

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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
)	
Wireless Telecommunications Bureau and)	
Wireline Competition Bureau Seek Comment)	
on WIA Petition for Rulemaking,)	
WIA Petition for Declaratory Ruling and)	
CTIA Petition for Declaratory Ruling)	WT RM-11849
)	
Accelerating Wireless Broadband Deployment)	
By Removing Barriers to)	
Infrastructure Investment)	WT Docket No. 17-79
)	
Accelerating Wireline Broadband Deployment)	
By Removing Barriers to)	
Infrastructure Investment)	WC Docket No.17-84

**COMMENTS OF THE NATIONAL LEAGUE OF CITIES; CLARK COUNTY,
NEVADA; COBB COUNTY, GEORGIA; HOWARD COUNTY, MARYLAND;
MONTGOMERY COUNTY, MARYLAND; THE CITY OF ANN ARBOR, MICHIGAN;
THE CITY OF ARLINGTON, TEXAS; THE CITY OF BELLEVUE, WASHINGTON;
THE CITY OF BOSTON, MASSACHUSETTS; THE CITY OF BURLINGAME,
CALIFORNIA; THE TOWN OF FAIRFAX, CALIFORNIA; THE CITY OF
GAITHERSBURG, MARYLAND; THE CITY OF GREENBELT, MARYLAND; THE
TOWN OF HILLSBOROUGH, CALIFORNIA; THE CITY OF KIRKLAND,
WASHINGTON; THE CITY OF LINCOLN, NEBRASKA; THE CITY OF LOS
ANGELES, CALIFORNIA; THE CITY OF MONTEREY, CALIFORNIA; THE CITY OF
MYRTLE BEACH, SOUTH CAROLINA; THE CITY OF NEW YORK, NEW YORK;
THE CITY OF OMAHA, NEBRASKA; THE CITY OF PORTLAND, OREGON; THE
CITY OF SAN BRUNO, CALIFORNIA; THE MICHIGAN COALITION TO PROTECT
PUBLIC RIGHTS-OF-WAY; THE TEXAS MUNICIPAL LEAGUE; AND THE TEXAS
COALITION OF CITIES FOR UTILITY ISSUES**

October 29, 2019

EXECUTIVE SUMMARY

The above-captioned communities and associations of local governments, representing millions of Americans nationwide, strongly oppose the demands made by CTIA and WIA in the Petitions at issue in these proceedings. The Petitions ask the Commission to significantly exceed the congressionally established limits of Sections 6409(a) and 224, and urge the Commission to adopt positions inconsistent with those the Commission relied upon in defending the existing Section 6409(a) framework before the Fourth Circuit.

Petitioners fail to substantiate their allegations, and in many cases omit critical context in mischaracterizing local permitting and land use practices. No record based solely on responses to these Petitions will provide adequate support to justify Petitioners' demands. Moreover, the agency's views are entirely unknown and therefore cannot be commented upon, thereby failing to provide adequate notice and opportunity to comment on any ultimate rule changes.

Section 6409(a) was adopted to allow minor modifications and expansions to existing sites previously approved through discretionary land use and zoning processes. Section 6409(a) was not meant to allow installation of equipment in locations never previously approved for wireless use. Section 6409(a) was not meant to short-circuit the ability of localities to protect the aesthetics of their communities. Section 6409(a) was not meant to entitle applicants to evade payment of fees, to start shot clocks without actually submitting applications, or to begin construction without actually receiving permits. Section 6409(a) was intended to cover only those minor modifications that were not deemed "substantial."

Yet under the guise of requests for "clarification," Petitioners ask the Commission to grant them the right to demand approval of larger sites with less concealment, placed on portions of structures or on plots of land never subject to land use review and approval, and to deny localities the application information necessary to enforce applicable local, state, and federal law.

These are not “clarifications” – these are, in fact, substantial changes to the Section 6409(a) regime, and inconsistent with the statute and the Commission’s prior rulings.

There is no need to change the rules. The fact that an application falls outside of Section 6409(a) does not mean that it will face significant delays or be denied. Rather, even an application that involves a substantial change will typically be approved in the normal course, subject to appropriate additional conditions that protect the public. The Commission has an ample record showing that most applications for wireless facilities are approved, and approved without reliance on Section 6409(a). Moreover, the sorts of modifications sought are really not needed for well-designed installations, including those designed to support 5G. Changing the rules to make it easier to modify facilities is almost certain to cause significant additional delays in deployment. That is because techniques that communities and carriers are using to minimize impacts and to obtain approvals in areas where wireless providers are installing facilities entirely inconsistent with those installed by other utilities – authorizing carefully designed and placed monopoles; installing structures that include street lighting and that if not completely “stealth” are nonetheless designed to fit in with the surrounding environments, for example – may no longer be enforceable. Because the record shows that the impact of installing out-of-place facilities can be a reduction in property values, the effect will be to heighten opposition to deployment, and reverse important strides now being made in designing wireless facilities.

TABLE OF CONTENTS

EXECUTIVE SUMMARY	i
TABLE OF CONTENTS.....	iii
I. INTRODUCTION	1
II. COMMISSION ACTION MUST FLOW FROM A RECORD REFLECTING THE COMMISSION’S OWN VIEWS, NOT SOLELY THOSE OF THIRD PARTIES, TO ENSURE A FAIR OPPORTUNITY FOR COMMENT.	2
III. PETITIONERS FAIL TO DEMONSTRATE A NEED FOR COMMISSION ACTION, AND RELY UPON UNSUBSTANTIATED PRESUMPTIONS OF NECESSITY.....	3
IV. THE PETITIONS SEEK CHANGES IN SECTION 6409(a) RULES THAT ARE IN DIRECT CONFLICT WITH COMMISSION REPRESENTATIONS TO THE 4TH CIRCUIT AND BEYOND THE SCOPE OF THE STATUTE.....	5
V. WIRELESS DEPLOYMENTS IMPLICATE PUBLIC SAFETY, ACCESSIBILITY, COMMUNITY AESTHETICS, PROPERTY RIGHTS AND OTHER CONCERNS WHICH MUST BE RESPECTED.....	6
VI. THE CHANGES REQUESTED ARE INCONSISTENT WITH THE CORE ELEMENTS OF THE SECTION 6409(a) FRAMEWORK.	10
A. Expansion of equipment compounds outside the rights-of-way constitutes a “substantial change” falling outside the protections of Section 6409(a).	10
B. Permitting excavation outside the leased area can constitute a substantial change, and a blanket exclusion is not justified.....	12
C. The entire building or structure is not the “base station” – only that portion originally reviewed and approved to support a wireless facility.	14
D. The proposed interpretations of “concealment element” both subvert the purpose of Section 6409(a), and reflect a lack of understanding of the holistic evaluation at the core of siting review.	16
E. Attempts to draw a distinction between ground-mounted and pole-mounted equipment only underscore the flaws in the test for substantiality when applied to facilities in the rights-of-way.	19
F. No Commission action is necessary with respect to Section 6409(a) application fees.	21
1. Non-Payment of regulatory fees is a fatal flaw in an application.....	22
2. Commission rules permit localities to employ deposits and escrow funds. This should not be changed.....	23
3. The Commission’s presumptively reasonable fee levels cannot serve as a yardstick to measure whether any given fee or set of fees do or do not reflect costs.....	24

VII.	NO CHANGES SHOULD BE MADE TO EXPAND THE SECTION 6409(a) SHOT CLOCKS OR THE DEEMED GRANTED REMEDY.	25
A.	Shot clocks should commence when an application is actually submitted.....	25
B.	Expanding the shot clock to “all approvals” is not the simple clarification Petitioners suggest.	27
C.	Applicants should not be empowered to begin construction without receiving the necessary permits.	29
VIII.	CONCLUSION.....	31

