

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

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
)	
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)	RM-11688 (terminated)
)	
2012 Biennial Review of Telecommunications Regulations)	WT Docket No. 13-32
)	

To: The Commission

**T-MOBILE USA, INC.
REPLY COMMENTS**

Kathleen O'Brien Ham
Luisa L. Lancetti
Indra Sehdev Chalk

T-MOBILE USA, INC.
601 Pennsylvania Ave., NW
North Building, Suite 800
Washington, DC 20004
(202) 654-5900

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To: The Commission

REPLY COMMENTS OF T-MOBILE USA, INC.

T-Mobile USA, Inc. (“T-Mobile”)¹ respectfully submits the following reply comments in response to the Commission’s Notice of Proposed Rulemaking (“NPRM”).²

I. INTRODUCTION AND SUMMARY

The record in this proceeding demonstrates that Commission action is necessary to eliminate uncertainty and ensure that Section 6409(a) of the Middle Class Tax Relief and Job

¹ T-Mobile USA, Inc. is a wholly-owned subsidiary of T-Mobile US, Inc., a publicly traded company.

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

Creation Act of 2012³ achieves its objective – facilitating expeditious nationwide wireless collocations and modifications of existing wireless facilities.⁴ T-Mobile, with its ubiquitous network upgrades and new build plans, which are designed to provide consumers the advanced wireless services essential to the economic health of our nation, is on the front lines of cell site development and modernization.⁵ Unfortunately, too often T-Mobile finds that unreasonable municipal requirements prevent or delay the deployment of collocations and the modernization of existing cell sites that are necessary to support those services. In T-Mobile’s experience, many municipalities refuse to expedite the siting process, and some have established procedures to slow the process – even in the face of Congressional mandates. T-Mobile’s experience is not isolated.

A real and immediate need exists for the Commission to adopt rules to promote the deployment of advanced wireless infrastructure. In their comments, many municipalities espouse interpretations of Section 6409(a) that effectively would eviscerate the concept of a nationwide collocation by right⁶ embodied in Section 6409(a). Some municipalities even threaten to delay or deny new siting applications if the Commission provides guidance and establishes rules that promote the collocation-by-right principle. The Commission must act swiftly to eliminate any uncertainty and ensure that Section 6409(a) helps expedite wireless

³ 47 U.S.C. § 1455(a).

⁴ See *NPRM*, 28 FCC Rcd at 14272 (citing H.R. Rep. 112-399 at 136 (2012)).

⁵ T-Mobile’s national wireless network contains over 50,000 cell sites underscoring the importance of clear federal rules regarding upgrades of transmission equipment at base stations.

⁶ As used herein collocation by right embodies two concepts embedded in Section 6409(a). First, wireless providers have a right to collocate new wireless facilities at locations where there is an existing tower or base station. Second, wireless providers have a right to update transmission equipment at existing base stations. The federal right exists so long as the collocation or modification does not substantially change the physical dimensions of the existing tower or base station.

collocations as Congress intended.⁷ If the FCC fails to provide guidance and rules, tower owners, wireless providers, and local jurisdictions will have to resort to the long and uncertain path of litigation. Under this scenario, Section 6409(a)'s goal of expeditious, nationwide wireless broadband deployment will not be realized.

Consistent with the record to date, the Commission should first reject the narrow interpretation of Section 6409(a) (and its terms) proffered by various local jurisdictions. Second, the Commission should adopt rules clarifying the process for filing, reviewing, and processing eligible facilities request ("EFR") applications pursuant to Section 6409(a). Third, the Commission should clearly state that Section 6409(a) mandates the approval of valid EFR applications and preempts any contrary state and local regulations. Finally, the Commission should safeguard against municipalities evading Section 6409(a) by claiming they are acting as a landlord as opposed to a government entity, and providing preferences, such as expedited processing, for collocations on municipally-owned property.

II. THE COMMISSION SHOULD ADOPT CLEAR AND SPECIFIC RULES GOVERNING REQUESTS UNDER SECTION 6409(a)

The record demonstrates that clear definitions of the terms used in Section 6409(a) are necessary to avoid delays, uncertainty, and unnecessary litigation.⁸ Absent clarification, the

⁷ See 158 Cong. Rec. E237, E239 (Daily ed. Feb. 24, 2012) (extended remarks of Rep. Fred Upton) ("Upton Statement"); see also Comments of the City of Chicago at 3-5, WT Docket No. 13-238 (Feb. 3, 2014) (stating that Congress intended to make the collocation process more efficient).

⁸ See, e.g., Comments of CTIA – The Wireless Association[®] at 9-11, WT Docket No. 13-238 (Feb. 3, 2014); Comments of ExteNet Systems, Inc. at 4, WT Docket No. 13-238 (Feb. 3, 2014); Comments of Joint Venture: Silicon Valley at 5-7, WT Docket No. 13-238 (Feb. 3, 2014) ("Silicon Valley Comments"); Comments of the New York State Wireless Ass'n Comments at 1-2, WT Docket No. 13-238 (Feb. 3, 2014) ("NY State Wireless Ass'n Comments"); Comments of PCIA - The Wireless Infrastructure Association & The HetNet Forum at 24-28, WT Docket No. 13-238 (Feb. 3, 2014) ("PCIA Comments"); Comments of Steel in the Air, Inc. at 5, WT Docket No. 13-238 (Feb. 3, 2014); Comments of Towerstream Corp. at 7-10, WT Docket No.

Congressional purpose of encouraging the rapid deployment of wireless broadband by removing unreasonable barriers to updating and improving wireless services from the nation's existing wireless infrastructure would be frustrated. T-Mobile has extensive experience litigating the meaning of terms found in Section 332(c)(7)(B)⁹ of the Communications Act of 1934, as amended.¹⁰ To avoid having history repeat itself with Section 6409(a), clear direction from the Commission is necessary. Otherwise, local governments and wireless providers will litigate for years without any guarantee that the courts can reach a consensus about the meaning of the terms used in Section 6409(a).

There is no merit to the claims made by several municipal associations and state and local governmental entities that the Commission should refrain from taking decisive action and simply leave EFR applicants with only a judicial remedy. The history of litigation under Section 332(c)(7) since the enactment of the 1996 Act emphasizes this.¹¹ In 2009, 13 years after the passage of the 1996 Act, the Commission on its own accord clarified that a locality could not

13-238 (Feb. 3, 2014); Comments of Verizon and Verizon Wireless at 27, WT Docket No. 13-238 (Feb. 3, 2014) (“Verizon Comments”); Comments of the Wireless Internet Serv. Providers Association at 4, WT Docket No. 13-238 (Feb. 3, 2014) (“WISPA Comments”).

⁹ 47 U.S.C. § 332(c)(7)(B). This provision was added to the Communications Act by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (“1996 Act”).

¹⁰ See 47 U.S.C. §§ 151, *et seq.*

¹¹ See, e.g., *T-Mobile USA v. City of Anacortes*, 572 F.3d 987, 995-98 (9th Cir. 2009); *VoiceStream Minneapolis, Inc. v. St. Croix County*, 342 F.3d 818, 833, 834-35 (7th Cir. 2003); *Second Generation Props., LP v. Town of Pelham*, 313 F.3d 620, 631-35 (1st Cir. 2002); *Sprint Spectrum L.P. v. Willoth*, 176 F.3d 630, 643 (2d Cir. 1999); *APT Pittsburgh Ltd. P’ship v. Penn Twp. Butler County*, 196 F.3d 469, 480 (3d Cir. 1999); *Town of Amherst v. Omnipoint Comm’cns Enters., Inc.*, 173 F.3d 9, 14-15 (1st Cir. 1999); see also *Willoth*, 176 F.3d at 641 (noting, when interpreting this provision, that it “‘would be [a] gross understatement to say that the Telecommunications Act of 1996 is not a model of clarity.’” (quoting *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999) (alteration in original))).

deny a wireless siting application because another wireless carrier already served the area.¹² The Commission determined that a contrary interpretation would be inconsistent with fostering healthy competition among wireless providers, which served important national interests. T-Mobile encourages the Commission to use the present rulemaking proceeding to once again provide the specific rules and interpretations necessary to guide industry, local governments, and the courts – this time under Section 6409(a).

