

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Accelerating Wireless Broadband Deployment)	WT Docket No. 17-79
by Removing Barriers to Infrastructure)	
Investment)	

To: The Commission

PETITION FOR DECLARATORY RULING

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TABLE OF CONTENTS

INTRODUCTION AND SUMMARY	2
DISCUSSION	5
I. THE COMMISSION SHOULD CLARIFY THAT SECTION 6409(A) AND THE RELATED SHOT CLOCK APPLY TO ALL AUTHORIZATIONS NECESSARY TO DEPLOY WIRELESS INFRASTRUCTURE.	5
II. THE COMMISSION SHOULD CLARIFY WHEN THE SECTION 6409(A) SHOT CLOCK BEGINS TO RUN.	7
III. THE COMMISSION SHOULD CLARIFY WHAT CONSTITUTES A SUBSTANTIAL CHANGE UNDER ITS RULES IMPLEMENTING SECTION 6409(A).	9
A. THE COMMISSION SHOULD CLARIFY THE DEFINITION AND SCOPE OF CONCEALMENT ELEMENTS.	10
B. THE COMMISSION SHOULD CLARIFY THAT EQUIPMENT ATTACHED TO A TOWER OR SMALL CELL NODE DOES NOT CONSTITUTE AN EQUIPMENT CABINET.	13
C. THE COMMISSION SHOULD CLARIFY THE SCOPE OF SECTION 1.6100(B)(7)(IV).	14
1. THE COMMISSION SHOULD CLARIFY THAT SECTION 1.6100(B)(7)(IV) IS ONLY TRIGGERED IF THE PROPOSED MODIFICATION WOULD CAUSE A STRUCTURE TO RUN AFOUL OF PREVIOUSLY IMPOSED CONDITIONS.	14
2. THE COMMISSION SHOULD CLARIFY THAT LOCAL LIMITS ON THE NUMBER OR SIZE OF ANTENNAS ARE IRRELEVANT FOR DETERMINING WHETHER A PROPOSAL CONSTITUTES A SUBSTANTIAL CHANGE.	15
3. THE COMMISSION SHOULD CLARIFY THAT BLIGHT AND OTHER AESTHETIC CONCERNS REGARDING PREVIOUSLY APPROVED STRUCTURES DO NOT RENDER THEM INELIGIBLE FOR SECTION 6409(A).	16
D. THE COMMISSION SHOULD CLARIFY THE SEPARATION CLAUSE IN SECTION 1.6100(B)(7)(I) TO ELIMINATE UNCERTAINTY.	17
E. THE COMMISSION SHOULD CLARIFY THAT THE “CURRENT SITE” FOR PURPOSES OF SECTION 1.6100(B)(7)(IV) MEANS THE ENTIRE AREA COVERED BY THE CURRENT LEASE.	18
F. THE COMMISSION SHOULD REITERATE THAT MODIFICATIONS TO LEGAL, NON-CONFORMING STRUCTURES DO NOT <i>PER SE</i> CONSTITUTE SUBSTANTIAL CHANGES.	19
IV. THE COMMISSION SHOULD CLARIFY THAT CONDITIONAL APPROVALS VIOLATE SECTION 6409(A).	20

V. THE COMMISSION SHOULD CLARIFY THAT LOCALITIES MAY NOT IMPOSE
PROCESSES THAT DELAY, DEFEAT, OR REDUCE THE PROTECTIONS
AFFORDED UNDER SECTION 6409(A)..... 21

VI. THE COMMISSION HAS AUTHORITY TO ISSUE THE REQUESTED
CLARIFICATIONS..... 24

CONCLUSION..... 24

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The Wireless Infrastructure Association (“WIA”),¹ pursuant to Section 1.2 of the Federal Communications Commission’s (“FCC” or “Commission”) rules,² hereby seeks a Declaratory Ruling clarifying the rules implementing Section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012 (“Spectrum Act”).³ Specifically, WIA urges the Commission to clarify that (i) Section 6409(a) and the implementing regulations apply to all state and local authorizations required to deploy new or replacement transmission equipment on existing wireless towers or base stations; (ii) the Section 6409(a) shot clock begins to run when an applicant makes a good faith attempt to request local approval; (iii) the substantial change criteria in Section 1.6100(b)(7) of the Commission’s rules should be narrowly interpreted; (iv) “conditional” approvals of eligible facilities requests (“EFRs”) violate Section 6409(a); and (v) localities may not establish processes or impose conditions that effectively defeat or reduce the protections afforded under Section 6409(a).

¹ WIA is the principal organization representing companies that build, design, own, and manage telecommunications facilities throughout the world. Its members include infrastructure providers, telecommunications carriers, and professional services firms.

² 47 C.F.R. § 1.2.

³ Section 6409(a) of the Spectrum Act is codified as 47 U.S.C. § 1455.

INTRODUCTION AND SUMMARY

WIA recognizes and appreciates the Commission's continuing commitment to create a regulatory environment that promotes wireless infrastructure deployment and the collocation of communications facilities. The Commission has taken a number of actions implementing Section 6409(a), which directs states and localities to 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."⁴ Congress did not define what constitutes a substantial change, leaving the Commission with the task of defining the phrase to eliminate ambiguity.

The Commission adopted rules in 2014 clarifying many of Section 6409(a)'s terms, such as "substantial change," in an effort to advance Congress's goal of facilitating rapid deployment.⁵ According to the Commission, the implementing rules "will serve the public interest by providing guidance to all stakeholders on their rights and responsibilities under the provision, reducing delays in the review process for wireless infrastructure modifications, and facilitating the rapid deployment of wireless infrastructure, thereby promoting advanced wireless broadband services."⁶

Unfortunately, despite the Commission's best intentions, certain jurisdictions continue to misapply Section 6409(a) and/or are still acting in ways that circumvent the protections afforded by Section 6409(a). For example, the *2014 Order* stated that the rules implementing Section 6409(a) did not inhibit the ability of localities "to enforce and condition approval on compliance with generally applicable building, structural, electrical, and safety codes and with other laws

⁴ *Id.* § 1455(a)(1).

