

**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 Wireless Facility Modification)	
Requests Under Section 6409(a) of the)	
Spectrum Act of 2012)	
)	
Wireless Telecommunications Bureau and)	RM-11849
Wireline Competition Bureau Seek)	
Comment on WIA Petition for)	
Rulemaking, WIA Petition for Declaratory)	
Ruling and CTIA Petition for Declaratory)	
Ruling)	

COMMENTS OF COMPETITIVE CARRIERS ASSOCIATION

Competitive Carriers Association (“CCA”)¹ hereby submits the following comments in response to the Commission’s *Public Notice* in the above-captioned proceedings.² The Federal Communications Commission (“FCC” or “Commission”) seeks comment on three petitions that, among other things, collectively “ask the Commission to adopt new rules or clarify existing rules

¹ CCA is the nation’s leading association for competitive wireless providers and stakeholders across the United States. CCA’s membership includes nearly 100 competitive wireless providers ranging from small, rural carriers serving fewer than 5,000 customers to regional and national providers serving millions of customers. CCA also represents associate members including vendors and suppliers that provide products and services throughout the mobile communications supply chain.

² *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*, Public Notice, DA 19-913, WT Docket No. 19-250, WC Docket No. 17-84, RM-11849 (rel. Sept. 13, 2019) (“*Public Notice*”).

regarding Section 6409(a) of the Spectrum Act of 2012.”³ CCA previously has supported the Commission’s significant and successful “efforts to promote the infrastructure reform necessary for the United States to lead the world in 5G development.”⁴ Despite the great strides that the Commission has made to reduce barriers to next generation wireless deployment, including its implementation of Section 6409(a) of the Spectrum Act, certain barriers remain in some jurisdictions that “continue to impede important upgrades and construction.”⁵

CCA members continue to work cooperatively with many jurisdictions to deploy wireless networks and upgrades. However, some jurisdictions continue to ignore the mandates of Section 6409, or wield the Commission’s rules in a manner that delays rather than speeds deployment. As the Commission has seen, rules that appear clear and straightforward on paper can prove malleable and divisive in practice, particularly when the rules govern interactions with numerous and diverse localities and stakeholders.⁶ Those interactions can become more streamlined and less contentious when all stakeholders clearly understand the rules that frame them. Additional clarity and certainty from the Commission should enable private parties and municipalities to work together most effectively to serve their customers and constituents.

³ *Id.* at 1; *see* Wireless Infrastructure Association (“WIA”) Petition for Rulemaking, RM-11849 (filed Aug. 27, 2019) (“WIA Rulemaking Petition”); WIA Petition for Declaratory Ruling, WT Docket No. 17-79 (filed Aug. 27, 2019) (“WIA PDR”); CTIA Petition for Declaratory Ruling, WT Docket No. 17-79, WC Docket No. 17-84 (filed Sept. 6, 2019) (“CTIA PDR”). WIA and CTIA are referred to herein collectively as “Petitioners.”

⁴ Letter from Alexi Maltas, SVP & General Counsel, CCA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, WC Docket No. 17-84, at 1 (filed July 12, 2019) (“CCA July 2019 Letter”).

⁵ *Id.*

⁶ WIA, for example, describes how private parties and municipalities often disagree on matters as fundamental as which actions trigger the start of the 60-day shot clock for eligible facilities requests (“EFRs”) that qualify for Section 6409(a) relief. *See* WIA PDR at 7-8.

To address these situations, CCA agrees with the requests of the Petitioners to issue targeted clarifications and modernizations to the Commission’s rules implementing Section 6409(a). *First*, CCA agrees that the Commission should clarify that a request that has been “deemed granted” allows an applicant to proceed with construction without the requested permits or authorizations. *Second*, CCA supports the request for clarification that “concealment elements” are limited only to those elements that are identified as concealment elements in an initial application or approval. *Third*, CCA supports WIA’s request that the Commission update its compound expansions rules to allow for minor, necessary expansions without delay. With these small steps, the Commission will provide additional, important guardrails that will ensure certain local rules, regulations, and practices do not impede 5G deployment.

