

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Acceleration of Broadband Deployment by Improving Wireless 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 CTIA – THE WIRELESS ASSOCIATION®

Michael F. Altschul
Senior Vice President, General Counsel

Scott K. Bergmann
Vice President, Regulatory Affairs

Brian M. Josef
Assistant Vice President, Regulatory Affairs

CTIA-The Wireless Association®
1400 Sixteenth Street, NW
Suite 600
Washington, DC 20036
(202) 785-0081

February 3, 2014

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY	2
DISCUSSION	4
I. TEMPORARY TOWERS SHOULD BE EXEMPT FROM THE TOWER REGISTRATION 30-DAY PUBLIC NOTICE REQUIREMENT	4
A. The Proposed Exemption Would Serve the Public Interest.....	6
B. The Exemption Should Not Be Limited to Specific Types of Towers	7
C. Post-Construction Environmental Notices Should Not Be Required	8
D. The Exemption Should Continue to Apply to Temporary Towers that Remain Deployed After 60 Days Only if Certain Criteria Are Satisfied	9
II. CLARIFICATION OF SECTION 6409(A) IS NECESSARY TO REMOVE UNCERTAINTY	9
A. Definitional Clarifications	11
1. Existing Wireless Tower or Base Station	11
2. Collocation.....	13
3. Substantially Change the Physical Dimensions	13
B. Implementation Issues	14
III. THE SHOT CLOCK SHOULD BE MODIFIED IN THE WAKE OF SECTION 6409 ENACTMENT.....	16
IV. ORDINANCES ESTABLISHING PREFERENCES FOR SITING WIRELESS FACILITIES ON MUNICIPAL PROPERTY MAY VIOLATE SECTION 332(C)(7).....	20
V. THE COMMISSION CAN ENSURE THAT DAS AND SMALL CELL DEPLOYMENTS ARE SUBJECT TO MINIMAL DELAY	21
A. DAS and Small Cell Deployments Are Covered by Section 6409 and the Commission’s Shot Clock.....	21
B. The FCC Should Streamline Its Environmental Review Process for DAS and Small Cell Technologies	22
VI. STREAMLINING THE WIRELESS SITING PROCESS WOULD FACILITATE EFFORTS TO IMPROVE NETWORK RESILIENCY AND RELIABILITY	23
CONCLUSION.....	23

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Acceleration of Broadband Deployment by Improving Wireless 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 CTIA – THE WIRELESS ASSOCIATION®

CTIA – The Wireless Association® (“CTIA”)¹ submits these comments in support of the Commission’s *Notice of Proposed Rulemaking* proposing to simplify the wireless siting process.² Expediting the wireless siting process is consistent with congressional directives and is essential if carriers are to meet public demand for wireless broadband services. CTIA supports the Commission’s efforts to streamline and improve the wireless siting process. In particular, as discussed below, the Commission should (i) exempt temporary towers from the 30-day public notice requirement associated with tower registrations, (ii) clarify certain provisions of Section 6409(a) to eliminate uncertainty, (iii) fine tune the existing collocation and new build Shot

¹ CTIA is the international organization of the wireless communications industry for both carriers and manufacturers. Membership in the organization covers Commercial Mobile Radio Service (“CMRS”) providers and manufacturers, including cellular, Advanced Wireless Service, 700 MHz, broadband PCS, and ESMR, as well as providers and manufacturers of wireless data services and products.

² Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, *Notice of Proposed Rulemaking*, 28 FCC Rcd 14238 (2013) (“NPRM”).

Clocks, and (iv) clarify that distributed antenna systems (“DAS”) and other small cell deployments are covered by Section 6409(a) and the Shot Clock.

INTRODUCTION AND SUMMARY

Expediting the wireless siting process is essential to satisfying the demand for wireless broadband services. Congress has directed the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans” and to “remove barriers to infrastructure investment.”³ More recently, Congress enacted Section 6409(a) of the Middle Class Tax Relief and Job Creation Act to ease the burdens of infrastructure deployment.

The Administration also has recognized the need to expedite the wireless siting process and the need for wireless broadband deployment. During his 2011 State of the Union Address, President Obama stated that his Administration would facilitate the deployment of next generation high-speed wireless coverage to 98 percent of all Americans by 2016.⁴ To achieve this objective, President Obama issued Executive Order 13616 which established a multi-agency working group to streamline access to land controlled by the federal government.⁵

The Commission also has long been committed to expediting the deployment of the infrastructure needed to support advanced wireless broadband services. The Commission’s

³ 47 U.S.C. § 1302(a).

⁴ Address Before a Joint Session of the Congress on the State of the Union, Daily Comp. Pres. Docs., 2011 DCPD No. 00047, p. 6 (Jan. 25, 2011), *available at* <http://www.gpo.gov/fdsys/pkg/DCPD-201100047/pdf/DCPD-201100047.pdf>; *see also* Remarks by the President on the National Wireless Initiative in Marquette, Michigan, Daily Comp. Pres. Docs., 2011 DCPD No. 00079, p. 5 (Feb. 10, 2011), *available at* <http://www.gpo.gov/fdsys/pkg/DCPD-201100079/pdf/DCPD-201100079.pdf>.