Exhibit A	Comments of the Smart Communities Siting Coalition, WT Docket No. 16-421 (Mar. 8, 2017).
Exhibit B	Comments of Montgomery County, Maryland, WT Docket No. 16-421 (Mar. 8, 2017).
Exhibit C	Reply Comments of the Smart Communities Siting Coalition, WT Docket No. 16- 421 (Apr. 7, 2017).
Exhibit D	Reply Comments of Montgomery County, Maryland, WT Docket No. 16-421 (Apr. 7, 2017).
Exhibit E	Comments of the Smart Communities and Special Districts Coalition, WT Docket No. 17-79 (Jun. 15, 2017).
Exhibit F	Reply Comments of the Smart Communities and Special Districts Coalition, WT Docket No. 17-79 (Jul. 17, 2017).
Exhibit G	Ex Parte Letter Responding to Broadband Deployment Advisory Committee Recommendations Regarding State & Local Government Barriers to Broadband Deployment, WT Docket No. 17-79 (Jul. 16, 2018).
Exhibit H	Ex Parte Letter Responding to Draft Small Cell Order, WT Docket No. 17-79 (Sep. 29, 2018).
Exhibit I	Application No. 2019040781 from Verizon Wireless to Montgomery County, Maryland (rev. Aug. 2, 2019).
Exhibit J	Application No. 2019070898 from T-Mobile to Montgomery County, Maryland (rev. Aug. 8, 2019).
Exhibit K	Application No. 2019070894 from Verizon Wireless to Montgomery County, Maryland (Jul. 9, 2019).
Exhibit L	EMFScientist.org, <i>International Appeal: Scientists call for Protection from Non- ionizing Electromagnetic Field Exposure</i> (Sep. 21, 2019).
Exhibit M	Declaration & Reply Declaration of Andrew Afflerbach for the Smart Communities Siting Coalition (Mar. 2017).
Exhibit N	Kevin E. Cahill, Ph.D, <i>The Economics of Local Government Rights of Way Fees</i> (Mar. 8, 2017).

- Exhibit O Report and Declaration of David E. Burgoyne for the Smart Communities Siting Coalition (Mar. 7, 2017).
- Exhibit P Report and Declaration of Steven M. Puuri for the Smart Communities Siting Coalition (Mar. 8, 2017).
- Exhibit Q Bryce Ward, *Effect on Broadband Deployment of Local Government Right of Way Fees and Practices* (Jul. 18, 2011).
- Exhibit R Columbia Telecommunications Corporation, *An Engineering Analysis of Public Rights-of-Way Processes in the Context of Wireline Network Design and Construction* (Jul. 13, 2011).

I. INTRODUCTION

The National League of Cities; Clark County, Nevada; Cobb County, Georgia; Howard County, Maryland; Montgomery County, Maryland; the City of Ann Arbor, Michigan; The City of Arlington, Texas; the City of Bellevue, Washington; the City of Boston, Massachusetts; the City of Burlingame, California; the Town of Fairfax, California; the City of Gaithersburg, Maryland; the City of Greenbelt, Maryland; the Town of Hillsborough, California; the City of Kirkland, Washington; the City of Lincoln, Nebraska; the City of Los Angeles, California; the City of Monterey, California; the City of Myrtle Beach, South Carolina; the City of New York, New York; the City of Omaha, Nebraska; the City of Portland, Oregon; the City of San Bruno, California; the Michigan Coalition to Protect Public Rights-of-Way; the Texas Municipal League; and the Texas Coalition of Cities for Utility Issues (collectively, “Localities”) submit these comments in opposition to a trio of industry requests¹ (“Petitions”) seeking revisions to the Commission’s rules² implementing Sections 6409(a) of the 2012 Spectrum Act³ and 224 of the Telecommunications Act.⁴ The petitions seek changes inconsistent with the plain meaning of the statute and the Commission’s existing rules. The requested relief directly contradicts the Commission’s original view of the statute, and the interpretations the Commission relied upon in defending the current Section 6409(a) rules before the 4th Circuit. Furthermore, the requested changes to the scope of Section 224 are inconsistent with the clear intent of the Congress and

¹ Petition for Rulemaking, RM-11849 (filed Aug. 27, 2019) (“WIA Rulemaking Petition”); Petition for Declaratory Ruling filed by the Wireless Infrastructure Association, WT Docket No. 17-79 (filed Aug. 27, 2019) (“WIA Declaratory Ruling Petition”); Petition for Declaratory Rulemaking filed by CTIA, WT Docket No. 17-79, WC Docket No. 17-84 (filed Sep. 6, 2019) (“CTIA Petition”) (collectively, “Petitions”). Throughout these Comments, where an issue is addressed by both CTIA and WIA, they may be referred to jointly as “Petitioners;” otherwise, they will be referenced individually.

² 47 C.F.R. § 1.6100.

³ 47 U.S.C. § 1455(a).

⁴ 47 U.S.C. § 224.

jeopardize significant local government interests. They will complicate, not streamline, deployment of advanced facilities. For these and other reasons outlined herein, the Commission should reject the changes sought by the Petitioners.

II. COMMISSION ACTION MUST FLOW FROM A RECORD REFLECTING THE COMMISSION'S OWN VIEWS, NOT SOLELY THOSE OF THIRD PARTIES, TO ENSURE A FAIR OPPORTUNITY FOR COMMENT.

Should it act on these Petitions, the Commission's actions will be subject to judicial review on the same basis as the adoption or modification of any other regulations, as the Petitions seek real changes, not mere "clarifications." The Commission must ensure its actions are consistent with its public interest obligations in Title 47, and with the Administrative Procedures Act.⁵ In interpreting Sections 6409(a) and 224, the Commission may only rely on a permissible construction where Congress has left an ambiguity – it may not seek to rewrite the statute or go beyond its scope in service of a preferred result.⁶

If the Commission elects to pursue these issues further, it cannot proceed purely on the basis of these petitions, and should instead advance a clear proposal of its own, consistent with the requirements of the APA.⁷ "[A]n agency proposing informal rulemaking has an obligation to make its views known to the public in a concrete and focused form so as to make criticism or

⁵ The Commission's actions must, for example, not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "contrary to constitutional right, power, privilege, or immunity" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" among other requirements. 5 U.S.C. § 706(2)(A)-(C).

⁶ See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., et al.*, 467 U.S. 837, 842-43 (1984).

⁷ Agencies may generally amend or repeal existing rules issued pursuant to discretionary authority. *Encino Motorcars, LLC v. Navarro*, 579 U.S. ___, 136 S. Ct. 2217, 2125 (2016) ("Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change."). The agency must, however, comply with the default repeal rules that are mandated either by statute or judicial order or such actions would not be "in accordance with law." 5 U.S.C. § 706. The APA therefore "mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. ___, 135 S. Ct. 1199, 1206 (2015).

formulation of alternatives possible.”⁸ The *Public Notice* seeking comment on these petitions provides no insight whatsoever into the Commission’s views, or “sufficient detail on [a rule’s] content and basis in law and evidence to allow for meaningful and informed comment.”⁹ “In sum, ‘[t]he opportunity for comment must be a meaningful opportunity.’ That means enough time with enough information to comment and for the agency to consider and respond to the comments.”¹⁰ All the Commission has done thus far is seek comment on a broad array of allegations, and related demands for rule changes, of a single industry. Action by declaratory ruling in this context – where far more is sought than a simple rule clarification - would not comport with the APA’s requirements.

III. PETITIONERS FAIL TO DEMONSTRATE A NEED FOR COMMISSION ACTION, AND RELY UPON UNSUBSTANTIATED PRESUMPTIONS OF NECESSITY.

While framed as requests for “clarification” and “narrow rule changes,”¹¹ the Petitions in fact demand significant rewrites and offer no compelling legal or factual basis to justify the requested actions. The procedural problems presented by Petitioners’ requests are compounded by the fact that the Commission is permitting petitioners to identify alleged problems without actually providing the most basic facts that would allow commenters to fully respond or permit the agency to address the proposals in context. While the Petitions list numerous allegedly problematic practices, they offer no evidence to substantiate the assertions made, and in many cases omit critical context.¹²

⁸ *Home Box Office v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977).

⁹ *Am. Med. Ass’n v. Reno*, 57 F.3d 1129, 1132 (D.C. Cir. 1995).

¹⁰ *Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir. 2011) (quoting *Rural Cellular Ass’n v. FCC*, 588 F.3d 1095, 1101 (D.C. Cir. 2009)).

¹¹ WIA Rulemaking Petition at 2.

