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

In the Matter of	)	
	)	
Implementation of State and Local Governments'	)	WT Docket No. 19-250
Obligation to Approve Certain Wireless Facility	)	
Modification Requests Under Section 6409(a) of	)	RM-11849
the Spectrum Act of 2012	)	

LOCAL GOVERNMENTS AND NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS PETITION FOR RECONSIDERATION

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I. INTRODUCTION

Local Governments[1] and National Association of Telecommunications Officers and Advisors ("NATOA"),[2] pursuant to Section 1.429 of the Federal Communications Commission's ("Commission" or "FCC") rules,[3] respectfully submit this petition for

[1] The Local Government Coalition ("Local Governments") is a collection of local governments and local government organizations committed to both the timely and efficient deployment of wireless services and the preservation of Congressionally acknowledged rights of local governments to ensure that such deployments are sensitive to the needs and design of a community. It includes the Cities of Portland, Oregon; Boston, Massachusetts; Gaithersburg, Maryland; Brookhaven, Georgia; Emeryville, California; Gig Harbor, Washington; Kirkland, Washington; Lincoln, Nebraska; Plano, Texas; The Town of Hillsborough, California; Howard County, Maryland; Clarke County, Nevada, The Texas Coalition of Cities For Utility Issues; The Texas Municipal League; The Michigan Municipal League, and PROTEC: The Michigan Coalition To Protect Public Rights-Of-Way

[2] NATOA's membership includes local government officials and staff members from across the nation whose responsibility is to develop and administer communications policy and the provision of such services for the nation's local governments.

[3] 47 C.F.R. § 1.429. Petitioners are not relying upon any facts or arguments that have not previously been presented to the Commission as frowned upon under Subsection (b) of the Rule.

reconsideration ("Petition") of the Commission's 6409 Report and Order ("Order") in the above-captioned proceeding.[4] In the Order, the Commission amends 47 C.F.R. § 1.6100(b)(7) which defines what is a "substantial change" to a wireless facility modification, by amending part (iv) to read:

> It entails any excavation or deployment outside of the current site, except that, for towers other than towers in the public rights-of-way, it entails any excavation or deployment of transmission equipment outside of the current site by more than 30 feet in any direction. The site boundary from which the 30 feet is measured excludes any access or utility easements currently related to the site.

This Petition seeks reconsideration of the Order based on Petitioners' belief, shared by Commissioners Rosenworcel[5] and Starks,[6] that the Order oversteps the Commission's legal authority in permitting unfettered growth and deployment of transmission equipment up to 30 feet in every direction of the current tower site. As Commissioner Rosenworcel so succinctly stated: "the FCC cannot expand the scope of Section 6409 without authority from

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[4] *In the Matter of Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Report and Order, FCC 20-75 (Rel. Nov. 3, 2020). ("Order").

[5] Rosenworcel Dissent at 1 (noting the FCC's Order "is inconsistent with the statute and …risk[s] thwarting the very partnerships with local interests we need if we want to see smart cities technology truly develop").

[6] Starks Dissent at 1 (stating that the Order "is inconsistent with the plain language of section 6409, which mandates streamlined processing only for modifications of 'existing wireless towers.' By its own terms, the provision does not extend its requirements beyond the wireless tower itself, yet this decision will allow applicants to obtain streamlined processing for work well outside the facility"). In fact, Commissioner Starks goes on to outline how the Order could empower applicants to evade local zoning by gaming the system: "[T]his decision could encourage applicants to evade local zoning regulations by seeking initial approval for less space than they actually need and then obtaining streamlined processing for expansions beyond that area. Such expansions could lead to serious public safety issues." *Id*.

Congress to do so."[7] This troubling overreach warrants reconsideration and rescission of that portion of the Order.

Barring rescission, Petitioners seek reconsideration on the size of transmission equipment that is permitted to be deployed in this new expanded area. The Order fails to impose clear size limitations, which in and of itself is a clear violation of the statutory requirement that the Commission limit changes to those that are not substantial.

II. THE RULE FAILS TO DEMONSTRATE THAT THERE IS A PREDICATE FOR ACTION OR THAT THE COMMISSION POSSESSES THE LEGAL AUTHORITY TO TAKE THE ACTIONS IT DOES

Commissioner Rosenworcel's dissent makes the case clear. The Commission cannot "square the plain language of Section 6409 with [the Order]."[8] "Section 6409 … is simple and straightforward. It forbids localities from exercising their traditional zoning authority to deny applications to modify wireless towers or base stations if—and only if—the application does not 'substantially change the physical dimensions' of the existing facility."[9]

The Order fails first to demonstrate:

1. There is a need for deployment and excavation 30 feet outside the existing tower site, nor
2. That the Commission has the authority to essentially expand the site over the objections of the siting authority, and

[7] Rosenworcel Dissent at 1.

[8] Rosenworcel Dissent at 1.