⁵ Accelerating Broadband Infrastructure Deployment, Exec. Order 13616, 77 Fed. Reg. 36903 (June 20, 2012).

National Broadband Plan (“NBP”)⁶ concluded that wireless infrastructure siting is often a difficult and time-consuming process that discourages private investment through regulations such as permitting and zoning rules.⁷ The NBP provided a variety of recommendations to facilitate infrastructure deployment⁸ and the Commission has acted on those recommendations.⁹ For example, in recognition of the delays incurred in local permitting, the Commission adopted 90-day and 150-day Shot Clocks for local governments to decide on wireless siting applications.¹⁰

The instant *NPRM* seeks comment on additional steps that the Commission can take to facilitate wireless siting. The Commission correctly notes that the ability of wireless providers to meet the demand for wireless broadband services is dependent on “the extent to which they can deploy new or improved wireless facilities or cell sites.”¹¹ It also correctly notes that various

⁶ FCC, Connecting America: The National Broadband Plan (2010), <http://download.broadband.gov/plan/national-broadband-plan.pdf>.

⁷ *Id.* at 109.

⁸ *Id.*

⁹ See, e.g., Implementation of Section 224 of the Act, *Report and Order and Order on Reconsideration*, 26 FCC Rcd 5240 (2011), *aff’d sub nom. American Elec. Power Service Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 118 (2013); 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, *Notice of Inquiry*, 26 FCC Rcd 5384 (2011) (“*Broadband Acceleration NOI*”).

¹⁰ See CTIA 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 (2009) (“*Shot Clock Declaratory Ruling*”), *recon. denied*, 25 FCC Rcd 11157 (2010), *aff’d sub nom. City of Arlington, Texas v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff’d*, 133 S.Ct. 1863 (2013).

¹¹ *NPRM* at ¶ 2.

regulatory processes delay the deployment of such infrastructure.¹² CTIA thus supports the Commission’s conclusion that “eliminating any steps associated with [siting] processes that may not be needed” is “an important public goal” and would provide “significant benefit.”¹³

Eliminating unnecessary delays – and generally simplifying the wireless siting process – also is important to ensure network resiliency and reliability. Wireless carriers continue to deploy additional infrastructure designed to minimize disruptions from natural and man-made disasters. The speed and ability to deploy the infrastructure necessary to improve network resiliency is dependent on wireless siting policies.

In sum, CTIA urges the Commission to act expeditiously to (i) exempt temporary towers from the 30-day public notice requirement associated with tower registrations, (ii) clarify certain provisions of Section 6409(a) to eliminate uncertainty, (iii) fine tune the existing collocation and new build Shot Clocks, and (iv) clarify that DAS and other small cell deployments are covered by Section 6409(a) and the Shot Clock.

DISCUSSION

I. TEMPORARY TOWERS SHOULD BE EXEMPT FROM THE TOWER REGISTRATION 30-DAY PUBLIC NOTICE REQUIREMENT

CTIA urges the Commission to adopt its proposal to codify the exemption for temporary towers.¹⁴ On December 21, 2012, CTIA filed a Petition for Expedited Rulemaking asking the Commission to revise Section 17.4(c)(3)-(4) of its rules¹⁵ to exempt certain temporary towers from the environmental notification requirements associated with the antenna structure

¹² *Id.* at ¶ 3.

¹³ *Id.*

¹⁴ *Id.* at ¶¶ 68-89.

¹⁵ 47 C.F.R. § 17.4 (c)(3)-(4).

registration process.¹⁶ CTIA requested the exception because the notification requirements would have the unintended consequence of precluding CMRS licensees from quickly erecting and operating temporary towers in response to short-term, unanticipated events.¹⁷

Under CTIA's proposal, temporary towers would be exempt from the environmental notification requirements if they: (i) will be in use for 60 days or less; (ii) require the filing of Form 7460-1 with the FAA; (iii) do not require marking or lighting pursuant to FAA regulations; and (iv) will be less than 200 feet in height.¹⁸ CTIA also requested a waiver of the notification requirements for towers meeting these criteria during the pendency of the requested rulemaking.¹⁹ All commenters supported CTIA's proposal.²⁰

On May 16, 2013, the Commission granted the requested waiver²¹ but limited its applicability to "those proposals that either involve no excavation or involve excavation where the depth of previous disturbance exceeds the proposed construction depth (excluding footings and other anchoring mechanisms) by at least two feet."²² The Commission properly concluded that towers covered by the proposal "rarely generate public comment regarding potentially

¹⁶ CTIA Petition for Expedited Rulemaking, RM-11688 (filed Dec. 21, 2012).

¹⁷ *Id.* at 1, 3-7.

¹⁸ *Id.* at 4.

¹⁹ *Id.* at 11-12.

²⁰ Amendment of Parts 1 and 17 of the Commission's Rules Regarding Public Notice Procedures for Processing Antenna Structure Registration Applications for Certain Temporary Towers, *Order*, 28 FCC Rcd 7758, 7761 ¶ 8 (2013) ("Waiver Order").

²¹ *Id.* at ¶ 18.

