

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**The League of California  
Cities; The League of Oregon  
Cities; City of Glendora,  
California; City of Rancho  
Palos Verdes, California; and  
City of Torrance, California,**

Petitioners,

v.

**Federal Communications  
Commission**

and

**United States of America,**

Respondents.

Case No. \_\_\_\_\_

**PETITION FOR REVIEW  
of Declaratory Ruling of the  
Federal Communications  
Commission**

Pursuant to Federal Rule of Appellate Procedure 15, Circuit Rule 15-1, 5 U.S.C. § 706, 47 U.S.C. § 402(a), 47 U.S.C. § 151 *et seq.*, and 28 U.S.C. §§ 2342(1) and 2344, the League of California Cities; the League of Oregon Cities; the City of Glendora, California; the City of Rancho Palos Verdes, California; and the City of Torrance, California

(collectively, “Petitioners”) hereby petition this Court for review of the Federal Communications Commission (the “Commission”) declaratory ruling captioned as *In the Matter of Implementation of State and Local Governments’ Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250 and RM-11849, FCC 20-75 (released Jun. 10, 2020) (the “Ruling”). A complete copy of the Ruling is attached.

The Ruling purports to “clarify” existing Commission interpretations of Section 6409(a) of the Spectrum Act (codified as 47 U.S.C. § 1455(a)) originally adopted through an informal rulemaking proceeding captioned as *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, WT Docket No. 13-238, 30 FCC Rcd. 31 (Oct. 17, 2014). However, the Commission’s new rules and significant changes to its existing rules unlawfully preempt local and state government authority promulgated without response to the arguments advanced by Petitioners in the record.

The Ruling is a final order subject to appeal under 47 U.S.C. § 402(a). Venue is proper in this Court under 28 U.S.C. § 2343 because all Petitioners are located in this judicial circuit.

All Petitioners have standing to bring this Petition. The League of California Cities, the League of Oregon Cities, the City of Glendora and the City of Rancho Palos Verdes participated in the underlying proceeding. The City of Torrance did not participate in the underlying proceeding but are nonetheless aggrieved by the Ruling because it directly, immediately and adversely affects their interests.

Petitioners seek review of the Ruling on the grounds that the Ruling is arbitrary, capricious, and an abuse of discretion within the meaning of the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701 *et seq.*; violates the APA’s notice requirements for rulemakings, *id.* §§ 551(5) and 553; violates federal law, including, but not limited to, the Constitution of the United States, the Communications Act of 1934, as amended, and the Commission’s regulations promulgated thereunder; and is otherwise contrary to law. Petitioners respectfully request that this Court hold unlawful, vacate, enjoin, and set aside the Ruling; and grant such other relief as the Court may find proper.

Dated: June 22, 2020

Respectfully submitted,

THE LEAGUE OF CALIFORNIA  
CITIES; THE LEAGUE OF OREGON  
CITIES; CITY OF GLENDORA, CAL.;  
CITY OF RANCHO PALOS VERDES,  
CAL.; and CITY OF TORRANCE,  
CAL.,

By: /s/ Robert C. May III  
Robert C. May III  
TELECOM LAW FIRM, PC  
3570 Camino del Rio North  
Suite 102  
San Diego, California 92108  
Telephone: (619) 272-6200  
Fax: (619) 376-2300  
Email: [tripp@telecomlawfirm.com](mailto:tripp@telecomlawfirm.com)

## **CERTIFICATE OF CORPORATE DISCLOSURE**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and the United States Court of Appeals for the Ninth Circuit Local Rule 26.1, Petitioners hereby submit the following disclosures:

1. The League of California Cities is a nonprofit corporation which does not issue stock, and which has no parent corporation, nor is it owned in any part by any publicly held corporation.
2. The League of Oregon Cities; the City of Glendora, California; the City of Rancho Palos Verdes, California; and the City of Torrance, California are each a governmental agency and therefore exempt from Rule 26.1.

Dated: June 22, 2020

Respectfully submitted,

THE LEAGUE OF CALIFORNIA  
CITIES; THE LEAGUE OF OREGON  
CITIES; CITY OF GLENDORA, CAL.;  
CITY OF RANCHO PALOS VERDES,  
CAL.; and CITY OF TORRANCE,  
CAL.,

By: /s/ Robert C. May III  
Robert C. May III  
TELECOM LAW FIRM, PC

3570 Camino del Rio North  
Suite 102  
San Diego, California 92108  
Telephone: (619) 272-6200  
Fax: (619) 376-2300  
Email: [tripp@telecomlawfirm.com](mailto:tripp@telecomlawfirm.com)

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

In the Matter of	)	
	)	
Implementation of State and Local Governments’	)	WT Docket No. 19-250
Obligation to Approve Certain Wireless Facility	)	
Modification Requests Under Section 6409(a) of	)	RM-11849
the Spectrum Act of 2012	)	

**DECLARATORY RULING AND NOTICE OF PROPOSED RULEMAKING**

**Adopted: June 9, 2020**

**Released: June 10, 2020**

**Comment Date: 20 days after publication in the Federal Register**

**Reply Date: 30 days after publication in the Federal Register**

By the Commission: Chairman Pai and Commissioners O’Rielly and Carr issuing separate statements;  
Commissioners Rosenworcel and Starks dissenting and issuing separate statements.