[9] *Id.*

3. Finally that such an expansion does not substantially change the physical dimensions of the existing facility.

A. NO PREDICATE FOR ACTION

A review of the record reveals the absence of specific evidence to substantiate the need for the new 30-foot rule. No data or analysis is presented that applications falling outside of the prior Section 6409(a) rules face significant delays or denial. Nor is there any economic evidence to substantiate that the proposed change will speed deployment. In contrast, communities have provided hundreds of pages of exhibits, including economic studies detailing the minor role local government fees and processes play in in retarding wireless infrastructure deployment.[10] Communities have demonstrated that a large number of delays in permits being issued are the result of improper applications submitted by providers.[11] Finally, the record reveals expert documentation of the negative impact on property values arising from wireless deployment, especially given the size of various deployments.[12]

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[10] Kevin E. Cahill, Ph.D, The Economics of Local Government Rights of Way Fees (Mar. 8, 2017) (attached as Exh. N to the Comments of the National League of Cities, *et al*., WT Docket No. 19-250, RM-11849 (Oct. 29, 2019).

[11] *See, e.g.* Comments of Montgomery County, Maryland, WT Docket No. 16-421, at 12-20 (Mar. 8, 2017) (describing extensive delays in application review caused by Mobilitie's failure to submit complete applications and protracted delays in addressing omissions); Reply Comments of the Smart Communities Siting Coalition, WT Docket No. 16-421, at 13-14 (Apr. 7, 2017) (describing the widespread occurrence of delays resulting from incomplete applications). These comments are attached as Exh. B and C, respectively, to the Comments of the National League of Cities, *et al*., WT Docket No. 19-250, RM-11849 (Oct. 29, 2019).

[12] *See* Comments of City of Portland, *et al.*, WT Docket No. 19-250, RM-11849 (July 22, 2020) (citing Petitioners' Brief at 19, *Sprint Corporation v. FCC*, No. 19-70123 (9th Circuit, Jun. 10, 2019), ECF No. 76 (citing Local Governments Excerpt of Record-405-415 (Comments Smart Communities, Exh. 3, Burgoyne Declaration)). Petitioners' Brief

B. SECTION 6409(a) DOES NOT DELEGATE AUTHORITY TO THE COMMISSION TO EXPAND AN "EXISTING SITE"

Jurisdictional authority for the Commission to enact the Order is not to be found in statute, nor in Commission precedent.[13] Moreover, there is a strong presumption against agency preemption with "respect for the States as 'independent sovereigns in our federal system.'"[14] This presumption "applies with particular force in fields within the police power of the state" including in the context of telecommunications regulations.[15]

Statutory construction begins with the plain language of the statute by giving its words their ordinary meaning.[16] The text of Section 6409(a) empowers the Commission to create rules that define the type of growth that is an eligible facility requests and therefore subject to 6409.[17] The statute defines eligible facility requests as " any request for

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explains that "[u]nrebutted evidence showed that these large facilities reduce adjoining property values."

[13] In its 2014 Order implementing 6409, the Commission found that deployment outside the site cannot reasonably be a "modification of an existing wireless tower." The Commission unequivocally stated the statutory term "existing" "requires that wireless towers or base stations have been reviewed and approved under the applicable local zoning or siting process." *Acceleration of Broadband Deployment By Improving Wireless Facilities Siting Policies,* WT Docket Nos. 13-238, 11-59, 13-32, Report and Order, 29 FCC Rcd 12865, 12872, para. 174 (2014), *aff'd*, *Montgomery County, Md. v. FCC*, 811 F.3d 121 (4th Cir. 2015) ("2014 Order").

[14] *Wyeth v. Levine*, 555 U.S. 555, 565 n.3 (2009). In *Wyeth*, the Court found that Congress had not expressly authorized a federal agency to preempt state law and rejected a residual claim for preemption grounded solely in the agency's supposed judgment that the local rules would create an obstacle to a federal policy.

[15] *Farina v. Nokia, Inc*., 625 F.3d 97, 116,117 (3rd. Cir. 2010) (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

[16] "[T]he meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485, 37 S. Ct. 192, 61 L. Ed. 442 (1917).

[17] Spectrum Act § 6409(a)(1) provides "a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or

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."[18] Nothing in this definition or any other portion of Section 6409(a) empowers the FCC with jurisdiction to modify the parameters of the existing tower site. The Commission cannot unilaterally expand its authority to define an eligible facility request to include expansion of the site or to reach off-site deployments. To do so would be to ignore the statutory limits of its authority [19]

This new-found expansion of Commission authority also conflicts with past Commission precedent and existing rules. In the 2014 Order, the Commission unequivocally stated, "the State or local government must decide that the site is suitable for wireless facility deployment before Section 6409(a) will apply."[20] This statement reflects the plain meaning and intent of the phrase "existing wireless tower" in Section 6409(a), and is codified in the Commission's definition of "existing" in the rules, which state that a tower is existing only "if it has been reviewed and approved under the applicable zoning or siting process."[21] The Order does not alter this definition of "existing," and thus creates an internal

base station that does not substantially change the physical dimensions of such tower or base station."

[18] 47 U.S.C.§ 1455 (a)(2).

[19] *See Hearth, Patio & Barbecue Ass'n v. U.S. Dep't of Energy*, 706 F.3d 499, 506 (D.C. Cir. 2013) ("Government regulators simply cannot choose to ignore statutory limits on their authority and expect deference to come of their intransigence.").