²² *Id.* at ¶ 12.

significant environmental effects and rarely are determined to require further environmental processing.”²³

CTIA supports the Commission’s proposal to codify the exemption for temporary towers.²⁴ As the Commission explains, it has “discretion to identify particular circumstances in which inviting public involvement is impracticable or inappropriate.”²⁵ Moreover, “the environmental notice requirements will typically be impracticable for temporary towers that meet the criteria” set forth in the Waiver Order and any detriment would be outweighed by “the risk that carriers will not be able to meet short-term capacity needs” if compliance with the notification requirements remained mandatory.²⁶ Adoption of the proposed exemption for temporary towers will “remove an administrative obstacle to the availability of broadband and other wireless services during major events and unanticipated periods of localized high demand.”²⁷

A. The Proposed Exemption Would Serve the Public Interest

The expected public interest benefits associated with the proposed exemption are substantial. Absent the FCC’s waiver, carriers would have been precluded from deploying temporary towers or forced to seek individual waivers of the notice requirements for each temporary tower. The proposed exemption is superior to a waiver procedure because the exemption will allow for the timely deployment of a temporary tower while the waiver procedure

²³ *Id.* at ¶ 11 (citation omitted).

²⁴ *NPRM* at ¶¶ 68-89.

²⁵ *Id.* at ¶ 79.

²⁶ *Id.*

²⁷ *Id.* at ¶ 68.

is unlikely to be concluded in a timely manner. For example, if rescue workers request additional capacity from a carrier to help volunteers in an area communicate in a search effort, every moment that the capability is unavailable endangers the life of the lost person. The proposed exemption enables carriers to meet this pressing need, while a waiver approach would require the carrier to obtain FCC approval. The waiver process also would unnecessarily divert FCC resources that could be better used elsewhere, and delay the deployment of temporary towers. The Commission's conclusion that it is unlikely that temporary towers will pose an environmental issue further undermines any rationale for the waiver process.

B. The Exemption Should Not Be Limited to Specific Types of Towers

CTIA supports both the adoption of the proposed exemption from the environmental notice requirements and the FCC's specific enumerated criteria:

- The antenna structure is not intended to be used for more than 60 days;
- Construction of the antenna structure requires the filing of Form 7460-1 with the FAA;
- The antenna structure does not require marking or lighting pursuant to FAA regulations;
- The antenna structure will be less than 200 feet in height;
- The antenna structure will involve either no excavation or excavation where the depth of previous disturbance exceeds the proposed construction depth (excluding proposed footings and other anchoring mechanisms) by at least two feet; and
- Construction of the antenna structure does not require the filing of an Environmental Assessment.²⁸

Despite carefully tailoring these criteria, the Commission asks whether the rules should incorporate specific types of facilities and structures that would be covered by the exemption.²⁹

CTIA does not support adoption of any such list because it likely would have “unintended

²⁸ *NPRM*, Appendix A (Proposed Section 17.4(c)(1)(vii)).

²⁹ *Id.* at ¶ 87.

consequences, such as inadvertently excluding new technologies or types of structures.”³⁰ If a structure satisfies the six specific criteria set forth in the proposed rule, the exemption should apply.

Given the rapid development of technology and the myriad types of facilities and structures, any attempt to formulate a comprehensive list is unlikely to succeed. The list likely would generate debate, waiver requests, and delays as applicants and local jurisdictions argued over (i) the effect of the FCC not including a particular facility or structure on the list, and (ii) whether the applicant had properly characterized its facility or structure. Invariably, disputes over the list would prevent carriers from deploying in a timely manner the technology and facilities that would be optimal in a given situation. Carriers should have the flexibility to choose any type of tower or structure that would meet their needs, provided the eligibility criteria in the proposed rule are satisfied.

C. Post-Construction Environmental Notices Should Not Be Required

CTIA agrees with the Commission’s tentative conclusion that post-construction environmental notices should not be required for temporary towers falling within the exemption.³¹ Post-construction notices for covered temporary towers would impose unnecessary burdens on both carriers (preparing the notices) and the Commission (reviewing and maintaining the notices) with no corresponding public benefit, given that these installations are not expected to have significant environmental effect and because the tower deployments would be over by the time the local and national notice periods had concluded.³²

³⁰ *See id.*

³¹ *Id.* at ¶ 85.

³² *See id.*

D. The Exemption Should Continue to Apply to Temporary Towers that Remain Deployed After 60 Days Only if Certain Criteria Are Satisfied

The Commission correctly recognizes that there may be some instances where, subsequent to deployment, a carrier determines that a temporary tower covered by the exemption must be deployed for longer than 60 days.³³ To ensure the integrity of the 60 day limit, a carrier should only be permitted to keep a tower deployed for more than 60 days pursuant to the exemption in limited circumstances. To qualify for an extension under the exemption, a carrier should be required to:

- Seek an extension at least 10 days prior to the expiration of the initial 60 day period; and
- Provide a compelling justification in support of keeping the temporary tower deployed for up to an additional 60 days.³⁴

Requiring a carrier to satisfy these criteria should be sufficient to safeguard against concerns of potential abuse of the exemption.