⁵ See *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd 12865 (2014) ("*2014 Order*").

⁶ *Id.* at 12872.

codifying objective standards reasonably related to health and safety.”⁷ This has emboldened some localities to claim – erroneously – that Section 6409(a) and the related shot clock do not apply to all of the sometimes numerous government approvals that are necessary before infrastructure deployment can commence. Other localities are claiming that the Section 6409(a) shot clock does not commence until numerous hurdles are cleared, including pre-application hurdles.

Additionally, some localities are broadly interpreting what constitutes a “substantial change” under the Commission’s rules so that numerous requests are deemed ineligible for Section 6409(a). For example:

- Section 1.6100(b)(7)(v) states that a proposed collocation would constitute a substantial change to a tower, and therefore be ineligible for the protections created by Section 6409(a), if “[i]t would defeat the concealment elements of the eligible support structure.”⁸ Some localities are interpreting the term “concealment elements” very broadly and claim that virtually any change to a structure – such as changes to the height or color of a structure – directly impacts concealment and therefore are outside the scope of Section 6409.⁹ Taking this broad application to its logical conclusion would allow localities to supersede Section 6409(a).
- Some localities are claiming that small radios, amplifiers, and other equipment attached to a tower or small cell node constitute equipment cabinets, and then they deny relief because the proposal would result in more than four equipment cabinets which, in their view, would constitute a substantial change under their interpretation of the current rule.¹⁰ Other jurisdictions claim that the installation of a generator or a backup generator is not an EFR and any collocation proposal that includes a generator constitutes a substantial change.
- Some localities, despite the Commission’s prior pronouncement that legal, non-conforming structures are eligible for Section 6409(a) relief,¹¹ continue to claim that any

⁷ *Id.* at 12875, 12945.

⁸ 47 C.F.R. § 1.6100(b)(7)(v).

⁹ See Letter from Sade Dada, Government Affairs Counsel, Wireless Infrastructure Association, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 3 (Sept. 10, 2018) (“WIA Sept. Letter”); Letter from Kenneth J. Simon, Senior Vice President and General Counsel, Crown Castle International Corp., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 11-12 (Aug. 10, 2018) (“Crown Castle 2018 Letter”); *accord* Letter from Joshua S. Turner, Counsel to Crown Castle International Corp., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (June 17, 2019) (“Crown Castle 2019 Letter”).

¹⁰ See Crown Castle 2019 Letter at 2.

¹¹ See 2014 Order, 29 FCC Rcd at 12950-51.

change to such structures constitutes “substantial changes,” making them ineligible under Section 6409(a),¹² unless the structures are modified to come into compliance with new code requirements enacted after the structures were erected, or some localities refuse to accept an EFR until all aspects of a site or property are brought into compliance.

- Some localities also deny requests for Section 6409(a) treatment because “blight,” such as graffiti or other issues unrelated to the applicant’s proposed facilities, prevents consideration of an EFR or otherwise constitutes a substantial change in the originally approved structure, making it ineligible for collocation under Section 6409(a).¹³

Further, some localities are imposing burdensome conditions, and/or information requirements that substantially delay, defeat, or reduce the protections afforded under Section 6409(a).

Based on the foregoing, WIA urges the Commission to clarify that (i) Section 6409(a) and the implementing regulations apply to all state and local authorizations required to deploy new or replacement transmission equipment on existing wireless towers or base stations; (ii) the Section 6409(a) shot clock begins to run when an applicant makes a good faith attempt to request local approval; (iii) the substantial change criteria in Section 1.6100(b)(7) of the Commission’s rules should be narrowly interpreted; (iv) “conditional” approvals of EFRs violate Section 6409(a); and (v) localities may not establish processes or impose conditions that effectively defeat or reduce the protections afforded under Section 6409(a). These discrete clarifications will build on the Commission’s successful and continuing efforts to remove barriers to infrastructure deployment, to accelerate the expansion of next generation wireless services to consumers, and to ensure continued U.S. leadership in all things wireless.

¹² See Crown Castle 2019 Letter at 2.

¹³ See *id.*

DISCUSSION

I. THE COMMISSION SHOULD CLARIFY THAT SECTION 6409(A) AND THE RELATED SHOT CLOCK APPLY TO ALL AUTHORIZATIONS NECESSARY TO DEPLOY WIRELESS INFRASTRUCTURE.

In adopting Section 6409(a), Congress directed state and local governments, notwithstanding any other provisions of law, to approve “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.”¹⁴ Such changes were deemed EFRs entitled to approval unless the request would substantially change the physical dimensions of the tower or base station.¹⁵ Given this congressional mandate, the Commission imposed a 60-day shot clock on local reviews of EFR applications.¹⁶

The record in this docket demonstrates that some localities are disregarding, misunderstanding, or attempting to game the Section 6409(a) shot clock by limiting it to a small subset of siting authorizations that are required for a given project¹⁷ and claiming that other authorizations that wireless carriers must obtain before deployment can commence – such as authorizations under applicable building, structural, electrical, and safety codes – are not covered by Section 6409(a) and the related shot clock.¹⁸

Further, some jurisdictions treat every request for a permit associated with a single collocation proposal as a separate EFR, with a separate shot clock. Under this approach, a

¹⁴ 47 U.S.C. § 1455(a)(2).

¹⁵ *Id.* § 1455(a)(1).