¹² *See, e.g.* WIA Rulemaking Petition at 12-13. WIA provides a long list of allegedly problematic fee-related requirements imposed by local governments, but omits, for example, any recognition that in jurisdictions requiring a deposit, that deposit is drawn on only to directly recover costs

For instance, WIA stated in an *ex parte* letter that a site, whose potential plans it included, could not be expanded as described as “the current rules would not allow for this expansion.”¹³ Presumably, WIA is claiming that expansions of this nature would be rejected, and not simply that they do not fall within the bounds of Section 6409(a). In fact, the modifications in question have never been requested by the infrastructure provider in question, and according to staff from the jurisdiction in question, it is probable that under that jurisdiction’s current rules, the expansion in question would likely be approved as a matter of routine.

What is true is that adding several hundred square feet to an existing equipment compound, as the plans in the WIA *ex parte* contemplate, may not be *entitled* to approval mandated by Section 6409(a), but it does not automatically follow that failure to qualify for Section 6409(a) relief implies an expansion is not possible. The Petitions, in their entirety rest, nonetheless, on just such a presumption. They rest atop the unsubstantiated claim that unless localities are *compelled* to approve an increasing number of facility expansions under Section 6409(a), then all such facility expansions will presumably be denied. This is not the case.

WIA in one instance suggests that significant changes are necessary to avoid “significantly curtail[ing] the number of sites available for Section 6409(a) treatment.”¹⁴ This presumes, however, that the Commission’s goal should be to *maximize* the number of sites falling under Section 6409(a) as opposed to 47 U.S.C. § 332(c)(7), and the Petitions further imply that *failure* to maximize the scope of Section 6409(a) would prevent deployment. No

incurred in reviewing an application, and that any unused balance is routinely returned to the applicant after the process is concluded. It merely lists high deposit amounts to imply local fees are out of control; the complete story is significantly different, and frequently absent from the Petitions’ examples.

¹³ See Ex Parte Letter from John A. Howes, Jr., WT Docket No. 19-250, RM-11849, WT Docket No. 17-79, WC Docket No. 17-84, at 2-3 (Oct. 2, 2019) (“...the current rules would not allow for this expansion.”)

¹⁴ WIA Declaratory Ruling Petition at 18.

evidence is offered to demonstrate that *but for* Section 6409(a) protections, desired deployment (such as that necessary for FirstNet) would not be approved by localities. There is no widespread effort to thwart Section 6409(a) applications.

Furthermore, the Commission's 2018 infrastructure actions, which have been in effect less than a year, have already made substantial changes in the name of promoting deployment.¹⁵ The FCC's planned report to Congress on broadband deployment demonstrates that, in the Commission's view, broadband services *are* being timely deployed and in an equitable manner.¹⁶ Petitioners' claims of the need for urgent action stand in stark contrast to the Commission's own views on the pace of deployment, even setting aside the prematurity of considering further action so soon after the 2018 orders took effect.

IV. THE PETITIONS SEEK CHANGES IN SECTION 6409(a) RULES THAT ARE IN DIRECT CONFLICT WITH COMMISSION REPRESENTATIONS TO THE 4TH CIRCUIT AND BEYOND THE SCOPE OF THE STATUTE.

The Petitions collectively seek far more than clarifications. They ask the Commission to significantly expand the scope of Section 6409(a)'s protections, and to grant interpretations of the statute that were specifically rejected by the Commission when it originally implemented the statute.¹⁷ Furthermore, many of the changes sought directly conflict with the Commission's defense of the rules before the Fourth Circuit.¹⁸ Section 6409(a) was adopted to permit

¹⁵ See generally *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Declaratory Ruling and Third Report and Order*, 33 FCC Rcd. 9088 (2018) ("Small Cell Order").

¹⁶ See *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, Fifteenth Broadband Deployment Report Notice of Inquiry*, FCC 19-102, GN Docket No. 19-285 (rel. Oct. 23, 2019).

¹⁷ See *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, Report & Order*, 29 FCC Rcd 12865 (2014) ("2014 Infrastructure Order"), *aff'd*, *Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015).

¹⁸ Compare CTIA Petition at 10 (arguing that a structure's height should not be treated as a concealment element, and that concealment elements and blanket concealment conditions should not be permissible bases for exclusion from 6409(a) protections) *with* Brief of Respondents

modification of existing wireless towers and base stations through collocations, removal, and replacement of transmission equipment, where the modification did not substantially change the physical dimensions of the tower or base station.¹⁹ The Commission “interpreted the term ‘existing’ in Section 6409(a) to limit the statute’s reach to facilities that had previously been reviewed and approved by a State or local government...”²⁰ The Commission recognized the limited scope of the statute in it in 2014, and relied on that narrow scope to defend its rules in court. It should not now depart from that interpretation by blessing an effort to expand the statute’s reach far beyond its limits, nor does it have the authority to extend its rules that far.²¹

V. WIRELESS DEPLOYMENTS IMPLICATE PUBLIC SAFETY, ACCESSIBILITY, COMMUNITY AESTHETICS, PROPERTY RIGHTS AND OTHER CONCERNS WHICH MUST BE RESPECTED.

In evaluating applications to deploy wireless facilities in their communities, localities have an obligation to their constituents to consider impacts including public safety and welfare,²² property values,²³ aesthetic considerations, impact on residents, and allocation of scarce local government resources.²⁴ Wireless deployments are frequently complex, involving placement of multiple facilities over a geographic area. In many cases, part of that area (locations where other

Federal Communications Commission, *Montgomery County v. FCC*, Nos. 15-1240 & 15-1284, Docket No. 61 (2015) (“FCC Respondents Brief”) at 41 (“...where an existing tower is concealed by a tree line and its location below the tree line was a consideration in its approval, an extension that would raise the height of the tower above the tree line would constitute a substantial change, and a zoning authority could impose conditions designed to conceal the modified facility.”)

¹⁹ 47 U.S.C. § 1455(a).

²⁰ FCC Respondents Brief at 3.

²¹ See 5 U.S.C. § 706(2)(C).

²² See Exhibit P, Report and Declaration of Steven M. Puuri for the Smart Communities Siting Coalition (Mar. 8, 2017).

²³ See Exhibit O, Report and Declaration of David E. Burgoyne for the Smart Communities Siting Coalition (Mar. 7, 2017).

²⁴ See Exhibit M, Declaration & Reply Declaration of Andrew Afflerbach for the Smart Communities Siting Coalition (Mar. 2017); Exhibit N, Kevin E. Cahill, Ph.D, *The Economics of Local Government Rights of Way Fees* (Mar. 8, 2017); Exhibit Q, Bryce Ward, *Effect on Broadband Deployment of Local Government Right of Way Fees and Practices* (Jul. 18, 2011).

utilities are underground, for example) placement of aboveground facilities would reverse an expensive, and locally funded process for undergrounding utilities, with attendant adverse consequences for property values and aesthetics. Local governments largely excel when given the opportunity to work in partnership with infrastructure providers to reach mutually agreeable outcomes. But it is critical that the Commission understand all the pressures local governments must consider when it examines any allegations about local actions, such as those made in the Petitions.

By way of example, CTIA's request to expand Section 224 to include poles which solely support lighting fixtures, but not other utility lines, raises serious concerns for local governments.²⁵ Localities commonly control the design of light poles installed by utilities, and pay utilities for not only the service provided, but the cost of the poles and fixtures in a locality's selected design. The poles are not placed on the basis of utilities' preferences, but in a manner that ensures lighting is properly placed and that the lighting design fits in with the community. Installation, maintenance, and ongoing costs are paid by localities, and local rights to assume control of the poles are protected in many cases by contract or tariff. The electric utility may have limited authority to control use of the poles.²⁶

To simply open up light poles owned by utilities for attachment under Section 224, then, directly implicates local rights including contractual rights, the financial interests of the locality, and its interest in designing and providing street lighting. In many instances, a locality may stop

²⁵ CTIA Petition at 21-25.