II. CLARIFICATION OF SECTION 6409(a) IS NECESSARY TO REMOVE UNCERTAINTY

Congress enacted Section 6409(a) of the Middle Class Tax Relief and Job Creation Act to “advance wireless broadband service.”³⁵ Section 6409(a) establishes a national collocation-by-right principle by providing that a state or local government “may not deny, and shall 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

³³ *Id.* at ¶ 88.

³⁴ For example, if the tower was requested by a police department searching for a missing person or suspect, a letter from the police department stating that the search is still underway and the tower remains necessary should constitute a compelling justification for keeping the tower deployed beyond the initial 60 day period.

³⁵ *See id.* at ¶ 91 (citing H.R. Rep. 112-399 at 136 (2012)).

station.”³⁶ An “eligible facilities request,” in turn, is defined as “any request for modification of an existing wireless tower or base station that involves” the collocation, removal, or replacement of transmission equipment.³⁷

Representative Upton, the sponsor of Section 6409, explained that the purpose of the provision was to “streamline[] the process for siting of wireless facilities by preempting the ability of State and local authorities to delay collocation of, removal of, and replacement of wireless transmission equipment.”³⁸ Creative interpretations that are inconsistent with this goal are not credible.

On January 25, 2013, the Wireless Telecommunications Bureau (“Bureau”) issued a Public Notice clarifying various terms and phrases contained within Section 6409(a).³⁹ Although CTIA generally agrees with many of the Bureau’s interpretations, a few appear inconsistent with congressional intent.⁴⁰ Despite the broad scope of Section 6409(a) to facilitate wireless collocations, some parties have publicly criticized that the Bureau’s interpretations as flawed and have argued for far narrower interpretations.⁴¹ CTIA believes that this rulemaking provides the Commission with an opportunity to gather and analyze conflicting interpretations

³⁶ 47 U.S.C. § 1455(a) (codifying Section 6409(a)).

³⁷ 47 U.S.C. § 1455 (a)(2).

³⁸ 158 Cong. Rec. E237, E239 (Daily ed. Feb. 24, 2012) (extended remarks of Rep. Fred Upton) (“Upton Statement”).

³⁹ Wireless Telecommunications Bureau Offers Guidance on Interpretation of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, *Public Notice*, 28 FCC Rcd 1 (WTB 2013) (“*Section 6409(a) PN*”).

⁴⁰ As there was no solicitation of public comment prior to the *Section 6409(a) PN*, CTIA welcomes this opportunity for the public to provide definitional input.

⁴¹ See *NPRM* at ¶ 96 & n.215.

and points of view and provide valuable guidance concerning the proper definition of terms left undefined in Section 6409(a),⁴² as well as implementation issues.⁴³

A. Definitional Clarifications

1. EXISTING WIRELESS TOWER OR BASE STATION

Wireless. The Commission commonly uses the generic term “wireless” to include a wide variety of mobile and fixed common carrier and private radio services. For example, the *Fifteenth CMRS Competition Report* makes clear that “wireless” describes both mobile and fixed services, and both common carrier and private operators.⁴⁴ It would be inconsistent with underlying purpose of Section 6409(a) – to “advance wireless broadband service”⁴⁵ – to limit “wireless” to common carrier services given that commercial wireless broadband services generally are classified as non-common carrier services. CTIA thus supports the Commission’s proposal “to find that Section 6409(a) ‘applies to the collocation, removal, or replacement of equipment used in connection with any Commission-authorized wireless transmission, licensed or unlicensed, terrestrial or satellite, including commercial mobile, private mobile, broadcast, and public safety services, as well as fixed wireless services such as microwave backhaul or fixed broadband.’”⁴⁶

Tower. As noted by Representative Upton, the purpose of Section 6409(a) was to preempt “the ability of State and local authorities to delay collocation of, removal of, and

⁴² *Id.* at ¶ 96.

⁴³ *Id.* at ¶¶ 123-27.

⁴⁴ *See, e.g., Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Fifteenth Report, 26 FCC Rcd 9664, 9694 n.49, 9807 (2011).

⁴⁵ *See NPRM* at ¶ 91 (citing H.R. Rep. 112-399, at 136 (2012)).

⁴⁶ *Id.* at ¶ 104 (citation omitted).

replacement of wireless transmission equipment.”⁴⁷ The Commission has correctly noted that, “[a]t a *minimum*, ‘tower’ would appear to include, as in the [Nationwide Programmatic Agreement], structures built for the sole or primary purpose of supporting antennas used for any wireless communications service. *However*, many other types of structures, from buildings and water towers to streetlights and utility poles” are also used to support antennas.⁴⁸ Congress certainly did not intend to preempt state and local actions delaying collocations only on towers – structures that historically generate much controversy – and simultaneously preclude timely issuance of local permits for collocations on existing structures. Moreover, any such limitation would be inconsistent with the Commission’s long standing preference for collocations on existing structures.⁴⁹

Base Station. The term “base station” has a longstanding and unambiguous meaning in radio communications, both domestically and internationally. CTIA supports the Commission’s tentative conclusion that, consistent with these longstanding definitions, a base station includes transmitting, receiving, and all other equipment (including coaxial cable, primary power, and backup power) needed at a particular location for communication by radio with mobile units.⁵⁰

⁴⁷ Upton Statement, 158 CONG. REC. at E239.

