

September 19, 2014

VIA ECFS

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

Re: *Ex Parte Communication*
WT Docket Nos. 13-238, 13-32; WC Docket No. 11-59

Dear Ms. Dortch:

On September 17, 2014, Brian Josef, Assistant Vice President, Regulatory Affairs, of CTIA – The Wireless Association®, and Jonathan Campbell, Director, Government Affairs, of PCIA – The Wireless Infrastructure Association, together with the undersigned (collectively, “CTIA and PCIA” or the “Associations”), met with Chad Breckinridge, Patricia Robbins, and Peter Trachtenberg of the Wireless Telecommunications Bureau. During the meeting, CTIA and PCIA discussed appropriate remedies to implement the mandate in Section 6409(a) of the Spectrum Act that local jurisdictions “may not deny, and shall approve” any Eligible Facilities Request (“EFR”).¹

Consistent with their recommendations in the Broadband Acceleration docket, CTIA and PCIA reiterated that the FCC should implement a “deemed granted” remedy to carry out Section 6409(a)’s “shall approve” mandate if an EFR application is not timely approved.² The most

¹ Middle Class Tax Relief and Job Creation Act of 2012, 112 Pub. L. 96, Title VI, 126 Stat. 156, 232, § 6409(a) (2012) (“Spectrum Act”), *codified at* 47 U.S.C. § 1455(a).

² *See* Comments of CTIA – The Wireless Association®, WT Docket Nos. 13-238, 13-32; WC Docket No. 11-59, at 17-18 (Feb. 3, 2014); Reply Comments of CTIA – The Wireless Association®, WT Docket Nos. 13-238, 13-32; WC Docket No. 11-59, at 8-10 (Mar. 5, 2014) (“CTIA Reply Comments”); Comments of PCIA – The Wireless Infrastructure Association, WT Docket Nos. 13-238, 13-32; WC Docket No. 11-59, at 50-53 (Feb. 3, 2014); Reply Comments of PCIA – The Wireless Infrastructure

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effective way to carry out Congressional intent is to deem granted applications that are not acted upon in a timely manner or are impermissibly denied by a local jurisdiction.

At a minimum, CTIA and PCIA emphasized that the “shall approve” mandate necessitates an expedited period of no more than 45 days for a locality to review and approve an EFR application. The Associations explained that an expedited review period is warranted because an EFR application should be subject, at most, to an administrative review consisting only of verification by the local jurisdiction that, in fact, the application is an eligible facilities request.³ The limited scope of the administrative review coupled with the “shall approve” mandate in Section 6409(a) warrants significantly reducing the time period for review.⁴ Accordingly, the FCC should explicitly clarify that if the locality fails to act on an EFR application within 45 days, the application is statutorily effective pursuant to Section 6409(a) and an applicant may then seek injunctive or other appropriate relief in a court of competent jurisdiction.⁵ The shorter review period for EFR applications will be easily administrable by requiring applicants to identify, at the time of filing, whether or not their application is an EFR.

Association, WT Docket Nos. 13-238, 13-32; WC Docket No. 11-59, at 23-26 (Mar. 5, 2014) (“PCIA Reply Comments”).

³ See CTIA Reply Comments at 6; PCIA Reply Comments at 21.

⁴ CTIA and PCIA also discussed the 90-day review period for collocations under the current Section 332(c)(7) “shot clock,” which requires action by the end of the review period but does not prescribe the outcome. See *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B)*, 24 FCC Rcd 13994 (2009) (“*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). When the FCC adopted that review period in 2009, it rejected a shorter time frame because of the need for flexibility to “explore collaborative solutions,” “prepare a written explanation,” and “accommodate reasonable, generally applicable procedural requirements.” *Id.* at ¶ 44. Three years later, Congress removed the need for that flexibility – making a shorter time frame appropriate – by mandating approval of Section 6409(a) EFR applications.

⁵ CTIA and PCIA highlighted that the FCC has previously adopted a “go to court” remedy in a case where the underlying statute is silent as to a specific remedy, and the FCC has ample authority to do so here as well. See *Preemption of Local Zoning Regulation of Satellite Earth Stations*, 11 FCC Rcd 19276, ¶¶ 56-58 (1996); compare Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, § 207 (1996) (directing the FCC to “promulgate regulations to prohibit restrictions that impair a viewer’s ability to receive video programming services” through over-the-air reception devices (“OTARD”)) with 47 C.F.R. 1.4000(d) (permitting parties to petition the Commission “or a court of competent jurisdiction ... to determine whether a particular restriction is permissible or prohibited” under the OTARD rule); see also PCIA Comments at 50-51 (explaining that Section 6003(a) of the Spectrum Act provides the FCC with broad authority to adopt rules to implement and enforce the “shall approve” provisions of Section 6409(a) “as if [those provisions] [were] a part of the Communications Act”).

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Pursuant to Section 1.1206 of the Commission's rules, this notice will be filed via ECFS with your office, and a copy will be provided via email to the attendees. Please do not hesitate to contact the undersigned with any questions.

Respectfully submitted,

WILKINSON BARKER KNAUER, LLP

/s/ William J. Sill

William J. Sill

cc: Chad Breckinridge
Patricia Robbins
Peter Trachtenberg