

**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)
)

**REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF
TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE UNITED STATES
CONFERENCE OF MAYORS, THE NATIONAL LEAGUE OF CITIES, THE
NATIONAL ASSOCIATION OF COUNTIES AND THE NATIONAL ASSOCIATION
OF TOWNS AND TOWNSHIPS**

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SUMMARY

The record does not support the Commission’s proposal to mandate local approval of “modifications” to “existing wireless towers” that fall outside the tower site. Comments supportive of this proposal fail to address the clear statutory limitations that preclude the Commission from implementing it. The programmatic agreements on historic preservation and environmental review are not related to Section 6409(a), and the desire for “consistency” between these agreements and the Section 6409(a) rules cannot override the statutory limits the Commission must confront here. Further, “consistency” is illusory given the significant differences between the agreements and the existing 6409(a) rules that will remain even if the proposed amendments are made. Finally, supportive commenters fail to acknowledge, let alone address, the risks and harms from precluding any substantive review of new deployments in areas far afield from the approved tower.

Most commenters support the Commission’s proposal to clarify that the “site” is limited to the area that has been reviewed and approved for wireless deployments outside the context of Section 6409(a). We agree. Several commenters suggest that this definition should be the later of this last review or the date of the Commission’s new rule, should one be adopted. This suggestion should be rejected, as it conflicts with the definition of “existing” and would lead to arbitrary tower boundaries. With the clarifications suggested on the Municipal Organizations’ Comments and Western Communities Coalition Comments, as well as the definition set forth in the Local Governments’ Comments, the proposal provides clarity and aligns with the Commission’s repeated assurances that Section 6409(a) could not be used to extend wireless facilities into areas never before reviewed or approved for such deployments.

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I. INTRODUCTION

The National Association of Telecommunications Officers and Advisors (“NATOA”),¹ the United States Conference of Mayors (“USCM”),² the National League of Cities (“NLC”),³ the National Association of Counties (“NACo”)⁴ and the National Association of Towns and Townships (“NATaT”)⁵ (together, the “Municipal Organizations”) submit these reply comments to address comments filed in response to the Notice of Proposed Rulemaking (“NPRM”) released

¹ NATOA’s membership includes local government officials and staff members from across the nation whose responsibility is to develop and administer communications policy and the provision of such services for the nation’s local governments.

² USCM is the official nonpartisan organization of cities with populations of 30,000 or more, which includes 1,192 such cities in the country today.

³ NLC is the voice of America’s cities, towns and villages, representing more than 200 million people.

⁴ NACo represents county governments, and provides essential services to the nation’s 3,069 counties.

⁵ NATaT represents the interests of more than 10,000 towns and townships across the country at the federal level.

on June 10, 2020, in the above-referenced dockets regarding proposed changes to the FCC’s rules implementing Section 6409(a) of the 2012 Spectrum Act (“Rules”).⁶

The comments submitted in response to the NPRM do not support the proposal to mandate local approval of deployments and excavations outside the “site” under section 1.6100(b)(7)(iv) of the Rules. While supportive commenters express a desire to deploy outside the site, no commenters explain how such a rule change could comply with the text of Section 6409(a), which does not reach deployments where there is no existing tower, nor address the significant implications of this proposal. The feigned need for consistency between the Rules and Nationwide Programmatic Agreements⁷ cannot justify a rule that would exceed the bounds of the statute and revoke the repeated assurances from this Commission that the statute does not permit deployments in areas not previously reviewed or approved for wireless facilities. As such, we urge the Commission not to move forward with this proposal.

The record demonstrates support for the proposed change to the definition of the term “site” in section 1.6100(b)(6), with the clarifications suggested in the Municipal Organizations’ Comments and as further clarified by the Local Governments’ Comments and the Western Communities Coalition’s Comments.⁸ To the extent those clarifications reflect the Commission’s

⁶ 47 U.S.C. § 1455(a) (“Section 6409(a”).