⁴⁸ *NPRM* at ¶ 108 (emphasis added).

⁴⁹ *See Implementation of the National Environmental Policy Act of 1969, Report and Order*, 49 FCC 2d 1313, 1324 (1974) (finding that mounting an antenna on an existing building or tower “has no significant aesthetic effect and is environmentally preferable to the construction of a new tower, provided there is compliance with radiation safety standards....”). Although the Bureau previously proffered a more narrow interpretation of the term “tower” as used in Section 6409(a), it appears that the Bureau incorrectly attempted to conform the definition to existing “tower” definitions set forth in the Commission’s rules, rather than conforming the definition to congressional intent. *See Section 6409(a) PN*, 28 FCC Rcd at 3. Moreover, as noted above, this interpretation was provided without first obtaining public comment.

⁵⁰ *See NPRM* at ¶ 110.

2. COLLOCATION

The Commission should define “collocation” as: “the mounting or installation of an antenna on an existing tower, building or structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes.” This approach would be consistent with the 2001 and 2004 Nationwide Programmatic Agreements (“NPAs”) and ensure timely build-out of fully functioning systems.⁵¹ Wireless base stations and the systems in which they are integrated cannot operate without both transmit and receive antennas – therefore receive antennas should be included in the definition of collocation. Otherwise, broadband deployment would be frustrated as it could allow localities to contend that receive antennas still remain subject to local review.

Similarly, under the 2004 NPA, “antennas” are defined to include “*on-site* equipment, switches, wiring, cabling, power sources, shelters or cabinets associated with the antenna. . . .”⁵² The Commission thus should make clear, especially given the importance of network resiliency, that collocation proposals for Section 6409(a) purposes include *on-site* equipment, such as generators, that may be deployed to improve network resiliency and reliability.

3. SUBSTANTIALLY CHANGE THE PHYSICAL DIMENSIONS

Section 6409(a) applies to equipment replacement and collocations that do not “substantially change the physical dimensions” of an existing wireless tower or base station. This phrase is undefined. To eliminate any ambiguity, the Commission should determine that this phrase is synonymous with the phrase “substantial increase in the size of the tower,” as

⁵¹ See Nationwide Programmatic Agreement regarding the Section 106 National Historic Preservation Act Review Process, 47 C.F.R. Part 1 App. C, at § IIA(4), (14) (Tower) (“2004 NPA”); see also Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, 47 C.F.R. Part 1 App. B, at § I.A, B (“2001 NPA”).

⁵² See 2004 NPA, 47 C.F.R. Part 1, App. C § II.A(1).

defined in the 2001 NPA, explicitly adopted in the 2004 NPA, and utilized in the Commission's recent *Order on Remand* adopting interim ASR rules.⁵³

Use of the 2001 NPA definition of collocation creates a result that is consistent with Section 6409 in that the only "change" of dimensions that would be considered substantial in the tower siting context would be a significant increase of physical dimensions, as defined in the NPA. Moreover, the Commission should confirm that the reference to "physical dimensions" in Section 6409(a) relates to empirically measurable dimensions (height and width, for example), and not subjective evaluations such as visual effect.⁵⁴ Moreover, this definition has been utilized for over a decade and has not been a source of controversy.

B. Implementation Issues

The Commission poses a number of questions regarding the interplay between Section 6409(a) and various state and local building and zoning requirements.⁵⁵ The answers to each of these questions are simple and unambiguous: states and localities "may not deny and shall approve" eligible facilities requests as defined in Section 6409(a). Congress did not carve out any exemptions from this mandate. Thus, it would be impermissible for a state or local government to deny an eligible facilities request because it would allegedly violate certain local

⁵³ See National Environmental Policy Act Compliance for Proposed Tower Registrations, *Order on Remand*, 26 FCC Rcd 16700 (2011) ("*Order on Remand*").

⁵⁴ Some municipal consultants have suggested augmenting an empirical analysis with a subjective one, which would deprive many collocations of Section 6409(a)'s benefits. For example, some argue that each collocation application should be accompanied with a visual analysis, which would be reviewed by the local jurisdiction. Isotrope Wireless, New Wireless Regulation from the 2012 Middle Class Tax Relief and Job Creation Act, at 5 (Mar. 2012), http://www.town.billerica.ma.us/index.php?option=com_docman&task=doc_view&gid=1164&Itemid=114 ("It might be necessary for a local permit granting authority to evaluate a visual analysis to determine whether a proposed design alteration is a substantial change to the dimensions.").

⁵⁵ See *NPRM* at ¶¶ 123, 136.

laws, such as fall zones or set back distances.⁵⁶ Therefore, we agree with the FCC that Section 6409(a) trumps enforcement of such regulations. Any other conclusion runs afoul of Section 6409 and would encourage states and localities to adopt new regulations designed to carve facilities out from the scope of Section 6409.

