 composite analysis of all users of the site to determine that the applicant's proposed
12 facilities will not cause radio frequency interference with the City and Borough's public
13 safety communications equipment and will implement appropriate technical measures, as
14 described in antenna element replacements, to attempt to prevent such interference; and

15
16 (d) Whenever the City and Borough has encountered radio frequency interference
17 with its public safety communications equipment, and it believes that such interference has
18 been or is being caused by one or more antenna arrays, the following steps may be taken:

19 (1) The City and Borough shall provide notification to all wireless service
20 providers operating in the City and Borough of possible interference with the public safety
21 communications equipment, and upon such notifications, the owners shall use their best
22 efforts to cooperate and coordinate with the City and Borough among themselves to
23 investigate and mitigate the interference, if any, utilizing the procedures set forth in the
24 joint wireless industry-public safety "Enhanced Best Practices Guide," released by the FCC
25 in Appendix D of FCC 04-168 (released August 6, 2004), including the "Good Engineering

1
2 Practices," as may be amended or revised by the FCC from time to time in any successor
3 regulations.

4 (2) If any equipment owner fails to cooperate with the City and Borough in
5 complying with the owner's obligations under this section or if the FCC makes a
6 determination of radio frequency interference with the City and Borough public safety
7 communications equipment, the owner who failed to cooperate and/or the owner of the
8 equipment which caused the interference shall be responsible, upon FCC determination of
9 radio frequency interference, for reimbursing the City and Borough for all costs associated
10 with ascertaining and resolving the interference, including but not limited to any
11 engineering studies obtained by the City and Borough to determine the source of the
12 interference. For the purposes of this subsection, failure to cooperate shall include failure to
13 initiate any response or action as described in the "Enhanced Best Practices Guide" within
14 24 hours of the City and Borough's notification.
15

16 **49.65.1000 Transfer of Ownership**

17 In the event a WCF provider or owner transfers ownership of a WCF to a different
18 provider or owner, the previous and new service provider or owner shall notify the director
19 no less than 10 days from the date of transfer. The new provider or owner shall include the
20 name, address and phone number of the person to be responsible for the WCF.
21

22 **49.65.1010 Non-use and abandonment.**

23 (a) Notwithstanding section 49.10.600, the director may require removal of a
24 WCF under the following circumstances, which are deemed detrimental to the health,
25 safety, and welfare interests of the City and Borough:

1
2 (1) WCFs with a permit that have not been used as a WCF for a period
3 exceeding 90 consecutive days or a total of 180 days in any 365-day-period, except for
4 periods caused by force majeure or acts of God, in which case, repair or removal shall
5 commence within 90 days.

6 (2) Permitted WCFs that have fallen into such a state of disrepair that
7 create a public health or safety hazard, which shall be deemed a nuisance per se.

8 (3) WCFs that have been located, constructed, or modified without first
9 obtaining all permits required by law, or that have been located, constructed or modified in
10 a manner inconsistent with the applicable permit requirements, which shall be deemed a
11 nuisance per se.
12

13 (b) If the director makes such a determination as noted in subsection (a) of this
14 section, the director shall notify the permittee in writing that said WCF is to be removed.

15 (c) Within 90 days of the postmarked date of the director's notice, the permittee,
16 or its successors or assigns, shall dismantle and remove such WCF, and all associated
17 structures and facilities, from the site and restore the site as close to its original condition as
18 is possible, such restoration being limited only by physical or commercial impracticability
19 proven to the satisfaction of the director.
20

21 (d) If the WCF is not removed or substantial progress has not been made to
22 remove the WCF within 90 days after the permit holder has received notice, the City and
23 Borough may remove or cause to be removed the WCF at the sole expense of the owner or
24 permit holder.

25 (e) If, the City and Borough removes or causes to be removed a WCF and the
owner of the WCF does not claim and remove it from the site to a lawful location within ten

1
2 days, then the City and Borough may take steps to declare the WCF abandoned, and sell it
3 and its components.