⁷ See 47 C.F.R. Part 1, App. B, Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (“Collocation NPA”); 47 C.F.R. Part 1, App. C, Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process § II.A.1 (together, the “NPAs”).

⁸ Comments of National Association of Telecommunications Officers and Advisors *et al.*, WT Docket No. 19-250, RM 11849 (July 22, 2020) (“Municipal Organizations’ Comments”) at p. 3-5; Comments of City of Portland, Oregon *et al.*, WT Docket No. 19-250, RM 11849 (July 22, 2020) (“Local Governments’ Comments”) at p. 8-9; 15-17; Comments of City of San Diego, California *et al.*, WT Docket No. 19-250, RM 11849 (July 22, 2020) (“Western Communities Coalition’s Comments”) at p. 9-11.

intent, we support the proposal to revise the definition of “site” to ensure that only areas that have been reviewed and approved for wireless deployments are subject to Section 6409(a).

II. DISCUSSION

A. No Commenters Provide Support for Reading Section 6409(a) as Authorizing Excavation or Deployment Outside the Existing Site

No commenter seriously suggests that the proposal to mandate local government approval of excavation and deployment outside the “site” is consistent with the statutory language, which limits the scope of Section 6409(a) to “modification of an existing wireless tower ... that does not substantially change the physical dimensions of such tower” The only industry commenter to address the statute in any meaningful way focuses on the definition of “substantial change,” and suggests it is a reasonable policy choice to determine that it is not substantial to deploy outside of the existing site.⁹ This analysis ignores the text of the statute, which the Commission may not do.

Deployment outside the site cannot reasonably be found to be a “modification of an existing wireless tower.” This is clear from the 2014 Order, in which the Commission unequivocally stated that the statutory term “existing” “requires that wireless towers or base stations have been reviewed and approved under the applicable local zoning or siting process.”¹⁰ Even assuming *arguendo* the proposal was a reasonable policy choice in interpreting the term

⁹ Comments of Crown Castle International Corp., WT Docket No. 19-250, RM 11849 (July 22, 2020) (“Crown Castle Comments”) at p. 16-17.

¹⁰ 2014 Order at ¶ 174. The Commission also found this definition to be consistent with “congressional intent that deployments subject to Section 6409(a) will not pose a threat of harm to local land use values.” *Id.* The same cannot be said of the proposal to mandate approval of deployments up to thirty feet outside the site regardless of the impact those deployments may have on local land use values.

“substantial change” (as explained below, it is not), it is nevertheless unreasonable to define that term in a manner that conflicts with the definition of “existing.”¹¹

As explained in our Comments, it is not reasonable to define a deployment outside the tower site as a non-substantial change.¹² Such a definition is unsupportable in no small part because the Rules provide no clear limit on the size of these undefined installations, making it impossible to determine that whatever deployments occur outside the site could never be “substantial.”

In addition to the unknown size of the additional deployments, the size of the area outside the site eligible for Section 6409(a) treatment is, in itself, substantial. The proposal provides that up to thirty feet on all sides of the site would be open for excavation and deployments.¹³ As stated in our Comments, this thirty feet would apparently extend not only from all sides of the approved tower compound, it would also extend from the approved easements, which by definition are part of the “site.”¹⁴ This huge area could easily exceed the total area of the approved tower site. Yet the proposal fails to consider the context of the existing site and easements and thus would deem not “substantial” a change that effectively doubles—or more—the ground area of a tower.

The record includes at least one example of the substantial nature of the requested change. In its Petition for Rulemaking, WIA included an example of a faux water tank that appears to sit on an existing site that is 29 feet by 18 feet.¹⁵ Extending thirty feet from all sides of this site could

¹¹ See, e.g., *Whitman v. American Trucking*, 531 U.S. 457 (2001); *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 321 (2014) (“[A]n agency interpretation that is inconsistent with the design and structure of the statute as a whole does not merit deference.”).

¹² Municipal Organizations’ Comments at p. 7-8.