I. THE COMMISSION HAS MADE GREAT STRIDES TO REMOVE UNNECESSARY BARRIERS TO 5G DEPLOYMENT

Over the past decade, the Commission has taken a number of important steps to “promote the deployment of wireless infrastructure, recognizing that it is the physical foundation that supports all wireless communications.”⁷ In 2014, for example, the Commission built on Congress’s critical foundation in Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012,⁸ adopting rules to “clarify” ambiguous terms in Section 6409(a) and “advanc[e] Congress’s goal of facilitating rapid deployment . . . by providing guidance to all stakeholders on their rights and responsibilities” and “reducing delays in the review process for wireless infrastructure modifications.”⁹ In 2017, the Commission eliminated unnecessary

⁷ *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd. 12,865, 12,866 ¶ 1 (2014) (“*2014 Order*”).

⁸ *See* 47 U.S.C. § 1455(a) (codification of Section 6409(a)).

⁹ *2014 Order* at 12,872, ¶ 15.

historic preservation reviews where old utility poles were “replaced with substantially identical poles that can support antennas or other wireless communications equipment.”¹⁰ And in 2018, the Commission clarified and streamlined elements of the Tribal review process for wireless deployments.¹¹ It also—at the urging of both private actors and many state and local officials—issued a separate order to address excessive fees and other practices that inhibited wireless deployments, and adopted shot clocks for reviews of applications for small wireless facilities.¹²

Those steps have generated great momentum in the race to 5G. CTIA noted earlier this year that “America leads the world with the most commercial 5G deployments of any nation.”¹³ CCA members work closely with the communities that they serve to ensure that these next-generation technologies are deployed where they can reach all Americans—not just a select few.

The Commission’s work to reduce regulatory obstacles, however, is not yet complete. Lingering ambiguities in the Commission’s rules implementing Section 6409(a) have resulted in inconsistent practices across jurisdictions and uncertainty among stakeholders as to what those rules require and prohibit. The Commission has recognized that “regulatory uncertainty” in this context—where time is of the essence—“creates an appreciable impact on resources that

¹⁰ *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Report and Order, 32 FCC Rcd. 9,760, 9,760 ¶ 1 (2017).

¹¹ *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Second Report and Order, 33 FCC Rcd. 3,102, 3,103-04 ¶ 4 (2018), *affirmed in part, vacated and remanded in part sub nom. United Keetoowah Band of Cherokee Indians in Oklahoma et al. v. FCC*, 933 F.3d 728 (D.C. Cir. 2019).

¹² *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, 33 FCC Rcd. 9,088, 9,089-92 ¶¶ 5-13 (2018) (“September 2018 Order”).

¹³ CTIA, *The Global Race to 5G: Spring 2019 Update 2* (2019), <https://api.ctia.org/wp-content/uploads/2019/04/The-Global-Race-to-5G-Spring-2019-Update.pdf>.

materially limits plans to deploy service.”¹⁴ Indeed, CCA members’ experiences confirm that, in some situations, jurisdictions attempt to invoke loopholes and other ambiguities to impede or prevent deployment.

CCA submits these comments to encourage the Commission to provide much-needed clarity regarding its Section 6409(a) rules, and to adopt a needed update to those rules. These steps will further the ability of all stakeholders to work together to continue quickly and responsibly deploying the physical infrastructure that will deliver 5G across the Nation.

II. THE COMMISSION SHOULD PROVIDE REGULATORY CERTAINTY ON KEY DEPLOYMENT ISSUES THROUGH TARGETED CLARIFICATION AND MODERNIZATION OF ITS RULES IMPLEMENTING SECTION 6409(A)

The WIA and CTIA petitions raise a host of clarifications and changes the Commission might make regarding its Section 6409(a) rules. CCA focuses here on several issues of particular interest to its members, and that it has already encouraged the Commission to address.¹⁵

First, CCA agrees with WIA and CTIA that the Commission needs to clarify the meaning and significance of a “deemed granted” approval under Section 1.6100(c)(4) of its rules in situations where the local authority has “fail[ed] to approve or deny [the] request.”¹⁶ In particular, the Commission should clarify that when a request is “deemed granted,” the applicant

¹⁴ *September 2018 Order* at 9,118-19 ¶ 60; *see also, e.g., 2014 Order* at 12,951 ¶ 204 (“In sum, we find that the definitions, criteria, and related clarifications we adopt for purposes of Section 6409(a) will provide clarity and certainty, reducing delays and litigation, and thereby facilitate the rapid deployment of wireless infrastructure and promote advanced wireless broadband services.”).

