

**Before the
Federal Communications Commission
Washington, D.C. 20054**

In the Matter of)	
Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies)	WT Docket No. 13-238
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)	WC Docket No. 11-59
2012 Biennial Review of Telecommunications Regulations)	WT Docket No. 13-32

COMMENTS OF THE COMMONWEALTH OF VIRGINIA

The Commonwealth of Virginia, Department of State Police (“Commonwealth”), by its counsel, hereby submits comments on behalf of its Statewide Agencies Radio System (“STARS”) in response to the September 26, 2013 Notice of Proposed Rulemaking (NPRM) in the above matter (FCC 13-122), inviting comments on interpretation and implementation of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 (“Spectrum Act”).

INTRODUCTION

STARS includes a public safety grade statewide integrated voice and mobile data network that uses a digital trunked VHF narrowband technology to support twenty-two state agencies. STARS relies on towers, owned and maintained by the Commonwealth, to transmit its land mobile and microwave radio signals. These towers are all built to the same high performance specifications in order to ensure high capacity microwave throughput and public safety grade reliability for the land mobile and microwave radio networks during the worst

weather events under current loading and after being fully loaded with pre-planned communications.

The Commonwealth, on behalf of STARS, wishes to offer comments in support of a limited interpretation of the Spectrum Act Section 6409(a) mandate - that states “may not deny and shall approve” - any eligible facilities request, namely that such mandate only applies to state action in a land use regulatory capacity, and should not be interpreted as opening to public use all state-owned towers such as those in the STARS public safety tower network.

BACKGROUND

As a twenty-two state agency public safety grade statewide system for voice and mobile data communications, STARS has been designed to be as secure as possible, with the exact location of its towers kept confidential. Va. Code §2.2-3705.2.14 specifically exempts STARS (or any other similar local or regional public safety communications systems) from the Virginia Freedom of Information Act.

In recent years, Virginia has experienced foreign terrorist attacks (the 9/11 attack on the Pentagon and 1993 attack outside CIA facilities in Langley, Virginia) and domestic terrorism (the 2002 Beltway Sniper attacks). Virginia has one of the highest concentrations of federal government facilities of any state in the nation, and many of these facilities could be prime targets for terrorist attacks (e.g, Pentagon and CIA facilities in northern Virginia, Fort Belvoir, Marine Corps Base Quantico, Langley Air Force Base, Fort Lee, and the immense Navy installations in Norfolk and other portions of Hampton Roads). Protection of the STARS public safety communications system, which would be used to respond to terrorist attacks (or respond to a natural disaster, such as a hurricane evacuation of Hampton Roads) is a primary goal and major concern of the Commonwealth. An advanced terrorist attack on STARS communications towers near a terrorist primary target could help prevent an organized response to the attack,

disrupting relief efforts and terrorist apprehension. For security reasons, allowing widespread easy access to STARS towers by non-government employees of private wireless service providers, suppliers and tenants is an open invitation to security problems.

In the 2010 Communications Sector –Specific Plan, an annex to the 2006 National Infrastructure Protection Plan, the U.S. Department of Homeland Security points out that National Goal 1 of the Communications Sector is to “protect and enhance the overall physical and logical health of communications.”¹

As part of maintaining the security of STARS, the Commonwealth normally does not disclose the location, structural or real estate details of its STARS tower system, all of which could facilitate attacks on the towers. The FCC and FAA may post some information but the Commonwealth strongly suggests that this old way of doing business needs to change in the new post 9/11 environment. The security routinely afforded federal law enforcement facilities and systems should similarly be provided to state and local public safety communications systems.

All STARS towers were engineered for high capacity microwave radio and specific current and future land mobile loading, along with building in reliability for short term weather events and long term aging. This additional engineering for maximum reliability was at considerable extra expense to the Commonwealth and should not be put at risk by third party use. Adding any extra loading to towers that exceeds our public safety reliability requirements should not be allowed unless the towers are strengthened or replaced to meet their original design specifications.²

¹ p. 3. Improving physical security at communications facilities is a key element of the Plan, *id.* at 47, with facility access controls and limiting access to protect the backbone identified as important measures. *Id.* at 51 and 58.

² Any collocation (whether by FirstNet or others) should meet existing STARS requirements for current and planned loading on any individual structural element (along with environmental issues such as wind speed with radial ice).

COMMENTS

The Commonwealth strongly agrees with the Intergovernmental Advisory Committee (“IAC”) Advisory Recommendation Number 2013-9 conclusion that the mandate in Section 6409 (a) that states or localities “may not deny and shall approve” any eligible facilities request applies only to governments acting in their role as land use regulators and not in their capacity as property owners³. The Commonwealth is encouraged by the Commission’s proposal in Paragraph 129 of the NPRM to adopt this IAC approach, but would suggest that this interpretation should be set forth in the proposed regulations.

The Commonwealth would note that since STARS does not regulate any private land use (zoning, permit approval or otherwise), and purely operates its tower system as a property/facilities owner, that it believes STARS could and should properly refuse any eligible facilities request. The Conference Report accompanying the Spectrum Act, discussing state and local “zoning law procedures”⁴ clearly indicates that Congress intended in the mandate language of Section 6049(a) to address state and local zoning and other land use procedures, and did not intend to transform all publicly owned tower and base station facilities into common carriers, open for use by the first applicants who wished to attach wireless facilities.

Any contrary interpretation, that a state or locality “may not deny and shall approve” requests, when applied to any tower or base station facility owned by a state or locality, would not only raise Tenth Amendment constitutional issues⁵ but would also raise Fifth Amendment

³ IAC Recommendation p. 3

⁴ See footnote 265 of NPRM

⁵ Compelling a State to enact a federal regulatory program, under Printz v. United States, 521 US 898, 933 (1997)

takings issues, with no mechanism established in the statute for just compensation.⁶ It could also create a rush by applicants asserting rights to be the first claimants to access any available public tower space at an undetermined cost, and without regard to the impact on national, state, and local security.

The Commonwealth believes that clarification of this issue is of sufficient importance that it should be incorporated into the regulation, and would therefore suggest that proposed 47 CFR §1.30001(c) be amended to read as follows:

(c) A State or local government, when acting in its capacity as a land use regulator, may not deny and shall approve any eligible facilities request for modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station, provided, however, that nothing herein shall impair the right of a State or local government, when acting in its capacity as the owner or lessor of a wireless tower or base station, in its discretion, to refuse facilities use or access requests to such wireless tower or base station, or to grant any facilities use or access requests on terms that the State or locality deems appropriate.

CONCLUSION

The Commonwealth urges the Commission to take action to make it very clear that the “may not deny and shall approve” language in Section 6409(a) of the Spectrum Act applies only to State and local action in a land use regulatory capacity, and does not have any bearing on the right of a State or locality to control use of wireless tower facilities or base station owned or

⁶ Constituting a permanent physical occupation taking without just compensation under Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), and with a federal taking of state property subject to the Fifth Amendment requirement of just compensation. U.S. v. Carmack, 329 U.S. 230 (1946).

leased by the State or locality. The legislative history of the Spectrum Act, as well as practical concerns, which include national security, demand this result.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF STATE POLICE

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of January, 2014, a copy of the foregoing Comments of the Commonwealth of Virginia was sent by email to peter.trachtenberg@fcc.gov and mania.baghdadi@fcc.gov.


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