²⁶ In contrast to utility poles regulated under Section 224, electric utilities do not simply install street lights for their own use and then charge a fee for shared access to those poles. Rather, power may be provided to a pole pursuant to a request by a locality for provision of electrical power to a street light owned by the community; or the light pole, power and maintenance may be provided pursuant to an offering by the utility. In some cases, pursuant to a development plan, a light pole is owned or controlled by a home owners' association. This makes access to light poles, and the interests affected by access, quite different than access to utility poles.

service to a particular pole at any time, and have that pole removed, pursuant to the provisions of street lighting tariffs applicable to electric utilities. The locality may then install its own light and purchase power and maintenance under separate agreements. Either way, the locality has paid for a particular design, in a particular location, and has a direct interest both in the aesthetic appearance of the street light, and in its location and operation. Opening these poles up to Section 224 attachment undermines those rights and compromises localities' ability both to control aesthetics of poles they pay for, and to manage attachments to those poles, which is essential to their proper operation.²⁷

There are similar issues with other aspects of the Petitions, where Petitioners' requests run counter to common-sense elements of local permitting processes. WIA provides a list of application requirements it feels are inappropriate, yet many of these are essential to core elements of review.²⁸

Evaluation of whether an application qualifies as an EFR, for example, is largely dependent on the size and dimensions, and quantity, of equipment already existing at the proposed site, in order to compare the dimensions of the existing site to the criteria for measuring a substantial change.²⁹ In order to determine whether an application qualifies as an EFR, therefore, the locality needs to know what equipment is already there, yet WIA suggests that asking for "an inventory of all other antennas and equipment on a tower" is an "onerous documentation requirement[]" that should not be permitted.³⁰

It is common, too, for a permit applicant to provide evidence that the applicant has the legal right to access and work on the property where they seek permits. As localities are not

²⁷ Metal street light poles can present stray voltage risks, for example.

²⁸ WIA Declaratory Ruling Petition at 21-23.

²⁹ See 47 C.F.R. § 1.1600(b)(7).

³⁰ WIA Declaratory Ruling Petition at 22.

generally privy to agreements between property owners and communications companies, it is routine to request clear documentation proving a right to access the property where work will be done. Documenting that permission is an obligation that must be borne by the applicant, yet according to WIA, a requirement that an applicant document the consent of the underlying property owner is “onerous.”³¹

WIA also alleges that “RF reports *for local approval*” are similarly burdensome, in particular arguing that requiring applicants to specify the radio frequencies to be used is problematic as “determining the exact operating frequency of each antenna can be time consuming.”³² First, it is difficult to believe that the entities constructing wireless facilities and installing wireless antennas, and certifying that those antennas comply with FCC emissions regulations, are inconvenienced by a need to identify the frequencies their emitters actually utilize. Even so, the FCC recognizes localities’ right to verify compliance with emissions limits, and the cumulative emissions at a site grow with each EFR installation.³³ Montgomery County,

³¹ *Id.* This is a rather standard requirement for permitting: the locality will not typically consider a request for a land use permit unless submitted by the landowner, or a person who has an appropriate permission from the landowner to make the request. This avoids wasting local resources on review of a proposal where a fundamental permission is missing.

³² WIA Declaratory Ruling Petition at 22.

³³ Montgomery County, Maryland, has buildings which now support nearly four dozen antennae. In order to verify that cumulative emissions are at permissible levels, specific information about each EFR is necessary. This will be increasingly true as carriers seek to use Section 6409(a) requests to modify small wireless facilities. As the Commission’s current RF emissions rules do not account for non-thermal impacts, and inadequately evaluate the cumulative effects, it is increasingly imperative that the Commission undertake real steps to measure and address the exponential increase in total emissions as wireless services have proliferated over the past two decades. There is significant new scientific evidence as yet unaddressed by the Commission, and localities nationwide strongly urge the Commission to conduct a meaningful evaluation of the cumulative, complete impact of all emissions contemplated by the deployment of 5G technologies. For further information, see the attached materials. *See, e.g.* Exhibit L, EMFScientist.org, *International Appeal: Scientists call for Protection from Non-ionizing Electromagnetic Field Exposure* (Sep. 21, 2019), available at https://www.emfscientist.org/images/docs/International_EMF_Scientist-Appeal.pdf; 5GAppeal,

one of those communities identified by name in WIA’s list, requests a list of individual frequencies rather than general bands because, in its experience, carriers commonly omit some frequencies or submit incorrect information, and as a result, their calculation of exposures is inaccurate.³⁴ The information provided is used to determine whether the applicant has properly considered the cumulative effects of the modifications on general and occupational exposures – and taken the appropriate, Commission required steps to prevent occupational and general exposures. Absent the data, localities would be unable to do what Sections 332(c)(7) and 6409(a) permit them to do.

VI. THE CHANGES REQUESTED ARE INCONSISTENT WITH THE CORE ELEMENTS OF THE SECTION 6409(a) FRAMEWORK.

A. *Expansion of equipment compounds outside the rights-of-way constitutes a “substantial change” falling outside the protections of Section 6409(a).*

The Commission’s rules currently state that a “substantial change” not entitled to Section 6409(a) protections results when, among other requirements, the modification “entails any excavation or deployment outside the current site.”³⁵ In defending the rules to the Fourth Circuit, the Commission explained that it “interpreted the term ‘existing’ in Section 6409(a) to limit the statute’s reach to facilities that had previously been reviewed and approved by a State or local government.”³⁶ Section 6409(a), which reaches only “existing” sites, thus only extends to the scope of sites actually approved to support wireless facilities. WIA asks the Commission to

Scientists and doctors warn of potential serious health effects of 5G (Sep. 2017), available at <http://www.5gappeal.eu/scientists-and-doctors-warn-of-potential-serious-health-effects-of-5g/>; *BioInitiative 2012 – A Rationale for Biologically-based Exposure Standards for Low-Intensity Electromagnetic Radiation* (2017), <https://www.bioinitiative.org>.

³⁴ See, e.g. Exhibit J, Application No. 2019070898 from T-Mobile to Montgomery County, Maryland (rev. Aug. 8, 2019) (T-Mobile listed frequencies licensed to Sprint as those its facility would utilize). Applicants also frequently claim categorical exclusions which in fact do not apply See, e.g. Exhibit K, Application No. 2019070894 from Verizon Wireless to Montgomery County, Maryland (Jul. 9, 2019) (claiming categorical exclusions from RF emission standards).

³⁵ 47 C.F.R. § 1.6100(b)(7)(iv).

³⁶ FCC Respondents Brief at 3.

redefine the “current site” referred to in Section 1.6100(b)(7)(iv) of the Commission’s rules to be the entire leased area at the time a provider seeks to install new equipment.³⁷ WIA claims this is necessary to avoid curtailing the number of sites subject to Section 6409(a)³⁸, but this requires a presumption that, but for Section 6409(a) protections, expansion would generally be denied. No evidence is offered that this is true. What would follow would be extensive bypassing of local review for property uses *not* previously reviewed and approved to support wireless equipment.

WIA’s October 2019 ex parte letter demonstrates one type of expansion this “clarification” would allow.³⁹ WIA shared a site plan with the Commission involving nearly a 50% expansion of the base compound, adding hundreds of square feet to a site. But the Commission was clear when it explained, before the Fourth Circuit, that Section 6409(a) protections stem, ultimately, from a site that was previously subject to discretionary review and approval. The Commission told the court that “a zoning authority ‘is not obligated to grant a collocation application under Section 6409(a)’ unless the wireless tower or base station has previously been ‘reviewed and approved under the applicable local zoning or siting process’ or received ‘another form of affirmative State or local regulatory approval.’”⁴⁰ It explained, in the context of measuring the size of changes, that “changes are measured from the dimensions of the tower or base station as originally approved, or as most recently modified with zoning approval prior to enactment of the Spectrum Act – not, as industry requested, ‘from the last approved change[.]’”⁴¹ The Commission repeatedly expressed to the court a view of Section 6409(a) grounded in non-substantial changes to, or expansions of, sites previously specifically approved

³⁷ WIA Declaratory Ruling Petition at 18.

³⁸ *Id.*

³⁹ *See* Ex Parte Letter from John A. Howes, Jr., WT Docket No. 19-250, RM-11849, WT Docket No. 17-79, WC Docket No. 17-84, at 2-3 (Oct. 2, 2019).

⁴⁰ FCC Respondents Brief at 14 (quoting 2014 Infrastructure Order at ¶174).

⁴¹ FCC Respondents Brief at 15-16.

for wireless installations – not whatever site the landlord and the tenant later agree upon. No prior approval has been conducted when the site is expanded solely by operation of an amended ground lease.

