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	)	RM-11849
Modification Requests Under Section 6409(a) of	)	
the Spectrum Act of 2012	)	
	)	

To: Chiefs, Wireless Telecommunications and Wireline Competition Bureaus

COMMENTS OF
AMERICAN TOWER CORPORATION

American Tower Corporation ("American Tower") hereby submits these comments in response to the Public Notice released jointly by the Wireless Telecommunications Bureau and Wireline Competition Bureau (collectively, the "Bureaus") of the Federal Communications Commission ("FCC" or "Commission")[1] which seeks comment on a Petition for Rulemaking and a Petition for Declaratory Ruling, each separately submitted by the Wireless Infrastructure Association ("WIA"),[2] and a Petition for Declaratory Ruling filed by CTIA.[3]

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[1] *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 Docket No. 19-250, WC Docket No. 17-84, RM-11849, Public Notice, DA 19-913 (rel. Sept. 13, 2019); *see also 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, et al.*, WT Docket No. 19-250, RM-11849, WC Docket No. 17-84, Order, DA 19-978 (rel. Sept. 30, 2019) ("Bureau Extension Order"). Because these comments exclusively address issues relating to clarifying the implementation of Section 6409 (as defined below), American Tower is, pursuant to the Bureau Extension Order at ¶ 4, filing in Docket No. 19-250 only.

[2] Wireless Infrastructure Association Petition for Rulemaking (filed Aug. 27, 2019) *("*"WIA Rulemaking Petition"); Wireless Infrastructure Association Petition for Declaratory Ruling (filed Aug. 27, 2019) ("WIA Declaratory Ruling Petition," together with the WIA Rulemaking Petition, the "WIA Petitions").

[3] CTIA Petition for Declaratory Ruling (filed Sept. 6, 2019) ("CTIA Petition").

I. INTRODUCTION

American Tower is a global real estate investment trust and a leading independent owner, operator and developer of multi-tenant communications real estate. We have long worked arm in arm with wireless providers and local government officials to meet evolving network needs. Today, as demands for capacity in this ecosystem exponentially escalate, companies like American Tower find themselves needing to meld the broad coverage provided by traditional macro cells with the more targeted reach of small cells and distributed antenna system (DAS) networks. In this environment, American Tower owns and manages more than 40,000 tower sites in the United States, is the leading provider of neutral-host indoor DAS networks in the country, and offers small cell infrastructure nationally and globally. American Tower continues to adapt to the increasingly heterogeneous nature of the wireless network marketplace.

Against this background, American Tower supports efforts of WIA and CTIA to clarify issues related to macro facility siting that are hindering the deployment of next generation broadband wireless networks in a rapid and efficient manner. Such clarifications, in combination with successful, ongoing FCC initiatives designed to remove barriers to infrastructure deployment, promise to ease burdens associated with broadband deployment and expedite private sector investment in the infrastructure needed for next generation broadband services.

In these comments, American Tower particularly supports the requests in this docket related to the clarification and implementation of Section 6409(a) ("Section 6409") of the Middle Class Tax Relief and Job Creation Act of 2012 (the "Spectrum Act").[4] Our support for these requests is rooted in the plain language of Section 6409, which provides that "a State or local government may not deny, and shall approve, any eligible facilities request for a modification of

[4] Section 6409 is codified at 47 U.S.C. §1455(a)(1).

an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station."[5] "Eligible facilities request" ("EFR") is defined in relevant part in the Spectrum Act to mean "any request for modification of an existing wireless tower or base station that involves…collocation of new transmission equipment."[6] The compulsory and broad nature of the language of Section 6409 (e.g., "may not deny, and shall approve" and "any request for a modification…that involves") reflects Congress' considered decision to establish a comprehensive, preemptive regulatory scheme mandating prompt state and local processing to grant qualifying EFRs.

American Tower supports two particular requests set forth in the WIA/CTIA Petitions. The first such request, in which WIA seeks a rulemaking to revise current rules that define all collocations on existing towers involving compound expansions as "substantial changes" (i.e., *not* EFRs subject to Section 6409 processing),[7] encourages revisions that would allow for limited compound expansions related to qualifying collocations. The second request, coming from both WIA and CTIA, seeks to clarify the definition of "concealment element" as used in the Section 6409 context. The FCC's granting of both requests will increase efficiency of wireless infrastructure deployment and serve the public interest.

