

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

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

To: The Commission

**COMMENTS OF
THE WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION**

The Wireless Internet Service Providers Association (“WISPA”)¹ hereby submits its Comments in support of the petitions filed by the Wireless Infrastructure Association (“WIA”)² and CTIA³ (collectively, “Petitions”) for the Federal Communications Commission (“FCC” or “Commission”) to adopt new rules and to clarify existing rules regarding Section 6409 of the Spectrum Act of 2012.⁴

¹ WISPA is the trade association that represents the interests of wireless Internet service providers (“WISPs”) that provide IP-based fixed wireless broadband services to consumers, businesses, and anchor institutions across the country. WISPA’s members include more than 800 WISPs, equipment manufacturers, distributors and other entities committed to providing affordable and competitive fixed broadband services. WISPs use unlicensed, lightly-licensed and licensed spectrum to deliver last-mile broadband and voice services to more than four million people, many of whom reside in rural, unserved, and underserved areas where wired technologies, such as FTTH, DSL and cable Internet access services may not be available.

² WIA Petition for Rulemaking (filed Aug. 27, 2019) (“WIA Rulemaking Petition”); WIA Petition for Declaratory Ruling (filed Aug. 27, 2019) (“WIA Declaratory Ruling Petition”).

³ CTIA Petition for Declaratory Ruling (filed Sept. 6, 2019 (“CTIA Petition”).

⁴ Public Notice, *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, DA 19-913 (rel. Sept. 13, 2019); *Order Granting Extension of Time*, WT Docket No. 19-250, WC Docket No. 17-84, RM-11849, DA 19-978 (rel. Sept. 30, 2019). WISPA does not take a position in these Comments regarding the issues raised by CTIA with respect to Section 224 of the Communications Act.

Introduction

WIA recommends that the Commission update its rules as follows:

- Ensure that collocations requiring limited compound expansions – excavation within 30 feet of a tower site – qualify for relief under Section 6409(a);
- Require the fees associated with Eligible Facilities Requests (“EFRs”) under Section 6409(a) represent a reasonable approximation of actual and direct costs incurred by the governmental entity; and
- Clarify that (1) Section 6409(a) and the implementing regulations apply to all state and local authorizations; (2) the shot clock under Section 6409(a) begins to run when an applicant makes a good faith attempt to request local approval; (3) the substantial change criteria in Section 1.6100(b)(7) of the Commission’s Rules should be narrowly interpreted; (4) “conditional” approval of EFRs violate Section 6409(a); and (5) localities may not establish processes or impose conditions that effectively defeat or reduce the protections afforded under Section 6409(a).

CTIA urges the Commission to clarify the following issues regarding Section 6409(a):

- The term “concealment element” in its rules applies only to a stealth facility or design element and that concealment requirements may not be used to disqualify an application as an eligible facilities request;
- The term “equipment cabinet” in its rules means cabinets that are placed on the ground or elsewhere on the premises and does not include equipment attached to the structure itself;
- The entire structure or building is the “base station” being modified, and that the structure’s size determines if the modification qualifies as an EFR; and
- If a siting authority fails to timely act on an application for an EFR under Section 6409(a), and the application is deemed granted, applicants may lawfully construct even if the locality has not issued related permits.

Section 6409(a) states that state and local governments “may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.”⁵ In 2014, the Commission adopted rules to implement Section 6409(a) and clarify certain terms that were

⁵ Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156, § 6409(a) (2012), codified at 47 U.S.C. § 1455(a).

otherwise undefined in the statute.⁶ The Commission explained that the rules “will serve the public interest by providing guidance to all stakeholders on their rights and responsibilities under the provision, reducing delays in the review process for wireless infrastructure modifications, and facilitating the rapid deployment of wireless infrastructure, thereby promoting advanced wireless broadband services.”⁷

WISPs play an important role in delivering affordable fixed wireless broadband services to consumers and businesses, especially in rural, unserved, and underserved areas of the country. Like other fixed and mobile wireless communications providers, WISPs require access to towers, buildings, water tanks, grain legs and other available vertical infrastructure to deliver service. WISPs therefore face similar regulatory barriers that restrict or delay access by larger wireless companies, but as small businesses often lack the resources to endure excessive fees and delays that hinder their ability to provide service.