What WIA asks, in effect, is that wireless companies be permitted to retroactively change the scope of the necessary prior approval, if the property owner agrees, and that if they are successful in negotiating, then their subsequent actions be protected by Section 6409(a). Notwithstanding the fact that a nearly 50% increase in the size of a ground lease is hardly “insubstantial,” the Commission represented to the Fourth Circuit that Section 6409(a) protections extended only to changes to a site previously subject to discretionary review and approval. What WIA seeks is fundamentally inconsistent with this limitation, and cannot be permitted.

B. Permitting excavation outside the leased area can constitute a substantial change, and a blanket exclusion is not justified.

As noted above, the current rules find a “substantial change” outside the scope of Section 6409(a) where the proposal “entails any excavation or deployment outside the current site.”⁴² This is again based on the Commission’s understanding the scope of Section 6409(a) as limited only to sites previously approved as wireless facilities.⁴³ WIA suggests the Commission “harmonize” the Section 6409(a) rules with the Section 106 Nationwide Programmatic Agreement by allowing excavation or deployment within thirty feet of any part of the current lease area, or any utility easement, without it constituting a substantial change.⁴⁴ WIA’s assertion of harmonization, however, is strained at best. The Collocation Agreement’s allowance for

⁴² 47 C.F.R. § 1.6100(b)(7)(iv).

⁴³ See FCC Respondents Brief at 3.

⁴⁴ WIA Rulemaking Petition at 9-10.

nearby excavation is made solely in the context of the replacement of a pole⁴⁵ – not in the context of the modification of an existing facility, permitted under Section 6409(a). The two refer to very different circumstances. Permitting excavation incident to a pole being replaced is significantly different than permitting several yards worth of trenching, in circumstances where the effects are not subject to full review.⁴⁶

The line WIA suggests be drawn is also not rational given the diversity of installations to which it would apply. In the City of Arlington, Texas, for example, the average width of a public right-of-way is approximately 60 feet. The street itself occupies most of that space, while wireless facilities are located in the sidewalks on either side. A thirty-foot excavation is *not* insubstantial in that circumstance – it could extend across more than half the street, disrupting public utilities and traffic while additional excavation degrades the integrity of the street itself. To provide another example, envision a facility on private property set well back from a road, whose utility easement extends to the curb. New excavation thirty feet further into the street, or elsewhere on private property, or even installation of new above-ground equipment in or adjacent to that utility easement (which was never previously approved as a place to put equipment, only buried utility lines) would nevertheless not constitute a ‘substantial change’ and thus be completely outside local zoning review. WIA’s proposal may, in theory, not pose a problem for a facility located well away from public ways, on a large farm or industrial site. But

⁴⁵ 47 C.F.R. Part 1, App. C, Section III.B. Notably, the Collocation Agreement addresses replacement of antennas in certain circumstances without triggering Section 106 historic preservation review, but only protects “ground disturbance associated with the collocation does not exceed the depth and width of any previous ground disturbance.” WIA does not, however, suggest harmonization with this more narrow provision directly related to antenna replacement (one of the purposes underlying Section 6409(a)). WIA instead seeks harmony with a provision for replacement of poles, which happens to grant greater leeway for excavation.

⁴⁶ Installation of a new pole would not be subject to Section 6409(a), so the excavation could be reviewed in the context of the application for placement of the new pole.

that same expansion could cause serious problems in a parking lot, where placement anywhere other than the precise approved location would cause significant problems. Sorting out what does and doesn't work is the role of the local government, and Section 6409(a) wasn't meant to supplant that nearly so broadly as WIA desires. If excavation or deployment extends beyond the bounds of the site as previously approved, it is under the rules inherently substantial, and should not be entitled to mandatory approval.

C. The entire building or structure is not the “base station” – only that portion originally reviewed and approved to support a wireless facility.

The definition of “base station” currently includes the portion of a building or support structure other than a tower which supports the existing wireless facility and “that has been reviewed and approved under the applicable zoning or siting process.”⁴⁷ CTIA asks the Commission to expand the Section 6409(a) framework by treating the entirety of a building – not just the portion originally reviewed, and approved, to support wireless equipment – as part of the “base station,” and to entitle applicants to approval of applications to place antennae anywhere on such a structure.⁴⁸ This is a stark departure from the existing framework, and from the grounds on which the Commission justified that framework to the court. The changes requested would allow Section 6409(a)'s narrow exception to localities' right to discretionary review, to expand so far as to swallow the general rule.

Section 6409(a) is narrowly applicable to “existing wireless tower[s] or base station[s].”⁴⁹ The Commission found – and reiterated to the Fourth Circuit⁵⁰ – that the term “existing” “requires that wireless towers or base stations have been reviewed and approved under the

⁴⁷ 47 C.F.R. § 1.6100(b)(1)(iii).

⁴⁸ CTIA Petition at 15-16.

⁴⁹ 47 U.S.C. § 1455(a)(2).

⁵⁰ FCC Respondents Brief at 3, 50.

applicable local zoning or siting process.”⁵¹ That underlying approval, from which Section 6409(a) protections ultimately flow, is in the case of building-mounted facilities generally based on the particular placement of the original facilities in a particular location on a structure. Review and approval of a roof-mounted antenna installation on an office building, for example, entails review of the particular installation to be installed at a particular location on the building, and considers any of the necessary mounting equipment and design elements in their context. An approval, for example, of a rooftop site concealed within a cupola, does not entail approval for an unlimited number of cupolas elsewhere on the structure. That review also involves not only aesthetic considerations, but also examination of structural stability, wind load, fire and electrical safety, emergency egress, and other considerations. While the underlying structure is a part of the base station, only that part of the underlying structure *where the wireless facility was placed* was approved to support wireless equipment – expansions must stem from that location, therefore.

Similarly, the Commission made clear to the Fourth Circuit that the measurements for determining substantiality “are measured from the dimensions of the tower or base station *as originally approved*, or as most recently modified *with zoning approval* prior to enactment of the Spectrum Act – not, as industry requested, “from the last approved change,” which the Commission predicted would create a daisy-chain that “provide[s] no cumulative limit at all.”⁵² The Commission’s focus, again, was on the dimensions of the specific wireless facility *originally reviewed and approved*. It should not be based on the total size of the underlying structure, nor on whatever size the structure has grown to in the intervening years since the original approval.

⁵¹ 2014 Infrastructure Order at ¶174.

⁵² FCC Respondents Brief at 15-16 (quoting 2014 Infrastructure Order at ¶¶196-97) (emphasis added).

Finally, the purpose of Section 6409(a) is to allow insubstantial expansion and modification of *previously approved installations*.⁵³ CTIA now asks that the presence of a wireless facility anywhere on a structure, entitle providers to the placement of additional antennas on any part of that same structure, regardless of proximity or relationship to the previously approved structure.⁵⁴ This too is at odds with the Commission’s view, as it compels approval of what are, fundamentally, new wireless facilities. Attaching new equipment to a structure in a location wholly unrelated to the previously approved installation is precisely the sort of “substantial change” Congress and the Commission specifically excluded from the scope of Section 6409(a).

D. The proposed interpretations of “concealment element” both subvert the purpose of Section 6409(a), and reflect a lack of understanding of the holistic evaluation at the core of siting review.

The Commission’s rules currently provide that a proposed modification constitutes a “substantial change” outside the scope of Section 6409(a) where it “would defeat the concealment elements of the eligible support structure.”⁵⁵ Petitioners’ requests to significantly curtail the scope of concealment elements reflects both a misunderstanding of the holistic review at the core of land use approval, and a flawed view of the purpose of the statute.⁵⁶

Petitioners argue that concealment elements should be limited only to portions of the facility originally identified as concealment elements, and must focus on those elements whose primary purpose is to conceal. This narrow reading misses numerous elements of siting review that contribute to concealment, however. Concealment is achieved through a broader set of tools than the use of fully stealthed facilities (which providers routinely seek to avoid deploying, citing

⁵³ See 2014 Infrastructure Order at ¶168.

⁵⁴ CTIA Petition at 16.

⁵⁵ 47 C.F.R. § 1.6100(b)(7)(v).