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**I. INTRODUCTION**

1. Today, we continue our efforts to facilitate the deployment of 5G networks—and the economic opportunity that they enable—in every community. To reach all corners of our nation, 5G networks must use a range of spectrum bands, from low to high frequencies, and a variety of physical infrastructure, from small cells to macro towers. To meet these needs, the Commission’s spectrum policy

has focused on making available a wide range of low-, mid-, and high-band spectrum.<sup>1</sup> Similarly, the Commission's infrastructure policy has focused on updating our regulations to reflect new technology like small cells. Most notably, the Commission has modernized its approach to federal historic preservation and environmental review governing wireless infrastructure to accommodate small cell technology<sup>2</sup> and has addressed outlier conduct at the State and local government level that needlessly slowed down and increased the costs of deploying new small cells and modified wireless facilities.<sup>3</sup> We have seen a significant acceleration of wireless builds in the wake of those decisions. At the same time, there remain additional barriers to wireless infrastructure deployment that merit our consideration.

2. These barriers affect not just small cell deployment. Indeed, we know that providers of 5G networks will not reach all Americans solely by deploying small cell technology. We therefore also must focus on ensuring that our infrastructure regulations governing macro towers align with the critical need to upgrade existing sites for 5G networks, particularly in rural areas, where small cell deployment may be less concentrated.<sup>4</sup> As the record in this proceeding shows, ongoing uncertainty regarding the application of existing federal law to aspects of State and local government review of modifications to

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<sup>1</sup> *Review of the Commission's Rules Governing the 896-901/935-940 MHz Band*, WT Docket No. 17-200, Report and Order, Order of Proposed Modification, and Orders, FCC 20-67 (May 14, 2020); *Transforming the 2.5 GHz Band*, WT Docket No. 18-120, Report and Order, 34 FCC Rcd 5446 (2019); *Auction of Priority Access Licenses for the 3550-3650 MHz Band, Comment Sought on Competitive Bidding Procedures for Auction 105*, AU Docket No. 19-244, Public Notice, 34 FCC Rcd 9215 (OEA/AU 2019); *Expanding Flexible Use of the 3.7 to 4.2 GHz Band*, GN Docket No. 18-122, Report and Order and Order of Proposed Modification, 35 FCC Rcd 2343 (2020); *Wireless Telecommunications Bureau Announces that Applications for Auction 103 Licenses are Accepted for Filing*, Public Notice, DA 20-461, 2020 WL 2097298 (WTB Apr. 30, 2020).

<sup>2</sup> *See, e.g., Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, Second Report and Order, 33 FCC Rcd 3102 (2018) (*2018 NEPA/NHPA Order*) (streamlining environmental and historic preservation review procedures and clarifying cases in which fees are required for Tribal review), *aff'd in part, rev'd in part, United Keetoowah Band of Cherokee Indians, v. FCC*, 933 F.3d 728 (D.C. Cir. 2019) (affirming the FCC's changes in the *2018 NEPA/NHPA Order* to tribal involvement in Section 106 review and denying request to vacate the *Order* in its entirety while granting petitioners' request to vacate the portion of the decision that exempted small cells from review under the National Environmental Policy Act and the National Historic Preservation Act).

<sup>3</sup> *See, e.g., Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, WC Docket No. 17-84, Declaratory Ruling and Third Report & Order, 33 FCC Rcd 9088, 9096-100, paras. 23-28, 32 (2018) (*2018 Small Cell Order*) (clarifying state and local legal requirements that may have the effect of prohibiting service under 47 U.S.C. §§ 253, 332(c)(7)), *pets. for review pending, Sprint Corp. v. FCC, et al.* (9th Cir.).

<sup>4</sup> Certain residents and representatives of rural areas have expressed support in the record for our efforts to accelerate deployment of wireless infrastructure. *See, e.g.,* Letter from Denis Pitman, Chairman, Donald W. Jones, Member, and John Ostlund, Member, Board of County Commissioners for Yellowstone County, MT, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 19-250 and RM-11849 (filed May 28, 2020); Letter from Travis W. Jones, Chief, Broadview Rural Fire District, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 19-250 and RM-11849 (filed June 1, 2020); Letter from John Prinkki to Marlene H. Dortch, Secretary, FCC, WT Docket No. 19-250 and RM-11849 (filed June 2, 2020); Letter from Paul Anderes, Commissioner, Union County, OR, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 19-250 and RM-11849 (filed May 27, 2020); Letter from Michelle Erickson-Jones to Marlene H. Dortch, Secretary, FCC, WT Docket No. 19-250 and RM-11849 (filed June 1, 2020); Letter from Clinton Loss, President, Montana Emergency Medical Services Association, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 19-250 and RM-11849 (filed June 4, 2020); Letter from Marian J. Orr, Mayor, City of Cheyenne, WY, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 19-250 and RM 11849 (filed Apr. 23, 2020); Rocky Mountain Farmers Union (@RMFUnion), Twitter (May 19, 2020, 8:13 PM), <https://twitter.com/RMFUnion/status/1262899253229256705>; Billings, MT Chamber of Commerce (@ChamberBillings), Twitter (May 19, 2020, 7:16 PM), <https://twitter.com/ChamberBillings/status/1262884844129812483>.



existing wireless equipment remains a deterrent to the rapid deployment of 5G wireless infrastructure. We are committed to working with State and local governments to facilitate the deployment of advanced wireless networks in all communities consistent with the decisions already made by Congress, which we expect will usher in a new era of American entrepreneurship, productivity, economic opportunity, and innovation for years to come.