4 (f) Notwithstanding anything in this section to the contrary, the director may
5 approve a temporary use permit/agreement for the WCF, for no more than 90 days, during
6 which time a suitable plan for removal, conversion, or relocation of the affected WCF shall
7 be developed by permit holder or owner, subject to the approval of the director. If such a
8 plan is not developed, approved and executed within the 90-day time-period, then the City
9 and Borough may take possession of and dispose of the affected WCF in the manner
10 provided in this section.
11

12 **49.65.1020 Conflict with other ordinances.**
13

14 Where this article differs or conflicts with other ordinances, unless the right to do so is
15 preempted or prohibited by the state or federal government, the more restrictive or
16 protective of the City and Borough and the public shall apply.
17

18 **49.65.1030 Violations**

19 Violations of this article or any special use permit obtained pursuant to this article
20 shall be subject to the provisions of section 49.10.600 through 49.10.660.
21

22 **Section 3. Amendment of Section.** CBJ 49.80.120 Definitions, is amended by
23 the addition of the following definitions to be incorporated in alphabetical order:

24 *Amateur Radio Antenna* means any tower used for amateur radio (ham) transmissions
25 consistent with FCC regulations.

Antenna means communications equipment that transmits and receives electromagnetic
radio signals used in the provision of all types of wireless communications services.

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2 *Antenna array* means A single or group of antenna elements and associated mounting
3 hardware, transmission lines, or other appurtenances which share a common attachment
4 device such as a mounting frame or mounting support structure for the sole purpose of
transmitting or receiving electromagnetic waves.

5 *Antenna support structure* means a structure that is primarily constructed for the purpose of
6 holding antenna but on which one or more antennas may be mounted, including buildings,
water tanks, pole signs, church steeples, and electric power transmission towers.

7 *Appurtenant or associated facilities* means an accessory facility or structure serving or being
8 used in conjunction with (WTF), and located on the same property or lot as the (WTF),
including but not limited to, utility or transmission equipment storage sheds or cabinets.

9 *Base station* means a facility consisting of radio transceivers, antenna, coaxial cable, a
10 regular and back-up power supply, and other electronics associated with the operation of a
11 WCF.

12 *Collocation* means the placement of an antenna on an existing WCF for the purpose of
transmitting and/or receiving radio frequency signals for communications purposes.

13 *Commercially impracticable* means the inability to perform an act on terms that are
14 reasonable in commerce. The inability to achieve a satisfactory financial return on
investment or profit, standing alone, shall not be considered "commercial impracticability"
15 and shall not render an act or the terms of an agreement commercially impracticable.

16 *Concealed* means a tower, ancillary structure, or equipment compound that is not readily
17 identifiable as such, and is designed to be aesthetically compatible with existing and
proposed building(s) and uses on a site. There are two (2) types of concealed facilities: 1)
18 Antenna Attachments, including painted antenna and feed lines to match the color of a
building or structure, faux windows, dormers or other architectural features that blend with
19 an existing or proposed building or structure and 2) Freestanding. Freestanding concealed
towers usually have a secondary, obvious function, which may include church steeple,
20 windmill, bell tower, clock tower, light stanchion, flagpole with or without a flag, or tree.

21 *Equipment cabinet or shelter* means a small structure shelter, cabinet or vault used to house
22 and protect the electronic equipment necessary for processing wireless communication
signals. Associated equipment may include air conditioning and emergency generators.

23 *FAA* means the Federal Aviation Administration or its duly designated and authorized
24 successor agency.

25 *FCC* means the Federal Communications Commission or its duly designated and authorized
successor agency.

Feed lines means cables used as the interconnecting media between the
transmission/receiving base station and the antenna.

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3 *Flush mounted* means any antenna or antenna array attached directly to the face of the
4 support structure or building in a manner that permits mechanical beam tilting if necessary
but such that no portion of the antenna extends above the height of the support structure or
building.

5 *Guy wire* means any wire or cable that provides structural support between a tower and the
6 ground.