Providers of fixed wireless broadband services are covered by Section 6409(a), but may not be covered by other sections of the Communications Act that address state and local siting authority. As a result, WISPs are more dependent on Section 6409(a) than other types of providers to gain access to available infrastructure. Without access under Section 6409(a) to such infrastructure in a timely and cost-efficient manner, WISPs cannot provide broadband services, particularly to rural communities and other areas that may be left unserved because of the significantly higher cost to deploy wireline technologies to remote and hard-to-serve areas. WISPA therefore has a significant interest in ensuring that fixed wireless broadband providers

⁶ *Acceleration of Wireless Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, WT Docket No. 13-238, 29 FCC Rcd 12865 (2014) (“2014 Order”).

⁷ *Id.* at 12872 ¶ 15.

enjoy the full benefits and protections that Congress and the Commission intended under Section 6409(a) and the implementing regulations.

Discussion

I. THE PETITIONS IDENTIFY THE NEED FOR THE COMMISSION TO CLARIFY CERTAIN ASPECTS OF SECTION 6409(a)

Many localities have engaged in good faith efforts to follow Section 6409(a) and the Commission's rules by adopting laws and policies that encourage broadband entry and competition in a manner that is consistent with the needs of their communities. Nonetheless, WIA and CTIA provide numerous examples of localities that misconstrue or disregard Section 6409(a) and the Commission's rules, avoid applying Section 6409(a) by exploiting loopholes and ambiguity in the statute and implementing regulations, and impose restrictions that circumvent the protections that Congress and the Commission intended to afford under Section 6409(a).

WISPA's members have encountered similar examples of localities that are not fully aware of Section 6409(a) or have adopted policies that frustrate the ability of fixed wireless providers to deploy broadband facilities under the process envisioned by Congress in Section 6409(a). WISPA's members continue to face regulatory hurdles when they submit applications for EFRs under Section 6409(a). WISPA shares WIA's and CTIA's concerns that despite the good intentions of some communities, there continues to be uncertainty and inconsistent application of Section 6409(a) and the Commission's rules.

Therefore, the Commission can and should act to eliminate practices that are inconsistent with Section 6409(a) in order to further promote the deployment of communications facilities necessary to reduce the digital divide. WISPA has supported previous efforts by the Commission to reduce regulatory barriers to broadband deployment and urges the Commission in this proceeding to build upon those efforts by adopting the proposals by WIA and CTIA to

streamline deployments under Section 6409(a). Fixed broadband providers and local communities will benefit from clearer standards that will eliminate ongoing uncertainty and differing local interpretations that have discouraged infrastructure investments by WISPs. WISPA supports the proposals by WIA and CTIA because they will promote clarity in implementing Section 6409(a) and ensure that collocation requests are processed expeditiously and in a manner that is consistent with Section 6409(a).

II. THE COMMISSION SHOULD ADOPT THE PETITIONS' PROPOSALS

Section 6409(a) Shot Clock. WISPA supports WIA's and CTIA's recommendations that the Commission clarify certain issues related to the 60-day shot clock adopted in the *2014 Order* and the remedies available in the event a state or local government fails to act within the timeframe for review.⁸

The Commission previously concluded that a shot clock for state and local government review of EFRs under Section 6409(a) was warranted to ensure that "all stakeholders have a clear understanding of when an applicant may seek relief from a State or municipal failure to act under Section 6409(a)."⁹ The Commission relied upon evidence in the record of significant delays in the processing of covered requests and found that such unreasonable delays were inconsistent with the Congressional mandate to approve all eligible requests and undermined "the important benefits that the provision is intended to provide to the economy, competitive wireless broadband deployment, and public safety."¹⁰

WIA and CTIA provide additional evidence of significant delays caused by localities that (1) treat every request for any type of permit associated with a single EFR as a separate request

⁸ WIA Declaratory Ruling Petition at 5-9; CTIA Petition at 17-19.

