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April 27, 2020

**VIA ELECTRONIC FILING**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Re: *Ex Parte* Submission, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, WC Docket No. 17-84; *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*; WC Docket No. 17-84; *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, RM-11849

Dear Ms. Dortch:

This submission is made on behalf of the Western Communities' Coalition, which is comprised of local governments and local government associations that filed Comments and Reply Comments in this Docket.<sup>1</sup> After the comment period in the above-captioned proceeding closed, industry commenters made several *ex parte* filings with statements and information that warrant correction. These filings misconstrue critical tools of responsible governance, grossly understate the petitions' adverse impacts and suggest that some local governments are incapable of fulfilling their obligations during the COVID-19 pandemic.

Western Communities' Coalition rejects the proposition that local governments cannot maintain the continuity of government services during this pandemic. Local governments nationwide have risen to the occasion as the COVID-19 emergency expands into its second month. Any suggestion that the crisis evidences a need for federal preemption lacks factual

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<sup>1</sup>The members of the Western Communities' Coalition that join this *ex parte* are the City of Beaverton, Oregon; City of Carlsbad, California; City of Cerritos, California; City of Coronado, California; Town of Danville, California; City of Lawndale, California; League of California Cities; City of Napa, California; City of Oxnard, California; City of Pleasanton, California; City of Rancho Palos Verdes, California; City of Richmond, California; Town of San Anselmo, California; City of San Diego, California; City of San Marcos, California; City of San Ramon, California; City of Santa Cruz, California; City of Santa Monica, California; City of Solana Beach, California; City of South Lake Tahoe, California; City of Thousand Oaks, California; City of Boulder, Colorado; Town of Breckenridge, Colorado; Colorado Communications and Utility Alliance; King County, Washington; City of Lacey, Washington; City of Olympia, Washington; City of Tacoma, Washington; Thurston County, Washington; and City of Tumwater, Washington.

support and reveals the same conceit that underlies the industry's declaratory ruling petitions: that alleged misconduct by a small number of jurisdictions justifies sweeping federal action.

The record in this proceeding and the facts on the ground do not support preemption.

## I. Local Governments Are Rising to the Challenge

Robust and reliable communications networks provide critical services during any public health crisis. For precisely this reason, and having been involved in emergency management planning for years, local governments across the country continue to process applications to modify, upgrade and deploy communications infrastructure, whether remotely or by appointment.<sup>2</sup> These steps and many others show that local governments are rising to the challenge, which makes industry complaints about temporary delays more puzzling.<sup>3</sup> COVID-19 completely disrupted normal economic activity and, on the recommendation of public health officials, required public and private sectors to take drastic measures to impede transmission of the virus. A review of how local governments have responded and implemented new operations, including those related to permitting, while mitigating the spread of this virus demonstrates that intrusive federal action is unnecessary.

### A. The Commission is Aware of State, Local and Tribal Work in Planning for Emergencies

As the Commission knows, its own Intergovernmental Advisory Committee (IAC) spent considerable time in 2019 working on emergency response issues, resulting in the adoption of a series of Advisory Recommendations, including IAC ADVISORY RECOMMENDATION No: 2019-3, In the Matter of Intergovernmental Disaster Response Coordination

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<sup>2</sup> See, e.g., Steve Taylor, *Cell tower approved at Seckman High campus*, LEADER PUBLICATIONS, (Apr. 6, 2020), available at: [https://www.myleaderpaper.com/news/cell-tower-approved-at-seckman-high-campus/article\\_eef4cb60-75e8-11ea-9f43-377a433112ad.html](https://www.myleaderpaper.com/news/cell-tower-approved-at-seckman-high-campus/article_eef4cb60-75e8-11ea-9f43-377a433112ad.html) (describing Jefferson County Council approval of conditional-use permit by telephone conference); Bruce A. Scuton, *Freeholders meet by phone, has audience participation*, NEW JERSEY HERALD (Mar. 26, 2020), available at: <https://www.njherald.com/news/20200326/freeholders-meet-by-phone-has-audience-participation> (board approved a new agreement for a cell tower in meeting held over the telephone); Leah Wankum, *Sprint cell tower in Shawnee getting 5-foot extension to make room for more antennas*, SHAWNEE MISSION POST (Mar. 18, 2020), available at: <https://shawneemissionpost.com/2020/03/18/sprint-cell-tower-in-shawnee-getting-5-foot-extension-to-make-room-for-more-antennas-88741/> (planning commission approved plans in meeting predominately conducted via teleconference); see also Francis Scarcella, *Shikellamy School District board members approve wireless network upgrades*, THE DAILY ITEM (Apr. 16, 2020), available at: [https://www.dailyitem.com/news/local\\_news/shikellamy-school-district-board-members-approve-wireless-network-upgrades/article\\_5a500771-7bad-5367-a222-ec8679ceedb8.html](https://www.dailyitem.com/news/local_news/shikellamy-school-district-board-members-approve-wireless-network-upgrades/article_5a500771-7bad-5367-a222-ec8679ceedb8.html) (school board approves plan to upgrade wireless networks in the district via zoom meeting).