A. The Commission Should Adopt Clear Definitions of the Terms Used in Section 6409(a)

T-Mobile knows firsthand the delays caused by the lack of precise definitions of the terms in Section 6409(a). T-Mobile thus joins with CTIA, PCIA, Verizon, and others urging the Commission to eliminate as many uncertainties as possible in the statute.¹³

1. The Definition of “Transmission Equipment” Must be Comprehensive Enough to Include All Equipment Used in the Operation of a Cell Site

The record demonstrates that many municipalities seek to negate the positive effects of Section 6409(a) by defining the term “transmission equipment” narrowly to include solely equipment actually involved in transmitting or receiving signals.¹⁴ As numerous parties

¹² *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994, 14015-19 (2009) (“*Shot Clock Order*”), *recon. denied*, 25 FCC Rcd 11157 (2010), *aff’d sub nom. City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff’d*, 133 S. Ct. 1863 (2013).

¹³ *See, e.g.*, CTIA Comments at 9-11; ExteNet Comments at 4; Silicon Valley Comments at 5-7; NY State Wireless Ass’n Comments at 1-2; PCIA Comments at 24-28; Steel in the Air Comments at 5; Towerstream Comments at 7-10; Verizon Comments at 27; WISPA Comments at 4.

¹⁴ *See* Comments of Fairfax County, VA at 7, WT Docket No. 13-238 (Feb. 3, 2014); Joint Comments of the League of California Cities *et al.* at 2-3, WT Docket No. 13-238 (Feb. 3, 2014); Comments of the Colorado Communications and Utility Alliance *et al.* at 9, WT Docket No. 13-238 (Feb. 3, 2014) (“CCUA Comments”); Comments of the City of Tempe, AZ at 11, 16, WT Docket No. 13-238 (Feb. 3, 2014) (“Tempe Comments”); City of Tucson Comments at 4-5, WT Docket No. 13-238 (filed by Piroshka Glinsky, Jan. 31, 2014) (“Tucson Comments”);

demonstrate, restricting the term “transmission equipment” to electronics only would frustrate the Congressional purpose of accelerating broadband deployment,¹⁵ allowing the localities to “grant” an EFR for the electronics alone and then insist that a wireless provider go through a time-consuming, discretionary conditional use, special use, or variance process for other equipment necessary for the antennas to function.¹⁶

Wireless providers rely on integrated functioning wireless facilities to provide services to their customers. While electronic components are one part of an operational wireless station, by themselves, they will not allow a wireless provider to deliver service to end users. Therefore, the Commission should define “transmission equipment” as “antennas and all other equipment used in the operation of a cell site, including backhaul facilities.”¹⁷ Such an approach would be consistent with the definition of “antenna” used in the Nationwide Programmatic Agreement.¹⁸

2. A Comprehensive Definition of “Existing Tower or Base Station” is Essential to Expediting Wireless Collocations

Through the enactment of Section 6409(a), Congress intended to expedite wireless broadband deployments, and achieving that objective requires a comprehensive definition of the phrase “existing tower or base station.” As PCIA notes, the definition should “at a minimum

Comments of the City of West Palm Beach, FL Comments at 5, WT Docket No. 13-238 (Feb. 3, 2014) (“West Palm Beach Comments”).

¹⁵ See Comments of Fibertech Networks, LLC at 18-19, WT Docket No. 13-238 (Feb. 3, 2014); PCIA Comments at 29-31; Comments of Sprint Corp. at 8, WT Docket No. 13-238 (Feb. 3, 2014); Steel in the Air Comments at 5-6; Comments the Telecommunications Industry Ass’n Comments at 5-6, WT Docket No. 13-238 (Feb. 3, 2014); Towerstream Comments at 10-11; Comments of the Utilities Telecom Council at 12, WT Docket No. 13-238 (Feb. 3, 2014).

¹⁶ See Fairfax County Comments at 7; League of California Cities Comments at 2-3; CCUA Comments at 9; Tempe Comments at 11, 16; Tucson Comments at 4-5; West Palm Beach Comments at 5.

¹⁷ PCIA Comments at 29.

¹⁸ See Nationwide Programmatic Agreement regarding the Section 106 National Historic Preservation Act Review Process, 47 C.F.R. Part 1 App. C, § II.A(1); PCIA Comments at 29.

include[] structures that support or house an antenna, transceiver, or other associated equipment that constitutes part of a base station, even if they were not built for the sole or primary purpose of providing such support.”¹⁹

The broad definition is necessary given the increasing reliance of wireless providers on non-tower structures. T-Mobile currently has thousands of wireless base stations installed on non-telecommunications tower support structures around the country. As the Commission has previously observed “base stations are generally placed atop a purpose-built communications tower or on a tall building, water tower, or other structure providing sufficient height above the surrounding area.”²⁰ T-Mobile and other national wireless carriers rely on wireless facilities affixed to buildings, water tanks, utility poles, and other structures to provide wireless services to consumers. Any suggestion that Section 6409(a) is confined to wireless facilities mounted on communications towers is simply detached from the current state of wireless network deployment.

Non-tower structures will become increasingly important as traffic is offloaded to numerous adjacent small cell sites to keep up with burgeoning demand. These small cell sites are a key component of T-Mobile’s network development expansion plans. To avoid radio-frequency interference among small sites located in closer geographic proximity to each other, it will be increasingly important for wireless providers to site or collocate new wireless facilities on non-communications tower structures. Doing so serves the interests of both wireless providers responding to customer demands as well as that of state and local government entities that wish to avoid new tall telecommunications towers.

¹⁹ PCIA Comments at 31. T-Mobile also urges the FCC to adopt the definitions of “Existing,” “Collocation,” “Removal,” and “Replacement” proposed by PCIA. *Id.* at 34-37.

²⁰ *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Fifteenth Report, 26 FCC Rcd 9664, 9841 (2011).

Ironically, state and local governments have for years required wireless providers to look at siting alternatives other than new wireless communications towers. Indeed, wireless providers have developed a comprehensive list of such support structures in response to the pressure imposed by state and local governments during zoning and other regulatory review processes. All of these locations house existing base stations and thus fall squarely within the protections afforded by Congress in Section 6409(a). The Commission should therefore reject efforts to narrowly define “existing towers and base stations.”

3. Whether the Physical Dimensions of a Tower or a Base Station Have “Substantially Changed” Must Be Based on Evaluation of the Physical Characteristics of a Proposal Without Regard to Aesthetics

T-Mobile concurs with the numerous commenters noting that determining whether a collocation proposal would “substantially change the physical dimensions” of a tower or base station for purposes of Section 6409(a) is a straightforward, ministerial act.²¹ It is a simple evaluation of the physical characteristics of a proposal.

Absent clarification, Section 6409(a) is susceptible to misinterpretation and even possible abuse. There is no basis for the suggestion that this analysis must take into account aesthetics or visual impact,²² or that a substantial change must be “evaluated in the context of specific installations and a particular community’s land use requirements.”²³ Such arguments are inconsistent with the plain language of the statute.

²¹ See PCIA Comments at 40-44; Fibertech Comments at 31; Sprint Comments at 11; Verizon Comments at 31-32; *see also* CTIA Comments at 16-19.