⁵⁶ See CTIA Petition at 9-13; WIA Declaratory Ruling Petition at 10-13.

increased costs) and use of semi-stealthed facilities such as monopines. Equipment cabinets attached to poles in rights-of-way, for example, are frequently approved with specific dimensions not only to minimize intrusion into sidewalks and streets for safety reasons, but also to minimize visibility of the site from one or more angles. Similarly, the specific location of a rooftop site, or its inclusion in a particular architectural feature, is approved on the basis of the facility in the context of the total structure. And as the Commission acknowledged to the Fourth Circuit, the actual height of a facility relative to its surroundings may constitute a concealment condition attached to a property.⁵⁷ Concealment elements are not always discrete pieces – the very nature of a site is often a concealment element entitled to Section 6409(a) protection. For example, placement of a facility out of the line of sight of houses, or in a stand of trees, may be an important consideration in the initial approval of a project; allowing changes that defeat that concealment fundamentally changes the impact of the facility. The size and configuration of an equipment cabinet approved for attachment to a pole in the rights-of-way, for example, is a concealment element designed both to reduce visual clutter from the roadways, *and* to reduce the danger of equipment overhanging into roads or enhancing the risks of injury or damage due to falls. There have been very positive steps taken by carriers who now design taller, narrower boxes that are virtually invisible from one side of a pole, and are of uniform depth. Proper placement of those facilities can minimize community impacts. Allowing these designs to be

⁵⁷ FCC Respondents Brief at 41 (“Thus, for example, where an existing tower is concealed by a tree line and its location below the tree line was a consideration in its approval, an extension that would raise the height of the tower above the tree line would constitute a substantial change, and a zoning authority could impose conditions designed to conceal the modified facility.”) Nevertheless, Petitioners argue that using a site’s approved height and footprint as baselines for measuring the substantiality of a change is improper, and that instead the maximum possible dimension must be used, even where never subject to any review or approval for their intended use. This view is fundamentally inconsistent with the Commission’s own interpretations of the statute and defense of the current rules.

bypassed effectively makes the initial placement more controversial, and is unnecessary.

The changes now sought reflect no appreciation for these and other considerations. WIA suggests, for example, that only portions of a facility “purpose built for concealment” should be considered concealment elements.⁵⁸ But as explained above, concealment sometimes comes from context, or from requirements such as painting intended to minimize color. And often, the size of particular elements of a facility are integral to its concealment. The suggestion made by Crown Castle and raised again by WIA, that the size of any facility or component not constitute a concealment element, represents a fundamental misunderstanding of this fact.⁵⁹ Many facilities, and particularly those pole-mounted small cells, are approved as minimally obtrusive specifically because of the size, shape, and appearance of particular components.⁶⁰

Similarly, the suggestion that concealment elements should only be those elements expressly identified as such at the time of original approval,⁶¹ places localities in the impossible position of only being able to preserve elements whose explicit identification was never thought to be necessary. The establishment of a setback from a roofline may not be identified as a concealment element, but that, and safety issues, are its obvious purpose. And of course, until now, no authority has had reason to tag particular requirements as “concealment elements.” It would be arbitrary and unjustifiable to suggest that, unless “magic words” were used in an approval, conditions that have a concealment effect may be ignored. And going forward, the requirement would add additional time and expense to the permitting process, as localities would

⁵⁸ WIA Declaratory Ruling Petition at 12.

⁵⁹ *Id.* at 13.

⁶⁰ In effect, because Crown Castle’s business model leads it to demand much larger facilities than are consistent with an area, it is really asking the Commission to approve a form of bait and switch: allow it, after obtaining approval, to replace a small equipment box with a very large one. The cost of encouraging bad design will predictably be more opposition to any wireless placement. The Commission’s approach to concealment elements was correct to begin with.

⁶¹ *Id.* at 12; CTIA Petition at 12.

be forced to develop extra processes to ensure that all elements meant to serve as a “concealment element,” in whole or in any part, are identified as such. That additional bureaucratic cost would be borne by the wireless providers under the Commission’s rules, while providing no affirmative benefit. Similarly, the suggestion that permit requirements and conditions generally should not qualify as concealment elements,⁶² misses the point that many attributes of a site contribute to concealment, first, and second, as the Commission acknowledged to the Fourth Circuit, conditions placed on a site may be integral to concealment, and their violation may constitute a substantial change.⁶³

Section 6409(a) is, at its core, a preemptive statute. Preemptive statutes are to be construed narrowly, and part of construing preemption narrowly is construing exceptions to preemption broadly. Construing the exceptions narrowly, as CTIA urges, simply expands the scope of preemption and renders the exception near-meaningless – an impermissible construction the Commission should reject.

E. Attempts to draw a distinction between ground-mounted and pole-mounted equipment only underscore the flaws in the test for substantiality when applied to facilities in the rights-of-way.

The Commission’s rules establish limits on the amount by which the height of an “eligible facility” may be increased, and establish a limit on the size of a horizontal appurtenance that may be attached to the facility.⁶⁴ The size limits vary depending upon whether the eligible facility is inside or outside the rights-of-way: for example, the rules grant providers a right to attach an appurtenance to a facility in the rights-of-way so long as it does not “protrude from the edge of the structure by more than six feet.”⁶⁵ Additionally, the rules limit the number of

⁶² CTIA Petition at 12-13.

⁶³ FCC Respondents Brief at 41.

⁶⁴ 47 C.F.R. § 1.6100(b)(7)(i)-(ii).

⁶⁵ 47 C.F.R. § 1.6100(b)(7)(ii).

equipment cabinets that may be installed in connection with “any” eligible facilities to the “standard” number, and no more than four.⁶⁶ For facilities in the rights-of-way, the section prevents addition of any ground-mounted cabinets where there are currently none, and limits the total amount by which the volume of round-mounted cabinets may increase.⁶⁷

Petitioners ask the Commission to alter 47 C.F.R. § 1.6100(b)(7)(iii) so that it only applies to ground-mounted cabinets, and to find that any number of pole-mounted enclosures, of any size and depth, can be added to the pole as long as they do not require placement of an “appurtenance” that extends more than six feet from the pole.⁶⁸ This would permit expansions in the rights-of-way that are hardly unsubstantial.⁶⁹ The proceedings before the Commission contain pictures of poles festooned with equipment boxes and meeting the proposed standard, and which are far different in appearance than the “pizza box” often touted as the exemplar for small cell deployments. For that reason, the request should be rejected. The current rule places at least some limits on what may be attached to a pole.

However, the request underlines a significant problem that the Commission’s current rules do not adequately address, and which must be addressed if it even considers amending the existing rules. The rules are simply not designed to reasonably capture the “substantiality” of a change in the height, width, or depth of facilities installed in the rights-of-way, particularly since the available space is often limited and placement of expansion facilities affects both the safety

⁶⁶ 47 C.F.R. § 1.6100(b)(7)(iii).

⁶⁷ *Id.*

⁶⁸ CTIA Petition at 13-14; WIA Declaratory Ruling Petition at 12.

⁶⁹ For further discussion of these issues, see Exhibit E, Comments of the Smart Communities and Special Districts Coalition, WT Docket No. 17-79, at 27-28, 29 (Jun. 15, 2017); Exhibit F, Reply Comments of the Smart Communities and Special Districts Coalition, WT Docket No. 17-79, at 81 n.244 (Jul. 17, 2017); Exhibit G, Ex Parte Letter Responding to Broadband Deployment Advisory Committee Recommendations Regarding State & Local Government Barriers to Broadband Deployment, WT Docket No. 17-79, at 16-17 (Jul. 16, 2018).

and use of the rights-of-way, as well as adjoining properties. A horizontal extension of up to six feet, for example, would massively increase the size of a facility attached to a pole frequently only 12 inches in diameter, resulting in armatures either protruding over sidewalks, or monopolizing a narrow verge. Similarly, the height increase standards in Section 1.6100(b)(7)(i) allow standard utility poles (around 25-40 feet in height) to be 10 feet – between 25 and 40% - by right. This is hardly an insubstantial change, and is even more substantial when a similar extension is sought atop a shorter pole used in residential areas, or in an area where the only above-ground facility may be the wireless facility. In other contexts, the Commission has recognized that a percentage change affects the substantiality of the increase, and it must reconsider its rules to avoid the sorts of placements improperly sought under Section 6409(a).⁷⁰

F. No Commission action is necessary with respect to Section 6409(a) application fees.

There are no local regulatory fees the Commission has authority to regulate, which are not already confined to costs. First, with respect to application fees and rent for use of property within the rights-of-way, the Commission has already declared that both are to be based on costs.⁷¹ And for rent to use property outside the rights-of-way, we remind the Commission that its authority does not extend to public buildings and other property, and thus fees for use of, say, rooftop space on city hall cannot be limited or prescribed by the Commission. And rents charged

⁷⁰ A percentage test would of course need to take into account not only dimensions, but placement and proportions. For example, a simple volumetric standard could allow a provider to dramatically alter the appearance of a facility by changing only a single dimension (width, for example). Likewise, there should be a limit on the number and location of appurtenances that may be added in the right-of-way based on the type of pole to which a facility is attached – it is one thing to add a cross-arm in the telecommunications space to a utility pole that has cross-arms, and another to seek to add an appurtenance at or near ground level, or to a different type of structure.