¹⁶ 2014 Order, 29 FCC Rcd at 12929, 12955-58. The Commission also recognized that a primary goal of the Spectrum Act, as embodied in Section 6409(a), was “to facilitate collocation in order to advance the deployment of . . . broadband services” which would “promot[e] billions of dollars in private investment, and creat[e] tens of thousands of jobs.” *Id.* at 12931 (citation omitted).

¹⁷ See WIA Sept. Letter at 2; Crown Castle 2019 Letter at 2.

¹⁸ See Crown Castle 2019 Letter at 2.

locality has different shot clocks for issuing zoning approval, building permits, completing architectural review, *etc.*

Various jurisdictions took similar approaches after the Commission adopted its shot clock for wireless siting requests subject to Section 332.¹⁹ In response, the Commission noted that a narrow reading of Section 332 as limited to zoning permits would frustrate its purpose – facilitating rapid infrastructure deployment – “by allowing local governments to erect impediments to the deployment of personal wireless services facilities by using or creating other forms of authorizations outside of the scope of Section 332(c)(7)(B)(ii).”²⁰ The Commission was particularly concerned that if the Section 332 shot clock was limited to zoning permits, “states and localities could delay their consideration of other permits (*e.g.*, building, electrical, road closure or other permits) to thwart the proposed deployment.”²¹ Accordingly, the Commission clarified that the Section 332 shot clock applied to “all authorizations” necessary for the deployment of facilities covered by Section 332 and that “[b]uilding and safety officials will be subject to the same applicable shot clock as all other siting authorities involved in processing the siting application.”²²

A similar clarification now is necessary with regard to the Section 6409(a) shot clock. The Commission adopted the Section 6409(a) shot clock, in part, to ensure that a state or local government could not “evade its statutory obligation to approve covered applications by simply failing to act on them, or [by imposing] lengthy and onerous processes not justified by the limited scope of review contemplated by the provision.”²³ Jurisdictions should not be allowed to

¹⁹ *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, 30 FCC Rcd 9088, 9157 & n.391 (2018) (“*Declaratory Ruling and Order*”).

²⁰ *Id.* at 9157.

²¹ *Id.* at n.390.

²² *Id.* at 9155-56, 9159.

²³ *2014 Order*, 29 FCC Rcd at 12955.

evade or game the process by narrowly construing what constitutes an EFR to prevent broadband deployment and defeat the shot clock.

The Commission also should clarify that, if a deemed granted notice is not timely challenged by a locality in court within 30 days, a wireless provider is legally authorized to move forward with construction and deployment even if the locality refuses to issue building and other permits technically required under local regulations. Absent such a clarification, expensive and time-consuming litigation may be required – which is inconsistent with the objective of Section 6409(a).

Further, to eliminate any ambiguity, the Commission should clarify that a denial under Section 6409(a) must (i) be in writing, (ii) clearly and specifically make an express determination that the request is not covered by Section 6409(a), and (iii) include a clear explanation of the reason(s) for the denial to be effective. If a denial does not satisfy all of these factors, the Commission should further clarify that the shot clock continues to run. Such clarifications are necessary to avoid confusion over whether a deemed granted notice can be issued for a failure to act or whether legal rights to challenge a denial in court have been triggered.

The requested clarifications will eliminate unnecessary delays in the siting process that would be caused by individual litigation proceedings over the EFR definition.²⁴

II. THE COMMISSION SHOULD CLARIFY WHEN THE SECTION 6409(A) SHOT CLOCK BEGINS TO RUN.

As noted above, the Commission adopted the Section 6409(a) shot clock, in part, to ensure that a state or local government could not “evade its statutory obligation to approve covered applications by simply failing to act on them, or it could impose lengthy and onerous

²⁴ See *id.* at 12925.

processes not justified by the limited scope of review contemplated by the provision.”²⁵

Nevertheless, some localities continue to misunderstand or game the process to prevent the Section 6409(a) shot clock from starting.

In some cases, localities claim that they lack procedures for processing EFRs²⁶ and the shot clock cannot commence until the procedures have been established. In other cases, localities claim that the shot clock does not commence until an application is routed to the proper official or department, or until pre-application meetings or public hearings have been completed.²⁷ In some cases, jurisdictions claim that additional information not required by local codes must be provided before it will accept an EFR. Further, some localities simply refuse to acknowledge or accept EFRs and thus claim that the shot clock has not been triggered.

Similar approaches were taken by localities after the Section 332 shot clock was adopted, prompting the Commission to issue a declaratory ruling that “the shot clock begins to run when the application is proffered . . . notwithstanding [a] locality’s refusal to accept it.”²⁸ Accordingly, the Commission should clarify here that the Section 6409(a) shot clock begins to run once an applicant in good faith attempts to seek the necessary local government approvals. In jurisdictions where there is no local process specified for EFR, some local governments will bounce an EFR between departments or processes and then disregard the shot clock or argue that the shot clock has not started.²⁹ Thus, the Commission should further clarify that a good faith attempt to seek the necessary government approvals that starts the shot clock includes submitting

²⁵ *See id.*

²⁶ Some jurisdictions rely on electronic forms which do not have a space to designate that an application is an EFR or have systems that do not allow an applicant to upload a cover letter identifying an application as an EFR.

²⁷ For example, Poway, California; Cajon, California; Seattle, Washington; and Whatcom County, Washington still require pre-application appointments or meetings before they will accept an application.

²⁸ *Declaratory Ruling and Order*, 30 FCC Rcd at 9163.

²⁹ Although the requested shot clock clarification should incent localities to implement all procedures necessary to promptly process EFRs, it may be helpful for the Commission to provide some additional guidance to assist localities seeking to adopt such procedures.

an EFR under any reasonable process and starts upon initial written submission in the case where a state or local government requires any type of pre-application submission or meetings.