7 *Monopole WCF* means a style of free-standing WTF consisting of a single shaft usually
8 composed of two or more hollow sections that are in turn attached to a foundation. This type
9 of WTF is designed to support itself without the use of guy wires or other stabilization
devices. These facilities are mounted to a foundation that rests on or in the ground or on a
building's roof.

10 *Non-concealed* means a WCF that has not been treated, camouflaged, or disguised to blend
11 with its surroundings and is readily identifiable.

12 *Radio frequency emissions* means any electro-magnetic radiation or other communication
13 signal emitted from an antenna that is regulated by the FCC.

14 *Satellite earth station* means a parabolic or dish antenna that is mounted to a structure,
15 which may include associated equipment cabinets, necessary for the transmission or
reception of wireless communication signals with satellites.

16 *Tower* means a structure that is built for the sole or primary purpose of supporting
17 equipment for the transmission and/or reception of radio frequency signals or other wireless
communications or meteorological purposes, and usually consisting of an antenna or
18 antenna array, transmission cables, equipment cabinets, and their associated facilities.

19 *Tower base* means the foundation, usually concrete, on which the tower and other support
20 equipment is situated. For measurement calculations, the tower base is that point on the
foundation reached by dropping a perpendicular from the geometric center of the tower.

21 *Unipole* means a wireless communication structure in which antennas are mounted inside a
22 RF transparent cylinder. This design may also be referred to as a concealed monopole,
flagpole, light pole, free standing pole, or roof mounted pole on existing structures.

23 *Wireless Communication Facility (WCF)* means any manned or unmanned location for the
24 transmission and/or reception of radio frequency signals or other wireless communications,
and usually consisting of an antenna or group of antennas, transmission cables, and
25 equipment cabinets, and may include an antenna support structure. The following
developments shall be considered a WCF: developments containing new, mitigated, or
existing antenna support structures, public antenna support structures, replacement
antenna support structures, collocation on existing antenna support structures, attached

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2 wireless communications facilities, concealed wireless communication facilities, and non-
3 concealed wireless communication facilities. Excluded from the definition are:
4 noncommercial amateur radio, amateur ham radio and citizen band antennas, satellite
5 earth stations and antenna support structures, and antennas and/or antenna arrays for
6 AM/FM/TV/HDTV broadcasting transmission facilities.

7 Specific types of WCFs include:

8 *Attached WCF* means an antenna or antenna array that is secured to an existing
9 building or structure with any accompanying pole or device which attaches it to the
10 building or structure, together with transmission cables, and an equipment cabinet,
11 which may be located either on the roof or inside/outside of the building or structure.
12 An attached wireless communications facility is considered to be an accessory use to
13 the existing principal use on a site.

14 *Concealed WCF*, sometimes referred to as a concealed or camouflaged facility, means
15 a WCF, ancillary structure, or WCF equipment compound that is not readily
16 identifiable as such, and is designed to be aesthetically compatible with existing and
17 proposed building(s) and uses on a site. There are two types of concealed WCFs: 1)
18 attached and 2) freestanding. 1) Examples of concealed attached facility include, but
19 are not limited to the following: painted antenna and feed lines to match the color of
20 a building or structure, faux windows, dormers or other architectural features that
21 blend with an existing or proposed building or structure. 2) Freestanding concealed
22 WCFs usually have a secondary, obvious function which may be, but is not limited to
23 the following: church steeple, windmill, bell tower, clock tower, cupola, light
24 standard, flagpole with or without a flag, or faux tree.

25 *Freestanding WCF* means any manned or unmanned location for the transmission
and/or reception of radio frequency signals, or other wireless communications, and
usually consisting of an antenna or group of antennas, feed lines, and equipment
cabinets, and may include an antenna support structure. A freestanding WCF
includes, but is not limited to the following: guyed, lattice, or monopole support
structures.

Non-concealed WCF means a wireless communication facility that is readily
identifiable as such and can be either freestanding or attached.

Section 4. Amendment of Section. CBJ 49.85.100 is amended to add a
subsection (1) to read:

(18) Wireless Communication Facility Application Fees.