This same rationale would preclude localities from alleging that “non-conforming” towers are exempt from Section 6409(a) treatment.⁵⁷ Many localities have taken the position that changes to zoning and other regulations convert an existing tower – approved pursuant to prior regulations – into a “legal, non-conforming” tower if the existing tower does not satisfy the latter imposed requirements. Many of these same jurisdictions contend that collocations on such “legal, non-conforming” towers are not permitted or covered by the Shot Clock unless and until the tower is brought into compliance with the new regulations. For example, one CTIA member sought approval to collocate antennas on a non-conforming facility within the City of Campbell, California and, to date, the City has refused to grant the request, which has been pending for more than 130 days.⁵⁸

Congress determined, however, that states and localities must grant eligible facilities requests involving existing towers and did not suggest that retroactive application of zoning regulations would render “eligible facilities” ineligible. A contrary conclusion cannot be reached without effectively eviscerating Section 6409(a). Otherwise, localities could simply modify

⁵⁶ *See id.* at ¶ 125.

⁵⁷ *See id.* at ¶ 124.

⁵⁸ In another case, a jurisdiction reserved the right to rescind or modify approval of a collocation request if Section 6409(a) is later modified or repealed. The specter of future removal of facilities would have a chilling effect on build-out and such conditions should be preempted.

zoning ordinances to effectively exempt from Section 6409(a) large classes of non-conforming towers.

III. THE SHOT CLOCK SHOULD BE MODIFIED IN THE WAKE OF SECTION 6409 ENACTMENT

Section 6409(a) establishes a right to collocation and requires localities to approve covered collocation requests. While Section 6409(a) mandates the approval of collocations, Congress was silent as to the time frame for such approvals. For the reasons discussed below, the time frame for approving such collocations should be no more than 45 days. Moreover, to avoid any confusion regarding the interplay between Section 6409(a) and the existing Collocation Shot Clock, the Commission should incorporate the principles of Section 6409(a) into the Shot Clock. This objective can be accomplished by modifying the Collocation Shot Clock to deem collocations granted after 45 days.⁵⁹

The Collocation Shot Clock was premised on the fact that many localities had numerous substantive zoning decisions to make with respect to collocations — zoning decisions that they were entitled to make pursuant to Section 332(c)(7)'s preservation of local zoning authority. The Commission determined that (i) localities retained zoning authority over collocations, (ii) 90 days constituted a reasonable time for rendering decisions on collocation applications, and (iii) rather than treating collocation applications that had lingered at the local level for more than 90

⁵⁹ The Commission also should clarify that localities have one opportunity to deem an application incomplete and request information for purposes of triggering the Shot Clock. Some jurisdictions drag out this process by raising serially “incompleteness” allegations over lengthy periods of time. For example, one jurisdiction provided multiple notices that an application was incomplete – after the applicant cured prior notices – and ultimately stated that the application would remain incomplete so long as the applicant continued to receive requests from the locality for additional information. Due to this process, the application remained pending for approximately one year.

days as “deemed granted,” applicants would be entitled to seek judicial redress at that point.⁶⁰

The Collocation Shot Clock – along with the new build Shot Clock – was upheld first by the U.S. Court of Appeals for the Fifth Circuit and then by the Supreme Court.⁶¹ Although the Commission considered a 45-day shot clock for collocations, it expressed concern that more time might be needed to permit collaborative discussions among governments, wireless providers, and affected communities.⁶²

Since adopting the Shot Clock in 2009, the FCC has taken comment on its effectiveness in light of experiences at the local level and has solicited information on current Shot Clock efficacy in this rulemaking. CTIA agrees that the instant rulemaking is the appropriate forum to determine whether, in light of delays at the local level and Section 6409(a), these conclusions should be revisited.

Because Section 6409(a) mandates that collocation requests must be deemed granted unless they fundamentally change the physical dimensions of a structure, there no longer is a need for localities to evaluate most collocation requests – only those that substantially change the physical dimensions of a structure will need to be evaluated. These applications should be subject, at most, to an administrative review that should not require 90 days to complete. Nevertheless, some localities are subjecting eligible facilities collocation requests to lengthy review processes. For example, Livermore, California required a CTIA member to obtain a discretionary conditional use permit and submit to a new design review – a process that took 168 days – in order to collocate three like-sized, camouflaged antennas on an existing tree pole.

⁶⁰ See *Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14003, 14012-13.

⁶¹ See *City of Arlington v. FCC*, 133 S.Ct. 1863.

⁶² *Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14011.

Similarly, Albany, California subjected one CTIA member to lengthy public hearing in order to determine whether the collocation proposal involved an eligible facilities request.

These delays can be addressed and avoided by fine tuning the Collocation Shot Clock. The Collocation Shot Clock should be reduced from 90 days to no more than 45 days and the Commission should make clear that collocation requests are deemed granted at the end of this 45 day period.⁶³ Such an approach is reasonable given enactment of Section 6409(a) and the Commission's recognition, even before Congress greatly simplified the collocation review process, that some jurisdictions take 14 days or less to complete the review of wireless applications.⁶⁴

Deeming applications granted at the expiration of the Collocation Shot Clock is essential to effectuate Section 6409(a). Section 332(c)(7) and the FCC's Shot Clock merely afford an applicant the opportunity to seek judicial remedies as though the application has been denied. Section 6409(a), in contrast, deems covered collocation requests granted and preempts Section 332(c)(7) and "any other provision of law" to the extent inconsistent with this approach.⁶⁵

In implementing Section 6409(a), the Commission should make clear that any state or local moratoria governing collocation requests are preempted. Congress adopted Section 6409(a) to ensure that collocation requests are granted. Moratoria are inconsistent with this

⁶³ The Commission recognized that there may be reason to reevaluate the Shot Clock even before the enactment of Section 6409(a). *See Broadband Acceleration NOI*, 26 FCC Rcd at 5390.