<sup>3</sup> See Letter from John A. Howes, Jr., Government Affairs Counsel, WIA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 19-250 at 3-4 (Mar. 30, 2020) [hereinafter "*WIA March Letter*"].

(“Recommendation”).<sup>4</sup> This Recommendation includes best practices for coordination and for addressing critical communications infrastructure before, during and after disasters. Among other things, it discusses collaboration between carriers, government, subcontractors, municipalities, and other industry participants in order to address telecommunication issues and coordinate a unified response to emergencies.

As described below, local governments have taken to heart the recommendation to streamline permitting processes to allow critical infrastructure providers expeditious access to restore services. Local governments appreciate that the Recommendation notes:

disasters always occur at the local level. The citizens in the area where the event occurs, their local governments, and voluntary agencies are the first to have to cope with the damage. States recognize that local governments have the first line of responsibility in the preparation for, response to, and recovery from most emergencies and disasters. Actions by the state are always in support of local government. Strengthening the capabilities of local government will help prevent the loss of life and property during disasters, deliver assistance to victims most expeditiously, and reduce costs.<sup>5</sup>

As Chairman Pai noted regarding this Recommendation and others filed concurrently by the IAC, the reports “offer valuable insights and recommendations that will help inform the work of the FCC and that of our state, local, Tribal, and territorial government partners.”<sup>6</sup> Federal and state authorities agree that local governments know best what their communities need in times of crisis.

B. On a National and Local Level, Local Governments and the Industry Have Demonstrated Effective Collaboration During this Crisis

1. *National*

On April 14, 2020, CTIA, a trade association for the wireless industry, released a document titled “Working Together to Ensure Americans are Wirelessly Connected”.<sup>7</sup> To its credit, CTIA notes that local governments are already working diligently to address deployment

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<sup>4</sup> See *In the Matter of Intergovernmental Disaster Response Coordination*, Intergovernmental Advisory Committee to the FCC, Advisory Recommendation No. 2019-3 (Nov. 7, 2019).

<sup>5</sup> *Id.* at 10.

<sup>6</sup> *FCC Issues Public Safety and Telehealth Reports from Its Intergovernmental Advisory Committee*, Press Release (Nov. 7, 2019), available at: <https://docs.fcc.gov/public/attachments/DOC-360696A1.pdf>.

<sup>7</sup> CTIA, *Working Together to Ensure Americans are Wirelessly Connected During COVID-19*, available at: [https://api.ctia.org/wp-content/uploads/2020/04/COVID\\_Wireless-Connectivity-Final.pdf](https://api.ctia.org/wp-content/uploads/2020/04/COVID_Wireless-Connectivity-Final.pdf) (last visited April 20, 2020).

issues during this crisis. CTIA’s “best practice” suggestions, which include transitioning to online permitting, waiving requirements for original documentation until after emergency conditions pass, conducting meetings online, following DHS guidance where possible, and utilizing tolling agreements where needed, are already being undertaken by numerous local governments nationwide, including many that are represented in this *ex parte* filing. Also to its credit, CTIA notes that “the wireless industry is committed to working with state and local partners to keep constituents connected during these unprecedented times.”<sup>8</sup>

As local governments have been advocating for years, and demonstrating through their actions, respectfully discussing the legitimate needs of each side accomplishes more than seeking federal regulatory actions that restrict local authority to address important issues. CTIA’s best practices document supports the position that Commission intervention to further preempt local permitting authority during the COVID-19 crisis is unnecessary. Individual problems can and should be dealt with on an individual basis through pre-existing mechanisms. And this document demonstrates the kind of best practices that are useful in this situation: collaborative solutions based on getting the necessary documentation to localities in a reasonable timeframe using technology as a solution without sacrificing public safety.

The Wireless Industry Association (WIA) has also requested discussions and collaboration with the local government community to address how the wireless infrastructure industry and local governments are working together to ensure that we can keep Americans connected during the COVID-19 crisis.