3. Therefore, in this *Declaratory Ruling and Notice of Proposed Rulemaking*, we clarify the meaning of our rules implementing Congress' decisions in section 6409(a) of the Spectrum Act of 2012,<sup>5</sup> which recognized the efficiency of using existing infrastructure for the expansion of advanced wireless networks. Those rules set forth a streamlined process for State and local government review of applications to deploy wireless telecommunications equipment on existing infrastructure.<sup>6</sup> Under this framework, a State or local government shall approve within 60 days any request for modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.<sup>7</sup>

4. Our clarifications are necessary to ensure fidelity to the language of those rules and the decisions Congress made in section 6409(a) 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 station."<sup>8</sup> Specifically, our *Declaratory Ruling* clarifies our rules regarding when the 60-day shot clock for State or local government review of modifications of existing structures commences.<sup>9</sup> We also clarify what constitutes a "substantial change" in the physical dimensions of wireless infrastructure under our rules, and the extent to which certain elements of a proposed modification to existing infrastructure affect the eligibility of that proposed modification for streamlined State or local government review under section 6409(a).<sup>10</sup> Finally, we further streamline our historic preservation and environmental review process to eliminate a redundant and unnecessary element by clarifying that when the FCC and applicants have entered into a memorandum of agreement to mitigate effects on historic properties a subsequent environmental assessment addressing such effects is not required.<sup>11</sup>

5. In the *Notice of Proposed Rulemaking*, we seek comment on whether changes to our rules regarding excavation outside the boundaries of an existing tower site, including the definition of the boundaries of a tower "site," would advance the objectives of section 6409(a).<sup>12</sup>

<sup>5</sup> Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, title VI (Spectrum Act of 2012), § 6409(a), 126 Stat. 156 (Feb. 22, 2012) (codified as 47 U.S.C. § 1455(a)).

<sup>6</sup> See 47 U.S.C. § 1455(a); 47 CFR § 1.6100; *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket No. 13-238 and 13-32, WC Docket No. 11-59, Report and Order, 29 FCC Rcd 12865, 12922-66, paras. 135-241 (2014) (*2014 Infrastructure Order*), *aff'd*, *Montgomery Cty. v. FCC*, 811 F.3d 121 (4th Cir. 2015).

<sup>7</sup> 47 U.S.C. § 1455(a)(1); see 47 CFR § 1.6100 (b)(7), (c); *2014 Infrastructure Order*, 29 FCC Rcd at 12940-58, paras. 182-204, 205-21.

<sup>8</sup> 47 U.S.C. § 1455(a)(1).

<sup>9</sup> 47 CFR § 1.6100(c)(2)-(4); *2014 Infrastructure Order*, 29 FCC Rcd at 12955-58, paras. 211-221.

<sup>10</sup> 47 CFR § 1.6100(b)(7)(i), (iii), (v), (vi); *2014 Infrastructure Order*, 29 FCC Rcd at 12944-47, 12949-51, paras. 188-94, 200, 204.

<sup>11</sup> See 47 CFR §§ 1.1307(a), 1.1308, 1.1311; *Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission* (Wireless Facilities Nationwide Programmatic Agreement), 47 CFR pt. 1, Appx. C.

<sup>12</sup> 47 CFR § 1.6100(b)(7)(iv); 47 CFR § 1.6100(b)(6).

## II. BACKGROUND

6. Under Section 6409(a) of the Spectrum Act, Congress determined 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 station.”<sup>13</sup> Congress intended this provision of the Spectrum Act to advance wireless service by expediting the deployment of the network facilities needed to provide wireless services.<sup>14</sup>

7. In 2014, the Commission adopted the *2014 Infrastructure Order*, which, among other things, codified rules to implement section 6409(a).<sup>15</sup> Commission rules provide that a State or local government must approve an eligible facilities request within 60 days of the date on which an applicant submits the request.<sup>16</sup> The Commission defined the term “eligible facilities request” as “[a]ny request for modification of an existing tower or base station that does not substantially change the physical dimensions of such tower or base station, involving: (i) Collocation of new transmission equipment; (ii) Removal of transmission equipment; or (iii) Replacement of transmission equipment.”<sup>17</sup> The Commission’s rules provide that changes are “substantial” if they: exceed defined limits on increases in the height or girth of the structure or the number of associated equipment cabinets, involve excavation or deployment on ground outside a structure’s current site, defeat the concealment elements of the preexisting structure, or violate conditions previously imposed by the local zoning authority.<sup>18</sup> The Commission also established procedures for when the 60-day shot clock for review may be tolled, as well as a “deemed granted” remedy in the event that states and localities fail to act on an eligible facilities request within the 60-day window.<sup>19</sup> In recent years, the Commission has taken additional actions to streamline review by State and local governments of wireless infrastructure.<sup>20</sup>

8. In August and September of 2019, WIA and CTIA filed separate Petitions for Declaratory Ruling asking, among other things, for the Commission to make certain clarifications to streamline the section 6409(a) process,<sup>21</sup> and WIA filed a Petition for Rulemaking seeking changes to

<sup>13</sup> 47 U.S.C. § 1455(a).