¹³ NPRM at ¶ 55.

¹⁴ Municipal Organizations’ Comments at p. 6-7.

¹⁵ *Petition of Wireless Infrastructure Association for Rulemaking*, File No. RM-11849, (filed Aug. 27, 2019) (“WIA Petition for Rulemaking”), Appendix p. 2. The exhibit is a bit difficult to

add over 2,800 square feet to the site, more than quadrupling its current square footage. This does not include the expansion that would be allowed along what appears to be an 860-foot access easement leading to the site.

Industry commenters nevertheless justify the rule change by citing to the need to add more ground equipment near existing towers outside the rights of way. For example, WIA states “additional compound space has been needed at hundreds of its sites over the past two years to accommodate carrier needs.”¹⁶ Regardless of the accuracy of this assertion, it does not speak to the language of the statute. Congress expressly limited modifications subject to Section 6409(a) to those do not “substantially change the physical dimension” of the existing tower, not whatever space a wireless provider might want or need to use in the future. In other words, the “need” for more space says nothing about the substantiality of adding that space, and the latter is the relevant benchmark.

This logic—that the scope of the need justifies the rule change—suffers from the same flaw that rendered arbitrary and capricious the Commission’s 2018 Order exempting most small cell construction from historic-preservation and environmental review: If thirty foot expansions are necessary to accommodate such a large number of anticipated collocations, the Commission cannot reasonably conclude this proliferation of equipment outside of tower sites—which has no apparent cap in the rules—is not substantial.¹⁷

read. The description above is a good faith effort the accurately recite the numbers in the exhibit.

¹⁶ WIA Comments at p. 6.

¹⁷ See *United Keetoowah Band of Cherokee Indians, v. FCC*, 933 F.3d 728, 741 (D.C. Cir. 2019) (“The scale of the deployment the FCC seeks to facilitate ... makes it impossible on this record to credit the claim that small cell deregulation will ‘leave little to no environmental footprint.’”).

B. The NPAs Do Not Support, Let Alone Compel, the Rule Change

Industry commenters seem more concerned about the Rules' consistency with the NPAs related to Section 106 of the National Historic Preservation Act than its consistency with Section 6409(a). The NPAs do not implement Section 6409(a) and have no impact on local land use reviews. "Consistency" with them is an arbitrary goal given the different statutory contexts and the significantly different implications of avoiding federal historic preservation review as opposed to avoiding any local land use review whatsoever.

Commenters urging the rule change do not address the significant differences between the purpose of the NPAs and that of Section 6409(a). Commenters claim, for example, "the rule change proposed in this NPRM is needed to conform the Commission's rules implementing Section 6409 to the newly amended Collocation NPA."¹⁸ Others go further, arguing it is arbitrary and capricious and there is "no rational basis" to have the Section 6409(a) rules depart from these NPAs.¹⁹ These arguments rely on the unfounded assumption that Congress's intent in enacting Section 6409(a) was to mirror the NPAs and eliminate all substantive land use review of any facility that does not require Section 106 review per the NPAs. Not only is this assumption unfounded, it is expressly rejected by the text of the statute, which says "Nothing in paragraph (1) shall be construed to relieve the Commission from the requirements of the National Historic Preservation Act or the National Environmental Policy Act of 1969." This admonition cannot be squared with the notion that Congress intended Section 6409(a) to be coextensive with the NPAs. Had that been the intent, surely Congress would have said so or used language in the statute that mirrored the NPAs. Instead, Congress made the point that the requirements of Section 6409(a)

¹⁸ WIA Comments at p. 7.

¹⁹ Crown Castle Comments at p. 18; Comments of American Tower Corporation, WT Docket No. 19-250, RM 11849 (July 22, 2020) at p. 3.

and the requirements of historic preservation and environmental protection statutes—which are implemented in part through the NPAs—are distinct.