⁶⁴ *Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14011 (1 to 14 days); *id.* ("[T]he City of Saint Paul, Minnesota has processed personal wireless service facility siting applications within 13 days, on average, since 2000.").

⁶⁵ Middle Class Tax Relief and Job Creation Act of 2012, Pub. Law No. 112-96, § 6409(a)(1), 126 Stat. 156, 232 (2012) ("[n]otwithstanding section 704 of the Telecommunications Act of 1996 . . . or any other provision of law."). Section 704(a) of the Telecommunications Act enacted Section 332(c)(7) of the Communications Act, codified as 47 U.S.C. § 332(c)(7).

approach and should not be countenanced. Section 6409(a) has been in place for nearly two years and many states and localities already have adopted regulations that implement the statute. Moreover, Section 6409(a) clearly requires the approval of collocation agreements so there is no need for localities to adopt complicated regulations governing the evaluation of collocation requests. In the absence of preemption, moratoria can be enacted and extended indefinitely. For example, the City of Hillsborough, California adopted a moratorium after Section 6409(a) was enacted in 2012 and has extended the moratorium twice, so the moratorium is not scheduled to expire (if not extended for a third time) until later this year.⁶⁶ Simply put, after thirty years of experience developing regulations for wireless facility siting, there is no longer any need for moratoria and experience has shown that, if a moratorium is adopted, its termination date can be serially extended.

Finally, CTIA urges the Commission to modify the Shot Clock to incorporate the deemed granted approach for new tower proposals. In its Petition for Declaratory Ruling which gave rise to the Shot Clock, CTIA urged the Commission to adopt a deemed granted approach.⁶⁷ Under this proposal, an application for a new tower would be deemed granted if the state or locality did not act on it within the 150 day time limit. CTIA noted that the Commission has ample authority to adopt a deemed granted approach under Section 332(c)(7):

A “deemed grant” approach would be consistent with judicial decisions addressing failures to act in the Section 332(c)(7)(B)(v) context. In 1999, the Second Circuit noted that “the majority of district courts that have heard these cases have held that the appropriate remedy is injunctive relief in the form of an order to issue the relevant permits.” Other Federal courts of appeals have agreed with these district courts. Indeed, numerous federal district

⁶⁶ See <http://www.hillsborough.net/civica/filebank/blobdload.asp?BlobID=4879>.

⁶⁷ CTIA Petition at for Declaratory Ruling, WT Docket No. 08-165, at 1-2, 7, 27-29 (July 11, 2008).

courts have made clear that such relief is the *only* appropriate relief in the case of a zoning authority’s failure to act. Upon finding that the locality’s failure to act constituted an unreasonable delay under Section 332(c)(7)(B)(ii), one court concluded that the locality had “relinquished its right to seek further review of [the pending] application,” and that it was “unlikely [that] remand would serve any purpose” other than to “further delay [the] application in a swamp of hearings and meetings with no resolution in sight. The fundamental premise of such decisions is that Section 332(c)(7) authorizes an applicant to site facilities *upon the failure to act*.⁶⁸

The Commission opted against the deemed granted approach back in 2009 when it adopted the Shot Clock because of concerns that such an approach would be inconsistent with congressional intent.⁶⁹ The Commission should revisit this conclusion and, given its experience with the Shot Clock, enactment of Section 6409(a), and the clear congressional intent to facilitate siting decisions through a deemed granted approach, it should modify the Shot Clock to incorporate the deemed granted approach discussed above.

IV. ORDINANCES ESTABLISHING PREFERENCES FOR SITING WIRELESS FACILITIES ON MUNICIPAL PROPERTY MAY VIOLATE SECTION 332(c)(7)

Unfortunately, some municipalities are enacting ordinances with preferences designed to pressure applicants into placing wireless facilities on municipal land or municipally-owned towers and structures.⁷⁰ The Commission should clarify that such ordinances are precluded under Section 332(c)(7)(B)(i)(I) as unreasonably discriminatory if the preference for municipal sites provides preferential treatment for applicants utilizing municipal land or facilities. For

⁶⁸ *Id.* at 27-28 (quoting *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 497 (2d Cir. 1999); *Omnipoint Communications MB Operations, LLC v. Lincoln*, 107 F. Supp. 2d 108, 120-121 (D. Mass. 2000); *Masterpage Communications, Inc. v. Town of Olive*, 418 F.Supp.2d 66, 81 (N.D.N.Y. 2005)).

⁶⁹ *See 2009 Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14009.