²² See, e.g., CCUA Comments at 12; Comments of the District of Columbia Comments at 12-13, WT Docket No. 13-238 (Feb. 3, 2014) (“DC Comments”); League of California Cities Comments at 13-14, New Jersey State League of Municipalities Comments at 6, WT Docket No. 13-238 (Jan. 31, 2014).

²³ Comments of the City of Eugene OR at 12, WT Docket No. 13-238 (Feb. 3, 2014) (citation omitted) (“Eugene Comments”).

Furthermore, the FCC should acknowledge that Congress shifted the burden of proof to the governmental entity that wishes to deny a request to collocate or upgrade equipment at the site of an existing tower or base station. Congress imposed a “shall approve” and “may not deny” requirement that the governmental entity must apply in deciding on an EFR. A state or local government that wishes to deny the benefits of Section 6409(a) must demonstrate that the proposal *is not an EFR* because it would substantially change the *physical* dimensions of the existing tower or base station. Unlike provisions of the 1996 Act, which generally impose a burden on an applicant, Congress squarely reversed that presumption in Section 6409(a).

The Commission should adopt clear rules reflecting Congress’ decision about the burden of proof and make clear that governmental entities denying an EFR must expressly state why a substantial change in physical dimensions of the existing tower or base station would occur. The Commission should reject attempts by state and local government commenters to effectively reverse the Congressional presumption in favor of collocation, modification, and removal of transmission equipment by either suggesting that non-physical factors should be considered or by creating too narrow parameters for the test for what it means to “substantially change the physical dimensions.”

B. The Commission Should Adopt Rules Regarding the Filing, Review, and Processing of Applications, Including Time Limits

As noted above, Section 6409(a) clearly and unequivocally states that a state or local government “may not deny, and shall approve, any EFR 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.” As numerous parties demonstrate, Section 6409(a) limits EFR review

strictly to whether a proposal qualifies as an EFR without exception or condition.²⁴

To minimize potential disputes, T-Mobile strongly supports the implementation of FCC rules establishing (i) streamlined and standardized EFR application filing requirements, (ii) EFR application processing time frames, and (iii) a requirement that all EFR application decisions be in writing.²⁵

1. Local Governments Should Be Limited To Determining Whether an Application Qualifies as an EFR Under Section 6409(a)

The plain language of Section 6409(a) requires state and local governments to approve all EFR applications without discretionary review.²⁶ This means that municipalities must limit their review to whether a proposed collocation, replacement, or removal of transmission equipment will substantially change the physical dimensions of the tower or base station. In T-Mobile's experience, however, local governments regularly disregard Section 6409(a) once an EFR has been routed into the municipality's discretionary zoning process. As PCIA states, the Commission must make clear that a jurisdiction may not deny or delay an EFR based on purported inconsistencies with the jurisdiction's zoning plan or aesthetic concerns.²⁷

T-Mobile disagrees with those who suggest that the Commission should simply encourage local governments and industry to develop best practices, model ordinances, and informal dispute resolution methods instead of adopting formal rules,²⁸ and that states and local governments will need additional time to implement Section 6409(a) before the Commission

²⁴ See, e.g., CTIA Comments at 14-15; Fibertech Comments at 27; PCIA Comments at 40-42; Sprint Comments at 11; WISPA Comments at 9-10.

²⁵ See, e.g., *Shot Clock Order*, 24 FCC Rcd 13994.

²⁶ *NPRM*, 28 FCC Rcd at 14283; see PCIA Comments at 40.

²⁷ PCIA Comments at 41.

²⁸ Comments of the City of Alexandria, VA at 5, WT Docket No. 13-238 (Feb. 3, 2014); Comments of the National Association of Telecommunications Officers and Advisors, *et al.*, at 8, 11, WT Docket No. 13-238 (Feb. 3, 2014) ("NATOA Comments").

takes action.²⁹ Section 6409(a) was enacted more than two years ago, and now is the time for clear Commission action.

Wireless facility modifications are currently being implemented by wireless providers to improve wireless broadband throughout the country, and the Commission should not sit back and act as an informal mediator or sanction any more delays in implementing the Congressional mandate. The record demonstrates the importance of clear, decisive, and binding rules. As the City of West Palm Beach, Florida points out, the Commission is best positioned to interpret Congress' intent and that the establishment of defined standards and technical terms will facilitate the processing of applications for wireless services.³⁰ The Wireless Internet Service Providers Association similarly concludes that the Commission can aid broadband deployment by creating clear, national standards that would limit requests for declaratory rulings and litigation in federal and state court and avoid differing local interpretations.³¹ Clear federal rules help avoid litigation, which is costly and time consuming for all parties, and when litigation is unavoidable, clear federal rules provide specific and concrete guidelines for judicial review. History proves this point. Repeated litigation and inconsistent rulings persisted on the issue of the "reasonable period of time" that local governments were required to act on requests for the siting of personal wireless service facilities under the 1996 Act until the Commission issued the

²⁹ Eugene Comments at 5. One commenter recommends a delay of at least one year for municipalities to amend their requirements to comply with any new federal rules. League of California Cities Comments at 30.

³⁰ *See e.g.*, West Palm Beach Comments at 5.

³¹ WISPA Comments at 4.

Shot Clock Order.³² Since that time, both applicants and municipalities have been afforded a far clearer understanding of the ground rules.³³

State and local governments that have respected Congress' will and the directive of Section 6409(a) will be unaffected by clear national standards. In contrast, state and local governments that have disregarded the mandates of Section 6409(a) will not be swayed by best practices, model ordinances, workshops and non-binding mediation. T-Mobile has been subjected to burdensome, time consuming, and unnecessary application requirements that are unreasonably expensive. Various examples are set forth in the Declarations of John L. Zembruski and Timothy X. Sullivan, which are attached to these Reply Comments as Attachments A and B. The Commission should provide guidance and rules that replace a problematic *status quo* with a streamlined and standardized application process.

2. Specific Rules for Processing Eligible Facilities Requests Are Essential

The record demonstrates that the Commission should adopt a specific definition of what constitutes an EFR and identify what information regarding the proposed changes in transmission equipment at an existing wireless tower or base station must be submitted by wireless providers to a locality that is reviewing an EFR application.³⁴ The Commission also should specify how long the state or local government has to approve the EFR and require that state and local governments enter a written final decision either unconditionally granting or denying the EFR application within the time frame specified by the Commission.

³² See *Shot Clock Order*, 24 FCC Rcd 13994.

³³ Nevertheless, T-Mobile agrees that further clarification of some of the Shot Clock issues will bolster this trend. See, e.g., CTIA Comments at 16, 21-22; PCIA Comments at 53-59.

³⁴ See, e.g., PCIA Comments at 40, 46-50.

a. Standardized Application Requirements

To promote consistent broadband deployment throughout the country, application materials must be standardized across all jurisdictions and limited to those documents relevant solely to the determination of whether a proposal qualifies as an EFR.³⁵ Contrary to comments such as those submitted by the City of Tucson, Arizona, Section 6409(a) warrants expedited procedures and documentation limits even if there were no evidence of wide-spread systematic abuse by local jurisdictions.³⁶ Not only does the preparation of unnecessary application materials impose a significant financial burden on an applicant without providing any relevant benefit to the process, the mere preparation of such materials delays deployment and saps capital that could be used for further infrastructure development.

T-Mobile supports proposals for Commission adoption of the following standardized filing requirements:

- i. Application forms supplied by the jurisdiction, which require reasonable information, including the applicant's contact information, the location of the proposal, and a brief narrative to describe the EFR.³⁷
- ii. A statement from the applicant that it is authorized to propose the EFR should suffice. Authorization or a valid lease agreement from the property owner and/or tower owner should not be required. State and local governments must not insert themselves into an applicant's lease negotiations or disputes with landowners.³⁸
- iii. A cost-based fee structure.³⁹ Fees that are not cost-based should be deemed presumptively unreasonable.⁴⁰

³⁵ *See id.* at 47.