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- (A) Application fees required by 49.65.940(b): \$350
- (B) Additional fee required for special use permit applications required by 49.65.970(b)(1): \$500
- (C) Technical expert review fee specified in 49.65.940(b): \$4000

Section 5. Effective Date. This ordinance shall be effective 30 days after its adoption.

Adopted this _____ day of _____, 2014.

Merrill Sanford, Mayor

Attest:

Laurie J. Sica, Municipal Clerk

Parameters of Local Jurisdiction over Wireless Infrastructure

The development and deployment of wireless infrastructure (e.g. towers) has presented challenges to local government since the beginning of the wireless revolution in the early 1990's. Following the sale of spectrum by the US Government, the various wireless providers who paid millions wanted to deploy service and receive a return on their investment, but found they were being stymied by local government's regulations on construction of towers.

The industry went back to Congress for relief and as a result a portion of the 1996 Telecommunications Act (Section 704, codified at 47 USC §332(c)) contained the following provisions:

(A) the regulation of placement, construction, and modification of personal wireless services facilities by any state or local government shall not unreasonably discriminate among providers of functionally equivalent services;

(B) the regulation of the placement, construction, and modification of personal wireless service facilities by any state or local government shall not prohibit or have the effect of prohibiting the provision of personal wireless services;

(C) once an applicant files a request for authorization to place, construct, or modify a personal wireless service facility, the governmental entity shall act on the application "within a reasonable period of time after the request is duly filed";

(D) no state or local governmental entity may regulate the placement, construction, or modification of personal wireless service facilities on the basis of environmental effects of radio frequency emissions to the extent that such emissions comply with FCC regulations; and

(E) any decision by a state or local governmental entity to deny an application to place, construct, or modify a personal wireless service facility shall be in writing and supported by substantial evidence contained in a written record.

There's been plenty of court decisions since 1996 interpreting Section 704 and what constitutes "unreasonable discrimination" and prohibition of services, so that part of the law is fairly settled at this point as to what is permitted and what isn't. So the next issue that the wireless industry had with local government was with how long it took to process applications for wireless siting, since Section 704 required local government to act "within a reasonable period of time". The industry told the FCC that many local governments sat on their applications for extended periods of time and that services could not be deployed because of the delays. As a result of their desire to get speed into the process, the industry first went to the FCC, and had the FCC issue a Declaratory Ruling in 2009 requiring local government to

move along applications, in the case of co-locations requiring decisions in 90 days and for new locations in 150 days. This put an administrative burden on local government to make decisions which they may not be adequately informed upon in an expedited fashion, or otherwise they will be deemed approved.

Arlington and San Antonio Texas challenged the FCC's authority to impose those timelines on local government decisions, and the case went all the way to the Supreme Court, which in the 2013 session found that the FCC did in fact have authority to impose those timelines on local government, and thus (absent an intervening state law with different timelines) a local government is bound to make a decision on a wireless facility application in either 90 or 150 days, depending on the type of facility. The clock starts upon submission of a "complete" application and the local government must notify the applicant within 30 days of initial submission if the application is incomplete, otherwise the clock continues to run. IF the local government fails to adjudicate an application within those timelines, the applicant can go to US District Court and file suit against the community, which the court is supposed to address on an "expedited basis". Presumptions will be made in favor of the applicant in the case of a community failing to act within the timeline, with the community being required to overcome those presumptions with evidence as to why a decision could not be reached within those parameters.

Still unsatisfied with local governments' efforts to regulate placement of wireless facilities, the wireless industry went back to Congress and got a small paragraph inserted in the Middle Class Tax Relief and Job Creation Act of 2012, known as Section 6409 (now codified at 47 USC §1455(a)), which says:

SEC. 6409. WIRELESS FACILITIES DEPLOYMENT.

(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 mandates that local government MUST approve certain types of applications if they met the prescribed standards. Note however that Congress did not define what it meant by “substantially change the physical dimensions” or what was an “existing wireless tower or base station”. In the absence of any standards or definitions, the wireless industry expressed its opinions on Congressional intent as to those terms, which led to conflicting findings.

