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Via ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: *Ex Parte* Presentation
*WT Docket No. 17-79, Accelerating Wireless Broadband Deployment by
Removing Barriers to Infrastructure Investment; WT Docket No. 16-421,
Streamlining Deployment of Small Cell Infrastructure*

Dear Ms. Dortch:

T-Mobile commends the FCC for its strong leadership in reducing barriers to wireless infrastructure siting. In the past two years, the Commission has, among other things, facilitated the deployment of replacement poles critical to support next generation wireless services; clarified key elements of the tribal review process applicable to all cell sites, large and small; established shot clocks to speed the review of small wireless facilities; and interpreted Sections 253 and 332 of the Communications Act to further accelerate the deployment of 5G-enabling wireless infrastructure.¹ As Commissioner Carr noted recently, “[t]his FCC has been focused on cutting red tape so that all Americans, regardless of where they live, can have access to fast, affordable connections, including through our world-leading 5G. Combined, the FCC’s actions have enabled the U.S. to leapfrog our global competitors and secure the largest 5G build in the world.”² T-Mobile strongly agrees.

¹ See, e.g., *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Report and Order, 32 FCC Rcd 9760 (2017); *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Second Report and Order, 33 FCC Rcd 3102 (2018), *affirmed in part, vacated and remanded in part sub nom. United Keetoowah Band of Cherokee Indians in Oklahoma et al. v. FCC*, No. 18-1129 (D.C. Cir. Aug. 9, 2019); *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, 33 FCC Rcd 9088 (2018), *recon. pending, appeals pending*.

² News Release, FCC Commissioner Brendan Carr, *D.C. Circuit Affirms Significant 5G Infrastructure Reforms* (Aug. 9, 2019), <https://docs.fcc.gov/public/attachments/DOC-358999A1.pdf>.

Consistent with these already significant infrastructure reforms, T-Mobile submits this *ex parte* filing to support recent proposals in the record for the FCC to clarify Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012³ – which has since been codified in the Communications Act⁴ – and FCC’s rules implementing that section.⁵ Section 6409(a) 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.”⁶ The FCC took important steps to implement Section 6409(a) in 2014,⁷ but the record shows that certain jurisdictions continue to act in ways that undermine the protections afforded by the statute and the Commission’s rules.⁸ The Commission can help address these remaining deployment barriers by clarifying certain provisions of Section 6409(a) and the FCC’s rules.

The Commission has ample authority to adopt these clarifications via declaratory ruling. The FCC has broad discretion as to how it conducts its proceedings,⁹ and this includes whether to proceed by declaratory ruling.¹⁰ Under the Administrative Procedure Act and the FCC’s rules, the Commission has authority to issue a declaratory ruling to terminate a controversy or remove uncertainty.¹¹ And it is well settled that agencies are authorized to interpret ambiguous

³ See, e.g., Petition for Declaratory Ruling filed by WIA – The Wireless Infrastructure Association, WT Docket 17-79 (Aug. 27, 2019); Letter from Alexi Maltas, Competitive Carriers Association, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (July 12, 2019) (“CCA *Ex Parte*”); Letter from Mathew H. Mandel, Wireless Infrastructure Association, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (May 20, 2019) (“WIA *Ex Parte*”); Letter from Richard Rossi, American Tower Corporation, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (Aug. 10, 2018) ; Letter from Kenneth J. Simon, Crown Castle International Corp., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (Aug. 10, 2018) (“Crown Castle *Ex Parte*”).

⁴ Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96 § 6409(a), 126 Stat. 156 (2012) (“Spectrum Act”), *codified as* 47 U.S.C. § 1455(a).

⁵ 47 C.F.R. § 1.6100.

⁶ Spectrum Act § 6409(a); 47 U.S.C. § 1455(a).

⁷ See *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd 12865 (2014) (“*Wireless Infrastructure Order*”), *aff’d*, *Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015).

⁸ See, e.g., CCA *Ex Parte* at 1-3; Crown Castle *Ex Parte* at 10-17; WIA *Ex Parte* at 2-3.

⁹ *FCC v. Schreiber*, 381 U.S. 279, 289-90 (1965); 47 U.S.C. § 154(j).

¹⁰ See *Viacom Int’l v. FCC*, 672 F.2d 1034, 1042 (2d Cir. 1982) (FCC has discretion to proceed by declaratory ruling rather than rulemaking); *Chisholm v. FCC*, 538 F.2d 349, 364-65 (D.C. Cir. 1976) (FCC may adopt new statutory interpretation through declaratory ruling rather than rulemaking).

¹¹ See 5 U.S.C. §554(e) (“The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.”); 47 C.F.R. § 1.2 (“The Commission may, in accordance with ... the

provisions in the statutes they administer,¹² and agencies may likewise clarify ambiguities in their own rules and provide additional guidance via declaratory ruling.¹³ Indeed, the Commission has already acted in 2014 to interpret ambiguities in Section 6409(a) to remove deployment barriers, and the exercise of that authority has been recognized and upheld by the Fourth Circuit.¹⁴

The Commission should use this authority to take the following steps to clarify certain provisions of Section 6409(a) and/or the FCC's rules:

- *Purpose-Built Concealment.* Some municipalities have asserted that any modifications of antennas defeat concealment, even if the appearance of the tower or structure has not changed. For example, some have asserted that existing walls and fences around non-camouflaged towers are concealment elements, such that if new equipment is visible over those walls or fences, the concealment elements have been defeated.¹⁵ Others have called out the dimensions of “every aspect” of a project as an element of concealment, meaning any proposed increase in size, even within the allowance of Sections 1.6100(b)(7)(i) and (b)(7)(ii), would defeat concealment.¹⁶ The FCC should clarify that only those permit requirements that would be defeated by a modification and were originally required specifically to hide the equipment or blend it with its surroundings (i.e., designed specifically for the purpose of concealment) would be considered concealment elements when determining whether a proposed modification qualifies as an eligible facilities request (“EFR”). The FCC should also specifically clarify that increasing the size of facilities (whether concealed or not) within the allowance of Sections 1.6100(b)(7)(i) and (b)(7)(ii) is not a

Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.”).