[20] 2014 Order at ¶ 179.

[21] 47 C.F.R. § 1.6100(b)(5). The definition also finds that a tower is existing where it has not been reviewed and approved only if "it was not in a zoned area when it was built, but was lawfully constructed … ."

conflict within the rules by allowing deployments in areas that by definition are not part of an "existing" tower.

C. THE ORDER FAILS TO DEMONSTRATE OFF-SITE EXCAVATIONS AND DEPLOYMENTS ARE NOT SUBSTANTIAL

Were the Commission able to support a finding that it has the legally delegated authority to extend Section 6409 to cover off-site deployments, in establishing a protected growth pattern of 30 feet in any direction regardless of the size of the original site, the Order fails to meet the Congressional imposed limitation that growth not be substantial.

The Order offers as a defense for this size growth that the proposed changes will speed deployment. But speeding deployment does not free the Commission from the congressionally imposed test for permitted changes that focuses first and foremost on the "substantiality" of such changes. The Order's failure to consider the overall impact of the changes is a fatal defect. In addition, the Order, when combined with the Commission's recently announced concealment approach[22] will substantially change a site in size and potentially in its appearance to its neighbors.

The Order justifies these potentially substantial changes by finding that "any space that was once available at those tower sites has been used" and thus "there is less space at tower sites for additional collocations … ."[23] The Order goes on to find that "additional space is generally necessary to add the latest technologies … which requires more space

[22] *In the Matter of Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 20-75 (Rel. June 10, 2020).

[23] Order at ¶ 15.

than other collocation infrastructure."[24] In other words, more ground space is necessary to add additional equipment to existing sites and that equipment has as a common characteristic that it is more space-intensive. This logic—that the scope of the need justifies the rule change—suffers from the same flaw that rendered arbitrary and capricious the Commission's 2018 Order exempting most small cell construction from historic-preservation and environmental review: If thirty-foot expansions are necessary to accommodate numerous, large-scale equipment, the Commission cannot reasonably conclude this proliferation of equipment outside of tower sites is not substantial.[25]

Petitioners would remind the Commission that we are not saying that such site expansions and growth cannot or should not occur. We simply assert that they must not happen automatically. If public needs justify such a change, an applicant is protected by 47 U.S.C. § 332(c)(7).

III. THE ORDER SHOULD ESTABLISH A SIZE LIMITATION FOR TRANSMISSION EQUIPMENT DEPLOYED IN THE OFF-SITE AREA

Petitioners continue to believe that Section 6409(a) of the Spectrum Act cannot be reasonably read to allow for new deployment outside of the existing tower site. Should the Commission choose not to reconsider this aspect of the Order, we ask that the Commission establish caps on the size of "deployments" of transmission equipment permitted under revised 47 C.F.R. 1.6100(b)(7)(iv). Such caps will assist communities in siting additional wireless compounds because it empowers local governments to better address opposition to

[24] *Id.*

[25] *See United Keetoowah Band of Cherokee Indians, v. FCC*, 933 F.3d 728, 741 (D.C. Cir. 2019) ("The scale of the deployment the FCC seeks to facilitate … makes it impossible on this record to credit the claim that small cell deregulation will 'leave little to no environmental footprint.'").

such sites from adjacent property owners worried about the negative impact on their property values. As previously stated, when it comes to measuring the impact on the value of adjoining properties, studies have documented that the size of telecommunications equipment does matter.[26]

The failure to include such a cap in the Order was, like the new thirty-foot deployment zone, an unreasonable interpretation of Section 6409(a). The Order merely states that "given the limited types of transmission equipment deployed for collocations, such a restriction is not necessary to consider excavation or deployment within the 30-foot expansion area to be outside the scope of a substantial change."[27] This is pure speculation. And the very next sentence in the Order seems to contradict the assumption that the limited types of deployments somehow naturally caps their size: "[S]ize restrictions based on current equipment may unnecessarily restrict the deployment of future technology, which may include larger transmission equipment than currently deployed or available."[28] In other words, the Commission does not know what types of equipment might be deployed under the new rule, but it anticipates that the new equipment will be larger than today's deployments. This very concession under the *United Keetoowah Band* rule illustrates that the Order is arbitrary and capricious. The Order determines that whatever deployments occur outside the site could never be "substantial" while acknowledging that the rule itself is written to permit unknown deployments of unknowable and uncapped size.

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[26] *See* Comments of City of Portland, *et al.*, WT Docket No. 19-250, RM-11849 (July 22, 2020) (citing Petitioners' Brief at 19, *Sprint Corporation v. FCC*, No. 19-70123).

[27] Order at ¶ 21.

[28] *Id.*

IV. CONCLUSION

The Commission should reconsider and rescind its November 3rd Site Expansion Order. Doing so is necessary and appropriate in light of the questionable legal authority upon which the Commission relied to issue the Order

Barring reconsideration, the Commission should develop the record with respect to the size of permitted transmission equipment permitted in the expanded site area.

Respectfully submitted,

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