<sup>14</sup> See H.R. Rep. No. 112-399, at 136 (2012). A section-by-section analysis of the JOBS Act, a precursor to the Spectrum Act of 2012, was submitted in the Congressional Record during floor debate of the Middle Class Tax Relief and Job Creation Act of 2012. The analysis explains that the precursor section to section 6409(a) was intended 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.” 157 Cong. Rec. 2055 (2012) (statement of Rep. Fred Upton).

<sup>15</sup> 47 CFR § 1.6100; *2014 Infrastructure Order*, 29 FCC Rcd at 12922-65, paras. 135-241.

<sup>16</sup> 47 CFR § 1.6100(c); *2014 Infrastructure Order*, 29 FCC Rcd at 12952, 12955-57, paras. 206, 211, 212, 215.

<sup>17</sup> 47 CFR § 1.6100(b)(3). The statutory definition of “eligible facilities request” is slightly different. See 47 U.S.C. § 1455(a). Our use of the term eligible facilities request in this order relies on the definition set forth in the rule. See also *2014 Infrastructure Order*, 29 FCC Rcd at 12944-45, 12955, paras. 188, 211.

<sup>18</sup> 47 CFR § 1.6100(b)(7)(i)-(vi).

<sup>19</sup> *Id.* § 1.6100(c)(2)-(4).

<sup>20</sup> See *2018 Small Cell Order*, 33 FCC Rcd at 9096-100, paras. 23-28, 32; *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, WC Docket No. 17-84, Third Report & Order and Declaratory Ruling, 33 FCC Rcd 7705, 7775, 7777-79, paras. 140, 145-46 (2018) (*2018 Moratorium Order*) pets. for review pending, *American Elec. Power v. FCC*, et al. (9th Cir.).

<sup>21</sup> Petition of Wireless Infrastructure Association for Declaratory Ruling, WT Docket No. 19-250, at 2-4 (filed Aug. 27, 2019), [https://ecfsapi.fcc.gov/file/109180312204232/19-250%20WIA%20Ex%20Parte%20\(9-18-19\).pdf](https://ecfsapi.fcc.gov/file/109180312204232/19-250%20WIA%20Ex%20Parte%20(9-18-19).pdf) (WIA Petition for Decl. Ruling); Petition of CTIA for Declaratory Ruling, WT Docket No. 19-250, WC Docket No. 17-84 at 2 (filed Sept. 6, 2019), <https://ecfsapi.fcc.gov/file/1091954184161/190906%20CTIA%20Infrastructure%20PDR%20Final.pdf> (CTIA

section 1.6100 of the Commission's rules.<sup>22</sup> The petitioners and individual wireless service providers assert that localities are misinterpreting the requirements of section 6409(a) and our implementing rules.<sup>23</sup> They contend that these misinterpretations are delaying 5G deployment and other needed infrastructure upgrades, and they urge us to clarify aspects of the Commission's rules implementing section 6409(a).<sup>24</sup>

9. Specifically, WIA's Petition for Declaratory Ruling asks the Commission to clarify: (1) when the section 6409(a) shot clock begins to run; and (2) whether the shot clock and "deemed granted remedy" apply to all authorizations necessary to deploy wireless infrastructure.<sup>25</sup> It also asks the Commission to clarify: (1) the definitions of "concealment elements," "equipment cabinets," and "current site;" (2) when a change to the size or height of an antenna is a "substantial change;" (3) the interpretation of the separation clause in section 1.6100(b)(7)(i); (4) what are the "conditions associated with the siting approval" under section 1.6100(b)(7)(vi); and (5) that legal, non-conforming structures do not *per se* constitute substantial changes.<sup>26</sup> Additionally, WIA asks the Commission to clarify that localities may not issue conditional approvals under section 6409(a), nor may they needlessly impose processes to delay section 6409(a) approval.<sup>27</sup> CTIA's Petition requests clarification of the terms "concealment elements," "equipment cabinets," and "base station," under section 1.6100(b)(7), and it asks the Commission to find that applicants may lawfully construct facilities or make modifications if a locality has not issued all permits within the 60-day section 6409(a) shot clock and an application is deemed granted.<sup>28</sup>

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Petition for Decl. Ruling). Although WIA and CTIA filed their Petitions for Declaratory Ruling in WT Docket No. 17-79, that proceeding does not address issues arising under section 6409(a) of the Spectrum Act. Rather, that proceeding focuses on wireless infrastructure deployment issues under sections 253 and 332(c)(7) of the Communications Act, the National Environmental Policy Act, and the National Historic Preservation Act. Thus, the Public Notice opening this proceeding directed parties to use new WT Docket No. 19-250 for filings addressing the section 6409(a) issues raised in WIA's and CTIA's petitions. *See Wireless Telecommunications Bureau and Wireline Competition Bureau Seek Comment on WIA Petition For Rulemaking, WIA Petition For Declaratory Ruling and CTIA Petition For Declaratory Ruling*, WT Docket No. 19-250, Public Notice, 34 FCC Rcd 8099, 8099 & n.4 (WTB/WCB 2019) (*WIA/CTIA Petitions Public Notice*).