³⁶ Tucson Comments at 8.

³⁷ PCIA Comments at 47.

³⁸ *Omnipoint Commc'ns Inc. v. Common Council of the City of Peekskill*, 202 F.Supp.2d 210, 221-22 (S.D.N.Y. 2002).

³⁹ PCIA Comments at 48-49.

⁴⁰ *Id.* at 49.

- iv. Plans, with details to document that the facility modification or collocation does not substantially change the physical dimensions of the existing tower or base station. Surveys, information regarding other carrier's equipment, and other details should not be required.⁴¹

b. Reasonable Timeframes Must Be Established

A streamlined EFR review process within specified timeframes is necessary to give effect to Section 6409(a). Without timeframes, unreasonable delays and unnecessary litigation will persist. The record supports establishing a 45-day window for states and localities to review and approve EFRs subject to Section 6409(a).⁴² This period would run unless a locality determines, within the first 30 days, that an application is incomplete.⁴³ If an application is incomplete, the 45-day period should be tolled until the application is complete.⁴⁴ There is no merit to the argument that the Commission lacks authority to adopt time limits because they are not mentioned in Section 6409(a) – this argument was rejected by the U.S. Court of Appeals for the District of Columbia Circuit when it upheld the Commission's Shot Clock.⁴⁵

T-Mobile agrees that applicable and legitimate building, fire, electrical, and structural permits should be obtained by applicants, and ideally the total cumulative time for the approval of an EFR and these other permits should be 45 days. If, however, the Commission ultimately deems this too short a period for the additional permits, the timeframe for obtaining them should in no case be more than the 90 days currently permitted under the Shot Clock. In no case should the 45-day EFR review period exceed 90 days.

⁴¹ *Accord* PCIA Comments at 47.

⁴² *See* CTIA Comments at 16; PCIA Comments at 48.

⁴³ PCIA Comments at 48.

⁴⁴ *Id.* As with the shot clock, parties should be able to alter these deadlines through voluntary agreements.

⁴⁵ *Compare* DC Comments at 17-19 with *City of Arlington v. FCC*, 668 F.3d 229.

c. Imposition of Specialized Building, Fire, Electrical, and Structural Requirements Is Not Permissible Under Section 6409(a)

T-Mobile agrees that any construction, including that performed in connection with an EFR, should comply with universally applicable and objective, ministerial laws reasonably related to building, fire, electrical or structural codes.⁴⁶ Examples of such codes include structural standards,⁴⁷ such as ANSI and TIA-222⁴⁸ if adopted and in effect in the particular jurisdiction.

The Commission should remain vigilant to ensure that states and localities do not insert discretionary zoning code and land use criteria into their building, fire, electrical or structural codes for the purposes of circumventing Section 6409(a) and should take appropriate steps to prevent such practices.⁴⁹ In addition, the Commission should declare that discretionary criteria are categorically preempted. For example, states and localities often impose setback requirements on EFR applicants even though they are not universally required in building codes for similar uses such as light poles, buildings, bridges, overpasses, signs and other tall structures.⁵⁰ Rather, setbacks contained in zoning codes generally are based on site-planning and aesthetic issues. Moreover, setbacks are often imposed on wireless carriers in an unlawful

⁴⁶ *See, e.g.*, PCIA Comments at 41.

⁴⁷ *NPRM*, 28 FCC Rcd at 14283-84.

⁴⁸ The ANSI/TIA-222-G Standard, “Structural Standard for Antenna Supporting Structures and Antennas,” Rev. G, is available for purchase at http://global.ihs.com/search_res.cfm?RID=TIA&INPUT_DOC_NUMBER=TIA-222; *see generally* <http://www.tiaonline.org/all-standards/committees/tr-14>. Annex A to the standard, which sets for guidance regarding the standard’s requirements, was filed as Exhibit 2 to the Reply Comments of American Tower Corporation, WC Docket No. 11-59 (filed Sept. 30, 2011) (“American Tower Broadband Acceleration Reply Comments”).

⁴⁹ *Accord* PCIA Comments at 41.

⁵⁰ Examples of egregious setback provisions are discussed in the attached declarations.

attempt to indirectly regulate radio frequency emissions. These specialized rules violate both the Communications Act and Section 6409(a) and should not be part of the EFR review process.

3. EFR Decisions Must Be in Writing

The Commission should require that any local government determination that rejects an applicant's EFR claim or labels an EFR application as incomplete must be (i) in writing, (ii) specify with particularity the reasons why the municipality asserts that proposed changes in transmission equipment would result in a substantial change in the physical dimensions of the existing tower or base station or detail the information that is missing from the application, and (iii) delivered to the applicant within the timeframes specified by the Commission. The EFR should be deemed approved if a governmental entity does not grant an EFR application, or fails to provide a written final decision specifying with particularity the reasons why the governmental entity disagrees with applicant over a claimed EFR, within the timeframe specified by the Commission.

4. Conditions on the Approval of EFRs are Precluded by Section 6409(a).

As PCIA correctly notes, Section 6409(a) precludes a locality from conditioning approval of an EFR on contingencies or alterations to the EFR.⁵¹ Conditional EFR application approvals are in fact denials that violate Section 6409(a). This is particularly true with respect to contingencies or alterations to the EFR based on newly imposed aesthetic or other zoning criteria.⁵²

Some commenters argue that there should be special circumstances under which local authorities can condition or effectively deny an otherwise covered request and that these

⁵¹ PCIA Comments at 42-43.

⁵² When adding or replacing transmission equipment, it is T-Mobile's practice to match the color of the existing equipment.

circumstances should be defined broadly.⁵³ These commenters suggest that state or local governments need not grant a request that would result in an increase in height or size above that permitted by applicable zoning ordinances⁵⁴ and that Section 6409(a) does not require state and local governments to approve a modification of an existing tower or base station if such modification would not conform to a condition or restriction that the state or locality imposed in its original approval of a tower or base station.⁵⁵

T-Mobile disagrees for two simple reasons. First, an EFR is by definition an insubstantial change to the physical dimensions of the existing wireless tower or base station. The entire purpose of Section 6409(a) is to avoid the costly and unnecessary delays associated with a discretionary review process. Compliance with universal and objective building, fire, electrical, and structural codes will satisfy legitimate public safety concerns.

Second, state and local governments could easily thwart the effectiveness of Section 6409(a) by merely (i) revising the local land use laws with excessive setback requirements or overly restrictive height and bulk requirements, (ii) requiring that every approval of an EFR or new facility be conditioned on the installation of new stealth treatment that precludes any future modifications without prohibitively expensive changes to the stealth treatment, and/or (iii) approve all future EFRs and new facilities on the condition that there shall be no increase in size, height or design of the existing wireless tower or base station.

⁵³ New Jersey State League of Municipalities Comments at 7.

⁵⁴ *Id.*

⁵⁵ DC Comments at 15-16 (collocations that would be inconsistent with, or violate a condition of local approval, should be considered a substantial change exempt from Section 6409(a)); Comments of the Town of Hillsborough, CA at 3, WT Docket No. 13-238 (Feb. 3, 2014); Comments of the County of San Diego at 3, WT Docket No. 13-238 (Jan. 31, 2014) (the “may not deny and shall approve” clause should clarify that local governments may subject facilities to discretionary review and State and local governments should be able to require that covered requests be subject to conditions and that they comply with local land use laws).