Moreover, in response to industry complaints about localities refusing to start shot clocks until after public hearings, the Commission further clarified that “mandatory pre-application procedures and requirements do not toll the shot clocks.”³⁰ A similar clarification now is necessary regarding to the Section 6409(a) shot clock.³¹ Because they lack a specific EFR process or misunderstand Section 6409(a), many jurisdictions require a public hearing for EFRs despite the fact that there is no function for such a hearing given the jurisdiction’s limited scope of review. The Commission should clarify that the non-discretionary nature of an EFR renders public hearings unnecessary or superfluous and that, if such hearings are held, they must occur with the shot clock period and be limited to the presentation of information reasonably related to an EFR determination.

III. THE COMMISSION SHOULD CLARIFY WHAT CONSTITUTES A SUBSTANTIAL CHANGE UNDER ITS RULES IMPLEMENTING SECTION 6409(A).

Despite the Commission’s best intentions, the rules implementing Section 6409(a) create ambiguity over what constitutes a substantial change that would make a proposal ineligible for relief under Section 6409(a). As discussed below, the Commission should take steps to eliminate such ambiguities and specifically reject certain interpretations made by localities regarding what constitutes substantial changes under the Commission’s rules implementing Section 6409(a).

³⁰ *Declaratory Ruling and Order*, 30 FCC Rcd at 9162.

³¹ The Commission also should clarify that the shot clock cannot be not tolled based on unpublished rules or vague references to rules that are not specifically identified.

A. THE COMMISSION SHOULD CLARIFY THE DEFINITION AND SCOPE OF CONCEALMENT ELEMENTS.

The rules state that a modification would substantially change the physical dimensions of a structure – making it ineligible for Section 6409(a) relief – if the proposed modification “would defeat the concealment elements of the eligible support structure.”³² As discussed below, the record in this proceeding reflects that some jurisdictions are interpreting this language so broadly that the exception swallows the rule. Accordingly, the Commission should clarify that concealment elements are limited to equipment and materials used specifically to conceal the visual impact of a wireless facility.

Some jurisdictions claim that virtually all aspects of a previously approved tower relate to concealment and therefore any change would be substantial and beyond the scope of Section 6409(a).³³ For example:

- SeaWorld, California claims that every aspect of an approved project constitutes an element of concealment and, therefore, any proposed increase in size would defeat concealment.³⁴
- The City of San Diego and Cerritos, California take the position that additions or modifications of antennas on faux trees defeat concealment even if the appearance of the faux tree remains the same.³⁵

These record examples are not isolated cases. WIA’s members report additional examples, including:

- Coral Springs, Florida and Mount Vernon, New York take the position that coaxial cable placed on the outside of a non-stealth monopole defeats concealment and therefore would be a substantial change.
- A locality in Colorado claims that any increase in height on a monopine, even if below the substantial change threshold of the FCC rule, defeats concealment and therefore constitutes a substantial change.

³² 47 C.F.R. § 1.6100(b)(7)(v).

³³ Crown Castle 2018 Letter at 12-13.

³⁴ *Id.* at 12.

³⁵ *Id.*

- Multiple jurisdictions take the position that increasing the width of any canister on a flagpole or utility pole defeats concealment.
- A city in California does not allow weatherproof enclosure expansions greater than 36” and additionally imposes weatherproof enclosure conditions on all applications, even on non-canister towers.
- Encinitas, California claims that the deployment of fiberglass reinforced plastic screens for any antenna effectively creates new concealment criteria – requiring all subsequent antennas to be similarly screened – even though screening is not an express requirement of siting. Other jurisdictions take a similar approach, claiming that flush mounted antennas create a concealment requirement that must be met by all subsequent deployments even though flush mounting was never required.
- In some jurisdictions in Arizona, ballfield light towers are considered “stealth” facilities even though existing wireless equipment on the facilities is not concealed. These localities further claim that, given the stealth nature of the facilities, the placement of additional wireless equipment will defeat concealment and therefore would be substantial changes.

The Commission has already stated that “concealed or ‘stealth’-designed facilities” are “facilities designed to look like some feature other than a wireless tower or base station.”³⁶ The Commission has already provided examples of such stealth installations such as “painting to match the supporting façade or artificial tree branches.”³⁷ WIA suggests that these statements, which were “widely supported by both the wireless industry and municipal commenters,” make clear what the Commission intended. That is that “concealment elements” are those characteristics of a wireless facility installed for the sole and original purpose of rendering the visual and aesthetic appearance of the wireless facility as something fundamentally different than a wireless facility. Faux tree branches serve no other purpose than to create the appearance that a tower is a tree. Painting a rooftop antenna to match the building serves no purpose other than to enhance the appearance of the building. Placing coaxial cable on the inside of a monopole may serve many purposes, mainly though, it serves the functioning of the wireless facility. In no

³⁶ 2014 Order, 29 FCC Rcd at 12950.

³⁷ *Id.*

reasonable construction can it be said to visually render the (non-stealth) monopole as something other than a monopole.

Furthermore, because such concealment elements for stealth installations are fundamental characteristics of a wireless facility, the Commission should further clarify that concealment elements are only those expressly designated and permitted as such in the original siting approval. Just as a jurisdiction should not be permitted to impose new regulations upon a legal conforming wireless facility, neither should a jurisdiction be allowed to impose new concealment requirements through new and incremental conditional approval of EFRs. By clarifying that concealment elements are only those understood and expressly approved as such at the time of the original approval of the site, the Commission will provide needed certainty and affirm that concealment elements of stealth facilities are entitled to the same type of legal nonconforming protection otherwise afforded by Section 6409(a). The Commission should act quickly to eliminate this gamesmanship by clarifying that concealment elements must be narrowly construed under the rules implementing Section 6409(a). Specifically, the Commission should state that concealment elements are limited to equipment and materials used *specifically* to conceal the visual impact of a wireless facility pursuant to concealment conditions *imposed during the initial siting process*.³⁸ Under this approach, only those towers, poles, and related equipment that are “purpose built” for concealment are to be considered concealment elements.³⁹

To further eliminate controversy, WIA agrees with Crown Castle that the Commission should expressly state that:

³⁸ An increasing number of California jurisdictions are adopting “amortization” requirements that subject existing structures to newly adopted, broadly applicable concealment requirements. These jurisdictions then claim that any proposals to collocate on an existing structure violate concealment requirements. *See* Crown Castle 2018 Letter at 12. Accordingly, to ensure that these creative amortization ordinances cannot be used to eviscerate the protections afforded under Section 6409(a), the Commission must clarify that concealment elements are limited to those imposed during the initial siting process.