<sup>22</sup> Petition of Wireless Infrastructure Association for Rulemaking, File No. RM-11849, [https://ecfsapi.fcc.gov/file/108273047516225/WIA%20Petition%20for%20Rulemaking%20\(8-27-19\).pdf](https://ecfsapi.fcc.gov/file/108273047516225/WIA%20Petition%20for%20Rulemaking%20(8-27-19).pdf), (filed Aug. 27, 2019) (WIA Petition for Rulemaking). WIA's Petition for Rulemaking asks the FCC to amend section 1.6100 of the rules to determine that a compound expansion (i.e., excavation outside the current boundaries of leased or owned properties surrounding a tower site) is a "substantial change" under section 6409(a) only if excavation occurs more than 30 feet from a tower site boundary. The Petition for Rulemaking also asks the FCC to adopt rules requiring that (1) any fees charged for processing eligible facilities requests represent no more than a reasonable approximation of actual and direct costs incurred; and (2) an applicant's failure to pay disputed fees is not a valid basis for denial or refusal to process an eligible facilities request. WIA Petition for Rulemaking at 9-13.

<sup>23</sup> *See, e.g.*, WIA Petition for Decl. Ruling at 2; CTIA Petition for Decl. Ruling, at 3-4, 7-9; AT&T Comments at 2, 5; Competitive Carriers Association (CCA) Comments at 2; Crown Castle Comments at 4-6; CTIA Comments at 2-3, 6; CTIA Reply at 5-6; Extenet Comments at 21; Free State Comments at 2; T-Mobile Comments at 3, 6-7; WIA Comments at 3.

<sup>24</sup> WIA Petition for Decl. Ruling at 5-7; CTIA Petition for Decl. Ruling at 4-5. *See, e.g.*, CTIA Petition for Decl. Ruling at i-ii ("While the Commission's rules implementing Sections 6409 and 224 have played a vital role in promoting wireless infrastructure deployment, experience with these rules in the years since their adoption has identified areas of uncertainty and inconsistent application that slow down deployment and undermine Congressional and Commission intent.").

<sup>25</sup> WIA Petition for Decl. Ruling at 5-8.

<sup>26</sup> *Id.* at 9-10, 13, 16-20.

<sup>27</sup> *Id.* at 20, 21.

<sup>28</sup> CTIA Petition for Decl. Ruling at 9-16. CTIA also asks the Commission to clarify provisions of section 224 of the Communications Act related to accessing light poles, accessing space on poles, and pole attachment agreements.

(continued....)

10. Local governments allege that the current rules and processes are working well and that they are making efforts to comply with section 6409(a) and to process applications expeditiously.<sup>29</sup> They maintain that they have no interest in thwarting wireless network upgrades or delaying the deployment of appropriate facilities. They further claim that, to the extent their reviews are delayed at all, most of the delays are caused by applicants' errors<sup>30</sup> or their contractors' delays,<sup>31</sup> rather than by any improper local government review practices. They contend that the industry parties' arguments and proposals are premised on vague, unsubstantiated, and often false allegations that fail to identify specific localities or provide sufficiently concrete descriptions of their alleged violations.<sup>32</sup>

### III. DECLARATORY RULING

11. In this *Declaratory Ruling*, we clarify several key elements that determine whether a modification request qualifies as an eligible facilities request that a State or local government must approve within 60 days, and we clarify when the 60-day shot clock for review of an eligible facilities request commences. These interpretations provide greater certainty to applicants for State and local government approval of wireless facility modifications, as well as to the reviewing government agencies,<sup>33</sup> and these interpretations should accelerate the deployment of advanced wireless networks.<sup>34</sup>

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CTIA Petition for Decl. Ruling at 20-28. The portion of CTIA's Petition for Declaratory Ruling concerning pole attachments under section 224 of the Communications Act is being considered in WC Docket No. 17-84 and is not a subject of this *Declaratory Ruling*.

<sup>29</sup> See, e.g., City of Huntington Beach Comments at 1; NATOA Comments at 7; NATOA Reply at 3; City of Newport News Comments at 2; New York City Comments at 2; National League of Cities (NLC) Comments at 7; NLC Reply at 6-7; San Francisco Reply at 2-3; Seattle Comments at 1.

<sup>30</sup> See, e.g., San Diego Comments at 4-5 (summarizing survey finding that more than 70% of eligible facilities requests processed by 8 jurisdictions since 2014 required at least two incomplete notices before the applicant provided all needed information, adding an average of 29 days to the process; about 20% required a third notice, adding an average of 31 days; and 5% required a fourth notice, adding an average of 40 days); *id.* at 10-11 (examples of applicant misconduct include a provider's leaving small cell applications on the counter at town hall and later sending a letter asserting that the shot clock had commenced). The City of San Diego filed comments and reply comments jointly with 33 other municipal and county governments, referring to themselves collectively as the "Western Communities Coalition." For purposes of simplicity and easy identification, we refer to this group of commenters as "San Diego" throughout. See also NLC Comments at 27 (stating that Montgomery County, MD completes section 6409(a) review, on average, within 60 days, but about 24 of those days are spent waiting for applicants to correct errors, and more than half of eligible facilities requests require at least one request for submission of missing information).

<sup>31</sup> NLC Comments at 4-5 (asserting that from January through October 2019, the City of Portland, Oregon received 82 small wireless facilities permit applications, including 72 subject to section 6409(a), and that 17 of the 50 applications that the city had finished reviewing were not picked up by a contractor for at least a month after the city approved them); San Diego Comments at 5 (reporting that, based on the 650 eligible facilities requests that the City of San Diego reviewed pursuant to section 6409(a), applicants' contractors picked up building permits about 129 days after the city issued them, on average—approximately three times the length of time that the city took to process and approve them). See also Seattle Comments at 4-6 (asking the Commission to examine the problematic practices and processes employed by wireless companies and their contractors).