⁷¹ See Small Cell Order at ¶¶ 69-70. The Commission’s rulings are being challenged, and we do not suggest here that rulings are valid. The Petitions provide no basis for altering any of the Commission’s prior rulings governing the application of Section 6409(a) to public property.

by private property owners are similarly outside the Commission’s authority. Thus, the only context in which regulatory fees are relevant here, are application fees for regulatory review of installations outside the rights-of-way.

But most communities nationwide already charge regulatory fees designed only to recover costs because permit fees, like most other municipal regulatory fees, are broadly limited to recovery of costs by generally applicable state laws.⁷² No evidence is offered that localities are violating such laws and, even if they were, that is a matter to address with the states and not for the Commission to consider.⁷³ Nor is any evidence proffered to actually support the assertion that the regulatory fees charged *are not* reflective of localities’ costs. WIA merely provides a list of practices, with little to no context, and asserts that regulatory fees should therefore be cost-based “to curb these practices.”⁷⁴

I. Non-Payment of regulatory fees is a fatal flaw in an application.

The Commission’s rules permit the enforcement of local codes and standards for any application, including Section 6409 applications. Typically found in such codes is the obligation of the payment of an application fee.⁷⁵ Petitioners ask the FCC to rewrite its rules such that an

⁷² In Texas, for example, cities may only impose regulatory fees that do not exceed the regulatory cost. Otherwise, the fees are really taxes and are subject to the restrictions of Texas Constitution Article XI § 5. *See Lowenberg v. City of Dallas*, 261 S.W.3d 54 (Tex. 2008). In California, Proposition 26, approved by voters in 2010, imposes a similar restriction through amendments to the state Constitution. In Maryland, “regulatory fees must be reasonable and related to the purpose of regulatory measure” and fees in Montgomery County are therefore already cost-based. *See Exhibit D, Reply Comments of Montgomery County, Maryland*, WT Docket No. 16-421, at 4-8 (Apr. 7, 2017).

⁷³ Of note, few if any of the state bills addressing small cell deployment actually involved study of the costs localities incur in reviewing these applications. In many communities subject to such laws, the limited regulatory fees they are entitled to charge, fall far below their actual costs. These communities are in effect not only limited to recovering costs, but are required to absorb costs generated by wireless providers, effectively subsidizing that industry.

⁷⁴ WIA Declaratory Ruling Petition at 13.

⁷⁵ *See, e.g. Cobb County Code Sec. 106-182(H)* (application fees due upon submission of application).

applicant’s refusal to pay regulatory fees may not be a permissible reason to delay or deny an application, or to delay issuing permits “deemed granted,” so long as the fees are subject to a “good faith dispute” from the applicant.⁷⁶ Payment of regulatory fees is a foundational prerequisite to processing all manner of applications reviewed by local governments, including but by no means limited to wireless facilities applications. In many cases, an application is not complete, or has not been properly submitted, until regulatory fees have been paid.⁷⁷ What WIA seeks, in essence, is permission for its members to submit incomplete applications, and refuse to pay regulatory fees, yet enjoy accelerated shot clocks, a “deemed granted” remedy, and the right to begin construction, all without paying what they owe. Nothing in Section 6409(a), or anywhere else in the Act, empowers the Commission waive the obligation to pay applications fees.

2. *Commission rules permit localities to employ deposits and escrow funds. This should not be changed.*

In an effort to ensure that fees charged mirror costs incurred as closely as possible, some communities elect to require deposits or escrow funds be paid, against which costs are drawn as they are incurred, and the balance of which are returned following final action on the application in question. This practice avoids unnecessary delay and disagreement by ensuring funds are available to cover costs incurred, while ensuring providers’ costs reflect the demands their particular applications place on local resources.

⁷⁶ WIA Declaratory Ruling Petition at 13.

⁷⁷ For example, Georgia law requires payment of application fee at time the small wireless permit application is submitted. *See* O.C.G.A. § 36-66C-6(h). *See also* O.C.G.A. § 36-66C-5(a) (permit fees are a “condition” to the issuance of the permit); Cobb County Code Sec. 106-182(H) (application fees due upon submission of application).

WIA also asks that use of escrow or deposit fees only be used “for review that is reasonable related to a determination of whether a request is covered by Section 6409(a).”⁷⁸ This seems a solution in search of a problem. In many instances, the *entirety* of the review starts and stops with the question of eligibility. An eligible application (presuming, of course, it complies with all generally applicable building, electrical, and other codes and laws) must be approved.⁷⁹ WIA identifies no other purpose for which deposit or escrow fees are allegedly being utilized, and thus no indication of any actual problem this change would allegedly remedy.

3. *The Commission’s presumptively reasonable fee levels cannot serve as a yardstick to measure whether any given fee or set of fees do or do not reflect costs.*

Finally, we remind the Commission that its presumptively reasonable fee levels established by the Small Cell Order do not actually bear any relationship to the costs localities incur. A mere comparison between those fee levels, and a fee or rent assessed by a locality, cannot form the basis either for a Commission conclusion that particular fees do not reflect costs, or for a provider to allege that a charge does not reflect costs.

The Small Cell Order specifies that when a fee is at or below the presumptively reasonable level it set, then such a fee is presumptively reasonable.⁸⁰ It does not state that a fee at or below the presumptively reasonable level is presumptively cost-based.⁸¹ And the reason the Commission does not make that statement is that it could not make that statement based on the record before it in the Small Cell docket.

The Commission conducted no study of actual costs of permitting. The sources cited to provide a basis for the safe harbor amounts, themselves do not assert that the fee levels they

⁷⁸ WIA Declaratory Ruling Petition at 13.

⁷⁹ 47 C.F.R. §1.6100(c).

⁸⁰ Small Cell Order ¶78 (“...we conclude that fees at or below these amounts presumptively do not constitute an effective prohibition under Section 253(a) or Section 332(c)(7)...”).

⁸¹ *Id.*

impose are cost-based.⁸² What Petitioner and commenters attempt in the instant matter is to force a logical leap where none exists. It does not follow that where a fee is not presumptively reasonable, it is also presumptively not cost-based. The Commission wisely avoided making such a statement, as it would be inherently arbitrary and capricious due to the total lack of research and data in the record to support any Commission finding of actual costs.

Nor is it relevant that the Commission opined, without basis, that it envisioned few situations where fees would exceed this level. No research or data are present in the record to support such a conclusion.⁸³

Where a fee charged exceeds the presumptively reasonable fees established by the Small Cell Order, it is merely not presumptively reasonable, it is not presumptively higher than the recovery of costs. That the Commission, which did not conduct any analysis of actual real-world costs, did not imagine the safe harbor amount would frequently be exceeded, is entirely irrelevant. The Commission offers no basis upon which to base that belief, and the Commission's speculative pronouncement is neither determinative nor relevant.

VII. NO CHANGES SHOULD BE MADE TO EXPAND THE SECTION 6409(a) SHOT CLOCKS OR THE DEEMED GRANTED REMEDY.

A. Shot clocks should commence when an application is actually submitted.

The Commission's rules already provide that Section 6409(a) review shot clocks run from the "date on which an applicant submits a request seeking approval under this section."⁸⁴

Applicants must actually submit materials before the shot clocks can start.

WIA asks the Commission to change its rules to find that shot clocks begin when a

⁸² *Id.* n.233.

⁸³ *Id.*

⁸⁴ 47 C.F.R. § 1.6100(c)(2).