³⁹ *Id.*

- Permit requirements generally are not considered concealment elements, absent a prior fact-based analysis of a specific proposal resulting in a determination that certain requirements are necessary to conceal the proposed facility.⁴⁰
- The size of a facility, transmitter, or related equipment specified in a permit does not constitute a concealment element. Claiming that all items listed in a permit are “‘concealment elements’ is nothing more than an attempt to evade the specific, objective size criteria that the Commission adopted in the [2014 Order].”⁴¹

These clarifications will ensure that the protections afforded by Congress in Section 6409(a) cannot be defeated through creative or inappropriate regulatory interpretations at the local level.

B. THE COMMISSION SHOULD CLARIFY THAT EQUIPMENT ATTACHED TO A TOWER OR SMALL CELL NODE DOES NOT CONSTITUTE AN EQUIPMENT CABINET.

The rules state that a modification would substantially change the physical dimensions of a structure – and therefore be ineligible for Section 6409(a) relief – if it would result in more than four equipment cabinets at the structure.⁴² Some localities are claiming that small radios, remote radio heads/units, amplifiers, and other equipment attached to a tower or small cell node constitute equipment cabinets, and then they deny relief because the proposal would result in more than four equipment cabinets and therefore constitute a substantial change.⁴³ For example:

- The cities of Richmond, California, and Thousand Oaks, California consider remote radio units installed on a tower to be “equipment cabinets.”
- A city in Tennessee interprets Section 1.6100(b)(7)(iii) as setting a cumulative limit, rather than a limit on the number of cabinets associated with a particular EFR.

These creative interpretations defeat the protections set forth in Section 6409(a) and should be promptly corrected. Accordingly, the Commission should clarify that any equipment attached to an existing tower, base station, or small cell node – regardless of how such equipment

⁴⁰ *Id.* at 13.

⁴¹ *Id.*

⁴² 47 C.F.R. § 1.6100(b)(7)(iii).

⁴³ *See* Crown Castle 2018 Letter at 12.

is packaged or manufactured, does not constitute an equipment cabinet under Section 1.6100(b)(7)(iii).⁴⁴

C. THE COMMISSION SHOULD CLARIFY THE SCOPE OF SECTION 1.6100(B)(7)(IV).

Section 1.6100(b)(7)(iv) states that a structure modification constitutes a substantial change ineligible for treatment under Section 6409(a) if it “does not comply with conditions associated with the siting approval.”⁴⁵ This language should be clarified because it is becoming a loophole used by some localities attempting to avoid application of Section 6409(a).

1. THE COMMISSION SHOULD CLARIFY THAT SECTION 1.6100(B)(7)(IV) IS ONLY TRIGGERED IF THE PROPOSED MODIFICATION WOULD CAUSE A STRUCTURE TO RUN AFOUL OF PREVIOUSLY IMPOSED CONDITIONS.

Although Section 1.6100(b)(7)(iv) states that a substantial change occurs if a proposed modification would violate conditions associated with the prior local approval of a structure, some localities claim that a proposal is ineligible for Section 6409(a) treatment under the Commission’s implementing rules if the structure no longer complies with prior conditions – even if the proposed modification would not be responsible for creating the non-compliant condition. For example, the City of San Diego, California claims that any violation or non-compliance with prior siting requirements renders a tower or base station ineligible for Section 6409(a) treatment, even if the structure was compliant when initially constructed. The City then requires applicants to go through a lengthy, non-EFR approval process and remedy all alleged “deficiencies.” In other jurisdictions, the filing of a modification application is used to police compliance by the structure owner, or even the landowner, with initial site approval conditions. For example, if extensive landscaping improvements were required as part of the initial site

⁴⁴ *Accord id.* at 13.

⁴⁵ 47 C.F.R. § 1.6100(b)(7)(vi).

approval, a locality may refuse to process an EFR if various trees planted to comply with the landscape condition have died. The locality may refuse to process the application unless the applicant agrees to replace the trees (or in some cases replace the trees and comply with newer landscaping requirements). Or, for example, where a parcel of land has multiple uses, such as a commercial business as well as a cell tower, a jurisdiction may refuse to consider an EFR because of a violation or issue with a building or use that is entirely unrelated to the tower.

To eliminate such practices – along with the associated costs and delays, the Commission should clarify that Section 1.6100(b)(7)(iv) applies only if the proposed modification would cause non-compliance with prior conditions imposed on a structure or site. Importantly, this clarification would not prevent localities from enforcing their codes and siting conditions. Rather, the clarification would merely require the locality to enforce compliance by the structure owner or landowner and preclude the locality from holding an EFR applicant hostage by the process.

2. THE COMMISSION SHOULD CLARIFY THAT LOCAL LIMITS ON THE NUMBER OR SIZE OF ANTENNAS ARE IRRELEVANT FOR DETERMINING WHETHER A PROPOSAL CONSTITUTES A SUBSTANTIAL CHANGE.

WIA members report that various localities are imposing restrictions – either in ordinances or siting approvals – on the number and/or size of antennas that may be placed on a structure and the types and placement of antennas. For example:

- The City of Mount Vernon, New York restricts antennas to six feet or less.
- The City of Rockville, Maryland restricts antennas to 6x2 feet or smaller on towers.
- The City of Phoenix, Arizona will not allow more than two microwave dishes on a tower.

