



Wireless  
Infrastructure  
Association

May 20, 2019

**VIA ELECTRONIC FILING**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th St., S.W.  
Washington, D.C. 20554

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

Dear Ms. Dortch:

The Wireless Infrastructure Association (“WIA”),<sup>1</sup> pursuant to Section 1.1206 of the Federal Communications Commission’s (“Commission”) rules<sup>2</sup> and consistent with prior filings,<sup>3</sup> applauds the Commission’s ongoing efforts to create a regulatory environment that promotes wireless infrastructure deployment and the collocation of wireless facilities. Unfortunately, despite the significant strides the Commission has made in facilitating infrastructure deployment, certain jurisdictions are still working to circumvent the protections afforded by Section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012 (“Spectrum Act”), which directs states and localities to 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.”<sup>4</sup> WIA urges the Commission to address these issues and remove these remaining unnecessary state and local barriers to wireless deployment.

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<sup>1</sup> WIA is the principal organization representing companies that build, design, own, and manage telecommunications facilities throughout the world. WIA’s members include carriers, infrastructure providers, and professional services firms.

<sup>2</sup> 47 C.F.R. § 1.1206.

<sup>3</sup> See, e.g., Letter from Sade Dada, Government Affairs Counsel, Wireless Infrastructure Association, to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79 at 1 (Aug. 30, 2018); Letter from D. Zachary Champ, Vice President, Government Affairs, Wireless Infrastructure Association, to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79 at 1-2 (Nov. 16, 2018).

<sup>4</sup> Section 6409(a) of the Spectrum Act is codified at 47 U.S.C. §1455(a).

First, the Commission should issue a declaratory ruling clarifying that (i) Section 6409(a) and the implementing regulations apply to all state and local authorizations required to deploy new or replacement transmission equipment on existing wireless towers or base stations and (ii) the substantial change criteria in Section 1.40001(b)(7) of the Commission's rules should be narrowly interpreted. Second, the Commission should initiate a rulemaking to amend its rules to specify that collocations requiring limited compound expansions – specifically, excavation within 30 feet of a tower site – and that otherwise do not constitute substantial changes – qualify for relief under Section 6409(a) and the FCC's implementing regulations. These discrete steps will build on the Commission's successful and continuing efforts to remove barriers to infrastructure deployment, accelerate the expansion of next generation wireless services to consumers, and ensure continued U.S. leadership in all things wireless.

## **I. THE COMMISSION SHOULD CLARIFY THE SCOPE OF SECTION 6409(A) AND HAS AMPLE AUTHORITY TO DO SO**

Despite the Commission's best efforts to implement Section 6409, certain jurisdictions are still working to circumvent the protections afforded by the statute. For example, the *2014 Order* stated that the rules implementing Section 6409 did not inhibit the ability of localities "to enforce and condition approval on compliance with generally applicable building, structural, electrical, and safety codes and with other laws codifying objective standards reasonably related to health and safety."<sup>5</sup> This has emboldened some localities to claim – erroneously – that Section 6409 and the related shot clock do not apply to numerous approvals such as building permits and zoning authorizations, which are necessary before infrastructure deployment can commence.<sup>6</sup>

Some localities also are claiming that virtually any change to a structure defeats concealment elements and therefore constitutes a "substantial change" that is ineligible for Section 6409(a) relief.<sup>7</sup> Similarly, some localities are claiming that small radios, amplifiers and other equipment attached to a tower or small cell node constitute equipment cabinets, and then deny relief because the proposal would result in more than four equipment cabinets and therefore constitute a substantial change under this fanciful interpretation.

The Commission should address these interpretations of the scope of Section 6409, which constitute unnecessary barriers to broadband, by clarifying that (i) Section 6409(a) and the

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<sup>5</sup> *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies; Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting; 2012 Biennial Review of Telecommunications Regulations*, Report and Order, 29 FCC Rcd 12865, 12922 (2014) ("2014 Order").

<sup>6</sup> See Letter from Sade Dada, Government Affairs Counsel, Wireless Infrastructure Association, to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79 at 2 (Sept. 10, 2018); Letter from Richard Rossi, Senior Vice President, General Counsel-U.S. Tower, American Tower Corporation, to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79 at 15-16 (Aug. 10, 2018) ("American Tower Ex Parte").

<sup>7</sup> See 47 C.F.R. §1.40001(b)(7)(v); Letter from Kenneth J. Simon, Senior Vice President and General Counsel, Crown Castle International Corp., to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79 at 12-13 (Aug. 10, 2018) ("Crown Castle Letter").

implementing regulations (including the shot clock)<sup>8</sup> apply to all state and local authorizations required to deploy new or replacement transmission equipment on existing wireless towers or base stations and (ii) the substantial change criteria in Section 1.40001(b)(7) of the Commission's rules should be narrowly interpreted such that concealment measures generally are excluded from the size calculations when determining whether a collocation is subject to Section 6409 and equipment attached to a tower or small cell node does not constitute an equipment shed. The requested clarifications are necessary to effectuate the protections afforded by Congress in Section 6409(a).