II. THE FCC SHOULD AMEND ITS RULES TO ALLOW EXISTING TOWER COLLOCATIONS THAT OTHERWISE QUALIFY AS EFRs TO INCLUDE LIMITED COMPOUND EXPANSION

In its petition, WIA correctly identifies a major inconsistency between current FCC rules implementing Section 6409 and the Nationwide Programmatic Agreement ("NPA"). Unlike

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[5] 47 U.S.C. § 1455(a)(1).

[6] *Id*. at subsection (a)(2).

[7] *See* 47 C.F.R. § 1.6100(b)(7)(iv) ("Subsection (b)(7)(iv)"), which defines "substantial change" to be, inter alia, a change that "entails any excavation or deployment outside the current site." *See also* WIA Rulemaking Petition at 4-8.

Section 6409, the NPA *allows* for limited compound expansion without government review in certain tower *replacement* scenarios, namely replacements that entail "construction and excavation within 30 feet in any direction of the leased or owned property previously surrounding a tower."[8] Here, the NPA best supports the FCC's wireless deployment objective. The NPA's sensible approach to limited compound expansions in the replacement tower context provides a sound basis for establishing an *identical* boundary, 30 feet in any direction from the current site, within which the owner of an *existing* tower may expand a compound that will accommodate an otherwise EFR-qualifying collocation. Stated simply, there is no rational basis for treating compound expansion disparately in the replacement and existing tower collocation contexts.[9]

The current dissonant regulatory treatment of compound expansions in the context of existing tower collocations versus complete tower replacements runs contrary to the well-established goal of lessening the environmental impact of infrastructure deployment. It is irrational to exclude from EFR processing the relatively minor compound expansion that typically attends many collocations, since the environmental impacts of such activity are much less significant than those that typically accompany a tower replacement. Such an approach is inconsistent with the FCC's policy of promoting collocation and removing barriers to broadband deployment. For these reasons, American Tower strongly supports WIA's request that the FCC

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[8] *See Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process,* Report and Order, 20 FCC Rcd 1073, 1089 (2004) (FCC order implementing the NPA) (*"2004 Order*"). The NPA itself (September 2004 Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission) can be found at 47 C.F.R. Part 1, App. C.

[9] The concept that a federal agency should treat similar situations in a similar fashion is a bedrock principle of administrative law. *See, e.g., Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965).

initiate a rulemaking proceeding to modify Commission rules to expressly allow compound expansions that involve *excavation or deployment*[10] within 30 feet of a tower site boundary in connection with collocations that otherwise qualify as EFRs.[11]

This recommended action is consistent with one of the FCC's justifications for allowing limited compound expansions for replacement towers – the facilitation of additional collocation. As the Commission has noted, "[s]imilar to collocations, strengthened [replacement] structures may reduce the need for more towers by housing up to two, four, or more additional antennas."[12] The FCC also concluded that there was only minimal risk associated with allowing a limited compound expansion for the replacement of a tower, since any work done would be "very close to the existing construction," a conclusion equally applicable to collocations.[13] Both justifications support commencement of a rulemaking proceeding to classify limited compound expansions in connection with collocations as EFRs.

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[10] The WIA Rulemaking Petition request for relief focuses on the concept of "excavation" when it requests that the "Commission should modify Section 1.6100 to specify that a substantial change does not occur if *excavation* occurs within 30 feet of the current boundaries of a tower site." WIA Rulemaking Petition at 9 (emphasis deleted and added). American Tower submits that any rule amendment proposed in the rulemaking proceeding should encompass both excavation *and deployment*, consistent with the language of Subsection (b)(7)(iv). Retention of the "deployment" concept is of critical importance. A qualifying compound expansion that does not require excavation may well entail deployment. Of course, WIA's specific request that the Commission address WIA's concerns by amending the definition of "site" in 47 C.F.R. § 1.6100(b)(6) to incorporate a 30-foot buffer zone around the existing site boundary (WIA Rulemaking Petition at 10) would allow preservation of the existing language of Subsection (b)(7)(iv).

[11] *Id.* at 3.

[12] *2004 Order* at ¶ 45*; see also Letter from Richard Rossi, Senior Vice President, General Counsel-U.S. Tower, American Tower, to Marlene Dortch, Secretary of the FCC,* Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Deployment, WT Docket No. 17-79 at 6 (August 10, 2018) ("*American Tower August 10 Ex Parte"*).

[13] *2004 Order* at ¶ 45.

