Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
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
	)	
Accelerating Wireline Broadband Deployment By Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84
	)	
Accelerating Wireless Broadband Deployment By Removing Barriers to Infrastructure Investment	)	WT Docket No. 17-79

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE UNITED STATES CONFERENCE OF MAYORS AND THE NATIONAL ASSOCIATION OF COUNTIES

Nancy L. Werner
General Counsel
National Association of Telecommunications Officers and Advisors

Tom Cochran
CEO and Executive Director
The United States Conference of Mayors

Matthew D. Chase
Executive Director
National Association of Counties

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A. INTRODUCTION

The National Association of Telecommunications Officers and Advisors ("NATOA"), the United States Conference of Mayors ("USCM") and the National Association of Counties ("NACo") (together, the "Municipal Organizations") submit these reply comments in the above-referenced dockets regarding the Petition for Rulemaking filed by the Wireless Infrastructure Association (WIA), a Petition for Declaratory Ruling filed by WIA, and a Petition for Declaratory Ruling filed by CTIA,[1] seeking changes to the FCC's rules implementing Section 6409(a) of the 2012 Spectrum Act[2] ("Rules") and Section 224 of the Telecommunications Act.[3]

The comments filed in this docket do not support the changes requested in the Petitions. As noted in the Municipal Organizations' Comments, the Petitions request far-reaching changes to the Rules that will have significant impacts in our communities. Among the many significant issues raised in this proceeding, the Petitions and some supporting commenters seek to write the word "existing" out of the text of Section 6409, resulting in municipalities having no choice but to approve deployments in locations that have never been reviewed or approved for wireless deployments. Exacerbating the impacts of this rewriting of the law is the request to include in the scope of must-approve eligible facilities requests ("EFRs") all required approvals, including health and safety permits such as electrical, structural and building permits. These outcomes are well beyond the scope of Section 6409, and as the record shows, have serious public safety implications.

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[1] Petition for Rulemaking, RM-11849 (filed Aug. 27, 2019) ("WIA Rulemaking Petition"); Petition for Declaratory Ruling filed by the Wireless Infrastructure Association, WT Docket No. 17-79 (filed Aug. 27, 2019) ("WIA Petition"); Petition for Declaratory Rulemaking filed by CTIA, WT Docket No. 17-79, WC Docket No. 17-84 (filed Sep. 6, 2019) ("CTIA Petition") (collectively, "Petitions").
[2] 47 U.S.C. § 1455(a) ("Section 6409").
[3] 47 U.S.C. § 224.

While we do not believe the record warrants further action, if the Commission intends to address any of the requests in the Petitions, it should do so through a careful rulemaking process that allows for meaningful comment on clear proposals set forth by the Commission.

B. DISCUSSION

1. The Record Does Not Warrant Action on the Petitions.

The record in this docket does not support the need for the changes and clarifications requested in the Petitions. Most commenters supporting the Petitions cite to the Petitions themselves as justifying the need for the proposed actions, offering little or no additional specific examples of alleged bad acts necessitating changes to the Rules. This lack of specificity warrants dismissal of the Petitions without further action, as the record refutes many of the specific allegations in the Petitions,[4] which themselves are largely recycled from previous filings in other dockets.[5]

Contrary to the allegations in the Petitions, the record shows that most delays in Section 6409 modifications are attributable to applicants, not to local governments.[6] The record also demonstrates the significant public safety implications should the Rules require local approval of an even broader range of modifications than currently required. For example, the City of New

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[4] *See, e.g.*, Joint Comments of the City of San Diego, *et al*. (Oct. 29, 2019) ("Comments of San Diego, *et al*.") at 1 n.3 (explaining that SeaWorld, California does not exist); at 32 (allegations against Douglas County, Colorado fail to include that the County's finding that the modification is not an EFR has been upheld by a District Court); at p. 62-65; 73-80 (providing detailed responses to allegations against many local governments).

[5] *See, e.g.*, WIA Petition at 3 n.9 (citing to an August 10, 2018 Crown Castle letter filed in WT Docket No. 17-79 ("2018 Crown Castle Letter"); and to a September 10, 2018 WIA letter that, in turn, cites to the 2018 Crown Castle Letter; and to a June 17, 2019 Crown Castle letter filed in WT Docket No. 17-79 ("2019 Crown Castle Letter")). Notably, the 2019 Crown Castle Letter repeatedly cited in the WIA Petition contains no specific examples of the alleged actions by local governments warranting the requested changes. *See also*, CTIA Petition at 9 n.16 (citing to an August 30, 2019 T-Mobile letter filed in WT Docket Nos. 17-79 and 16-421 that contains no specific allegations); CTIA Petition at 11 n. 22-24; 39 (citing to the 2018 Crown Castle Letter).