Additionally, some jurisdictions routinely limit the number of carriers/providers that can install equipment on a given tower site, which prevents collocation under Section 6409(a), the types of antennas that can be installed, or the types of mounting (such as flush mounting).

These restrictions often are not based on any discernable safety concern and lack any sound engineering basis. Often, these restrictions are not technologically feasible for the applicant's equipment. In some cases, these restrictions are set at an artificially low level by localities and, when future collocation requests exceed the arbitrary thresholds, localities claim that the collocation requests violate the conditions associated with the initial siting approval and therefore do not qualify for treatment under Section 6409(a).

To avoid this gamesmanship and clear up any ambiguity in the substantial change criteria, the Commission should clarify that local restrictions imposed on the size or number of antennas that may be placed on a structure do not constitute "conditions" under Section 1.6100(b)(7)(vi), and that restrictions on antenna size, type, and placement cannot, standing alone, constitute a substantial change.

3. THE COMMISSION SHOULD CLARIFY THAT BLIGHT AND OTHER AESTHETIC CONCERNS REGARDING PREVIOUSLY APPROVED STRUCTURES DO NOT RENDER THEM INELIGIBLE FOR SECTION 6409(A).

Some localities are refusing to process requests for Section 6409(a) treatment because of the existence of "blight" on the wireless facility site or elsewhere on the property.⁴⁶ Blight caused by vandalism, such as graffiti, bears no relation to whether a proposed collocation would constitute a substantial modification of an existing structure and, thus, should not form a basis for refusing to process a collocation request pursuant to Section 6409(a). Other violations or conditions on a landowner's property unrelated to a wireless facility site likewise bears no connection with whether a proposed modification is a substantial change to an existing wireless structure. Additionally, in such circumstances, the blight issue is beyond the applicant's control, and remediation must be addressed by a property owner or other tenant on the same property as

⁴⁶ See Crown Castle 2019 Letter at 2.

the wireless site. Clarification from the Commission on this issue is necessary to ensure that structures remain available for collocation, as Congress intended, despite cosmetic damage caused by vandals. In addition, the Commission should clarify that unrelated blight or other violations on an owner's property may not impact or delay the processing of an EFR. Importantly, this clarification would not prevent applicants from working with a local jurisdiction to address blight or prevent localities from enforcing their codes and siting conditions. Rather, the clarification would require the locality to utilize state or local process to address blight rather than delay an EFR until such issues are addressed.

D. THE COMMISSION SHOULD CLARIFY THE SEPARATION CLAUSE IN SECTION 1.6100(B)(7)(I) TO ELIMINATE UNCERTAINTY.

Section 1.6100(b)(7)(i) states that a substantial change occurs, for towers other than towers in public ROWs, if a modification would increase “the 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.”⁴⁷ However, the separation clause is not being interpreted consistently by localities. Some localities claim that the antenna plus separation together is limited to twenty feet, while others interpret this to mean that the separation alone is limited to twenty feet.

Like Section 1.6100(b)(7)(i), the 2001 Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (“Collocation Agreement”) defines a substantial increase in a tower as occurring if “[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.

⁴⁷ 47 C.F.R. § 1.6100(b)(7)(i) (emphasis added).

...⁴⁸ In the related Collocation Agreement Fact Sheet, the Commission clarified that this language means “a separation of 20 feet *from the nearest existing antenna*.”⁴⁹ The Commission should issue a similar clarification that Section 1.6100(b)(7)(i) means a separation of 20 feet from the nearest existing antenna, not a separation of 20 feet including the antennas.

E. THE COMMISSION SHOULD CLARIFY THAT THE “CURRENT SITE” FOR PURPOSES OF SECTION 1.6100(B)(7)(IV) MEANS THE ENTIRE AREA COVERED BY THE CURRENT LEASE.

Section 1.6100(b)(7)(iv) states that a substantial change occurs if a proposed modification would require “excavation or deployment outside the current site.”⁵⁰ Although the rule specifically refers to the “current” site, some localities are interpreting Section 1.6100(b)(7)(iv) as referring to the original site. Under this creative interpretation, any subsequent modifications to expand a site to its *current* size are ignored.

To prevent localities from narrowing the scope of Section 1.6100(b)(7)(iv), the Commission should clarify that it meant what it said – a substantial change occurs if excavation or deployment is required outside the *current* site and the initial boundaries of a site are irrelevant under this analysis. This clarification is particularly important because site boundaries often change over the years and reading Section 1.6100(b)(7)(iv) as applying to the initial site boundaries, rather than the current site boundaries, will significantly curtail the number of sites available for Section 6409(a) treatment.

⁴⁸ See First Amendment to the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, 81 Fed. Reg. 59148, 59150 (2016) (emphasis added), codified as 47 C.F.R. Pt. 1, App. B (“Collocation Agreement”).

⁴⁹ *The Wireless Bureau and Mass Media Bureau Announce the Release of a Fact Sheet Regarding the March 16, 2001 Antenna Collocation Programmatic Agreement*, Public Notice, 17 FCC Rcd 508, 513 (2002) (emphasis added).

⁵⁰ 47 C.F.R. § 1.6100(b)(7)(iv).

F. THE COMMISSION SHOULD REITERATE THAT MODIFICATIONS TO LEGAL, NON-CONFORMING STRUCTURES DO NOT *PER SE* CONSTITUTE SUBSTANTIAL CHANGES.

Some localities are claiming that any changes to legal, non-conforming structures constitute “substantial changes” making them ineligible under Section 6409(a), unless the structures are modified to come into compliance with new code requirements enacted after the structures were erected.⁵¹ In some cases, localities even try to require compliance with new code requirements not directly related to a structure⁵² – such as access road modifications.