<sup>32</sup> See, e.g., San Diego Comments at 1-3, 9; NLC Comments at 2-3; NLC Reply at 2-3 (industry parties fail to respond to documented information submitted by localities).

<sup>33</sup> We expect that the industry will work cooperatively with localities who wish to further streamline or adjust their policies to comport with our clarifications to the Commission's rules. See, e.g., Letter from Nancy Werner, General Counsel, NATOA et al., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 19-250 and RM-11849, at 2 (filed May 22, 2020) (NATOA May 22, 2020 *Ex Parte* Letter) (asking the Commission to delay consideration of the item to later in the year and stating that the *Declaratory Ruling* would "dramatically impact the way that local governments across the nation manage their eligible facilities request applications"); Letter from Robert C. May, Michael D. Johnston, Dr. Jonathan L. Kramer, Counsel for Beaverton, Oregon et al., Telecom Law Firm PC, and

(continued....)



12. Specifically, we clarify that:

- The 60-day shot clock in section 1.6100(c)(2) begins to run when an applicant takes the first procedural step in a locality's application process and submits written documentation showing that a proposed modification is an eligible facilities request;
- The phrase "with separation from the nearest existing antenna not to exceed twenty feet"

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Kenneth Fellman, Gabrielle A. Daley, Counsel for Boulder, CO et al., Kissinger & Fellman, P.C., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 19-250 and RM-11849, at 2 (filed June 2, 2020) (asking the Commission to delay consideration of the current item and explaining that localities would need to adapt local practices, policies, and regulations to implement to adjust to the Commission's actions); Letter from Stephen Isler, Mayor, Town of Berwyn Heights, MD, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 19-250 and RM-11849, at 1 (filed June 2, 2020) (stating that a delay in adopting the *Declaratory Ruling* will "prevent the unnecessary diversion of scarce resources to adapt to the Commission's new rule clarifications").

<sup>34</sup> See Letter from John A. Howes, Jr., Government Affairs Counsel, WIA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 19-250 and RM-11849, at 3 (filed June 1, 2020) (WIA June 2020 *Ex Parte* Letter) (noting importance of Commission action "because, now more than ever, Americans are demanding better coverage and using more bandwidth. Over the past few months, network usage has surged as most Americans have been confined to their homes during the COVID-19 coronavirus pandemic."); Letter from Sarah K. Leggin, Director, Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 19-250 and RM-11849, at 2 (filed June 1, 2020) (CTIA June 2020 *Ex Parte* Letter) (explaining that the Commission's clarifications "will have a meaningful impact on the speed of deployment and the ability of localities, states, and industry to work together in a cooperative manner"); Letter from Steven O. Vondran, Executive Vice President and President, U.S. Tower, American Tower, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 19-250 and RM-11849, at 1-2 (filed May 19, 2020) (noting that the Commission's clarifications "will help speed the deployment of advanced wireless communication technologies throughout America at a time when American families are relying on wireless networks more than ever" during "the COVID-19 pandemic."). In light of these significant benefits to wireless infrastructure deployment, we decline to delay these clarifications. See, e.g., NATOA May 22, 2020 *Ex Parte* Letter; Letter from Kit Kuhn, Mayor, City of Gig Harbor, WA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 19-250 and RM-11849, at 1 (filed June 1, 2020). WIA's and CTIA's petitions seeking clarifications of the section 6409(a) rules have been pending for more than nine months. The petitions were filed in August and September of 2019; WTB sought comment on the petitions on September 13, 2019. WIA/CTIA *Petitions Public Notice*, 34 FCC Rcd 8099; Federal Communications Commission, Comment Sought on WIA Petitions for Declaratory Ruling and Rulemaking and CTIA Petition for Declaratory Ruling, Advance Notice of Proposed Rulemaking, 84 Fed. Reg. 50810 (Sept. 26, 2019). Over 70 localities, states, or organizations representing their interests have filed more than 650 pages of comments or letters. See WT Docket No. 19-250. The Declaratory Ruling addresses long-standing issues that have frustrated wireless deployments for years, and commenters in this proceeding have previously filed in this and other dockets about the issues addressed in this Declaratory Ruling. See, e.g., San Diego Comments at 41-44 (raising concerns that granting petitioners' request could allow an unlimited number of equipment cabinets to be added to a structure); NLC Comments at 25-30 (arguing that no changes should be made to the 6409(a) shot clock rules and discussing petitioners request that a "good faith effort" should start the 60-day shot clock); NLC Comments at 18 (arguing that concealment elements should not be only those identified as such at the time of approval); San Diego Comments at 37-39 (arguing against "retroactive limitations on concealment" and in favor of "local authority to continue to regulate aesthetics of deployment"); NLC Comments at 16-18 (arguing against a "narrow" definition of "concealment"); San Diego Comments at 30-36 (same); San Diego Comments at 47-48 (arguing that petitioners' requested changes would not solve the ambiguity regarding allowable height increases); NLC Comment at 2 (stating that the petitioners' seek rule changes, not mere clarifications). See also Letter from Stephen Traylor, Executive Director, NATOA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, Attach. at 13-15 (filed June 15, 2017) (attaching a 2014 filing discussing section 6409(a) that argued for giving localities authority to impose more conditions on wireless infrastructure and arguing against changes to the shot clock rules); Bellevue, Bothell, Burien, Ellensburg, Gig Harbor, Kirkland, Mountlake Terrace, Mukilteo, Normandy Park, Puyallup, Redmond and Walla Walla, WA Comments, WT Docket No. 17-79 (June 14, 2017) (describing ambiguity regarding concealment in the context of small cells and section 6409(a) and asking "that the Commission explicitly acknowledge that a small cell facility by very definition is a concealment element under 6409(a) regulations.").