⁹ *2014 Order* at 12956 ¶ 213.

¹⁰ *Id.* at 12955 ¶ 212.

subject to a separate shot clock; (2) lack procedures for processing EFRs; (3) require public hearings and impose other pre-application requirements before starting the shot clock; and (4) fail to respond or refuse to issue permits even after the application has been deemed granted under the Commission's rules. WISPA agrees that these types of delays violate the Commission's intent in adopting the Section 6409(a) shot clock to ensure that state and local governments do not evade their statutory obligation to approve EFRs.

WISPA further agrees that all state or local government authorizations that are required for a covered request (*e.g.*, any associated building, structural, electrical, road closure, zoning or other permit required for deployment of a covered request) should be subject to the same 60-day shot clock. And, the shot clock should begin once an applicant attempts in good faith to seek the necessary local government approvals, that a good faith attempt includes submitting an EFR under any reasonable process and starts upon written submission of the request, and that any required public hearings to consider an EFR do not toll the shot clock. WISPA concurs that any denials under Section 6409(a) should be in writing, clearly and specifically make an express determination that the request is not covered by Section 6409(a), and include a clear explanation of the reason(s) for the denial. In addition, WISPA supports the WIA and CTIA proposals asking the Commission to clarify that if a locality does not timely challenge a deemed granted notice, a provider may move forward with construction and deployment even if the locality refuses to issue the relevant permits.

Substantial Changes Under Section 6409(a). WISPA urges the Commission to adopt the recommendations by WIA and CTIA to clarify what constitutes a “substantial change” under Section 6409(a) and Section 1.6100(b)(7) of the Commission's rules.¹¹

¹¹ WIA Declaratory Ruling Petition at 9-20; WIA Petition for Rulemaking at 4-7; CTIA Petition at 8-16.

As discussed above, Section 6409(a) provides that a state or local government may only deny an EFR if it substantially changes the physical dimensions of the structure. Section 1.6100(b)(7) of the Commission's rules lists the criteria for determining whether a modification substantially changes the physical dimensions of an eligible support structure.¹² The Commission determined that the definition of a substantial change should be based on "specific, objective factors" because it would "provide an appropriate balance between municipal flexibility and the rapid deployment of covered facilities."¹³ The Commission further noted an objective standard was consistent with Congressional intent that "approval of covered requests occur in a timely fashion."¹⁴

Notwithstanding this Congressional intent and the Commission's effort to adopt an objective standard that promotes the rapid deployment of covered facilities, WIA and CTIA discuss how some localities have broadly interpreted the Commission's rules regarding what constitutes a substantial change in order to deny or delay access to wireless infrastructure. Their Petitions provide numerous examples of how localities overbroadly interpret Section 1.6100(b)(7) of the Commission's rules as it relates to concealment elements of an eligible support structure, the number of equipment cabinets allowed, pre-existing conditions associated with prior approval of the tower or base station, changes in height, antenna separation, excavation or deployment outside the current site, and changes to legal, non-conforming structures. They also provide several examples of localities that have adopted burdensome permitting-related or onerous documentation requirements that are not reasonably related to determining whether a proposed modification qualifies as an EFR under Section 6409(a), or

¹² 47 CFR § 1.6100(b)(7).

¹³ 2014 Order at 12945 ¶ 189.

¹⁴ *Id.*

issue conditional approvals that are not based on compliance with building codes and other non-discretionary structural and safety codes. WISPA therefore agrees with WIA and CTIA that the Commission should clarify its rules to address localities' overbroad and inconsistent interpretations that undermine Congressional and Commission intent to streamline application approvals for EFRs and frustrate the Commission's policy of promoting the rapid deployment of wireless networks.