The Commission has the authority to adopt these clarifications by declaratory ruling. Section 6409(a) does not define the approvals that are covered by that section, or what constitutes a substantial change, leaving the Commission with the task of defining those terms to eliminate ambiguity. The Commission has ample authority to issue declaratory rulings to remove uncertainty.<sup>9</sup> The Administrative Procedure Act expressly provides that an agency "may issue a declaratory order to terminate a controversy or remove uncertainty."<sup>10</sup> The Commission's authority to interpret statutory ambiguities has been upheld by courts on multiple occasions<sup>11</sup> and the Commission can issue such declaratory rulings on its own motion.<sup>12</sup> In fact, the Commission previously issued a declaratory ruling to clarify that the Section 332 shot clock applied to "all authorizations" necessary for the deployment of facilities covered by Section 332.<sup>13</sup>

## **II. THE COMMISSION SHOULD INITIATE A RULEMAKING TO ENSURE THAT COLLOCATIONS REQUIRING LIMITED COMPOUND EXPANSIONS QUALIFY FOR RELIEF UNDER SECTION 6409(A)**

WIA recognizes and appreciates the Commission's continuing commitment to create a regulatory environment that promotes wireless infrastructure deployment and urges the Commission to build on those efforts by modifying Section 1.40001(b)(7)(iv) to provide that excavation is considered a substantial change to a tower only if it occurs 30 feet or more outside

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<sup>8</sup> The Commission also should consider clarifying that the Section 6409(a) shot clock applies to all aspects of the approval process, such as public meetings, pre-application filing requirements, *etc.* Such a clarification would be consistent with the Commission's clarification of the Section 332 shot clocks. *See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, 2018 FCC LEXIS 3760, ¶¶ 132-35 (2018) ("2018 Declaratory Ruling").

<sup>9</sup> *See, e.g., Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, Declaratory Ruling, 24 FCC Rcd 13994, 14020 ¶ 67 (2009), *aff'd*, *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013).

<sup>10</sup> 5 U.S.C. § 554(e); *accord* 47 C.F.R. § 1.2.

<sup>11</sup> *See TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002); *BellSouth T, Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1188 n.1 (6th Cir. 2001); *N.Y. State Thruway Auth. v. Level 3 Communications, LLC*, 734 F. Supp. 2d 257, 265 (N.D.N.Y. 2010); *Montgomery County*, 811 F.3d 121; *City of Arlington*, 668 F.3d 229; *Mobile S., LLC v. City of Roswell*, 135 S. Ct. 808, 817 (2015).

<sup>12</sup> 47 C.F.R. § 1.2(a) ("The Commission may . . . on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty").

<sup>13</sup> *See 2018 Declaratory Ruling* at ¶ 132.

the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site. The FCC has broad discretion to streamline or modify its rules “if they no longer serve the public interest in their current form.”<sup>14</sup> Last year, the Commission recognized that its wireless siting rules needed to be updated in light of the need to deploy the wireless infrastructure necessary for next generation wireless services.<sup>15</sup> The Commission further recognized the need for rule modifications given the significant changes to the type of infrastructure being deployed today versus the infrastructure being deployed at the time many of its siting rules were adopted.<sup>16</sup> As discussed below, the proposed narrow, carefully defined change is needed to remove an unnecessary obstacle to collocations, as Congress intended when adopting Section 6409(a), and is warranted given technology and network changes since adoption of the Collocation Agreement and Section 1.40001 of the Commission’s rules, and also because the more stringent treatment applied to collocations versus new structures by virtue of 1.40001(b)(7)(iv) does not serve the public interest.

Recognizing the need to reform the siting process and accelerate the use of existing infrastructure, Congress in 2012 adopted Section 6409(a) directing localities to 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.”<sup>17</sup> Congress did not define what constitutes a substantial change, leaving the Commission to define the phrase to eliminate ambiguity. The Commission decided to use the four-prong substantial change definition in the 2001 Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (“Collocation Agreement”) rather than the comparatively more recent definition in the 2004 Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process (“NPA”).<sup>18</sup> Under the fourth prong of the Collocation Agreement definition, a substantial change occurs if there would be any excavation outside the current tower site boundary.

The Collocation Agreement was adopted in 2001 when wireless carriers were in the process of deploying 2.5G voice and data services<sup>19</sup> and relying largely on new tower construction to supply the infrastructure necessary to provide these services. In order to combat

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<sup>14</sup> See, e.g., *Amendments to Streamline and Harmonize Various Rules Affecting Wireless Radio Services*, Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 13900, 13903 (2005).

<sup>15</sup> See *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Second Report and Order, 33 FCC Rcd 3102 (2018) (“2018 Order”).

<sup>16</sup> See, e.g., *2018 Order*, 33 FCC Rcd at 3105; *2014 Order*, 29 FCC Rcd at 12866-87.

<sup>17</sup> Section 6409(a) of the Spectrum Act is codified at 47 U.S.C. § 1455(a). An eligible facilities request, as that term is used in the statute, includes the collocation of new transmission equipment, as well as the replacement or removal of existing transmission equipment. 47 U.S.C. § 1455(a)(2).