in section 1.6100(b)(7)(i) allows an increase in the height of the tower of up to twenty (20) feet between antennas, as measured from the top of an existing antenna to the bottom of a proposed new antenna on the top of a tower;

- The term “equipment cabinets” in section 1.6100(b)(7)(iii) does not include relatively small electronic components, such as remote radio units, radio transceivers, amplifiers, or other devices mounted on the structure, and up to four such cabinets may be added to an existing facility per separate eligible facilities request;
- The term “concealment element” in section 1.6100(b)(7)(v) means an element that is part of a stealth-designed facility intended to make a structure look like something other than a wireless facility, and that was part of a prior approval;
- To “defeat” a concealment element under section 1.6100(b)(7)(v), a proposed modification must cause a reasonable person to view a structure’s intended stealth design as no longer effective; and
- The phrase “conditions associated with the siting approval” may include aesthetic conditions to minimize the visual impact of a wireless facility as long as the condition does not prevent modifications explicitly allowed under section 1.6100(b)(7)(i)-(iv) (antenna height, antenna width, equipment cabinets, and excavations or deployments outside the current site) and so long as there is express evidence that at the time of approval the locality required the feature and conditioned approval upon its continuing existence.

13. Certain parties contend that we lack legal authority to adopt the rulings requested in the petitions, which they contend do not just clarify or interpret the rules established in 2014 but also change them, requiring that we issue a Notice of Proposed Rulemaking followed by a Report and Order.<sup>35</sup> As an initial matter, we note that we are not adopting all of the rulings requested in WIA’s and CTIA’s petitions for declaratory ruling because we find incremental action to be an appropriate step at this juncture, particularly given, as mentioned above, that the Commission has continued to take steps to ease barriers to deployment of wireless infrastructure since adopting rules to implement section 6409(a).<sup>36</sup> Our determinations in this *Declaratory Ruling* are intended solely to interpret and clarify the meaning and scope of the existing rules set forth in the *2014 Infrastructure Order*, in order to remove uncertainty and in light of the differing positions of the parties on these questions.<sup>37</sup> In addition, we find it appropriate to initiate a *Notice of Proposed Rulemaking* regarding tower site boundaries and excavation or deployment outside the boundaries of an existing tower site, in order to consider whether modifications of our rules are needed to resolve current disputes. We intend, with these steps, to continue to advance the same goals that led the Commission to adopt regulations implementing section 6409(a) in the first instance—to avoid

<sup>35</sup> See, e.g., NLC Comments at ii, 2 (stating that the interpretations requested by WIA and CTIA “are not ‘clarifications’ – these are, in fact, substantial changes to the Section 6409(a) regime, and inconsistent with . . . the Commission’s prior rulings” – and consequently, the Commission “cannot proceed purely on the basis of these petitions [by Declaratory Ruling], and should instead advance a clear proposal of its own, consistent with the APA”) (citing *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92 (2015)); San Diego Comments at 1, 3 (same).

<sup>36</sup> For example, we do not address WIA’s and CTIA’s requests for clarification that the shot clock and deemed granted rules apply to all permits relating to a proposed modification, including authorizations relating to compliance with health and safety rules. WIA Petition for Decl. Ruling at 2; CTIA Petition for Decl. Ruling at 3-4, 7-9. Nor do we address CTIA’s request for clarification of the permissible increases in the height of base stations. CTIA Petition for Decl. Ruling at 15-16. We do, however, clarify some of the limitations raised by WIA that apply to “conditions of approval” under section 1.6100(b)(7)(vi). WIA Petition for Decl. Ruling at 14-16, 19-24. Additionally, as noted herein, we offer other clarifications and seek comment on rule changes.

<sup>37</sup> In a few instances, we also provide further guidance on the interpretation of the underlying statute with regard to issues that the rules and the *2014 Infrastructure Order* do not directly address.

ambiguities leading to disputes that could undermine the goals of the Spectrum Act, i.e., to advance wireless broadband service.<sup>38</sup>

#### A. Commencement of Shot Clock

14. Section 1.6100(c)(2) provides that the 60-day review period for eligible facilities requests begins “on the date on which an applicant submits a request seeking approval.”<sup>39</sup> If the local jurisdiction “fails to approve or deny a request seeking approval under this section within the timeframe for review (accounting for any tolling), the request shall be deemed granted.”<sup>40</sup> The *2014 Infrastructure Order* discusses the procedures that local governments need to implement in order to carry out their obligations to approve eligible facilities requests within 60 days;<sup>41</sup> it does not, however, define the date on which an applicant is deemed to have submitted an eligible facilities request for purposes of triggering the 60-day shot clock.