Although the Commission has previously rejected similar arguments,⁵³ a declaratory ruling restating that legal, non-conforming structures are eligible under Section 6409(a) is necessary given that some localities continue to claim that any changes to legal, non-conforming structures constitute “substantial changes.” The Commission should clarify that non-compliance with new local requirements unrelated to a specific structure or site – such as general requirements regarding landscaping, access roads, and fencing – have no bearing on whether a structure remains eligible for treatment under Section 6409(a).

Additionally, the Commission should clarify that new fall zone and setback requirements cannot be used to deny an otherwise qualified application. Experience has shown that the retroactive adjustment of setback or fall zone ordinances after towers have been constructed can be used to transform compliant towers into legal, non-conforming towers. For example, although catastrophic failures are extremely rare, many localities have created fall zones that purport to define the area where a tower would collapse in the event of a catastrophic failure,

⁵¹ In some cases, municipalities will not process an EFR if the underlying owner’s property is not subdivided or platted correctly, even though a prior structure has been erected on the property.

⁵² See Letter from Michael H. Pryor, Counsel to American Tower Corp., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (Sept. 19, 2018).

⁵³ 2014 Order, 29 FCC Rcd at 12942-43.

generally without informed or realistic consideration of the soundness of infrastructure structural design. Setbacks, which do not exist in building codes which regulate building safety, also are being created and then being used to deny EFR status.⁵⁴

Based on the foregoing, the Commission should state that new fall zone and setback requirements, while appropriate when approving new wireless support structures, may not be used to deny an application for an otherwise qualified EFR on existing infrastructure.

IV. THE COMMISSION SHOULD CLARIFY THAT CONDITIONAL APPROVALS VIOLATE SECTION 6409(A).

Localities increasingly are acting on Section 6409(a) requests by issuing “conditional approvals.” The conditions associated with these approvals often are onerous,⁵⁵ such as requiring an applicant (i) to come into compliance with new landscaping requirements,⁵⁶ even though the structure complies with the standards in place when it was constructed, (ii) to notify certain property owners,⁵⁷ (iii) to satisfy certain painting requirements (*e.g.*, requirements to paint a site a different color or with a different type of paint), (iv) to use specific materials, (v) to adopt a specific maintenance schedule,⁵⁸ (vi) to provide certain reports, or (vii) to install certain lighting. In many cases, these requirements are not mandated by local codes but are imposed on an ad hoc basis by local jurisdictions.

Some localities also condition the processing or release of EFR permits on the payment of unnecessary and costly fees, including bond and escrow fees that generally are associated with

⁵⁴ Setbacks generally exist in land use codes, and therefore are not related to the structural safety of towers.

⁵⁵ In addition to onerous conditions, some localities impose conditions that may be impossible to satisfy. For example, Beaverton, Oregon attempts to condition approvals to require all conduit to be contained *inside* of existing poles.

⁵⁶ Bellingham, Washington is among the jurisdictions that impose landscaping requirements as part of the EFR process.

⁵⁷ For example, Little Silver, New Jersey will not release permits until an applicant provides proof that it mailed notices to nearby property owners.

⁵⁸ Concord, California is among the jurisdictions that condition EFR approvals on acceptance of certain site maintenance requirements.

major projects. Yet other jurisdictions refuse to grant EFR approvals unless the applicant agrees to grant the jurisdictions a discretionary right to remove a site.⁵⁹

The aforementioned conditional approvals, which are effectively denials unless an applicant agrees to take certain actions, are inconsistent with Section 6409(a) which states that “a State or local government may not deny, and shall approve” EFRs.⁶⁰ Accordingly, the Commission should clarify that localities may not impose conditions on permits issued pursuant to Section 6409(a), unless the conditions relate to “compliance with non-discretionary codes reasonably related to health and safety, including building and structural codes.”⁶¹ Moreover, to prevent further confusion and delay in the event that conditional approvals are issued, the Commission also should clarify that an improperly conditioned approval constitutes a failure to act under federal law such that a deemed granted notice may be issued or, alternatively, that any conditions in an approval of an EFR that are not based on generally applicable, relevant non-discretionary codes are void for Section 6409(a) purposes.

V. THE COMMISSION SHOULD CLARIFY THAT LOCALITIES MAY NOT IMPOSE PROCESSES THAT DELAY, DEFEAT, OR REDUCE THE PROTECTIONS AFFORDED UNDER SECTION 6409(A).

Various localities are imposing process and/or information requirements that substantially delay, defeat, or reduce the protections afforded under Section 6409(a). The Commission should clarify that such action is impermissible.

First, despite the Commission’s prior pronouncement “that in connection with requests asserted to be covered by Section 6409(a), state and local governments may only require

⁵⁹ See Crown Castle 2018 Letter at 14.

⁶⁰ 47 U.S.C. § 1455(a)(1).

⁶¹ The Commission also should clarify that jurisdictions may not limit the scope of Section 6409(a) through lease conditions. For example, some localities refuse to enter into leases unless applicants agree to forbear from claiming Section 6409(a) treatment for future modifications. See Letter from Andre J. Lachance, Associate General Counsel, Federal Regulatory and Legal Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, at 2 (Sept. 19, 2018); Crown Castle 2018 Letter at 13-14.

applicants to provide documentation that is reasonably related to determining whether the request meets the requirements of the provision.”⁶² various localities are imposing onerous documentation requirements as part of the permit review process. Some localities require an applicant to submit a letter – in some cases a notarized letter – from the underlying property owner authorizing the particular EFR even if the modification is permitted under the existing lease. In some cases, these jurisdictions refuse to recognize a valid power of attorney to sign the letters and require the actual signature of the landowner, further delaying the deployment process.⁶³ Other examples of information that must be provided in some jurisdictions before they will consider an EFR include:

- RF reports *for local approval*.⁶⁴
- Propagation maps.
- Paper copies of original conditional use permit approvals, or paper copies of all prior approvals.⁶⁵
- An inventory of all other antennas and equipment on a tower in connection with an EFR.
- Landscape plans.
- Full title reports.
- Non-interference letters.