Local governments have stepped up.

A key consideration in these discussions has been the distinction between an “emergency” and conditions that warrant special treatment for communications deployment. Not all deployments will ameliorate the emergency. The careful distinction between maintaining or restoring critical services and approving future projects that will not directly benefit the public during the emergency helps all stakeholders prioritize critical infrastructure efforts. To be sure, some deployments may be needed to provide additional capacity for underserved areas. But local governments are in the best position to work with their industry partners to identify and prioritize these projects relative to all other non-communication infrastructure projects that also deserve due consideration.<sup>9</sup>

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<sup>8</sup> *Id.*

<sup>9</sup> In some instances, temporary cell-on-wheels (or “COWs”) are being deployed to address high priority capacity and critical public safety needs. *See, e.g.,* Zacks Equity Research, *Verizon Provides Tech Support to Naval Ship Combating COVID-19*, YAHOO! FINANCE, available at: <https://finance.yahoo.com/news/verizon-provides-tech-support-naval-132201548.html> (last visited Apr. 22, 2020); Stephanie Kanowitz, *Telecom networks keeping up, stepping up*, GCN (Apr. 3, 2020), available at: <https://gcn.com/articles/2020/04/03/telecom-carriers-responders-network-demand.aspx>.

## 2. *Local*

During the COVID-19 crisis, there have been multiple examples amongst our members and our local government colleagues nationwide where wireline and wireless infrastructure companies have approached individual local governments, seeking collaborative and streamlined approaches to permitting in order to install new infrastructure to meet unprecedented demands on communications networks. Local governments like Boulder and Fort Collins, Colorado have been approached by a variety of providers, and each city has successfully collaborated with its industry partners to develop new processes to meet the legitimate needs of each party in these incredibly challenging times.

Other communities like Erie, Colorado, a suburban community located in Boulder and Weld Counties in the north metro area, despite implementing work-at-home protocols, have modified practices to allow for electronic applications, review and approval, and continue to provide for on-site inspection to protect public safety. Still others like Denver, Colorado and Arvada, Colorado, a suburban city of 120,000 located between Denver and Boulder, have implemented online application processes prior to the crisis, and inspections are being scheduled and occurring without delay during the crisis. These communities understand the importance of protecting public safety through effective safety code inspections even in these challenging times. It does the public little good if in the rush to build new telecommunications infrastructure we forego safety inspections and the result is damage to gas and water or sewer lines, leaving the public without a different set of critical public services.

Douglas County, Colorado, with a population of over 300,000, is located south of Denver and north of Colorado Springs. In 2016 Douglas County ranked as a top Digital County in the United States. And like many local governments, Douglas County has risen to the challenge of expediting broadband deployment. During the COVID-19 crisis, the County has not missed a beat with applications, permits, and inspections and are currently processing many eligible facilities requests and other wireless site applications. Even prior to the crisis the County has provided for electronic submittal, review, and payments for permits. The County has determined that inspections and traffic control are necessary for public safety, and while it has not waived these requirements, the County's permitting inspections proceeds fairly quickly – usually one to three days turnaround for approved plans. The COVID-19 crisis has not impacted the County's permitting and inspection abilities or timelines.

Collaboration, mutual respect and understanding between local government, the industry, and state and federal regulatory authorities is the tonic that will most successfully address network deployment issues during this and future crises. Indeed, the Colorado Municipal League has informed us of contact it recently received from two major providers, noting that

municipalities and counties are doing the best they can under the current circumstances and express gratitude for this work.<sup>10</sup>

Examples from other communities demonstrate that local governments have ably met the moment. For example, WIA's filing named Atlanta as a city that suspended development applications as part of the initial public health response.<sup>11</sup> Since that time, Atlanta launched a new online portal that "leapfrogged the normal electronic submittal launch architecture, so [the city] could get something going quickly."<sup>12</sup> South Lake Tahoe, California is another city rising to the challenge by accepting applications electronically and processing them while planners are working from home. Moreover, the City's building inspectors are still in the field with appropriate personal protective equipment and social distancing protocols in place. Many cities are even holding public meetings online and setting up remote work capabilities for staff, all while managing security risks from "Zoombombs" and other cyberattacks.<sup>13</sup> Still others must navigate these challenges in the context of state sunshine laws that may not have been suspended during the crisis.<sup>14</sup>