[6] *See, e.g.*, Comments of San Diego, *et al.* at 4-5; Comments of the National League of Cities *et al*. (Oct. 29, 2019) ("Comments of NLC, *et al.*") at 26-27.

York amply demonstrates the "many potential impacts to fire and other public safety operations if wireless infrastructure modifications are 'deemed granted' and allowed to proceed without sufficient review for compliance of applicable fire safety rules."[7] Other commenters describe additional safety standards that are at risk if local permitting processes are further curtailed, including "structural support standards, the National Electric Safety Code requirements, wind and ice load standards"[8] and "examination of structural stability, wind load, fire and electrical safety, [and] emergency egress[.]"[9] The record demonstrates that the proposals in the Petitions—requiring approval of modifications in areas never reviewed or approved for wireless deployments and subjecting health and safety permits to the shot clock—pose significant hazards that far outweigh the flimsy record of any need for changes to the Rules.

2. The Petitions Seek Significant Changes that Require a Rulemaking.

As noted in the Municipal Organizations' Comments as well as those of other commenters, many of the proposed "clarifications" are, in fact, changes to the Rules.[10] Not only does the Administrative Procedures Act require a rulemaking process to implement these changes, we believe such a process would further illuminate the many issues with the proposed changes and better inform the Commission of the significant, negative impacts of the proposed changes.

A rulemaking is necessary—if the Commission wishes to address the Petitions in the first place—because many of the proposals in the Petitions are either not specific enough to allow commenters to fully understand and comment on the precise changes and clarifications sought, or seek such specific "clarifications" that they actually rewrite the Rules. For example, the WIA

[7] Comments of the City of New York (Oct. 29, 2019) at 3.
[8] Comments of San Diego, *et al*. at 19.
[9] Comments of NLC, *et al*. at 15.
[10] *See* Comments of NATOA, *et al*. ("Municipal Organizations' Comments") at 4-6; s*ee, e.g.*, Comments of NLC, *et al*. at 2-3; Comments of San Diego, *et al*. at 41.

Petition asks that the Commission provide "[s]pecific guidance or examples on commonly required items that are not generally related to determination of a covered request" as a means of addressing supposed "process and/or information requirements that substantially delay, defeat or reduce the protections afforded under Section 6409(a)."[11] It is not clear which common and generally required zoning application items WIA would like the Commission to ban or what actions WIA would like the Commission to take to address other "process and/or information requirements." As such, commenters cannot address the changes or clarifications that may be made in response to this request.

The WIA Petition also requests that the Commission clarify that a Section 6409 application be deemed submitted upon a "good faith attempt" by the applicant to submit it. This proposal is at once too vague and ambiguous to allow for a clear understanding of how this standard would operate and also seeks a change to—not a clarification of—the current rule, which triggers the shot clock when an applicant actually submits an application.

This problem is exacerbated by the fact that the two Petitions for Declaratory Ruling seek clarifications on related issues but do not ask the Commission for the same relief. For example, WIA suggests that all necessary approvals are "deemed granted" and construction may begin if a deemed granted notice is not challenged within 30 days,[12] whereas CTIA suggests construction may begin "upon notice" from the applicant, which may be "day 61."[13] Yet another commenter suggests that local governments should be "subject to Commission sanction" for alleged misapplication of Section 6409.[14] There is no way to know which of these suggestions the

[11] WIA Petition at 21-24.
[12] WIA Petition at 7.
[13] CTIA Petition at 18-19.
[14] Comments of ExteNet Systems, Inc (Oct. 29, 2019) at 21.

Commission may entertain and thus comments may not sufficiently address all aspects or permutations of the various suggestions.

Finally, the laundry list of requested "clarifications" would lead to confusing and even contradictory outcomes. For example, Petitioners ask to include health and safety approvals in the shot clock, and thus these approvals would be "deemed granted" after expiration of that clock. What is left unclear is whether those approvals would also be must-approve under Section 6409, meaning that local governments not only have to act on those health and safety approvals within the shot clock, but they *could not deny* those approvals even if the application does not meet applicable health and safety codes. This omission dodges the serious health and safety issues of such an outcome as well as the legal question of the Commission's authority to add these approvals to the scope of an EFR.

Further, WIA does not address how the request to include these approvals in the shot clock relates to its other request for the Commission to affirm that EFR applications only include information to show the application is in fact an EFR.[15] It is not clear if this "clarification" would allow municipalities to require the EFR application to include the appropriate documentation needed for the health and safety reviews to take place.