Into the void stepped the FCC in January 2013, issuing an “Informal Guidance” to assist local government in ascertaining Congressional intent. The “Informal Guidance” had no binding effect, but was useful in illustrating what the FCC thought was the intent of Congress in Section 6409. A full copy of the “Informal Guidance” is attached to this memo. In the Informal Guidance, the FCC adopted a previously developed definition of “substantially change” from other legislation to be the definition for purposes of Section 6409, involving increases in height, width, addition of equipment and expansion of compound size. The “Informal Guidance” also offered its interpretation of what an “existing wireless tower or base station” meant, finding that a wireless tower was “any structure built for the sole or primary purpose of supporting FCC-licensed antennas and their associated facilities...” and an existing base station was “a structure that *currently* supports or houses an antenna, transceiver, or other associated equipment that constitutes part of a base station.” (emphasis added). As noted above, the FCC’s “Informal Guidance” had no binding effect however, and was merely a statement of what the FCC staff thought Congress intended. Nevertheless, the wireless industry adopted the “Informal Guidance” in part and lobbied for new state legislation in several jurisdictions which used parts of the “Informal Guidance” as standards to require local governments in those states to require approval of wireless infrastructure (see recent legislation in North Carolina and Georgia as examples¹).

Unsatisfied with just the “Informal Guidance” and emboldened by the Supreme Court’s affirmation of their authority to impose certain conditions upon the local approval of wireless facilities in the 2013 “Shot Clock” ruling, the FCC issued a Notice of Proposed Rulemaking² in September 2013 soliciting comments from all interested parties on a variety of wireless siting issues, including:

- Streamlining the environmental and historic preservation review processes for newer technologies, including small cells and distributed antenna systems;
- Removing barriers to the deployment of temporary towers, that are used in cases of emergencies or to add capacity during short term events;
- The meaning of terms included in a provision of the Middle Class Tax Relief and Job Creation Act of 2012 which states “a State or local government may not deny, and

¹ North Carolina House Bill 664, S.L. 2013-185, Georgia House Bill 176

² *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies (FCC 13-122)*

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;” and

- Clarification of issues addressed in the Commission’s “shot clock” order which set time periods for state and local governments to complete review of wireless siting applications.

Well over 200 comments were filed by local government and industry representatives, as well as the general public, and the FCC has not yet issued a Report and Order arising from the Notice of Proposed Rulemaking, but it is anticipated that the Report and Order will adopt the 4 prong test for “substantially change” used in the “Informal Guidance” as the guidepost for determining if an application for collocation MUST be approved without public hearing. The greater question will be what the FCC decides happens IF a local government fails to meet the Shot Clock timelines on an application, as one option would be a “deemed approved” which would permit the applicant to just obtain a building permit and construct if the local government failed to act. A host of other issues covered by the NPRM will also be decided in the Report and Order, and local governments will likely have to adapt to those issues absent a successful judicial challenge to the FCC’s findings.

Based on the current state of federal regulation of wireless infrastructure, it is important for local government to balance their legitimate local planning and zoning requirements with the expressed federal preference for the deployment of wireless infrastructure to ensure the availability of a variety of wireless services to all Americans. It is anticipated with the forthcoming 2015 TV Spectrum auction (where TV stations will give up some of their spectrum for the FCC to auction off to wireless providers) that the demand for further infrastructure will only increase to permit the auction winners to recover their investments in that spectrum. It is therefore important to have regulations that accomplish your local objectives while still remaining compliant with the applicable federal rules, and having the ability to adjust those regulations as needed when further clarification of the federal rules becomes available.