III. SECTION 6409(a) EXPLICITLY SUPPLANTS LOCAL REGULATIONS

Some commenters argue that principles of federalism require the Commission to leave state and local governments free to exercise their traditional or fundamental functions, including land use regulation. They assert that the Commission lacks the resources and expertise to perform these functions,⁵⁶ that local governments already encourage collocations,⁵⁷ and that standardized definitions will somehow deprive the public of the protections of existing local and state lawful requirements and adjudicative processes.”⁵⁸

Such comments expose the fundamental misunderstanding that many jurisdictions have regarding Section 6409(a). As explained above, if an application is for an EFR, there can be no discretionary zoning process. Section 6409(a) limits zoning and other regulatory authority over a prescribed class of cell site modifications. Congress was clear in passing legislation stating that EFRs shall be approved and may not be denied, notwithstanding “any other provision of law.”

It is a fundamental principle of our legal system that when Congress explicitly prohibits local government action on a topic, that Congressional action takes precedence and is preemptive.⁵⁹ Section 6409(a) states “Notwithstanding section 704 of the Telecommunications Act of 1996 (Public Law 104–104) *or any other provision of law* a State or local government *may not deny, and shall approve*, any eligible facilities request. . . .”⁶⁰ Similarly, the legislative history makes clear that Congress intended to “*streamline*[] the process for siting of wireless facilities by *preempting* the ability of State and local authorities to delay collocation of, removal

⁵⁶ See, e.g., DC Comments at 6.

⁵⁷ NATOA Comments at 6.

⁵⁸ Comments of the Missouri Municipal League Comments at 2, WT Docket No. 13-238 (Jan. 30, 2014).

⁵⁹ See *City of Arlington v. FCC*, 668 F.3d 229.

⁶⁰ 47 U.S.C. § 1455(a) (emphasis added).

of, and replacement of wireless transmission equipment.”⁶¹ Under the plain language of Section 6409(a), “traditional local land use authority” is explicitly supplanted with regard to EFRs.

IV. THE COMMISSION SHOULD ADOPT PRECAUTIONS TO PREVENT ABUSE OF MUNICIPAL PROPERTY OWNERSHIP

Section 6409(a) does not distinguish between situations in which a local government is acting as a municipal authority or as a landlord in a purely proprietary capacity. Should the Commission determine that government landlords are not covered by the statute, however, it should adopt precautionary measures to prevent abuse and make clear that local governments do not control public rights of way in a “proprietary” role.⁶² Similarly, the Commission should direct local governments to act on EFRs on the merits, without regard for underlying property interests.

A. Local Governments Must Act on an EFR on its Merits, Without Regard to the Identity of the Underlying Property Owner

A key concern for application of Section 6409(a) is that the governmental and purely proprietary functions of local government be clearly separated. One element of this is requiring that local governments act on an EFR based on the merits of the request, without regard to the local governments’ position as landlord. Accordingly, the Commission should require that when a wireless provider files an EFR application with a state or local government, the governmental entity should review, consider, and approve the EFR application on the merits alone.

Requiring State and local governments to make a clear decision on the merits notwithstanding their roles as landlords would promote broadband deployment by keeping the

⁶¹ Upton Statement, 158 Cong. Rec. at E239 (emphasis added).

⁶² T-Mobile has over 5,000 existing base stations installed on municipally owned or controlled property. Other wireless providers have also located cell sites on public property. Completely exempting all municipally owned or controlled property from the Section 6409(a) analysis requirements would have a material adverse effect on wireless carriers and effectively deny carriers an ability to seek recourse for violations of both federal law and lease rights.

deciding authorities focused on the issues, and allowing applicants to avail themselves of whatever remedies the Commission decides are appropriate, including judicial or regulatory appeal if an EFR application is denied. In addition, a clear demarcation between the two roles allows landlords to use contractual dispute resolution terms and state law on the lease issues, while not slowing down the course of the regulatory decision.

B. Section 6409(a) Applies to Facilities in the Public Rights of Way

The Commission should reject assertions by commenters, such as the City of San Antonio, who assert that Section 6409(a) does not apply to facilities in public rights of way because the public rights of way are “municipal property.”⁶³ Their assertion is incorrect because public rights of way are not held by local governments in a proprietary capacity but in trust for the public.⁶⁴ Comments from local governments to the contrary emphasize why the Commission

⁶³ Comments of City of San Antonio at 9, WT Docket No. 13-238 (Feb. 3, 2014).

⁶⁴ See, e.g., *City and County of Denver v. Qwest Corp.*, 18 P.3d 748 (Colo. 2001) (holding that municipal governments hold rights of way only in their governmental capacity, and consequently are not entitled to the same compensation obtained by the owners of private property); *AT&T v. Village of Arlington Heights*, 620 N.E.2d 1040, 1042, 1044 (Ill. S.Ct. 1993) (“Municipalities do not possess proprietary powers over the public streets. They only possess regulatory powers. The public streets are held in trust for the use of the public.”); *City of Zanesville v. Zanesville Tel. & Tel. Co.*, 59 N.E. 781, 785 (Ohio S.Ct. 1901) (“A municipal corporation, though holding the fee in its streets, has no private proprietary right or interest in them which entitles it to compensation”); *City of Albany v. State*, 250 N.Y.S.2d 300, 301 (App. Div. 1964), *aff’d* 15 N.Y.2d 1024 (1965) (“We have no difficulty in finding that both the land held for street purposes . . . and that used for water supply purposes . . . were held in a governmental rather than a proprietary capacity”) (citations omitted); *New Jersey Payphone Ass’n v. Town of West New York*, 130 F. Supp. 2d 631, 638-39 (D.N.J. 2001); *People v. Kerr*, 27 N.Y. 188, 199 (1863) (stating that municipalities hold the public rights-of-way in “trust for the benefit of the public” and “[t]he interest is exclusively *publici juris*, and is, in any aspect, totally unlike property of a private corporation, which is held for its own benefit and used for its private gain or advantage”); *State v. Simpson*, 397 P.2d 288, 291 (Alaska 1964) (“title to streets created by dedication is held by the municipality in trust for the public and not in a proprietary capacity”); *Village of Kalkaska v. Shell Oil Co.*, 446 N.W.2d 91, 95 n.18 (Mich. 1989) (“the ‘cities have no proprietary interest in city streets as their private property’”) (citing *Detroit v. Detroit City Ry. Co.*, 43 N.W. 447 (1889)); *City of International Falls v. Minnesota Dakota & Western Ry. Co.*, 134 N.W. 302, 304 (Minn. 1912) (“The city has no proprietary rights in its streets. Whatever rights it has it holds

must be vigilant to prevent overreaching by local governments.

C. The Commission Should Adopt Safeguards To Prevent “Municipal Property” Landlords from Creating a Massive Loophole in Section 6409(a)

To the extent that the Commission determines that Section 6409(a) does not apply to local governments acting in their purely “proprietary” capacity, it should nonetheless adopt safeguards to prevent local governments from abusing that interpretation to create a loophole that swallows Section 6409(a). More specifically, there are hundreds of wireless siting ordinances that have been enacted in the past two decades that impose some form of preference for the use of government-owned property. Some ordinances require applicants to provide written justification of why the provider is seeking to install a wireless facility on privately owned property rather than publicly-owned land, and an application will be denied if the applicant has not explained why it is not using government property.⁶⁵

Historically, such municipal preference requirements were frequently advanced by municipal consultants. Indeed, some municipal siting consultants tout their ability to encourage wireless providers to locate wireless facilities on publicly-owned land.⁶⁶ Otherwise, there is no

merely in trust for the public use.”); *County of Marin v. Superior Court of Marin*, 53 Cal.2d 633, 638 (Cal. 1960) (“All property under the care and control of a county is merely held in trust by the county for the people of the entire state”).

⁶⁵ T-Mobile has been joined as a party defendant to several lawsuits brought by property owners against local governments. The private parties allege that, by requiring that a telecommunications facility be located on government-owned rather than on privately-owned property, a local government has unlawfully interfered with a contractual expectancy arising from the private property owner’s agreement with a wireless carrier.