⁶² 2014 Order, 29 FCC Rcd at 12956.

⁶³ For example, the City of El Cajon, California requires that the signature on a letter of authorization exactly match title reports and grant deed. Tukwila, Washington and Grant County, Washington refuse to accept signatures based on a power of attorney.

⁶⁴ Representative jurisdictions include Carlsbad, California; Chula Vista, New Mexico; Encinitas, California; El Cajon, California; Escondido, California; La Mesa, California; Lemon Grove, California; Poway, California; San Diego, California; San Marcos, California; Solana Beach, California; Vista, California; Seattle, Washington; King County, Washington; Marysville, Washington; Portland, Oregon; Thurston County, Washington; Lane County, Oregon; Whatcom County, Washington. Prince George’s County, Maryland and Montgomery County, Maryland require applicants to provide the specific RF frequencies that will be utilized at a site. General bands are unacceptable and determining the exact operating frequency of each antenna model can be time consuming.

⁶⁵ This requirement is particularly wasteful and burdensome because the requested materials already are in the possession of the locality. To meet these record requirements, applicants often must make a public records request from the locality, a process that can take months. In contrast, prohibiting such requests in the context of EFRs will not deprive localities of any information that is not already in their possession.

- Address verification applications.
- Public hearing requirements.

Second, some jurisdictions create burdensome permitting-related requirements that must be satisfied before they will consider an EFR. For example, EFR applicants may be required to modify the underlying use permit for a structure – even though the use is not changing – before an EFR will be accepted. The permit modification process can be quite onerous and often results in new conditions that extend to existing users on a structure if they want to make future modifications. Other jurisdictions limit the number of open permits for a property or structure⁶⁶ and will not consider or act on any EFRs until the open permits are closed,⁶⁷ even if those permits are issued to different parties and are unrelated to the EFR or, in some cases, unrelated to the tower site. Similarly, some jurisdictions limit the number of applications that can be submitted at one time or by the same applicant.⁶⁸

In other cases, often in response to suggestions from consultants, jurisdictions establish very technical or structural hurdles,⁶⁹ or they add requirements above industry standards, such as mandating class III structural analyses instead of class II, or mandate excessive inspection requirements beyond ANSI/TIA standards.

To deter similar additional requests, the Commission should issue a declaratory ruling reiterating that all documentation requests and process requirements from localities must be

⁶⁶ The City of Bartlett, Tennessee, for example, will only allow one permit submission per tower at one time and will not accept subsequent applications until all permits have been closed out on any prior project on the same site.

⁶⁷ These jurisdictions include: Maricopa County, Arizona; City of San Diego, California; Division of State Architects, California; Miami, Florida; Worchester County, Maryland; Cass County, Missouri; Missoula County, Montana; North Hills, New York.

⁶⁸ For example, Atlanta, Georgia will accept a maximum of five applications at one time, with an ad hoc limit of three when officials are busy. DeKalb County, Georgia will accept only two applications at one time.

⁶⁹ Some localities, such as Whatcom County, Washington, require the submission of excessive structural documentation, including an inspection report, mount analysis, engineering letters, previous structural modification drawings, post-modification inspection reports, and tower mapping reports.

reasonably related to determining whether a proposal qualifies for treatment under Section 6409(a). Specific guidance or examples on commonly required items that are not generally related to determination of a covered request would provide clarity to applicants and localities alike.

VI. THE COMMISSION HAS AUTHORITY TO ISSUE THE REQUESTED CLARIFICATIONS.

The Commission has ample authority to adopt the requested clarifications by declaratory ruling in order to remove uncertainty. The Administrative Procedure Act expressly provides that an agency “may issue a declaratory order to terminate a controversy or remove uncertainty.”⁷⁰ Section 6409(a) does not define the approvals covered by that section, or what constitutes a substantial change, leaving the Commission with the task of defining those terms to eliminate ambiguity. The Commission’s authority to interpret statutory ambiguities has been upheld by courts on multiple occasions and the Commission can issue such declaratory rulings on its own motion. In fact, the Commission previously issued a declaratory ruling to clarify that the Section 332 shot clock applied to “all authorizations” necessary for the deployment of facilities covered by Section 332.⁷¹ Therefore, the Commission should adopt the requested clarifications to ambiguities in Section 6409(a) by declaratory ruling in order to remove uncertainty and to promote the deployment of networks.⁷²

CONCLUSION

For the foregoing reasons, WIA urges the Commission to clarify that (i) Section 6409(a) and the implementing regulations apply to all state and local authorizations required to deploy

⁷⁰ 5 U.S.C. § 554(e); *see also* 47 C.F.R. § 1.2(a).

⁷¹ *Declaratory Ruling and Order*, 30 FCC Rcd at 9155-56.

⁷² *See* 2014 Order, 29 FCC Rcd at 12923 (“Congress included Section 6409, which contributes to the twin goals of commercial and public safety wireless broadband deployment through several measures that promote the deployment of the network facilities needed to provide broadband wireless services.”).

new or replacement transmission equipment on existing wireless towers or base stations; (ii) the Section 6409(a) shot clock begins to run when an applicant makes a good faith attempt to request local approval; (iii) the substantial change criteria in Section 1.6100(b)(7) of the Commission's rules should be narrowly interpreted; (iv) "conditional" approvals of EFRs violate Section 6409(a); and (v) localities may not establish processes or impose conditions that effectively defeat or reduce the protections afforded under Section 6409(a).

Respectfully submitted,

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