Further, the implications of the Rules are far different from that of the NPAs. The Collocation NPA exempts certain wireless collocations from a discreet federal statute—Section 106—so long as certain criteria are met and no complaints are filed. The NPAs leave undisturbed the state and local laws impacting wireless facility deployments. In fact, the preamble of the Collocation NPA states that it “will not limit State and local governments’ authority to enforce their own historic preservation requirements... .”²⁰ So even where the Collocation NPA exempts a deployment from review, it anticipated there could remain a safety valve of state and local review to protect historic interests.

By contrast, Section 6409(a) preempts local authority over not just local historic preservation requirements, but all other local land use requirements. Local governments have no authority to deny Section 6409(a) permit requests regardless of any resident complaints or apparent conflicts with local land use regulations. Whereas the Collocation NPA assumed state or local historic review may remain intact, there is no hope for alternative reviews or safeguards under Section 6409(a). In short, while not diminishing the importance of Section 106, the interests protected by Section 106 are just one of the many interests that may be protected by local land use review, and thus the implications of jettisoning the latter are not the same exempting collocations from the former. As such, the considerations for extending the scope of Section 6409(a) must be something more than “consistency” with the NPAs. This is especially true here given, as the Commission observed, the “congressional intent that deployments subject to Section 6409(a) will

²⁰ 47 C.F.R. Part 1, App. B, preamble.

not pose a threat of harm to local land use values.”²¹ The Commission cannot honor this intent by blindly following in the footsteps of the NPAs, which implement very different statutes and implicate very different interests.

The implications become clearer when one looks at the text of the Collocation NPA in contrast to the Rules. The Collocation NPA states an “antenna may be mounted on an existing tower ... without such collocation being reviewed through the Section 106 process set forth in the NPA,” whereas the Rules say “A State or local government may not deny and shall approve any eligible facilities request for modification of an eligible support structure”²² The scope of the preemption in the Rules is broader than the tailored exemption in the Collocation NPA. The practical implication is stark: Exclusion from Section 106 review does not mean an applicant can construct its facilities or forego local land use review; the application of Section 6409(a) does.

The difference becomes significantly greater when one looks at other definitions in the Rules, which do not align with the Collocation NPA. For example, the Collocation NPA does not define the term “existing,” and thus in amending the NPA to allow for deployment outside the tower site, the Commission did not need to confront the inconsistencies that arise in a similar amendment to the Rules.²³ Further, despite the assertion in the 2014 Order that it was adopting the Collocation NPA definition of “tower,” the final Rules did not do so. Rather, the Rules define “tower” to include the “site” and thus also related easements. One implication of this difference is that the Collocation NPA on its face applies only where an antenna is being mounted on a tower, whereas the Rules can be read to define a “collocation” as the placement of non-antenna

²¹ 2014 Order at ¶ 174.

²² 47 C.F.R. Part 1, App. B, IV; 47 C.F.R. § 1.6100(c).

²³ *See* Municipal Organizations’ Comments at p. 9 (“The Rule states that a tower is ‘existing’ if ‘it has been reviewed and approved under the applicable zoning or siting process, or under another State or local regulatory review process...’”).

“transmission equipment” in the tower site even where no antenna is simultaneously being added to the tower. In other words, under the Collocation NPA, no equipment will be added outside the site unless it is “added to the Tower ... as part of the original installation of the antenna.”²⁴ The Rules—which do not even define “antenna”—are not so constrained, appearing to allow the addition of equipment regardless of whether it is associated with an antenna that is collocated on the tower structure and with no limit in size or number.²⁵ Tying the ground deployment to a simultaneously collocated antenna on the tower—which the Collocation NPA does—maintains a connection to the tower and is a limiting factor that does not exist in the Rules.