⁶⁶ *Helping Government*, PlanWireless, Kreines & Kreines, Inc., http://planwireless.com/helping_gov.htm (last visited Mar. 4, 2014) (“help local governments to regulate wireless and generate revenue from wireless.”); *Marketing & Lease Management*, CityScape Consultants, Inc., <http://www.cityscapegov.com/solutions/MarketingLeaseManagement.aspx> (last visited Mar. 4, 2014); *The Center for Municipal Solutions (CMS) Municipal Telecommunication Consultants*, <http://www.telecomsol.com/drupal/> (last visited Mar. 4, 2014) (“Where permissible under State

logical basis to say that a wireless tower, for example, would be completely acceptable on a municipally-owned piece of property, but would have an unacceptable adverse impact if located on the private property right next door.

If local governments can avoid the impact of Section 6409(a) whenever the wireless tower or base station is located on property owned by the local government in its purely proprietary capacity, they will have an incentive to impose yet more regulations intended to force wireless providers to use municipally-owned property.

V. CONCLUSION

For the above reasons, the Commission should provide definitions and guidance regarding the terms of Section 6409(a), thereby facilitating the siting of wireless facilities and speeding the deployment of broadband where American consumers need it most.

Respectfully submitted,

T-MOBILE USA, INC.

By: _____/s/_____
Kathleen O'Brien Ham
Luisa L. Lancetti
Indra Sehdev Chalk

601 Pennsylvania Ave., NW
North Building, Suite 800
Washington, DC 20004

(202) 654-5900

March 5, 2014

law, we help local officials actually require the use of County or Municipal owned property to open opportunities for new and increased revenue”).

ATTACHMENT A

DECLARATION OF JOHN L. ZEMBRUSKI

I, John L. Zembruski, Esq., Senior Corporate Counsel, T-Mobile USA, Inc. (“T-Mobile”) provide this declaration in support of T-Mobile’s Reply Comments in WT Docket No. 13-238. As in-house counsel I supervise outside counsel throughout the United States involving judicial appeals filed in either state or federal courts and disputes relating to cell site permit decisions of local governments. As part of my job responsibilities, I am actively involved in, and monitor, wireless siting developments at the state and local level. Based on my experience using personal knowledge as well as information provided to me by T-Mobile personnel and local counsel responsible for T-Mobile’s siting activities, I am familiar with the opportunities and challenges T-Mobile faces in obtaining authorizations for the placement, location, and modification of its facilities. Based on my experience, I am aware that numerous localities that have taken steps to significantly slow the wireless siting process without any countervailing public interest benefit. The following examples are representative of the hurdles that T-Mobile faces:

Village of Irvington, New York

The Village of Irvington requires a significant submission for any modification of a wireless facility, including matters that unequivocally constitute eligible facilities requests (“EFRs”). Specifically, an applicant must submit 18 copies of the required submission, which includes a structural certification, complete site plans, an environmental assessment form, a radio frequency (“RF”) exposure report, a \$500.00 special permit fee, and a \$5,000.00 escrow deposit fee. The Village then refers the application to the Village’s third-party consultant (not an uncommon practice in certain localities whereby a third-party consultant is hired and the applicant is required to pay the consultant’s bill). A meeting must then be scheduled with the Village Planning Board. If either the Village’s third party consultant or Planning Board is not satisfied that the application is “complete,” the scheduling of the public hearing will be indefinitely delayed. While a minimum of two Planning Board meetings are required, three to four are typically necessary. Due to the fact that the Planning Board is scheduled to meet only one time per month, the process can be unnecessarily drawn out for a significant period of time. In one instance, T-Mobile proposed to replace three existing antennas with six antennas on a large building located on a heavily screened property, which already housed numerous antennas for Verizon, Sprint, MetroPCS, AT&T, and T-Mobile. The Planning Board and the Village’s third party consultant insisted that T-Mobile’s antennas be lowered from existing mounts on the roof to the parapet of the building (or that T-Mobile demonstrate why such a re-location would not be possible). This would have required not only additional construction costs, but also the submission of revised plans, a revised RF exposure report, a structural report, and a lease amendment with the landlord to occupy space beyond T-Mobile’s leased area.

The Village of Irvington proceeded as though Section 6409(a) did not apply. The Village did not address whether T-Mobile’s application is an EFR and then grant or deny the application as proposed, but rather effectively denied the application by demanding that the installation be completely redesigned. The Village has carefully avoided giving T-Mobile a clear decision that could be the subject of an appeal.

Moreover, after the Village Board proposed a code change to account for Section 6409(a), the Village Board tabled it indefinitely. Although the proposed legislation would eliminate a Planning Board process – thereby arguably streamlining the process – the legislation contained other provisions that are inconsistent with Section 6409(a). For example, the legislation requires a referral of the application to the Village’s third party consultant after the filing of the \$5,000.00 escrow fee to pay for the consultant’s services. Under the proposed code change, the Village’s third party consultant would have unfettered discretion to review the application for an indefinite period of time.

This situation exemplifies the fact that absent swift Commission action, many localities simply will not comply with Section 6409(a).

Village of Williston Park, New York

In August 2013, T-Mobile submitted an EFR to the Village of Williston Park. The EFR proposed replacement of three roof top antennas. The replacement antennas are only five inches longer than the existing antennas. Further, T-Mobile proposed an overall reduction of accessory equipment. Rather than immediately grant T-Mobile’s EFR, the Village adopted legislation requiring that expensive stealth camouflaging be added to any facility to be modified. Since that time, the Village has refused to approve T-Mobile’s EFR. If exchanging antennas and removing equipment from an existing installation are not protected by Section 6409(a), then the statute becomes meaningless. Commission rules clearly articulating the scope of Section 6409(a) would eliminate delays like T-Mobile has experienced in Williston Park and facilitate deployment of wireless broadband.

City of New Rochelle, New York

New Rochelle is another locality that does not follow Section 6409(a). It subjects an application for a wireless facility modification to the full zoning process, even if the application is for an EFR. The process for obtaining approval for a site modification requires multiple separate submissions – a building permit, full site plans, and an escrow deposit, followed by a site visit. First, an applicant must file a building permit application. If the building permit application is denied, the applicant is then referred to zoning. The applicant must submit full site plans and pay a \$5,000.00 escrow deposit fee to the City to pay for the City’s wireless consultant. The City then requires a site visit with the City Senior Planner, the Fire Commissioner, the Building Inspector, and the City’s wireless consultant. At the site visit, the Senior Planner often makes new demands unrelated to the project, such as the re-location of the previously approved antennas and mounts. Only after the site visit can the required full zoning application be submitted to the City as part of the special permit approval process. The applicant must also file a \$1,500 special permit application fee and an engineering certification that the applicant is seeking to provide wireless service primarily within the City of New Rochelle (with wireless service to other municipalities not to exceed 40% of the service provided). Another delay of one to two months can then be expected while the submission is reviewed by the City. Once this review is completed, a meeting is then scheduled with the Planning Board. A public hearing is required with the Planning Board, including hearing notices to residents.

The time from the building permit application to final zoning approval can take between four to eight months. Fundamentally, the City of New Rochelle continues to simply ignore the enactment of Section 6409(a) by requiring a full zoning application submission and discretionary public hearing process.

Gardiner, New York

The Town of Gardiner, New York limits collocation to three carriers per site, regardless of the structural integrity of the tower.¹ This arbitrary restriction could needlessly force the construction of a new tower, thereby delaying broadband deployment and, therefore, cannot be squared with Section 6409(a).

Greenburgh, New York

The Town of Greenburgh, New York also limits the number of carriers to two per site and has imposed additional arbitrary limitations on the total number of antennas per site.