Another example is Fort Collins, Colorado where in mid-March a major provider contacted the City to convey its immediate construction needs to enhance connectivity during this crisis. The City recognized its obligation to address the needs of its citizens, the specific time-sensitive needs of this provider, and the importance of doing so in a manner that was competitively neutral and non-discriminatory towards all providers. City staff reports that the provider "will be sending us a list of locations they anticipate [deploying], and we will work with

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<sup>10</sup> Email message from Brandy DeLange, Legislative and Policy Advocate, Colorado Municipal League, to Ken Fellman (Apr. 27, 2020). The Colorado Municipal League is the voice of Colorado's cities and towns, counting more than 97 percent of the state's municipalities as members. Founded in 1923, the League is a nonprofit, nonpartisan organization providing services and resources to assist municipal officials in managing their governments and serving the cities and towns of Colorado.

<sup>11</sup> See *WIA March Letter* at 3 (citing the City of Atlanta's decision to temporarily suspend plan submittals in order for the city to implement remote working and social distancing protocols).

<sup>12</sup> Update from Commissioner Tim Keane, *Dep't of City Planning COVID-19 Response*, CITY OF ATLANTA, Ga. (Apr. 10, 2020), available at: <https://www.atlantaga.gov/government/departments/city-planning>.

<sup>13</sup> See, e.g., John LaConte, *Avon council gets hacked, forced to reschedule meeting*, VAILDAILY (Mar. 25, 2020), available at: <https://www.vaildaily.com/news/avon-council-gets-hacked-forced-to-reschedule-meeting/>; Kristen Setera, *FBI Warns of Teleconferencing and Online Classroom Hijacking During COVID-19 Pandemic*, FBI BOSTON (Mar. 30, 2020), available at: <https://www.fbi.gov/contact-us/field-offices/boston/news/press-releases/fbi-warns-of-teleconferencing-and-online-classroom-hijacking-during-covid-19-pandemic>; Shannon Bond, *A Must For Millions, Zoom Has A Dark Side —And An FBI Warning*, NPR (Apr. 3, 2020), available at: <https://www.npr.org/2020/04/03/826129520/a-must-for-millions-zoom-has-a-dark-side-and-an-fbi-warning>.

<sup>14</sup> See Stephen Piepgrass, et al., *Public Meeting Requirements in the Age of COVID-19*, LAW360 (Apr. 14, 2020), available at: <https://www.law360.com/articles/1258008/public-meeting-requirements-in-the-age-of-covid-19> ("Each state has sunshine laws that govern public access to governmental records and meetings. These laws are recognized as pivotal to public participation in our democracy.").

others around the City for permitting. Overall, it was great call and highlights the City's continued collaboration in working with others to find solutions."<sup>15</sup>

Other cities share success stories after overcoming the initial challenge. The City of Boulder was not equipped at the start of the crisis to address the need to make so much of its permitting and inspection services online. This is not an issue unique to telecommunications – there are many kinds of construction that are essential and need to continue without delay, including affordable housing. Boulder took quick action at the outset of the crisis to make many of its services available online, including the ability to conduct some inspections virtually. As a result, broadband providers are just one category of essential services that have been able to continue to enhance their operations within the City, despite the unprecedented challenges that this pandemic has caused.

As another example, Olympia, Washington processes three separate types of wireless permit applications through an online permit portal: (1) macro facilities; (2) eligible facilities requests; and (3) small cells in the rights-of-way. While the City is clearly equipped to handle permit applications electronically, it has not received applications for wireless facilities since the online portal was established in January.<sup>16</sup> However, Olympia demonstrates that local governments do not require federal intervention to develop sensible permitting procedures.

Accounting for emergency circumstances is a local issue that requires a local response. State and local governments are best positioned to allocate resources and collaborate with broadband providers as opposed to additional federal preemption of local authority.<sup>17</sup> Indeed, the evidence to date shows that local officials and providers have effectively worked together to move projects forward and that any delays have been borne out of a public health necessity, not for lack of effort to move deployment forward. Similar measures focusing on protection of public health taken by the private sector or the Commission are not viewed as problems that warrant regulatory intervention. There is no reason to subject local governments to a double

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<sup>15</sup> Email from Chad Crager, City Engineer, Fort Collins, Colo., to Jeff Mihelich, Deputy City Manager, Fort Collins, Colo. (Mar. 24, 2020).

<sup>16</sup> Olympia's work to position itself to meet residents' and wireless industries' needs online during Governor Jay Inslee's stay-at-home order due to the COVID-19 State of Emergency was recently recognized in the online newsletter of Dude Solutions, Olympia's vendor for the SmartGov online permitting system. *See Olympia, WA Utilizes SmartGov to Move Permitting Online & Improve Data Integrity* (Apr. 21, 2020), available at: <https://www.dudesolutions.com/resource/Olympia-WA-Client-Success-Story>.