¹² *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (“*Brand X*”) (“[A]mbiguities in statutes within an agency’s jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps ... involves difficult policy choices that agencies are better equipped to make than courts. If a statute is ambiguous, and the implementing agency’s construction is reasonable, *Chevron* requires a federal court to accept the agency’s construction of the statute”) (citing *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843-44, 865-66 (1984)); *see also Time Warner Entm’t Co. v. FCC*, 56 F.3d 151, 174-76 (D.C. Cir. 1995) (agencies are empowered to interpret their organic statutes through rules and other mechanisms).

¹³ *See Connect America Fund*, Declaratory Ruling, 30 FCC Rcd 1587, 1588 n.3 (2015) (issuing declaratory ruling to interpret the VoIP symmetry rule in Section 51.913(b) of the Commission’s rules); *Reexamination of Roaming Obligations of CMRS Providers*, Declaratory Ruling, 29 FCC Rcd 15483, 15494 (WTB 2014) (issuing declaratory ruling to provide guidance on how to evaluate data roaming agreements under the Section 20.12(e) of the Commission’s rules), *apps. rev. pending*.

¹⁴ *See supra* note 7.

¹⁵ *See Crown Castle Ex Parte* at 12; *WIA Ex Parte* at 2; *CCA Ex Parte* at 2.

¹⁶ *Crown Castle Ex Parte* at 12.

substantial change, and that as explained below some changes to existing concealment elements are permissible under Section 6409. Municipalities should not be permitted to impose size-based concealment elements to evade the specific, objective size criteria the FCC adopted in 2014 to determine what qualifies as an EFR.

- *Concealment Element Changes Related to EFRs.* Some localities claim that increases in size of concealment elements, such as increasing the height or length of screen walls or the width of a cannister, in connection with a proposed modification automatically disqualify the modification as an EFR because they defeat the existing concealment. The Commission should clarify that even when a modification would change an element designed for concealment, minor changes do not defeat existing concealment and thus do not disqualify an otherwise qualified EFR from Section 6409(a) streamlined processing, as long as the change maintains the overall concealment approach and does not materially change the perception of the site. For example, a portion of a stealth pole may be expanded in connection with a modification that satisfies the size allowances of 1.6100(b)(7) without defeating concealment as defined under section 1.6100.
- *New Permits.* The FCC should clarify that new permit conditions, including concealment requirements, may not be placed on EFR permits unless the conditions imposed relate to generally applicable laws codifying objective standards reasonably related to health and safety. The FCC should also clarify that any permit requirement placed on the installation of otherwise eligible infrastructure, such as maximum height, width, paint color, fencing, mount size, etc., cannot be considered a concealment element for the purposes of determining whether a future modification qualifies as an EFR.
- *New Blanket Requirements.* Some municipalities have attempted to circumvent Section 6409(a) by adopting blanket requirements that all new permits, including EFR permits, for collocations and/or equipment replacements on pre-existing structures must be camouflaged or meet certain concealment measures.¹⁷ The FCC should clarify that such new ordinances conflict with the plain language of Section 6409 and Congressional intent and cannot be used to deny EFR treatment on the grounds that any new antenna will “defeat the existing concealment.”
- *Confirm Deemed Granted Status.* Some municipalities continue to circumvent the statute and the FCC’s rules where an application is deemed granted by withholding paperwork, thereby making it difficult to obtain building permits or other certifications.¹⁸ The FCC should take steps to facilitate the enforcement of applications that are deemed granted by clarifying that “deemed granted” means the project may proceed without additional permits. The FCC also should clarify that an approval with conditions different from those in the application is the same as a

¹⁷ Crown Castle *Ex Parte* at 11.

¹⁸ See, e.g., CCA *Ex Parte* at 1-2; Crown Castle *Ex Parte* at 15; WIA *Ex Parte* at 2.

denial, and that in the event of such a “conditional” approval, the applicant can treat it as a denial for purposes of enforcing deemed grant remedies.

Parties have raised additional issues the Commission also should clarify. For example, some have asked the Commission to clarify that the term “equipment cabinets” in the definition of “substantial change” includes only ground enclosures that house or are intended to house other equipment.¹⁹ Others have requested that the FCC clarify that jurisdictions may not foreclose future EFRs from Section 6409(a) treatment through private contracts or negotiations.²⁰ Parties also have asked the FCC to rule that any permit conditions imposed that contradict Section 6409(a) are impermissible and unenforceable, and that localities may not require applications to provide documentation beyond what is reasonably related to determining whether the proposed modification qualifies as an EFR. T-Mobile encourages the FCC to pursue these issues in addition to those detailed above.

Pursuant to Section 1.1206 of the Commission’s rules, we are filing an electronic copy of this letter in the above-captioned dockets.

Respectfully submitted,

/s/ Cathleen A. Massey

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¹⁹ See Letter from Joshua S. Turner, Counsel to Crown Castle International Corp., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2-3 (June 17, 2019).

²⁰ See Crown Castle *Ex Parte* at 13.