The Town also amended its zoning code provisions related to wireless facilities by retroactively increasing the setbacks for existing and proposed wireless towers. It enacted a lot-width and lot-depth percentage-based setback for existing and proposed towers - within 350 feet of a residential district.² The zoning code also contains a 350 foot setback from all child day care centers, schools, public parks, camps, and playgrounds.³ The setback requirements are both excessive and exclusive to wireless facilities (whether proposed for placement on a rooftop or a tower), are not applied to any other use and otherwise serve no legitimate purpose related to building and safety codes. In my experience, many of the localities efforts to delay collocations and modifications are a product of their constituents' misplaced concern over RF emissions.

By enacting new zoning provisions, a number of existing towers instantly became non-conforming structures and, pursuant to the new regulations, collocation on non-conforming structures is prohibited.⁴ With a stroke of the pen the Town effectively banned collocation on existing wireless towers.

Highland Park, Illinois

In Spring 2013, T-Mobile submitted an EFR application to the City of Highland Park, Illinois. T-Mobile proposed to upgrade an existing site by swapping nine existing antennas with smaller antennas and to reduce the number of roof top equipment cabinets from three to two. Disregarding Section 6409(a), the City sought to impose various conditions – including extensive screening and stealthing requirements – and subjected the proposal to a public hearing. This simple proposal to modify an existing base station and reduce the existing footprint of the facility should have been promptly approved pursuant to Section 6409(a). Instead, the proposal

¹ Town of Gardiner, NY Zoning Code, § 220-46(B)(20)(b).

² Town of Greenburgh, NY Town Code, § 285-37(A)(3)

³ Town of Greenburgh, NY Town Code, § 285-37(A)(2)

⁴ Town of Greenburgh, NY Town Code, § 285-37(A)(11)

was not approved until February 2014, nearly a year after the EFR was submitted after significant prompting from T-Mobile including supporting materials and methods to demonstrate that the EFR request did not substantially change the physical dimensions of the base station.

Leonia, NJ

In March 2009 T-Mobile submitted an application for a zoning variance to permit T-Mobile to place antennas and three cabinets on a rooftop in Leonia that was already home to a competing wireless provider. Even though the antennas would rise above the roof line less than the existing antennas of another carrier, the Borough of Leonia Board of Adjustment (“Board”) passed a resolution denying the application on March 2011. T-Mobile attended eight public meetings at which the proposed project was discussed. It was not until nearly 4 years after T-Mobile filed its application that the US District Court for the District of New Jersey reversed the Board and ordered the Board to issue the necessary approvals. *See T-Mobile Northeast LLC v. Borough of Leonia Zoning Board of Adjustment*, 942 F. Supp. 2d 474 (2013). This demonstrates how a locality can significantly impede carrier network deployment efforts even without a valid reason.

Camden County and City of Osage Beach, MO.

After the passage of Section 6409(a), T-Mobile spent months trying to get Camden County and the City of Osage Beach, Missouri to relax city and county wireless-specific code requirements to enable T-Mobile to swap out of the backhaul facilities at three cell sites in both the County and in the City of Osage Beach. The scope of the project at each of the cell sites was simply to use fiber-optic cable rather than twisted pairs of copper line to route T-Mobile’s signals back to a switch. At each of the cell sites other carriers were using fiber-optic backhaul. For the three cell sites in the City of Osage Beach, hooking T-Mobile up to the existing fiber-optic back haul networks entailed installing a combined total of about 140 feet of conduit for the fiber-optic cable. T-Mobile also needed to add a small box (17 inches by 17 inches by 7 inches deep) to the existing T-Mobile equipment cabinets that were installed at each of these three cell sites. The new box was needed to enable use of fiber-optic backhaul. The City of Osage Beach’s wireless-only code required filing for a special use permit application (with fees of \$7,500), payment of municipal consultant escrow fees of \$12,500, and attendance at a public hearing on the applications. The total bill exceeded \$150 per lineal foot for the proposed conduit runs. While these eligible facility requests were ultimately granted, wireless broadband deployment was delayed for months. In fact, a prior network upgrade project slated for these two jurisdictions was put on hold by the Missouri T-Mobile market due to the frustration of dealing with these jurisdictions which demonstrates how customers suffer when local governments erect unreasonable obstacles to modernizing existing cell sites.

The above are just some of the examples that T-Mobile could provide to the Commission. Based on my experience supporting local T-Mobile markets in network upgrades where T-Mobile needs to add, replace, or remove transmission equipment at existing cell sites, I firmly believe that the Commission needs to adopt clear definitions and require local governments to follow clear processes under Section 6409(a) to meet the Congressional mandate of accelerating wireless broadband deployment.

I declare under the penalty of perjury the above information is correct to the best of my knowledge and belief.

/s/

John L. Zembruski
Senior Corporate Counsel, T-Mobile USA, Inc.

March 5, 2014

ATTACHMENT B

DECLARATION OF TIMOTHY X. SULLIVAN

I, Timothy X. Sullivan, Principal Attorney, Network Land Use and Litigation, T-Mobile USA, Inc., provide this declaration in support of T-Mobile's Reply Comments in WT Docket No. 13-238. Since joining T-Mobile in 2004,¹ my practice has concentrated on advancing the deployment of T-Mobile's national wireless network by assisting in the procurement of those local government land use and other regulatory approvals, *e.g.*, right of way permits, that are needed to allow T-Mobile to build new cell sites and modernize existing cell sites. I have headed a team of lawyers dedicated to advancing T-Mobile's national wireless network deployment. Unfortunately, wireless siting permit issues are so prevalent that T-Mobile has had to bring or defend more than 300 lawsuits in state and federal courts. Based on my experience, delays in obtaining final decisions over applications to build or modify a wireless facility can take years.² The following examples are representative of hurdles some local jurisdictions erect to expeditious build-out, the litigation reverse these efforts, and the delay that occurs, even when T-Mobile is successful:

City of Irvine, California

In October 2013, T-Mobile filed an action against the City of Irvine, California in the United States District Court for the Central District of California. *T-Mobile West LLC v. City of Irvine, CA et al.*, Case No. 8:13-cv-01652-JVS-DFM, (USDC CD CA 2013). This case involves T-Mobile's efforts since December 2012 to update a cell site that has been in operation since 2002. Specifically, T-Mobile seeks to replace a single antenna per sector with two shorter antennas per sector. The existing panel antennas are 59 inches high by 12 inches wide. The two panel antennas per sector that T-Mobile proposed are each 56 inches high by 12 inches wide. The antennas will be side mounted at 60 feet above ground level on a 119 foot tall tower owned by Southern California Edison. T-Mobile's eligible facilities request ("EFR") remains in stasis 14 months after T-Mobile filed with the local jurisdiction. Despite the good faith ongoing

¹ Unlike many, I have worked on tower siting issues for both a wireless carrier and a local jurisdiction. Prior to joining T-Mobile, I was a city attorney representing cities in the State of Washington for a dozen years. In that position, I helped draft RCW 35.99, the Washington Municipal Right of Way Telecommunications Act, relating to personal wireless facilities located in municipal rights of way.

² In one case, a dispute with a municipality over efforts to build a single new wireless tower that both Sprint and T-Mobile can collocate on to provide service within the Borough of Paramus, New Jersey is now dragging on into its tenth year and remains unresolved. *Sprint Spectrum L.P. & T-Mobile Northeast LLC v. Zoning Board of Adjustment for the Borough of Paramus, NJ*, Civil Action No. 09-4940 (JLL) (USDC DNJ 2010). Sprint's original application to build a communications tower at an ambulance station was filed in 2004. After resistance from the Borough over Sprint's proposed site, T-Mobile and Sprint filed a new joint application in 2007 to build a tower at another location. Both applications were denied by the Borough. Federal court litigation commenced in 2009 and the lawsuit is still pending in the United States District Court.

negotiations between the City of Irvine and T-Mobile to resolve the litigation,³ a recalcitrant locality is capable of delaying build-out of facilities for an extended period of time merely by maintaining the status quo.