<sup>17</sup> Although the *WIA March Letter* does not explicitly call for preemption during this crisis, Western Communities Coalition is puzzled that the suggestion that some local governments are not doing enough was filed in a docket that aims to further preempt local authority.

standard.<sup>18</sup> Ultimately, this pandemic will not “somehow render [ ] states and localities unable to figure out what was best for their communities.”<sup>19</sup>

## **II. The Commission Cannot Attribute Any Weight to T-Mobile’s Specious Allegations Against the City of Colorado Springs**

Perhaps no one example better describes the unique localism involved and required in wireless siting than the dispute in this docket between T-Mobile and the City of Colorado Springs, Colorado. T-Mobile criticized actions of Colorado Springs in its Reply Comments, and the City submitted an affidavit adding additional facts that T-Mobile omitted. T-Mobile subsequently submitted an *ex parte* letter further alleging that Colorado Springs was not providing all relevant facts to the Commission.<sup>20</sup>

While T-Mobile’s most recent filing misconstrues what the City supposedly “demanded” on certain dates, T-Mobile never acknowledges the most important fact related to these discussions – that at the time of these discussions it had not filed an application, there was no specific request for the City to act upon and there was no shot clock running. T-Mobile spent months sending letters and debating whether it was going to submit an application. However, there is no eligible facilities request until there is an application. The timeline in T-Mobile’s filing is deceiving by its omission; it does not include the date of T-Mobile’s actual application and approval by the City, which occurred over a short period in March and April of 2019. Moreover, once it had final approval from the City, T-Mobile waited more than three months to file for a building permit with the Pikes Peak Regional Building Department – a separate, regional entity that manages building permits.

In sum, the City does not dispute that in preliminary discussions about what was required by the City Code, there were differences of opinion between the parties that needed to be worked out. It does not criticize T-Mobile for raising those issues as a factor that needed to be addressed in connection with this particular site. What is wrong about the manner in which T-Mobile presented this matter to the Commission is that the City is somehow being blamed for

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<sup>18</sup> See *Auction 106 Postponed, Delay of Auction of FM Broadcast Construction Permits Initially Scheduled to Begin on April 28, 2020*, Public Notice, AU Docket No. 19-290 (Mar. 25, 2020) (providing that the Commission has indefinitely postponed the auction of construction permits in the FM broadcast service that was expected to begin on April 28, 2020); see also Monica Allevan, *3GPP delays 5g standards due to COVID-19*, FIERCEWIRELESS (Mar. 25, 2020), available at: <https://www.fiercewireless.com/tech/3gpp-delays-5g-standards-due-to-covina-19> (providing that the 5G standards-setting body has delayed the finalization of some 5G standards by three months).

<sup>19</sup> See *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Report and Order, Dissenting Statement of Comm. Mignon L. Clyburn, WC Docket No. 17-84, 32 FCC Rcd. 11128, 11239 (Nov. 29, 2017).

<sup>20</sup> See Reply Comments of T-Mobile USA, Inc., WT Docket No. 19-250, at 13 (Nov. 20, 2019); Statement for the Record of Benjamin Bolinger, Senior Attorney Colorado Springs, Colorado, FCC, WT Docket No 19-250 (Mar. 4, 2020); Letter from Cathleen A. Massey, Vice President Federal Regulatory Affairs T-Mobile, to Marlene H. Dortch, Secretary, FCC, WT Docket No 19-250 (Mar. 11, 2020).



unreasonable delay in T-Mobile's ability to deploy network facilities. Once preliminary issues were worked out, the timing between the submittal and approval was well within the shot clock requirements. And T-Mobile's unilateral decision to wait more than three months after approval to seek a building permit belies any claim that the City was the cause of a delay.

### **III. Applications Misrepresented as Eligible Facilities Requests Cause Delays and Public Safety Issues**

Only existing sites may qualify as an eligible facilities request. The Commission's Section 6409 regulations establish that an existing site has a physical existence and a legal existence.<sup>21</sup> Facilities that were not reviewed and approved by the applicable permitting authority are not legally existing for purposes of Section 6409. Applicants often fail in addressing this threshold question in an effort to save time and money and shift the responsibility to the local agency to perform the applicant's due diligence. Because applicants assume any modification to an existing facility qualifies for Section 6409 approval, project plans omit information relevant to this evaluation.