¹⁵ *See* CCA July 2019 Letter at 1-3. In its July 2019 letter, CCA also explained that its members continue to see significant difficulties with tower siting on federal lands, resulting in slower deployment in those areas. These issues persist today, and like the issues raised by WIA and CTIA discussed herein, they pose unnecessary obstacles to 5G progress.

¹⁶ 47 C.F.R. § 1.6100(c)(4).

can move forward with the qualifying modification or collocation without the requested permits or authorizations.¹⁷ The experience of CCA members and the examples WIA and CTIA cite in their petitions demonstrate that this clarification is badly needed to break logjams in certain jurisdictions.

In the *2014 Order*, the Commission adopted a bright-line rule: a “60-day time period for States and localities to review applications submitted under Section 6409(a)”¹⁸ and either “approve or deny [the] request,” or else it is deemed granted.¹⁹ And as CTIA notes, then-Commissioner Pai explained that “an applicant can *start building* on day 61 if a municipality doesn’t act on its application.”²⁰

Contrary to the Commission’s directives for the “deemed granted” process, CCA members have encountered some jurisdictions that have sought to delay members’ deployments even when their applications have been deemed granted by operation of the Commission’s rules. In these situations, the carrier has, pursuant to the rules, notified the “applicable reviewing authority” of the deemed grant,²¹ but the locality claims that building permits or other certifications are still required before the carrier can commence. CTIA’s petition collects for the

¹⁷ See WIA PDR at 7 (“The Commission also should clarify that, if a deemed granted notice is not timely challenged by a locality in court within 30 days, a wireless provider is legally authorized to move forward with construction and deployment even if the locality refuses to issue building and other permits technically required under local regulations.”); CTIA PDR at 19 (the Commission should clarify that if an application is “deemed granted,” the applicant “may lawfully modify the tower or base station upon notice to the authority,” and the grant “applies to all approvals related to the modification”).

¹⁸ *2014 Order* at 12,962 ¶ 228.

¹⁹ 47 C.F.R. § 1.1600(c)(2), (4).

²⁰ *2014 Order*, Statement of Commissioner Ajit Pai (emphasis added); see CTIA PDR at 17.

²¹ 47 C.F.R. § 1.1600(c)(4).

record similar experiences from other parties, such as localities that refuse to issue “ministerial permits” needed for construction “because it would be outside of their standard process” and others that even more directly argue that a deemed granted remedy under Section 6409(a) and the Commission’s rules has not been triggered when an EFR application has been granted but a building permit has not.²²

The Commission should make clear that it meant what it said in the *2014 Order*: when an application is “deemed granted,” the applicant may lawfully proceed with construction. No other permits or approvals are needed, nothing needs to be re-filed, and no other waiting periods apply. Just as the Commission recognized that Section 6409(a) “does not permit [localities] to delay” their approval of qualifying applications,²³ it should clarify that they may not achieve the same end through other means, *i.e.*, imposing additional requirements after an application has been “deemed granted.”²⁴

Second, CCA agrees that stakeholders need additional clarity regarding the meaning of “concealment elements” in Section 1.6100(b)(7)(v) and what kinds of modifications “defeat” them.²⁵ In the *2014 Order*, the Commission described concealment elements as those tailored to make wireless facilities “look like some feature other than a wireless tower or base station,” and specifically identified “painting to match the supporting façade” and “artificial tree branches” as

²² CTIA PDR at 18.

²³ *2014 Order* at 12,961 ¶ 227.