“good-faith effort” is made to submit an application.⁸⁵ No further description of what such a “good-faith effort” may look like is offered, however, and such a regime is so vague and subjective as to be impossible to implement. Shot clocks should run from the time an application is actually submitted, and wireless companies should recognize that the structures local governments put in place to facilitate application submittal (such as accepting applications through in-person appointments) are generally designed to streamline application processes. An in-person submittal, for example, permits staff to begin to evaluate applications for completeness on the spot, providing the most immediate possible notice of inadequate applications. These kinds of approaches benefit applicants and streamline deployment by addressing one of the most significant sources of delay in application processing – the frequent submittal of incomplete applications⁸⁶ or applications improperly claiming Section 6409(a) status.⁸⁷

Montgomery County, Maryland, for example, has received 142 Section 6409(a) applications to date in Fiscal Year 2019 – more than half of all wireless applications filed. Of these, 126 – 89% of the total – have required at least one request for information owing to inadequate submission of information.

Section 6409(a) applications in Montgomery County are processed, on average, in 60 calendar days, of which 36, on average, are shot clock days while the other 24 represent periods

⁸⁵ WIA Declaratory Ruling Petition at 8.

⁸⁶ *See, e.g.* Exhibit B, 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.); Exhibit C, 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); Exhibit E, Comments of the Smart Communities and Special Districts Coalition, WT Docket No. 17-79, at 17-23, 28 (Jun. 15, 2017).

⁸⁷ *See, e.g.* Exhibit I, Application No. 2019040781 from Verizon Wireless to Montgomery County, Maryland (rev. Aug. 2, 2019) (applicant claims Section 6409(a) qualification for an installation hosting no other wireless equipment.)

where applications are awaiting additional information from carriers. Nearly half the time it takes for application review in the County is spent waiting for applicants to correct problems with their applications.

The City of Portland, Oregon has received 82 small wireless facilities permits since January 2019, of which 72 were Section 6409(a) applications. Fifty of those have thus far been processed and issued, of which 17 – 34% - had not been picked up by a contractor for a least a month after they were approved by the City. And from 2015 through 2018, the City issued more than 320 Section 6409(a) permits, while an additional 40 – more than 10% of the total – were never issued, primarily due to abandonment by the applicant or a failure to ever pay fees and pick up the permit.

The presumption, therefore, that delays result from processes and requirements intended to ensure applications are correct when filed, is not supported by the facts on the ground. The chief source of delays, ultimately, are incomplete applications or contractor inaction lasting in many cases just as long, or longer, than the time within which the locality *must* approve the permits. Starting the shot clock when a “good faith effort” or some other action other than submitting an actual application, simply validates and incentivizes applicants to continue their current practices which entail widespread submission of incomplete applications.

B. Expanding the shot clock to “all approvals” is not the simple clarification Petitioners suggest.

Section 6409(a) requests are fundamentally different from those addressed in the Small Cell Order. They stem from a different statute, have different remedies, and operate differently. The statutory language used to justify expansion of the shot clocks in the Small Cell Order is absent from Section 6409(a).⁸⁸ Furthermore, the Commission “permits States and localities to

⁸⁸ See Small Cell Order at ¶¶132-33.

condition a facility modification request on compliance with concealment measures and generally applicable building and safety codes”⁸⁹ – such compliance cannot be required or established as a condition if those other permits are subject to the same “deemed granted” remedy as the siting approval itself, and the provider therefore can insist on the right to move forward.

If the Commission does want to expand the scope of the Section 6409(a) shot clock, it must also “clarify” that localities may require proof that all other required approvals have been applied for as an element of an EFR application, and must be allowed to deny the EFR application in the event the carrier fails to comply with the requirements necessary to issuance of another permit. Simply extending the scope of the shot clocks, and by extension broadening the “deemed granted” remedy to cover that scope, only empowers providers to submit substandard applications, fail to seek additional approvals, and move forward on a “deemed granted” basis while localities’ only remedy is to seek judicial redress. Localities must also be permitted to require all information necessary to evaluate compliance with those codes – not merely the information necessary for siting purposes to determine whether a facility qualifies as an EFR. This outcome must be avoided by balancing any benefit for applicants with consequences – namely, denial of applications – if a carrier does not comply with applicable laws.

It is far more consistent with the statute, and far more practicable, to apply Section 6409(a) to the approval it has always been intended to cover – the siting or zoning approval – and to treat wireless providers the same as all others seeking building and other permits after

⁸⁹ See 2014 Infrastructure Order at ¶202 (“We therefore conclude that States and localities may require a covered request to comply with generally applicable building, structural, electrical, and safety codes or with other laws codifying objective standards reasonably related to health and safety, and that they may condition approval on such compliance.”)

siting approval is received.⁹⁰ There is no justification to grant special status to one narrow industry over others, particularly when nothing precludes that industry from seeking approval of substantial changes under shot clocks that (for small cells) are the same duration, or for non-small cells are only thirty days longer, and which the Commission has concluded already are applicable to all approvals.

C. Applicants should not be empowered to begin construction without receiving the necessary permits.

Almost without exception, construction projects cannot begin anywhere in the country until the necessary permits have been issued. CTIA suggests instead that where an application is deemed granted, construction should be allowed to commence immediately, and that applicants should not have to actually receive the permits that are deemed granted – they should simply be permitted to get to work.⁹¹ This cannot be permitted, as it creates significant public safety risks, short-circuits routine local government operations, and is outside the Commission’s authority to authorize.

This would create serious public safety problems. Contractors would be allowed to simply begin construction without having filed traffic management plans, without having cleared excavation plans with public works, and without other important oversight. Traffic may be affected, notification to the public of construction activities may not be made, and the results

⁹⁰ The Commission’s own language in defending the Section 6409(a) rules suggests strongly that the scope is meant to encompass only siting or zoning approval. Throughout its brief to the Fourth Circuit, the Commission emphasizes that “a zoning authority ‘is not obligated to grant a collocation application under Section 6409(a)’ unless the wireless tower or base station has previously been ‘reviewed and approved under the applicable local zoning or siting process’ ...”. FCC Petitioners Brief at 14 (quoting 2014 Infrastructure Order at ¶174). The emphasis, in both the 2014 Infrastructure Order and the brief defending it, is on zoning or siting approval – no mention is made of Section 6409(a) compelling grant of other generally applicable permits, or of subjecting those permits to the “deemed granted” regime. In fact, the Commission assumed those should be addressed by separate processes.

⁹¹ CTIA Petition at 17-20.

may significantly negatively impact communities where providers operate. This is not the result Congress intended in adopting Section 6409(a). They intended that minor modifications enjoy streamlined siting approval – not that providers be entitled to bypass local permitting laws and begin construction at their convenience. Where an application has been deemed granted and permits are not issued, a remedy already exists – the provider may seek judicial assistance.

Permitting construction without receipt of required permits also causes problems from a local government operations standpoint. Contractors are routinely required to have copies of permits at job sites to allow spot inspections – this would be impossible where the Commission had authorized construction without permits actually being issued. Localities would also be denied the ability to keep accurate records of construction underway or completed, or to verify that construction had been completed consistent with applicable permit codes, if the work proceeds without issuance of a permit first.

Finally, there is no evidence in the record suggesting an actual issue with localities refusing to issue necessary permits. CTIA offers only nonspecific references to anonymous localities, and its assertion that permitting construction without waiting for permit issuance would ultimately speed deployment stands in contrast to many local governments' real-world experiences. It is commonly the case that applicants wait several months following approval of the underlying siting requests to actually pull permits and begin construction, or in some cases pull permits and then wait several months more before actually commencing the work. As with application completeness delays discussed above, the reality is that contractor actions play a significant role in any alleged deployment delays.

VIII. CONCLUSION.

For all the foregoing reasons, the Commission should reject the Petitions' requests for significant changes to expand the scope of Section 6409(a) protections far beyond the scope the statute permits.

Respectfully Submitted,

/s/ Gerard Lavery Lederer

Gerard Lavery Lederer

Joseph Van Eaton

Gail Karish

John Gasparini

BEST BEST & KRIEGER LLP

2000 Pennsylvania Avenue N.W., Suite 5300

Washington, D.C. 20006

Counsel for the Localities

Michael J. Watza

KITCH DRUTCHAS WAGNER VALITUTTI

& SHERBROOK

One Woodward Avenue, Suite 2400

Detroit, MI 48226

Counsel to the Michigan Coalition to Protect

Public Rights-of-Way

October 29, 2019