More importantly, local governments cannot approve applications without accurate information. Some project plans may have been drafted without a site walk, which makes it impossible to know whether the plans accurately depict the equipment at the site. An application submitted in Thousand Oaks, California is illustrative. There, AT&T submitted a signed application through its vendor Eukon Group that contained plans sealed by a registered professional engineer that showed extensive camouflaging measures that were not actually deployed at the site. The applicant even indicated to the City's representative that AT&T would not pay to field verify the actual site conditions.<sup>22</sup>

Illegally deployed sites and applications that misrepresent deployed equipment that in fact do not qualify for Section 6409 sow lasting seeds of doubt as to whether the permitting agency can and should trust fundamental aspects of an application. In each of the described examples, the permits were ultimately approved showing that disqualification from Section 6409 is not a death knell to an orderly and honest Section 6409 process. These events are especially concerning as multi-carrier collocations continue to grow under Section 6409 modifications and right-of-way infrastructure becomes more densified. Corner-cutting practices naturally lead to delays when the project plans submitted by the applicant do not match the deployments shown in the existing permits.

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<sup>21</sup> See 47 C.F.R. § 1.6100(b)(5) (providing that the tower or base station must be constructed and reviewed and approved under the applicable zoning or siting process).

<sup>22</sup> On a separate occasion in a different jurisdiction, AT&T submitted a Section 6409 request supported by design plans through Eukon Group. Both the application and plans omitted a wholly-unpermitted four-foot microwave antenna at a rooftop site. The jurisdiction later approved the project and AT&T removed the unpermitted microwave antenna.

Engineers also need accurate information to produce reliable structural calculations and RF compliance evaluations. Notwithstanding problems from unreliable plans affecting the eligible facilities request analysis, inaccurate plans have downstream effects on the structural analysis given that it can only account for the equipment shown on the plans and provided to the structural engineer.<sup>23</sup> Moreover, plans that omit RF-transmitting equipment suffer from similar issues as they undermine the conclusions and mitigation measures needed to promote compliance with the Commission's RF exposure regulations.

To the extent that plans do not match existing permits, local governments can spot those problems and legitimately raise concerns about process and public safety. In other instances involving unpermitted equipment that is not disclosed on the existing permits or proposed plans, such latent defects cannot be detected at plan check. A regulatory regime that values speed above all else is reflected in the quality of the construction drawings. And as long as the Commission's rules continue to incentivize shoddy engineering, incomplete submittals and flawed reports, while also undermining the tools local governments use to ensure compliance, future Section 6409 modifications will pose unreasonable safety risks.

#### **IV. Conditional Approvals Benefit Applicants and Promote Good Governance**

At a recent *ex parte* meeting with Commission staff, Crown Castle lamented that conditional approvals cause uncertainty and delay.<sup>24</sup> Contrary to Crown Castle's claims, conditional approvals exist for legitimate purposes and provide greater certainty. They provide a clear record of the standards that apply, ensure similar treatment for similar applications even as regulations change over time, and make efficient use of local and applicant resources by providing a pathway for approval rather than denial.

When a local agency issues a conditional approval, the permit expressly provides the rules that apply to the project at the time of the approval. However, local regulations are not static. Rules that may have been appropriate for legacy facilities in 2000 might not be for a new facility in 2020. In the intervening decades, a jurisdiction could have updated its insurance or indemnification requirements to limit risks that injured plaintiffs will seek recovery from the

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<sup>23</sup> In some cases, plans contain a note that the depiction of the existing site is based on prior permit records, which may be many years old and do not accurately reflect the current conditions. This is especially true on shared rooftop sites. Moreover, a building owner or tenant could have added new equipment such as HVAC units, or collocated carriers may have added equipment without a permit. As the cumulative conditions change, each new piece of equipment not reflected in prior approved plans creates a cascading effect that requires local officials to review Section 6409 modifications with a healthy dose of skepticism. Public safety concerns are especially acute when structural calculations based on plans provided by the carrier that have not verified the actual physical conditions at the site.