<sup>18</sup> *2014 Order*, 29 FCC Rcd at 12945-49. Both the Collocation Agreement and the NPA were adopted to streamline and clarify the responsibilities of applicants to consider the effects of their proposed deployments on historic resources pursuant to Section 106 of the National Historic Preservation Act. Section 6409(a), by contrast, was intended to streamline the state and local planning review and approval process.

<sup>19</sup> See *Year 2000 Biennial Regulatory Review – Amendment of Part 22 of the Commission’s Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and other Commercial Mobile Radio Services*, Report and Order, 17 FCC Rcd 18401, 18410 (2002).

the “explosive growth” in the amount of new tower construction<sup>20</sup> necessary to support increasing demand for wireless services, the Collocation Agreement was crafted to promote collocation.<sup>21</sup> The signatories to the Collocation Agreement all agreed that “the effects on historic properties of collocations of antennas on towers, buildings and structures are likely to be minimal and not adverse” and that “collocations reduce both the need for new tower construction and the potential for adverse effects on historic properties.”<sup>22</sup> Accordingly, the signatories agreed that the Collocation Agreement “should be interpreted and implemented wherever possible in ways that encourage collocation.”<sup>23</sup>

Moving forward eighteen years from the Collocation Agreement, network architecture has changed dramatically. To meet the continued skyrocketing demand for wireless services, providers are rapidly densifying their networks and deploying 5G technology, which includes Multi-access Edge Computing (“MEC”) equipment. Introduction of higher frequency spectrum into the mix also requires wireless network densification. Providers are deploying an unprecedented number of cell sites to meet consumer demand.<sup>24</sup> Additionally, public safety networks – including the FirstNet network – are being expanded to improve coverage and capacity and rely heavily on collocating on existing sites to achieve these objectives. Our members inform us that compound expansion regulatory hurdles at many sites are impeding the life-saving work of rapidly deploying FirstNet facilities.

Due in large part to the success of the Collocation Agreement and Commission rules recognizing the benefits of and fostering collocation,<sup>25</sup> many towers no longer support antennas for just a single wireless provider – they now support antennas from multiple wireless entities (both commercial and public safety). However, the equipment sheds originally built at the sites often are full, and space no longer exists within the original site compounds to support the installation of additional equipment sheds.<sup>26</sup> Tower site compounds thus must be expanded slightly to permit the deployment of additional enclosures to house MEC and other equipment that will be connected to new, collocated antennas.<sup>27</sup> These minor expansions – even as little as one foot outside of the existing compound – would constitute a substantial change under Section 1.40001 because they would require excavation beyond the original tower site. These collocations thus would not qualify for treatment under Section 6409(a) of the Spectrum Act<sup>28</sup> simply because of the way the FCC chose to define when a compound expansion would be considered a substantial change.

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<sup>20</sup> See *The Wireless Bureau and Mass Media Bureau Announce the Release of a Fact Sheet Regarding the March 16, 2001 Antenna Collocation Programmatic Agreement*, Public Notice, 17 FCC Rcd 508, App. (2002).

<sup>21</sup> Collocation Agreement at 1-2.

<sup>22</sup> See Collocation Agreement at 1-2.

<sup>23</sup> *Id.*

<sup>24</sup> See *2018 Order* at ¶¶ 1, 41.

<sup>25</sup> See, e.g., 47 C.F.R. § 1.1306 note 1 (“The use of existing buildings, towers or corridors is an environmentally desirable alternative to the construction of new facilities and is encouraged.”).

<sup>26</sup> See *American Tower Ex Parte* at 6.

<sup>27</sup> *Id.*

<sup>28</sup> 47 C.F.R. § 1.40001.

The Commission has recognized that facilitating network densification “will require the elimination or mitigation of regulatory and other barriers to network deployment.”<sup>29</sup> The current definition of a substantial change adopted by the Commission in Section 1.40001(b)(7)(iv) of its Section 6409(a) implementing rules – which tracks the fourth prong of the Collocation Agreement definition of substantial change – is one such barrier.

The definition of substantial change in Section 1.40001(b)(7)(iv) also produces a counter-intuitive result. Specifically, collocations that involve minor (less than 30-foot) compound expansions are treated as substantial increases, but new structures that involve ground excavation up to 30 feet outside of the site boundary are not considered substantial increases. This result undermines the Commission’s goal of promoting collocation.

In sum, the current rule unnecessarily discourages the use of 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 safety, and/or foster new and beneficial competition. Consistent with recent Commission actions to revisit old siting policies to eliminate unnecessary impediments to wireless infrastructure deployment, WIA urges the Commission to revise its rules to follow the more recent approach taken in the NPA. Specifically, the Commission should update Section 1.40001(b)(7)(iv) to provide that excavation is considered a substantial change to a tower only if it occurs 30 feet or more outside the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site.

Pursuant to Section 1.1206 of the Commission’s rules, a copy of this letter is being filed in ECFS. Please do not hesitate to contact the undersigned with any questions.

Respectfully submitted,

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<sup>29</sup> 2018 Order, 33 FCC Rcd at 3102.