The arguments for consistency between the NPAs and the Rules make no mention of these and other significant differences that show “consistency” to be a fallacy. Allowing Section 6409(a) collocations up to thirty feet outside the tower site would align one aspect of the Rules with the NPAs. But because material portions of the Rules and the NPAs do not align, the change will have consequences that do not arise under the NPAs. If “consistency” is the goal, then at a minimum the Rules would need to revise the terms “tower,” “collocation” and “site” to align with the narrower focus of the Collocation NPA (and eliminate the term “existing” altogether). That this is not suggested by commenters demonstrates that “consistency” is not the goal, because true consistency would require tighter constraints in the Rules than what currently exists. The argument for “consistency” is a fig leaf meant to cover a desire to dramatically expand the reach

²⁴ 47 C.F.R. Part 1, App. B, § I.A.

²⁵ Though the Rules deem it substantial to seek “installation of more than the standard number of new equipment cabinets for the technology involved, but not to exceed four cabinets” (47 C.F.R. § 1.6100(b)(7)(iii)), the Commission recently held, in its Declaratory Ruling in this docket, that this limit is not cumulative and thus there is no overall cap to the number of new equipment cabinets that may be added to a tower that is outside the rights of way. The Rules do not address the size of equipment cabinets or other “transmission equipment” that may be added to a tower site that is outside the rights of way.

of Section 6409(a) beyond the text of the law, the intent of Congress and the scope of the Collocation NPA the rule change is supposed to emulate.

C. The Record Fails to Address Significant Issues Raised by the Thirty-Foot Expansion Proposal

Not only does the record fail to provide a legal basis for the proposed thirty-foot expansion, it fails to address significant issues that would result from such a change to the Rules. The “need” to deploy outside tower sites cannot justify the policy reversal, particularly in light of the unaddressed implications of the change.

The record does not rebut the clear issues raised in the comments with allowing excavations and deployments thirty feet outside the site.²⁶ Industry commenters assert that perhaps constraints imposed by landowners could prevent these issues or point out that the new rule would “not authorize an applicant to bypass jurisdictional review to add new towers to a site.”²⁷ These speculative assurances cannot support the rule change. Landowners may have an economic incentive to agree to deployments outside the original tower site, or may have long ago relinquished in the lease the right to curtail those deployments. Whatever motivation underlies a landowner’s decision to allow expansion, it says nothing about compliance with local land use codes and values. Section 6409(a) does not substitute property owners’ judgment for that of local land use officials.

Though we agree with Crown Castle that a new tower is impermissible under Section 6409(a), as previously discussed, the Rules are silent on the size of these additional “deployments.” A standard of “something less than a tower” does not draw a clear line limiting the scale of Section 6409(a) deployments outside the site. While a property owner might happily accept a large new

²⁶ See, e.g., Municipal Organizations’ Comments at p. 10-11.

²⁷ Crown Castle Comments at p. 10; WIA Comments at p. 8.

shed thirty feet from the tower site (and the rent check that comes with it), her neighbor might not be so welcoming of this structure near the property line. Neighboring property owners should not be denied the opportunity to protect their own property rights and values through the applicable land use process, yet this is what the proposed thirty-foot rule does. It would provide no avenue for neighbors to ensure compliance with land use regulations in the thirty-foot zone on all sides of the tower site and its related easements.

Commenters that support the rule do not address that the “site” includes easements and thus the new rule would seem to allow excavation and deployment thirty feet on any side of an easement related to a tower. WIA flatly rejects the assertion that deployments could be hundreds of feet from the tower without addressing the fact that easements are included in the definition of “site,” rendering this scenario very likely.²⁸ In fact, the example attached to WIA’s Petition for Rulemaking shows a wireless site that includes what appears to be an “860’ Long Paved Access Road” from the street to the existing wireless tower site. This provides a clear illustration of how deployments could occur far from the tower site.²⁹

Neither the record nor the proposed rule addresses how deployments outside the site would interact with the “substantial changes” under the Rules. Crown Castle acknowledges that “the remaining substantial change criteria still limit modifications to those within Section 6409’s parameters,” but fails to confront the problems with trying to apply these criteria.³⁰ For example, for Section 6409(a) to apply, an application must comply with conditions associated with the siting

²⁸ WIA Comments at p. 8.