<sup>24</sup> See Letter from Monica Gambino, VP Legal, Crown Castle, to Marlene H. Dortch, Secretary, FCC at 2 (Jan. 24, 2020) [hereinafter "*Crown Castle January Letter*"].

agency that approved the installation. These disputes are not imagined. They occur in the routine administration of local governments across the country, and there is nothing discriminatory about applying updated conditions to applications approved pursuant to rules adopted before the approval.<sup>25</sup>

Even as local regulations evolve over time, conditional approvals ensure that similar projects are subject to similar standards. Take the insurance and indemnification requirements discussed above: whether the application proposes a new facility or a second collocator seeks approval for new equipment to a roof-mounted site, the locality's ability to fairly allocate risk cannot be controlled by a permit issued decades earlier. Under the industry's view, a benign conditional approval would be preempted unless it ties back to a building or safety code.<sup>26</sup> This cannot be the intended policy because it would expose local governments to immeasurable risk simply by retaining their legitimate powers to oversee the development process.<sup>27</sup>

Not only do conditional approvals benefit local governments, they also benefit applicants. Rather than deny a defective application, appropriate conditions can avoid an applicant starting back at square one. Take for example a local government that conditioned a facility to be finished grey to conceal the equipment against the backdrop of the underlying building.<sup>28</sup> Subsequently, another applicant provides plans to add new equipment with a yellow finish.<sup>29</sup> Under Section 6409, failing to use the same finish would defeat concealment and be sufficient grounds for denial. However, rather than deny the project, the permitting authority would likely impose a condition of approval to provide a path forward and avoid wasting additional time and resources. A straightforward application of the industry's position reveals that such conditions would be preempted, and in this example, the application would need to be denied.

In this case and many others, the industry's proposals prevent reasonable people from taking reasonable actions. Strictly construed, the industry's opposition to conditional approvals

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<sup>25</sup> This is not to suggest that that local governments could apply new conditions that are incompatible with the Commission's substantial change thresholds. Rather, not all new conditions should be deemed preempted merely because they did not appear on the face of the original permit, or are not manifestly related to building and safety codes. Standardized conditions of approval related to legitimate municipal functions and authority must be preserved pursuant to local police powers.

<sup>26</sup> See *Crown Castle January Letter* at 2.

<sup>27</sup> To be clear, Western Communities Coalition is not advocating for a narrow carve-out of risk-related conditions in addition to building and safety conditions. All conditions not expressly preempted by the substantial change thresholds are retained pursuant to local police powers.

<sup>28</sup> See 47 C.F.R. § 1.6100(b)(7)(vi).

<sup>29</sup> Another one of the industry's double-edged requests for "clarification" is evident here. See WIA – The Wireless Infrastructure Association, Petition for Declaratory Ruling, WT Docket No. 17-79 at 12 (Aug. 27, 2019) (requesting that only concealment conditions expressly provided in the original approval should be preserved). The original approval might not contain an express condition of approval that all the equipment match the color of the structure. Instead, the applicant might have provided a note on the approved buildings plans that "ALL EQUIPMENT PAINTED TO MATCH." In the industry's view, future attempts to memorialize concealment conditions that appear on the face of site or original plans, but not written down in a condition, should be preempted.

will lead to more denials, not faster deployment. In response, the industry might claim that these are not the types of conditions that Section 6409 preempts or for which the applicant would claim preemption. But the fact of the matter is that these *are* conditions that would be preempted on grounds that they are unrelated to building and safety codes. Thus, the petitions merely seek greater leverage to strongarm local agencies into removing certain conditions that do not confer benefits to the applicant. Such a policy would not be the product of reasoned decision-making.

## V. The Expanded Deemed Granted Remedy Would Reverse Decades of Collective Regulatory Wisdom

Duly issued building permits serve different purposes that the industry's deemed granted remedy undermines. Permits ensure that engineers and contractors do not cut corners, notify the community of work being performed, and provide clear records of local authorization.<sup>30</sup> A rule that automatically authorizes construction even if no permits have been issued unreasonably puts these interests at risk, and industry commenters offer no convincing counterargument to this point.

Crown Castle continues to look past the central issue that causes such concern over the proposed remedy: there may be justifiable reasons for an application to take more than 60 days to review.<sup>31</sup> Additionally, a deemed granted application presumptively has not undergone a complete review to determine whether the project complies with applicable laws. In these and other cases, post-installation inspections or general notes in construction drawings would be inadequate.<sup>32</sup> Crown Castle's argument to the contrary – that inspections and construction notes are a panacea that can replace a completed permit review – is irredeemably flawed.

Post-installation inspections cannot mitigate harms caused during construction because the defect must be detected before breaking ground.<sup>33</sup> Additionally, local officials cannot afford to assume the project notes are accurate and that the actual design is compliant with the applicable codes listed in the notes. Applicants make mistakes; plans and structural reports submitted by applicants are not always compliant. The daily experience of building and public works officials proves the opposite. Indeed, evidence in this record and prior proceedings establishes that applicants often rely on permit reviews to check their work.<sup>34</sup> Under these

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<sup>30</sup> See *Comments of the National League of Cities, et al.*, WT Docket No. 19-250 at 29-30 (Oct. 29, 2019).