The FCC has long expressed a preference for collocation over the construction of new structures.[14] The FCC specifically referenced such advantages associated with collocation in the *2014 Order* that implemented Section 6409.[15] This preference embodies sound policy; collocation is faster, cheaper, more environmentally sound, and less disruptive than building new structures. However, such a preference is undermined by Subsection (b)(7)(iv). As noted by WIA, "the current rule unnecessarily discourages the use of this existing infrastructure that is otherwise able to support additional wireless deployments – deployments that can be used to expand or upgrade existing commercial services, enhance public policy, and/or foster new and beneficial competition."[16] That is because in many cases tower sites need to be expanded, however modestly, to allow for necessary equipment within on-ground housing that is to be connected to new, collocated antennas.[17] To the extent such minor expansions are treated as "substantial changes" necessitating local approval, the result is significant delays in collocating additional providers on existing towers. Such delays impede providers' efforts to deploy better, faster and more ubiquitous wireless broadband services in an efficient and cost-effective manner.

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[14] *See, e.g., Amendment of the Commission's Environmental Rules,* Order, 3 FCC Rcd 4986, ¶ 7 (1988) ("The Commission has long held that the mounting of antennas on existing buildings or antenna towers is environmentally preferable to the construction of a new facility. . .").

[15] *Acceleration of Broadband Deployment by Improving Wireless Siting Policies,* Report and Order, 29 FCC Rcd 12865 at ¶¶ 3 and 142 (2014) ("*2014 Order*") (recognizing that collocations "almost always result in less impact" and "collocation on existing structures is often the most efficient and economical solution for mobile wireless providers that need new cell sites to expand their existing coverage areas, increase their capacity, or deploy new advanced services."). As WIA observes, circumstances have significantly changed since the FCC's *2014 Order*. *See* WIA Rulemaking Petition at 11; *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States,* 371 U.S. 156, 168 (1962)). The FCC also has the authority to interpret Section 6409. *See Montgomery County v. FCC,* 811 F.3d 121 (4th Cir. 2015). These changed circumstances include skyrocketing demand for data services, the prospect of upcoming deployment of 5G technologies, and associated, unprecedented network densification.

[16] WIA Rulemaking Petition at 9.

[17] *Id*. at 8.

American Tower further emphasizes that issuance of WIA's requested rulemaking on this issue would parallel overall FCC efforts to put rational, consistent telecommunications policies in place. The FCC has taken numerous recent actions to support broadband deployment,[18] and Chairman Pai has repeatedly stated that the FCC needs to continue to take actions to reduce barriers to broadband deployment, a critical part of the FCC's 5G FAST Plan.[19] Maintaining differing treatments of collocations and tower replacements undermines, rather than promotes, this stated policy of the FCC. Acting to reduce this obstacle to broadband deployment would be consistent with – and promote – the FCC's 5G strategy.

As American Tower has previously emphasized to the Commission,[20] broadband expansion goes hand in glove with compound expansion. Compound expansion has increasingly become a tower owner's only real-world option to hosting additional wireless providers, particularly when multi-tenant collocations are involved. This trend has been driven in part by independent, neutral host companies like American Tower purchasing existing tower sites from carriers for the purpose of optimizing site usage via collocation of multiple wireless carriers. This ever more prevalent phenomenon of hosting multiple carriers at one tower site requires the addition of more equipment at that site (including additional ground equipment and backup generators), which in turn requires more land and compound expansion. The transition to multi-tenant infrastructure advances critical public interest values, facilitating the highest and best use

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[18] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment,* Declaratory Ruling and Third Report and Order, FCC 18-133 (rel. Sept. 27, 2018); *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure*, Third Report and Order and Declaratory Ruling, FCC 18-111 (rel. Aug. 3, 2018).

[19] *See* The FCC's 5G FAST Plan, *https://www.fcc.gov/5G*, (last visited Oct. 22, 2019) (updating infrastructure policy and encouraging the private sector to invest in 5G networks).

[20] *See American Tower August 10 Ex Parte* at 6.

of macro sites throughout the telecommunications ecosystem.[21] This transition is considerably slower when minor compound expansions associated with collocations must pass through onerous state and local government review.[22] To the extent this type of unnecessary governmental review remains in place, broadband deployment on the road toward 5G slows, contravening well-grounded FCC policy favoring the removal of barriers to deployment.[23]

For all of the reasons articulated above and by WIA, the FCC should initiate WIA's requested rulemaking without delay.