(Informal Guidance Memo from FCC Attached)



PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

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WIRELESS TELECOMMUNICATIONS BUREAU OFFERS GUIDANCE ON INTERPRETATION OF SECTION 6409(a) OF THE MIDDLE CLASS TAX RELIEF AND JOB CREATION ACT OF 2012

DA 12-2047
January 25, 2013

On February 22, 2012, the Middle Class Tax Relief and Job Creation Act of 2012 (Tax Act)¹ became law. Section 6409(a) of the Tax Act provides that a state or local government “may not deny, and shall approve” any request for collocation, removal, or replacement of transmission equipment on an existing wireless tower or base station, provided this action does not substantially change the physical dimensions of the tower or base station.² The full text of Section 6409(a) is reproduced in the Appendix to this Public Notice.

To date, the Commission has not received any formal petition to interpret or apply the provisions of Section 6409(a). We also are unaware of any judicial precedent interpreting or applying its terms. The Wireless Telecommunications Bureau has, however, received informal inquiries from service providers, facilities owners, and state and local governments seeking guidance as to how Section 6409(a) should be applied. In order to assist interested parties, this Public Notice summarizes the Bureau’s understanding of Section 6409(a) in response to several of the most frequently asked questions.³

What does it mean to “substantially change the physical dimensions” of a tower or base station?

Section 6409(a) does not define what constitutes a “substantial[] change” in the dimensions of a tower or base station. In a similar context, under the *Nationwide Collocation Agreement* with the Advisory Council on Historic Preservation and the National Conference of State Historic Preservation Officers, the Commission has applied a four-prong test to determine whether a collocation will effect a “substantial increase in the size of [a] tower.”⁴ A proposed collocation that does not involve a substantial increase in

¹ Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. 112-96, H.R. 3630, 126 Stat. 156 (enacted Feb. 22, 2012) (Tax Act).

² *Id.*, § 6409(a).

³ Although we offer this interpretive guidance to assist parties in understanding their obligations under Section 6409(a), *see, e.g., Truckers United for Safety v. Federal Highway Administration*, 139 F.3d 934 (D.C.Cir. 1998), the Commission remains free to exercise its discretion to interpret Section 6409(a) either by exercising its rulemaking authority or through adjudication. With two exceptions not relevant here, the Tax Act expressly grants the Commission authority to “implement and enforce” this and other provisions of Title VI of that Act “as if this title is a part of the Communications Act of 1934 (47 U.S.C. 151 et seq.)” Tax Act § 6003.

⁴ 47 C.F.R. Part 1, App. B, *Nationwide Programmatic Agreement for the Collocation of Wireless Antennas*, § I.C (*Nationwide Collocation Agreement*).

size is ordinarily excluded from the Commission's required historic preservation review under Section 106 of the National Historic Preservation Act (NHPA).⁵ The Commission later adopted the same definition in the *2009 Declaratory Ruling* to determine whether an application will be treated as a collocation when applying Section 332(c)(7) of the Communications Act of 1934.⁶ The Commission has also applied a similar definition to determine whether a modification of an existing registered tower requires public notice for purposes of environmental review.⁷

Under Section I.C of the *Nationwide Collocation Agreement*, a "substantial increase in the size of the tower" occurs if:

- 1) [t]he mounting of the proposed antenna on the tower 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
- 2) [t]he mounting of the proposed antenna would involve the installation of more than the standard number of new equipment cabinets for the technology involved, not to exceed four, or more than one new equipment shelter; or
- 3) [t]he mounting of the proposed antenna 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; or
- 4) [t]he mounting of the proposed antenna would involve excavation outside the current tower site, defined as the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site.

Although Congress did not adopt the Commission's terminology of "substantial increase in size" in Section 6409(a), we believe that the policy reasons for excluding from Section 6409(a) collocations that substantially change the physical dimensions of a structure are closely analogous to those that animated the Commission in the *Nationwide Collocation Agreement* and subsequent proceedings. In light of the Commission's prior findings, the Bureau believes it is appropriate to look to the existing definition of "substantial increase in size" to determine whether the collocation, removal, or replacement of equipment

⁵ See 16 U.S.C. § 470f, *see also* 47 C.F.R. § 1.1307(a)(4) (requiring applicants to determine whether proposed facilities may affect properties that are listed, or are eligible for listing, in the National Register of Historic Places).