²⁹ WIA Petition for Rulemaking, Appendix p. 2. Though the exhibit does not state this access road is an easement, typically an access road is granted by easement and thus this provides an apt illustration of the issue regardless of whether this specific site includes an easement.

³⁰ Crown Castle Comments at p. 10-11.

approval for the tower (with certain limitations).³¹ Presumably a collocation in the thirty foot area outside the site also would need to comply with this requirement.³² Yet in the context of deployments outside the site, it is far from clear what compliance with this condition would look like. For example, if the approval for the tower required the sheds or equipment cabinets within the tower site to be enclosed in fencing or hidden by shrubs, would compliance with this condition mean expanding the perimeter of the existing fencing or shrubs to encompass the new deployment, or would it mean a separate fence or shrubs for the new deployment? What if the fence or shrubs are not appropriate or effective outside the site (a likely issue where the new deployment is within thirty feet from some point along the access easement, well away from the site and original screening)? Must the siting authority approve a request that includes the prior condition even if it is inappropriate or ineffective in the location outside the site? Could the siting authority impose alternative conditions that meet the goals of the original condition? If so, can it continue to enforce the original conditions within the site? Would the new condition fall under section 1.6100(b)(7)(vi) such that subsequent deployments outside the site must comply with it?

One can envision many other scenarios in which conditions of approval or concealment elements could be undermined by a deployment outside the site, even if the applicant agrees to comply with them. This significantly complicates approvals that were intended to be nondiscretionary because they were intended to apply only to non-substantial changes to existing towers. Whatever superficial appeal there might be to a “simple” expansion up to thirty feet outside the site, the on-the-ground realities are far more complex and not amenable to the streamlined and rigid Section 6409(a) process.

³¹ 47 C.F.R. § 1.6100(b)(7)(vi).

³² Nothing in the NPRM suggests that the proposed changes to section 1.6100(b)(7)(iv) would allow an applicant to ignore the requirements in section 1.6100(b)(7)(vi).

Finally, the record does not establish the proposed new rule is necessary or that it outweighs the many issues to which it gives rise. Industry commenters repeatedly assert the need for more space for more deployments yet provide no evidence these additional deployments would be delayed or denied if pursued outside the Section 6409(a) must-approve process. This unsubstantiated assumption is the only impetus for the proposed new rule. The lack of data makes any cost/benefit analysis impossible to conduct and fails to provide adequate support for the rule change.

That a collocation does not qualify under Section 6409(a) does not mean the collocation cannot happen or that it will be delayed. It simply means Section 6409(a) does not apply. Nothing in the record shows that non-Section 6409(a) applications are not approved or are unreasonably delayed. There's likely good reason for the dearth of evidence: Section 332(c)(7) applies to these deployments, which imposes its own set of constraints and shot clocks on local governments. All the rule change would do that Section 332(c)(7) does not is mandate approval of deployments in previously undisturbed ground that has never been deemed suitable for wireless deployments, effectively substituting the Commission's judgement for that of the local zoning board.

The lack of evidence to support the asserted need for compound expansions as must-approve applications under Section 6409(a) cannot outweigh local governments' significant reliance on the 2014 Order and Rules in granting tower approvals over the last six years. Local governments could not have planned for these types of issues because they could not have anticipated this rule change. Since the 2014 Order, local governments have approved towers with the understanding that modifications may be mandated by Section 6409(a) but any modifications outside the tower site would be subject to further review. The Commission gave repeated

assurances this was the case, both in the 2014 Order and in the litigation challenging it.³³ Neither the NPRM nor the record include any discussion of if or how the Commission intends to address the significant impacts of changing the rules after years of operating under the clear rules and Commission assurances that Section 6409(a) does not allow for deployments outside the current site.