III. THE FCC SHOULD CLARIFY WHAT CONSTITUTES A "CONCEALMENT ELEMENT" TO PROVIDE ADDITIONAL CERTAINTY AND CONSISTENCY IN THE SITING PROCESS

American Tower also supports CTIA's and WIA's requests to clarify the definition of what constitutes a "concealment element" with respect to Section 6409.[24] Under FCC rules, a "modification substantially changes the physical dimensions of an eligible support structure if . . . it would defeat the concealment elements of the eligible support structure."[25] Such

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[21] *See id.* at 7.

[22] The Commission allows state and local review of proposed site modifications to ensure compliance with generally applicable laws codifying objective standards reasonably related to health and safety. *See 2014 Order* at ¶ 202.

[23] American Tower also requests that the Commission: (i) take the steps necessary to amend the Collocation Agreement, found at 47 C.F.R., Part 1, App. B, to conform it to the amendments to Rule 1.6100 requested by WIA and supported by American Tower herein, thereby affirming the amended rule's grant of the urgently needed latitude for compound expansions. *See* WIA Rulemaking Petition at 10; and (ii) "amend Section 1.6100(b)(7)(*iii*) to conform to the Collocation Agreement and exclude the addition of a single shelter from the substantial change definition." *Id*. at n. 32 (emphasis added).

[24] WIA Declaratory Ruling Petition at 10-13; CTIA Petition at 9.

[25] 47 C.F.R. § 1.6100(b)(7)(v); s*ee also 2014 Order* at ¶ 200 (agreeing that "in the context of a modification request related to concealed or 'stealth'-designed facilities – i.e., facilities designed to look like some feature other than a wireless tower or base station – any change that defeats the concealment elements of such facilities would be considered a 'substantial change' under Section 6409(a).").

modifications would be ineligible for EFR processing. Although the Commission has previously explained and provided examples of "concealed" or "stealth" facilities, interpretation of the meaning of "concealment element" has varied across the country.[26] Therefore, in order to provide additional certainty and consistency to the siting review process, the Commission should clarify that the size of the facility, transmitter, or related equipment specified in a permit, in and of itself, would *not* constitute a concealment element; rather, such "concealment elements" should be "limited to equipment and materials used *specifically* to conceal the visual impact of a wireless facility."[27]

Currently, without the requested clarification, jurisdictions are interpreting the meaning of "concealment elements" as they wish – and as WIA explains, many are "interpreting this language so broadly that the exception swallows the rule."[28] Indeed, locality rulings that *all* specifications listed in an approved permit *per se* constitute "concealment elements" effectively nullify Section 6409, as any future modification to such specifications would defeat concealment by "substantially changing" the once eligible support structure. Section 6409 was intended to reduce regulatory burdens and remove regulatory barriers in order to facilitate infrastructure deployment; not to allow localities to put additional deployment roadblocks in place on the basis of patently overbroad interpretations of the term "concealment elements."

Accordingly, American Tower supports the FCC granting the requested declaratory ruling clarifying that any interpretation of the meaning of "concealment element(s)" should include elements that are "limited to equipment and materials used *specifically* to conceal the

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[26] For instance, the Commission has found that "painting to match the supporting façade or artificial tree branches" are examples of stealth installations. *2014 Order* at ¶ 200; *see also* WIA Declaratory Ruling Petition at 11.

[27] WIA Declaratory Ruling Petition at 10 (emphasis added).

[28] *Id*.

visual impact of a wireless facility pursuant to concealment conditions *imposed during the initial siting process*."[29] With this understanding, permit specifications, such as the size of the facility, transmitter, or related equipment, would not be considered concealment elements for purposes of Section 6409 eligibility, unless there is evidence that such an element is indeed materially connected to wireless facility concealment. Moreover, under WIA's proposed clarification, the Commission should confirm that concealment elements are limited to those imposed during the initial siting process, which would preclude new concealment requirements from being introduced and applied to existing structures to prevent Section 6409 relief.

IV. CONCLUSION

By initiating WIA's requested rulemaking, and issuing WIA's and CTIA's requested declaratory ruling as discussed above, the Commission will continue to implement Section 6409 in a manner consistent with Congressional intent, promote broadband deployment and support the efforts needed to facilitate adoption of 5G technologies.

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[29] *Id*. at 12 (footnote omitted).

Respectfully submitted,

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