<sup>31</sup> See, e.g., *supra* Section III.

<sup>32</sup> See Letter from Joshua S. Turner, counsel for Crown Castle, to Marlene Dortch, Secretary, FCC, WT Docket No. 19-250 at 2 (Mar. 19, 2020) [hereinafter "*Crown Castle March Letter*"].

<sup>33</sup> For instance, applications for right-of-way facilities that do not provide accurate boundaries between the right-of-way and private property create potential inverse condemnation concerns. Additionally, underground utility strikes cannot be detected by an inspection or contractor notes.

<sup>34</sup> See *Joint Comments of League of Ariz. Cities and Towns et al.*, WT Docket No. 16-421 at 10-21 (Mar. 8, 2017) (providing examples of materially incomplete or error-ridden applications that require substantial review and corrections).

circumstances, if the application is deemed granted and construction begins, the risk to public safety could be catastrophic.

Rather than address this reality, Crown Castle holds out Phoenix and Pittsburgh as exemplar cities and suggests that failing to process all permits within 60 days simply reflects a failure of local process.<sup>35</sup> The Commission cannot rely on this unsupported assumption as a basis to change the current rule. The proposed remedy creates a dangerous incentive and insinuates that local governments cannot adopt the right process without the threat of federally-authorized construction without permits.<sup>36</sup> Nothing in the record shows this to be true.

Notwithstanding the fact that applicants are often the source of delay,<sup>37</sup> authorization to construct on day 61 removes any incentive to toll the shot clock or wait the few extra days for permits to be issued. To the extent that the deemed granted remedy is intended to speed deployment by requiring localities to act, the threat of litigation for local governments is more than adequate to achieve that goal. Whether Phoenix and Pittsburgh regularly complete the entire process within 60 days does not mitigate the risk to public safety that one deemed granted, unpermitted facility would have.<sup>38</sup> Moreover, the parties will be less likely to toll applications that raise unique Section 6409 questions or contain latent defects. A proposed remedy that circumvents local oversight reduces incentives to cooperate.

The industry's position also ignores the impact of its preferred remedy in the new deployment environment. By the Commission's own acknowledgement, hundreds of thousands of small cells will be due for modifications in the coming years.<sup>39</sup> One deemed granted application that creates safety risks is bad enough, but the massive increase in modification applications will necessarily increase the incidence of deemed granted applications. In turn, more unpermitted work in the right-of-way heightens the risk of catastrophic failure. In the face of such uncertainty, and especially given that the industry record supporting such preemption is no more than paper thin, redefining the deemed granted remedy would be especially dangerous policy. The status quo already strikes a reasonably safe balance.

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<sup>35</sup> See Letter from Joshua S. Turner, counsel for Crown Castle, to Marlene Dortch, Secretary, FCC, WT Docket No. 19-250 at 1 (Feb. 21, 2019); *Crown Castle March Letter* at 2.

<sup>36</sup> See *Crown Castle March Letter* at 2 (claiming that "there is no practical barrier to conducting all necessary reviews . . . and with the right process local jurisdictions can easily issue all necessary approvals for construction within the requisite time period.").

<sup>37</sup> See *Joint Comments of City of San Diego et al.*, WT Docket No. 19-250 at 5 (Oct. 29, 2019). Additionally, Denver, Colorado notes that when directly comparing some applicants to others over the past three years, City data clearly shows that a minority of applicants continue to have the most problems on a repetitive basis, after years of regular collaboration attempts and trainings, indicating systemic company-wide issues that these entities bear a greater responsibility as the cause of delay nationwide.

<sup>38</sup> See *Crown Castle February Letter* at 1; *Crown Castle March Letter* at 1-2.

<sup>39</sup> See *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, WT Docket No. 17-79, 33 FCC Rcd. 9088, 9111-12 at ¶ 47 (Sep. 27, 2018).

## VI. Conclusion

For the reasons described above and the evidence in this record, the Commission should decline to grant the relief requested in the industry's petitions. Moreover, the current public health crisis has proven that local governments are eminently capable of working in partnership with industry stakeholders to dedicate resources where they are needed most. The Commission should celebrate these success stories and not view this moment as an opportunity to further preempt local authority.

Respectfully submitted,

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