⁶ See 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, WT Docket No. 08-165, *Declaratory Ruling*, 24 FCC Rcd. 13994, 14012, para. 46 & n.146 (2009) (*2009 Declaratory Ruling*), *recon. denied*, 25 FCC Rcd. 11157 (2010), *pet. for review denied sub nom. City of Arlington, Texas v. FCC*, 668 F.3d 229 (5th Cir.), *cert. granted*, 113 S.Ct. 524 (2012); 47 U.S.C. § 332(c)(7).

⁷ See 47 C.F.R. § 17.4(c)(1)(B); National Environmental Policy Act Compliance for Proposed Tower Registrations, WT Docket No. 08-61, *Order on Remand*, 26 FCC Rcd. 16700, 16720-21, para. 53 (2011).

on a wireless tower or base station substantially changes the physical dimensions of the underlying structure within the meaning of Section 6409(a).

What is a “wireless tower or base station”?

A “tower” is defined in the *Nationwide Collocation Agreement* as “any structure built for the sole or primary purpose of supporting FCC-licensed antennas and their associated facilities.”⁸ The Commission has described a “base station” as consisting of “radio transceivers, antennas, coaxial cable, a regular and backup power supply, and other associated electronics.”⁹ Section 6409(a) applies to the collocation, removal, or replacement of equipment on a wireless tower or base station. In this context, we believe it is reasonable to interpret a “base station” to include a structure that currently supports or houses an antenna, transceiver, or other associated equipment that constitutes part of a base station.¹⁰ Moreover, given the absence of any limiting statutory language, we believe a “base station” encompasses such equipment in any technological configuration, including distributed antenna systems and small cells.

Section 6409(a) by its terms applies to any “wireless” tower or base station. By contrast, the scope of Section 332(c)(7) extends only to facilities used for “personal wireless services” as defined in that section.¹¹ Given Congress’s decision not to use the pre-existing definition from another statutory provision relating to wireless siting, we believe the scope of a “wireless” tower or base station under Section 6409(a) is not intended to be limited to facilities that support “personal wireless services” under Section 332(c)(7).

May a state or local government require an application for an action covered under Section 6409(a)?

Section 6409(a) states that a state or local government “may not deny, and shall approve, any eligible facilities request....” It does not say that a state or local government may not require an application to be filed. The provision that a state or local government must approve and may not deny a request to take a covered action, in the Bureau’s view, implies that the relevant government entity may require the filing of an application for administrative approval.

⁸ See *Nationwide Collocation Agreement*, § I.B.

⁹ See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, WT Docket No. 10-133, *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, Fifteenth Report*, 26 FCC Rcd. 9664, 9481, para. 308 (2011).

¹⁰ See also 47 C.F.R. Part 1, App. C, *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, § II.A.14 (defining “tower” to include “the on-site fencing, equipment, switches, wiring, cabling, power sources, shelters, or cabinets associated with that Tower but not installed as part of an Antenna as defined herein”).

¹¹ 47 U.S.C. § 332(c)(7)(A). “Personal wireless services” is in turn defined to mean “commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services.” *Id.* § 332(c)(7)(C)(1).

Is there a time limit within which an application must be approved?

Section 6409(a) does not specify any period of time for approving an application. However, the statute clearly contemplates an administrative process that invariably ends in approval of a covered application. We believe the time period for processing these applications should be commensurate with the nature of the review.

In the *2009 Declaratory Ruling*, the Commission found that 90 days is a presumptively reasonable period of time to process collocation applications.¹² In light of the requirement of Section 6409(a) that the reviewing authority “may not deny, and shall approve” a covered request, we believe that 90 days should be the maximum presumptively reasonable period of time for reviewing such applications, whether for “personal wireless services” or other wireless facilities.

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¹² See *2009 Declaratory Ruling*, 24 FCC Rcd. at 14012-13, paras. 46-47.

APPENDIX

SEC. 6409. WIRELESS FACILITIES DEPLOYMENT.

(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.