This case raises issues that should be squarely resolved by Commission action in this proceeding, such as what constitutes a “tower,” what constitutes a substantial change in the physical dimensions of the tower or base station such that Section 6409(a) does not apply, and whether “non-conforming” towers fall within the ambit of Section 6409(a). The Commission’s pronouncements would provide invaluable guidance in this and many other cases as well. In addition, the Commission’s guidance would minimize Section 6409(a) litigation as the parties and the public would have a common understanding of the scope of Section 6409(a).

The City and County of San Francisco, California

The City of San Francisco enacted an ordinance that requires that, if there will be any change in the “size, appearance, or power” of wireless equipment on utility poles in public rights of way, a full discretionary process is required. T-Mobile, along with Crown Castle and ExteNet, filed an action in the California Superior Court for San Francisco County in 2011 challenging the City’s ordinance on the ground that it violates certain California laws. After the enactment of Section 6409(a), the Plaintiffs amended their complaint to add a claim that the ordinance and its implementing regulations also violate Section 6409(a).

The City of San Francisco has not contested that Section 6409(a) preempts discretionary review (and obviously every change in size, appearance, or power would not be a substantial change in physical dimensions). Instead, the City has taken the position that the Plaintiffs’ facilities are not “base stations” and the utility poles are not “towers,” and therefore Section 6409(a) does not apply. T-Mobile and the other Plaintiffs believe that the Commission has already defined “base station” sufficiently to resolve the City’s assertion. Nonetheless, Plaintiffs had to present expert testimony at trial in January 2014 demonstrating that their installations were base stations, or at least part of base stations, under the Commission’s definitions. The parties are submitting post-trial briefs and hope for a ruling in March 2014. Even if the court does act this month, three years will have elapsed since the case was brought. FCC guidance that creates uniform rules, policies, and expectations would be far superior to numerous judicial decisions, each of which can take multiple years.

During the pendency of the case, T-Mobile has modified some of its right of way installations in San Francisco. In each case, T-Mobile replaced the existing antennas and equipment with significantly smaller antennas and equipment. But in every case, the City of San Francisco required T-Mobile to go through the full discretionary review process, which included a subjective aesthetic evaluation and the potential for multiple rounds of public hearings and appeals.

³ While this case is ongoing the parties are engaged in good faith negotiations. However, at present the timeframe for resolution by the court or via a settlement between the parties remains uncertain.

San Francisco's current practice of automatically subjecting these types of antenna and equipment replacements to full public hearing is in direct conflict with Section 6409(a). The FCC can eliminate such broad affronts to Section 6409(a) by unequivocally stating that such tactics are improper.

Town of Hempstead, New York

Four national wireless carriers,⁴ including T-Mobile, filed a lawsuit in October 2010 in the United States District Court for the Eastern District of New York against the Town of Hempstead, New York, shortly after the Town (the largest in the country) adopted a wireless siting ordinance which it touted as providing "the most aggressive tools at its disposal in dealing with the telecommunications giants."⁵ After Congress enacted Section 6409(a), Plaintiffs amended their complaint. Plaintiffs then filed a motion for summary judgment alleging that the Town's wireless siting ordinance is preempted under Section 6409(a) and other provisions of federal law. Just before the Town's opposition to the summary judgment motion was due, the Town repealed and then reenacted a revised version of the wireless ordinance. Because the Town altered many of the key provisions named in the carriers' summary judgment motion, the wireless plaintiffs withdrew the summary judgment motion. Although the Town's revisions removed certain objectionable provisions, sections of the reenacted ordinance still violate Section 6409(a) and other provisions of federal law. This lawsuit is on-going.

Even in the absence of litigation,⁶ T-Mobile experiences substantial delays in obtaining local approvals to collocate on existing towers and base stations, or to modify such facilities as part of the company's modernization efforts. Modernizing existing cell sites has been, and will continue to be a top priority for T-Mobile as it continues to upgrade existing cell sites to LTE technology, and will soon need to update cell sites to utilize newly available spectrum in the 700 MHz band.

Some examples of the problems T-Mobile has encountered are set forth below:

New Mexico

After the passage of Section 6409(a), T-Mobile had multiple cell sites that it was trying to install in several counties in New Mexico to expand wireless service in rural communities. Several of those counties employed a municipal wireless consulting firm that operates in multiple states. In each of these localities the permit application requirements to collocate new T-Mobile wireless facilities on existing communication towers were so expensive and time consuming that T-Mobile felt compelled to raise the prospect of seeking judicial redress. Once

⁴ *New York SMSA Partnership d/b/a Verizon Wireless, New Cingular Wireless PCS, LLC and T-Mobile Northeast LLC v. Town of Hempstead et al.*, Case No 02:10-cv-04997 (AKT) (USDC ED NY 2010). One of the parties to the lawsuit has dropped out.

⁵ Will Van Sant, *Hempstead Town Approves Tough New Law to Regulate Cell Towers*, Newsday (Aug. 3, 2010) (quoting Supervisor Kate Murray).

⁶ It is not uncommon, however, for litigation to arise over collocation requests. *See, e.g., T-Mobile Northeast LLC v. Village of East Hills*, 779 F. Supp. 2d 256 (USDC ED NY 2011); *MetroPCS New York, LLC v. City of Mount Vernon*, 739 F. Supp. 2d 409, (USDC SD NY 2010).

one of the counties entered into discussions with T-Mobile, the county revised many of its objectionable processes and requirements. Fortunately, several other counties then adopted the same approach. Even in this best case scenario, when discussions yielded results, the process delayed, by months, the rollout of T-Mobile wireless broadband facilities to customers in New Mexico.

Maricopa, Arizona

The requirements of the City of Maricopa, Arizona in regards to their permit application and their review procedures were very similar to those T-Mobile faced in New Mexico. Although the issues eventually were worked out through negotiations without a need to litigate, the process required T-Mobile to put its planned build-out on hold.

Cities of Long Beach and Redondo Beach, California

These cities took the position that Section 6409(a) does not apply to base stations installed on any structure other than a commercial telecommunications tower. This delayed the deployment of necessary upgrades to a significant number of existing T-Mobile cell sites.

City of Riverside, California

The City wanted to impose a host of new conditions of approval in conjunction with the review of EFR applications to upgrade transmission equipment at existing base stations. T-Mobile had to file a host of administrative appeals and make it clear that T-Mobile would pursue federal court litigation before it could secure approvals to upgrade these cell sites.

City of Baldwin Park, California

The City used an EFR application as an opportunity to require T-Mobile to bring existing cell sites up to new zoning standards. T-Mobile was required to replace an existing fence surrounding a cell site and install a decorative concrete block wall. The City's demands were unrelated to the issue of whether this was an EFR entitled to Section 6409(a) treatment.

City of Arcadia, California

The City deemed T-Mobile's EFR applications incomplete and ordered T-Mobile to submit a map of all T-Mobile's wireless facilities in the City as well as those outside the City, along with written reports identifying how T-Mobile's wireless coverage would be improved if the transmission equipment was replaced and updated. The City's demands for additional information were unrelated to the issues relating to replacement or addition of transmission equipment that the City is allowed to consider under Section 6409(a). Ultimately, T-Mobile was successful in getting the City to decide not to utilize these permit application requirements.

In sum, over the last decade I have witnessed numerous localities attempt to inappropriately constrain collocation and modification of existing facilities. Many localities attempted to thwart the Shot Clock after it was implemented and since the enactment of Section