⁷⁰ *Accord* NPRM at ¶ 160; Comments of PCIA – The Wireless Infrastructure Association, *et al.*, WC Docket No. 11-59 at 43-44 (filed Jul. 18, 2011).

example, an ordinance requiring the use of a municipal property, or a showing that no such property exists as a pre-condition to having a proposal to use non-municipal land or facilities granted, should be deemed unreasonably discriminatory. Such an approach improperly uses a municipality's zoning authority to increase revenues it receives as a landlord.

Without a non-discriminatory and expeditious siting process, at both the federal and local levels, the rapid roll-out of advanced wireless broadband services will be thwarted. Decisions regarding the proper placement of these facilities should be based, in the first instance, on the carrier's informed evaluation regarding where a facility needs to be placed to meet specific public demand, rather than local jurisdictions' desires to become a landlord. Delaying or precluding use of a non-municipal site or facility solely to bestow an economic benefit upon a local jurisdiction, is impermissible under Section 332(c)(7)(B)(i)(I) and inconsistent with Section 6409(a).

V. THE COMMISSION CAN ENSURE THAT DAS AND SMALL CELL DEPLOYMENTS ARE SUBJECT TO MINIMAL DELAY

DAS and other small cell facilities are among the smallest and least intrusive wireless facilities currently available. Given their minimal profile and lack of impact, there should be little, if any, review at the federal, state, and local level.

A. DAS and Small Cell Deployments Are Covered by Section 6409 and the Commission's Shot Clock

Despite the intrinsically small nature of DAS and small cell deployments, some jurisdictions steadfastly refuse to apply the Shot Clock to DAS and other small cell deployments.⁷¹ The instant *NPRM* provides the perfect opportunity for the Commission to eliminate any ambiguity. The Commission should clarify, as proposed, "that to the extent DAS

⁷¹ See *NPRM* at ¶¶ 158-59.

or small cell facilities, including third-party facilities such as neutral host DAS deployments, are or will be used for the provision of personal wireless services, such facilities are subject to the same presumptively reasonable time frames and other requirements as other personal wireless service facilities.”⁷² Such a clarification would be consistent with prior guidance provided to the wireless industry indicating that the term “base station” in Section 6409(a) applies to “distributed antenna systems and small cells.”⁷³

B. The FCC Should Streamline Its Environmental Review Process for DAS and Small Cell Technologies

CTIA supports the Commission’s consideration of methods for expediting the environmental review process for DAS and other small cell technologies.⁷⁴ As the Commission recognizes, the existing environmental rules were “developed long before small cell technologies became prevalent, and for the most part reflect the scale and level of environmental concern presented by traditional deployments on tall structures.”⁷⁵ CTIA thus supports the Commission’s proposal to categorically exclude DAS and small cell deployments from review pursuant to the National Environmental Protection Act and the National Historic Preservation Act.⁷⁶

⁷² *Id.* at ¶ 158.

⁷³ *Section 6409(a) PN*, 28 FCC Rcd at 3.

⁷⁴ *NPRM* at ¶¶ 6, 35.

⁷⁵ *Id.* at ¶ 7.

⁷⁶ *Id.* at ¶¶ 43, 56.

VI. STREAMLINING THE WIRELESS SITING PROCESS WOULD FACILITATE EFFORTS TO IMPROVE NETWORK RESILIENCY AND RELIABILITY

The wireless industry integrates into its build-out plans facilities that will improve network resiliency and reliability. Several significant storm-related disasters over the past three years have underscored the importance of infrastructure siting and hardening as they relate to wireless carriers' ability to maintain communications at the very time it is needed by public safety to assist recovery efforts and by the public to find out the fates of loved ones. New facilities are designed with an eye toward increasing network resiliency by providing redundant coverage so that if one or more sites are rendered inoperative there will not be a loss of coverage. Similarly, the deployment of new sites can increase capacity so that carriers can accommodate unanticipated peak usage that occurs during a significant event. Section 6409(a) holds the promise of aiding these efforts by reducing the time for deployment of these facilities.

In addition, wireless carriers' plans to deploy backup power to improve network resiliency can be frustrated by localities that impose difficult requirements on such carriers. By including backup power in the definition of "base station" as proposed above, localities will not be able to thwart or unduly delay requests to integrate back up power into proposed facilities and to add backup power to existing sites.

CONCLUSION

The Commission should amend its rules and clarify terms set forth in Section 6409(a) so as to expedite wireless infrastructure deployment. Specifically, the Commission should (i) exempt temporary towers from the 30-day public notice requirement associated with tower registrations, (ii) clarify certain provisions of Section 6409(a) to eliminate uncertainty, (iii) revise

the existing collocation and new build Shot Clocks, and (iv) clarify that DAS and other small cell deployments are covered by Section 6409(a) and the Shot Clock.

Respectfully submitted,

By: /s/ Brian M. Josef

Brian M. Josef

Assistant Vice President, Regulatory
Affairs

Michael F. Altschul
Senior Vice President and General
Counsel

Scott K. Bergmann
Vice President, Regulatory Affairs

CTIA-The Wireless Association®
1400 Sixteenth Street, NW
Suite 600
Washington, DC 20036
(202) 785-0081

Submitted: February 3, 2014