²⁴ Even if the Commission clarifies the standards for the “deemed granted” remedy, some carriers nevertheless may feel compelled to seek an injunction from court to actually obtain the necessary permits. The Commission can help streamline such litigation by making clear its expectation that applicants qualifying for a deemed granted remedy would meet the standards for a preliminary injunction. *Cf. September 2018 Order*.

²⁵ 47 C.F.R. § 1.6100(b)(7)(v); *see* CCA July 2019 Letter at 2.

examples.²⁶ Notwithstanding that direction, Petitioners identify a number of examples in the record in which wireless providers or other private stakeholders have faced municipalities with overly broad views of what aspects of wireless facilities qualify as concealment elements (and, relatedly, of what modifications defeat them).²⁷ CCA members have encountered similar situations.

Greater clarity is needed to eliminate these barriers to deployment and to reinforce the Commission's directions from the *2014 Order*. Without correction from the Commission, the "concealment elements" exception risks swallowing the rule that eligible facilities requests be approved. In particular, the Commission should clarify that *only* elements identified as concealment elements in an initial siting application or initial siting approval qualify as such under the Commission's regulations. Moreover, the Commission should confirm that the sizes of facilities cannot be considered concealment elements, given that the Commission already adopted specific, objective size criteria to define what qualifies as an EFR.²⁸ The Commission also should confirm that minor changes to concealment elements do not automatically eliminate EFR status and trigger a comprehensive review, so long as the change is consistent with the overall concealment plan and does not materially alter the site appearance.

Third, CCA supports WIA's request that the Commission modernize its rules regarding compound expansions so that stakeholders can make minor, necessary expansions to support 5G services without unneeded delay.²⁹ The current rules regard a modification as a *per se*

²⁶ *2014 Order* at 12,949-50 ¶ 200; *see* WIA PDR at 11; CTIA PDR at 10.

²⁷ *See* WIA PDR at 10-11; CTIA PDR at 10-11.

²⁸ *See* 47 C.F.R. § 1.6100(b)(7)(i), (ii); *see also* CCA July 2019 Letter at 2.

²⁹ *See* WIA Rulemaking Petition at 4-11.

substantial change if it “entails *any* excavation or deployment outside the current site.”³⁰ As WIA explains, those rules reflect standards that made sense when the industry needed to shift from construction of large new towers to greater collocation on existing towers.³¹ Today, however, the Commission’s efforts to increase collocation have succeeded, and there is little room left on existing towers to collocate the equipment necessary for 5G services without minor expansions of current tower sites.

Because the rules do not match the real-world environment, they stand as a significant obstacle to the Commission’s 5G objectives by removing minor, necessary changes to existing sites from the streamlined approval framework created by Section 6409(a) and the Commission’s implementing rules.³² Deploying high-volume 5G facilities requires the ability to make these minor expansions easily and efficiently. Rather than encouraging these timely and efficient steps, the current rules instead incentivize inefficient expenditures, as construction of new structures outside a site boundary are not treated as substantial modifications, while even extremely minor expansions to facilitate collocation on existing structures are.³³ To remove this unnecessary roadblock, the Commission should grant WIA’s petition and provide that minor excavations or deployments within certain size and distance parameters outside the current site do not constitute substantial changes under its rules.³⁴

³⁰ 47 C.F.R. § 1.6100(b)(7)(iv).

³¹ See WIA Rulemaking Petition at 5-6.

³² Some municipalities have also taken the position that increasing the size of the existing site in any way defeats concealment elements under 47 C.F.R. § 1.6100(b)(7)(v). When acting on the petitions, the Commission should make clear that the size of a site is not itself a concealment element, and changes to the size do not defeat concealment elements.

³³ See WIA Rulemaking Petition at 10.

³⁴ See CCA July 2019 Letter at 2.

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As the Commission continues its important work to facilitate the 5G transition, it should uphold its touchstones of increasing efficiencies where possible and providing certainty to all stakeholders. The WIA and CTIA petitions are replete with opportunities for the Commission to achieve both of those ends. Consistent with the specific recommendations in these comments, CCA respectfully urges the Commission to continue seizing on opportunities to provide clarity and certainty so that CCA members can deliver wireless services across the Nation.

Respectfully submitted,

/s/

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