D. The Record Supports a Definition of “Site” Limited to the Boundaries and Related Easements as Last Reviewed and Approved by the Appropriate Authority

As stated in our Comments, the Municipal Organizations agree—subject to the clarifications described therein and below—with the proposal in the NPRM to amend the term “site” in section 1.6100(b)(6).³⁴ Our clarifications to the proposal, which are reflected in the definition proposed in the Local Governments’ Comments,³⁵ address any concerns raised by industry commenters and provide a clear, objective standard for determining the “site” for purposes of Section 6409(a).

As explained in our Comments, the “site” should be limited to the area last reviewed and approved for wireless deployment in a non-discretionary process, regardless of the lease or other property boundaries at the time of that approval or the 6409(a) application. As succinctly stated in the Local Governments’ Comments, the “site” is the tower site and easement boundaries as “defined in the most recent permit granted at the discretion of an Authority.”³⁶ Not only is this clear and objective, it complies with the text and intent of Section 6409(a), as established in the

³³ See, e.g., at p. Municipal Organizations’ Comments at p. 2-3; Local Governments’ Comments at p. 16-17.

³⁴ NPRM at ¶ 55.

³⁵ Local Governments’ Comments at p. 8-9.

³⁶ Local Governments’ Comments at p. 8. See also Western Communities Coalition’s Comments at p. 9-10.

2014 Order, by ensuring that the Rules cannot be used to deploy in areas that have not been reviewed or approved for wireless deployments.

Several industry commenters suggest that this definition should be a “hybrid,” the later of the date of the last non-discretionary approval or the date of the Commission’s new rule, should one be adopted. This proposal is premised on the assertions that the proposal would otherwise give rise to disputes and create “regulatory uncertainty.”³⁷ Both assertions are incorrect. Any ambiguity in the NPRM is resolved in the Local Governments’ proposed definition. For example, Crown Castle expressed concerns over what the “last approval” means and what the “site” could be given the different lease arrangements that are common in the industry.³⁸ The Local Governments’ proposed definition provides a bright line: One simply looks to the previous discretionary approval of the tower site boundary and related easements. A non-discretionary approval, such as a Section 6409(a) approval, would not be permitted to move the boundary (a concept commenters do not dispute), nor would other discretionary approvals that do not address the boundaries of the tower site and easements.

While Crown Castle warns of possible disagreements over this concept, it is difficult to see how this would be problematic. The definition of “existing” in the Rules, which the Commission has not proposed to change, has always required that the tower to be modified must have been previously “reviewed and approved under the applicable zoning or siting process.” To qualify under Section 6409(a), then, the applicant must be prepared to show that the tower and its site previously was approved. Thus, our proposed definition of “site”—unlike the “hybrid” definition proposed by industry commenters—is consistent with the requirement that the modification occur

³⁷ Crown Castle Comments at p. 11.

³⁸ Crown Castle Comments at p. 12-13.

on an “existing” tower. Put another way, if, as Crown Castle suggests, an applicant cannot determine the previously approved boundaries of the tower site, then the applicant cannot establish that the tower is “existing” and is eligible for Section 6409(a) treatment in the first place.

By contrast, the “hybrid” proposal does not address the alleged ambiguities. Commenters reject as too ambiguous the suggestion to look back to the date of the last discretionary site approval (which, again, is required to establish an “existing” tower), yet find regulatory certainty in looking back to whatever site expansion may have been triggered by an expanded lease or other property interest on or before the date of the new rule. Not only is the latter far less clear, such a standard would seem to set establish multiple site boundaries for the same tower; apparently each lease or other property interest could establish its own site boundary for the tower, provided they did so before the date of the new rule. It is not clear if this rule would allow an applicant with post-rule lease rights to take advantage of the expanded “site” triggered by a third party’s lease rights that existed before the rule, or if only pre-rule parties will be allowed to use their expanded sites. Rather than clear up ambiguities and provide certainty, the “hybrid” rule creates another set of problems unaddressed in the comments, and ultimately establishes an arbitrary definition of “site.”