WISPA also concurs with WIA that the Commission should update its rules to make clear that excavation within 30 feet from a tower site boundary does not constitute a substantial change. As WIA demonstrates, the current rule limiting excavation to within the current boundaries of the leased or owned property surrounding the tower creates unnecessary barriers to deployment and incorrectly assumes that collocations can be accomplished without the need for minor compound expansions. Because some wireless networks require greater densification, excavation outside the site boundaries of existing tower sites may be necessary to support the addition of enclosures and other equipment. Updating the rule will therefore account for technological advancements and marketplace developments and reduce the need to construct new towers.¹⁵

Fees for EFRs. Finally, WISPA agrees with WIA that the Commission should amend its rules to specify that fees imposed by state and local governments for processing EFRs under Section 6409(a) must represent a reasonable approximation of actual and direct costs, consistent with the treatment of siting applications under Sections 253 and 332 of the Communications

¹⁵ See Reply Comments of WISPA WT Docket No. 13-238 (filed March 5, 2014) at 7-8 (supporting PCIA's proposed definition of a substantial change to include where the mounting of the proposed antenna would expand the boundaries of the leased or owned property surrounding the tower by no more than 30 feet in any direction or involve excavation outside these expanded boundaries or outside any existing access or utility easement related to the site).

Act.¹⁶ WISPA has previously recommended that the Commission interpret Section 6409(a) to require that fees imposed by a state or locality for an EFR must be fair and reasonable, competitively neutral and nondiscriminatory, and publicly disclosed by such government.¹⁷

WISPA explained that “excessive fees that are not directly and reasonably related to actual costs incurred by a State or locality in processing a Section 6409(a) application are also inconsistent with the mandate to approve applications and would undermine the important benefits that statute is intended to promote.”¹⁸

In previously declining to adopt any provisions regarding the collection of fees relating to Section 6409(a) applications, the Commission asserted that it had a “limited record of problems implementing the provisions” such that it would be premature to take further action.¹⁹ The WIA Rulemaking Petition demonstrates that further action is now warranted to address this problem. In other proceedings, WISPA has provided examples of discriminatory treatment and excessive fees imposed by localities to access infrastructure, as well as instances where localities have refused to consider request by WISPs to access infrastructure that already supported communications equipment installed by the local government or an incumbent provider.²⁰ For example, WISPA explained how the city of New Berlin, Wisconsin wanted to charge a WISP \$39,000 per year to rent space on a water tank, and other cities in Wisconsin allowed cellular carriers to collocate on their water tanks but denied similar access to a WISP.²¹ WISPA also

¹⁶ See *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, WT Docket No. 17-79, WC Docket No. 17-84, 33 FCC Rcd 9088, 9110-9130 (2018).

¹⁷ Comments of WISPA at 8-10, WT Docket No. 16-421 (filed March 8, 2017).

¹⁸ *Id.* at 9-10.

¹⁹ *2014 Order* at 12958 ¶ 221

²⁰ Comments of WISPA at 6-8, WT Docket No. 17-79 (filed June 15, 2017); *See also* Comments of WISPA at 7, WT Docket No. 16-421 (filed March 8, 2017).

²¹ Comments of WISPA at 6-7, WT Docket No. 17-79 (filed June 15, 2017).

noted that a WISP in Minnesota reported having to pay rental fees for access to a city-owned water tank even though the city did not charge any fees for equipment installed on the water tank used to support the commercial communications system used by state, county, and local public safety entities.²² State and local governments should not be permitted to charge excessive fees that have the effect of denying a covered Section 6409(a) request.

Conclusion

WISPA respectfully requests the Commission to take action in this docket consistent with the views expressed in these Comments.

Respectfully submitted,

**WIRELESS INTERNET SERVICE
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²² *Id.* at 7.