As another example, WIA acknowledges that Section 1.6100(b)(7)(vi) disqualifies a modification under Section 6409 if it "does not comply with conditions associated with the siting approval of the construction or modification of the eligible support structure or base station equipment."[16] WIA does not ask the Commission to abandon this rule. Yet elsewhere, WIA asks the Commission to preclude any conditions of approval on EFRs other than "compliance with non-

[15] WIA Petition at 24.
[16] WIA Petition at 14-15.

discretionary codes reasonably related to health and safety… ."[17] This request would preclude local governments from imposing the very aesthetic conditions to modifications Section 1.6100(b)(7)(vi) anticipates and protects from being undermined by future modifications.

Perhaps most concerning, as discussed below, many of the proposed changes conflict with the current definition of "existing." Should the Commission "clarify" matters as proposed in the Petitions, the Rules would contain unworkable contradictions between the clarifications and the defined term "existing." These unresolved contradictions create significant confusion over what the Rules would mean should WIA and CTIA get the clarifications they request. A rulemaking process that includes a draft of the proposed amendments to the Rules likely would illuminate these types of potential conflicts and better inform the public of the proposed changes.

3. The Proposed Changes Write the Word "Existing" Out of Section 6409.

The Municipal Associations' Comments highlighted some of the many issues in the Petitions that counsel against taking action on the proposals. We will not reiterate those points here other than to highlight that the Petitions effectively ask the Commission to ignore the word "existing" in Section 6409. The Commission cannot and should not accede to these requests.

As most if not all commenters acknowledge, Section 6409 mandates approval only of insubstantial modifications of existing towers and base stations, which this Commission has found to mean those towers and base stations previously reviewed and approved for wireless deployments.[18] The "existing" requirement protects the public by ensuring that every site is subject to local review and approval before deployments are eligible for "must-approve" status. Any expansion of the tower or base station site—whether through lease amendments or the requested thirty-foot compound expansion—means deployments may occur in areas that have not

[17] WIA Petition at 21.
[18] *See* 47 C.F.R. 1.6100(b)(5).

undergone required reviews or approvals. Similarly, CTIA's suggestion that a base station include the entire structure would authorize deployments on portions of a building that have never undergone review for wireless facilities. There is no reasonable interpretation of the word "existing" that can include locations that have never been part of a tower or base station site or, worse yet, locations that never would have been approved in an initial application because they do not meet applicable requirements.

Exacerbating the problem is the suggestion that the health and safety reviews be subject to Section 6409. These review processes may catch significant problems with new deployments in previously unreviewed areas, yet they would be curtailed under the proposed expansion of the shot clock, and may even be "must-approve" reviews if they are deemed to fall under Section 6409. This interpretation would mandate approval of deployments in areas where not only has there been no zoning review, but there may not be meaningful health and safety reviews, either. This is undoubtedly not what Congress had in mind in requiring approval of insubstantial modifications to existing towers and structures.

4. The Petitions Would Stall, Not Stimulate, Wireless Deployments.

As noted in the Municipal Organizations' Comments and as raised by other commenters, the expansion of the Rules requested in the Petitions will have a chilling effect on wireless deployments that create the possibility of a future EFR.[19] Localities will be understandably reluctant to approve the initial use of a building for wireless equipment if that means the entire building is now open for additional facilities with limited or no ability to deny (or, if Petitioners have their way, condition) the request. The approval of a well-designed and thoughtfully-placed antenna should not lead to must-approve applications for more intrusive or unsafe antennas placed

[19] *See* Municipal Organizations' Comments at 11; Comments of San Diego, *et al*. at 39-40.

elsewhere on the structure, yet the Petitions raise the specter of just that by expanding the site beyond the approved location and calling into question what concealment elements the Commission will recognize (among other things).

As noted in our Comments, unlike Section 332(c)(7), Section 6409 precludes local governments from denying EFRs. This dramatic remedy was intended to apply only in very limited circumstances in which modifications to an existing tower or base station would not be substantial. Expanding the reach of this remedy into areas that have the significant public health, safety and welfare concerns documented in the record creates unacceptable safety hazards that would necessitate more deliberate consideration of where and when towers and base stations will be permitted in the first place.

C. CONCLUSION

For the reasons set forth above, we respectfully request that the Commission reject the proposals made in the Petitions. Should the Commission wish to pursue any of the proposals, we respectfully urge the Commission to issue a Notice of Proposed Rulemaking specifying the proposed changes to the Rules and providing ample time for commenters to develop a sufficient record to allow the Commission to evaluate the proposed changes.

Respectfully submitted,

Nancy L. Werner
General Counsel
NATOA
3213 Duke Street, #695
Alexandria, VA 22314
(703) 519-8035

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