The proposal in the NPRM as clarified by the local government commenters does not, as Crown Castle suggests, place an “unknown number of prior site and compound expansions undertaken in reliance on the 2014 Order into regulatory uncertainty.”³⁹ First, as the comment itself states, there is no indication of how many sites may have been expanded under the industry’s interpretation of the Rules. Without more, the mere specter of vast regulatory uncertainty does not support their proposed “hybrid” rule.

³⁹ Crown Castle Comments at p. 14.

Second, and more important, nothing in the proposal, as clarified by the Local Governments' definition, creates uncertainty. If the site expansion was not approved through the applicable discretionary process, future deployments in the expanded area would not fall under Section 6409(a). This is a clear, bright line rule.

Third, and finally, that applicants "relied" on the Rules to deploy outside the site does not warrant a rule that codifies their past overreach.⁴⁰ Though perhaps not made express by supportive commenters, the only purpose for the "hybrid" rule proposing to set the site boundaries as of the date of a new rule is to thwart the local review this Commission repeatedly stated was required prior to application of Section 6409(a), and to do so only for those who ignored those statements and successfully thwarted that review in the past. As discussed above, the 2014 Order and the Commission's defense of it before the Fourth Circuit expressly stated that neither the statute nor the Rules allowed deployment in areas that had not been reviewed or approved for wireless facilities. Further, the definition of "existing" makes clear that the site must have been reviewed and approved to be eligible for Section 6409(a). Applicants that opted to ignore these clear statements and deploy outside the approved site should not be rewarded by being able to take further advantage of these unapproved site expansions.

Though Crown Castle suggests the 2014 Order and existing Rules support their hybrid definition—" [a] good analogy for this concept is the Commission's treatment of height extensions, for which the date of the Spectrum Act's passage functions as the date certain for determining baseline height"⁴¹—the opposite is true. In stark contrast to Crown Castle's proposal, the current height extension rule does not set a baseline that incorporates non-discretionary changes in the

⁴⁰ Crown Castle Comments at p. 14.

⁴¹ Crown Castle Comments at p. 11.

tower. It is thus more analogous with the Local Governments’ definition—it preserves the local review process by precluding non-discretionary changes from expanding the tower (or, in this case, the site).

In fact, in adopting the height extension rule, the Commission *rejected* the very suggestion Crown Castle makes here. The Commission “decline[d] to adopt industry commenters’ proposal always to measure changes from the last approved change or the effective date of the rules... .” It did so for the same reasons the Commission should so again—it would set a baseline that includes unapproved expansions:

[S]ince the Spectrum Act became law, approval of covered requests has been mandatory and therefore, approved changes after that time may not establish an appropriate baseline because they may not reflect a siting authority’s judgment that the modified structure is consistent with local land use values. *** Consistent with our determination above that a tower or base station is not covered by Section 6409(a) unless it received such approval, this approach will in all cases limit modifications that are subject to mandatory approval to the same modest increments over what the relevant governing authority has previously deemed compatible with local land use values.⁴²

The Commission’s reasoning was rooted in the text of Section 6409(a) and is as true today as it was in 2014. Allowing the leased or other property area, rather than the reviewed and approved boundaries, to dictate the “site”—even if (or perhaps especially if) it is limited to expansions prior to the new rule—is incompatible with Section 6409(a) and wholly arbitrary. It allows applicants and their landlords to set the site boundaries, blurs the boundary for subsequent collocations by third parties that do not have coextensive lease rights and removes from local governments their long-held authority to be make the “judgment” in the first instance of whether these deployments are “consistent” and “compatible with local land use values.”⁴³

⁴² 2014 Order at ¶ 197.

⁴³ *Id.*

III. CONCLUSION

For the reasons set forth above, we support the Commission's proposal in the NPRM to define the term "site" in section 1.6100(b)(6), with the clarifications described above, and oppose the proposal to amend section 1.6100(b)(7)(iv) to authorize effectively unreviewable deployments up to thirty feet outside the reviewed and approved tower site.

Respectfully submitted,



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