15. There is evidence in the record that some local jurisdictions effectively postpone the date on which they consider eligible facilities requests to be duly filed (thereby delaying the commencement of the shot clock) by treating applications as incomplete unless applicants have complied with time-consuming requirements. Such requirements include meeting with city or county staff, consulting with neighborhood councils, obtaining various certifications, or making presentations at public hearings.<sup>42</sup> While some stakeholders may have assumed that, after the *2014 Infrastructure Order*, local governments would develop procedures designed to review and approve covered requests within a 60-day shot clock period,<sup>43</sup> many have not done so and instead continue to require applicants to apply for forms of authorizations that entail more “lengthy and onerous processes” of review.<sup>44</sup> In such jurisdictions, applicants may need to obtain clearance from numerous, separate municipal departments, which could make it difficult to ascertain whether or when the shot clock has started to run.<sup>45</sup>

<sup>38</sup> See *2014 Infrastructure Order*, 29 FCC Rcd at 12922-26, paras. 135-44.

<sup>39</sup> 47 CFR § 1.6100(c)(2); see also *id.* § 1.6100(c)(3) (“The 60-day [shot clock] period begins to run when the application is filed. . . .”); *2014 Infrastructure Order*, 29 FCC Rcd at 12957, para. 216 (“[I]f an application covered by Section 6409(a) has not been approved by a State or local government within 60 days from the date of filing, accounting for any tolling, . . . the reviewing authority will have violated Section 6409(a)’s mandate to approve and not deny the request, and the request will be deemed granted”) (emphasis added).

<sup>40</sup> 47 CFR § 1.6100(c)(4); see also *2014 Infrastructure Order*, 29 FCC Rcd at 12957, para. 216 (noting that the 60-day “timeframe sets an absolute limit that—in the event of a failure to act— results in a deemed grant.”).

<sup>41</sup> *2014 Infrastructure Order*, 29 FCC Rcd at 12955-58, paras. 212-13, 215-21.

<sup>42</sup> See, e.g., Crown Castle Comments at 21 & n.51; AT&T Comments at 13, n.35 (citing *Douglas Cty. v. Crown Castle USA, Inc.*, 411 F. Supp. 3d 1176, 1182 (D. Colo. 2019) (noting county’s characterization of carrier’s filing as a “Presubmittal Review Request,” not a formal EFR application”), *amended and superseded on other grounds*, No. 18-cv-03171-DDD-NRN, 2020 WL 109208 (D. Colo. Jan. 9, 2020)).

<sup>43</sup> *2014 Infrastructure Order*, 29 FCC Rcd at 12956, para. 214.

<sup>44</sup> See, e.g., WIA Petition for Decl. Ruling at 8-9; T-Mobile Comments at 17 & n.64 (citing T-Mobile Reply Comments, WT Docket No. 13-238 (filed Mar. 5, 2014), Attach. A (Declaration of John L. Zembrusky) (identifying municipalities that lack section 6409(a) procedures and that insist on full-scale zoning review)).

<sup>45</sup> See, e.g., T-Mobile Reply at 4-5 (describing municipal ordinances or informal processes in Richmond, CA, Torrance, CA, and Chapel Hill, NC, that require applicants to obtain building permits either before or after the eligible facilities request shot clock runs); Crown Castle Comments at 5-6 (describing the processes of a township in New York, a county in California, and town in Massachusetts that each require review by multiple municipal departments before a building permit will be approved); CTIA Petition for Decl. Ruling at 18 & n.41 (discussing several localities that require “sequential” approvals, in which a locality will issue a conditional use permit or other document that approves the eligible facilities request, and then also require an applicant to obtain a building permit or other authorization, which the locality claims is not subject to the section 6409(a) shot clock).

16. To address uncertainty regarding the commencement of the shot clock, we clarify that, for purposes of our shot clock and deemed granted rules, an applicant has effectively submitted a request for approval that triggers the running of the shot clock when it satisfies *both* of the following criteria: (1) the applicant takes the first procedural step that the local jurisdiction requires as part of its applicable regulatory review process under section 6409(a), and, to the extent it has not done so as part of the first required procedural step, (2) the applicant submits written documentation showing that a proposed modification is an eligible facilities request.<sup>46</sup>

17. By requiring that an applicant take the first procedural step required by the locality, our goal is to give localities “considerable flexibility” to structure their procedures for review of eligible facilities requests,<sup>47</sup> but prevent localities from “impos[ing] lengthy and onerous processes not justified by the limited scope of review contemplated” by section 6409(a).<sup>48</sup> In taking the first procedural step that the local jurisdiction requires as part of its applicable regulatory review process, applicants demonstrate that they are complying with a local government’s procedures. The second criterion—requiring applicants to submit written documentation showing that the proposed modification is an eligible facilities request—is necessary because localities must have the opportunity to review this documentation to determine whether the proposed modification is an eligible facilities request that must be approved within 60 days.<sup>49</sup> We anticipate that the documentation sufficient to start the shot clock under our criteria might include elements like a description of the proposed modification and an explanation of how the proposed modification is an eligible facilities request.<sup>50</sup> We find that these criteria strike a reasonable balance between local government flexibility and the streamlined review envisioned by section 6409(a).<sup>51</sup>

<sup>46</sup> We provide this limited guidance in order to resolve uncertainty about what the Commission intended by its reference to when an applicant “submits a request seeking approval under this section.” Although as noted above interested parties have received notice and extended opportunity to comment on these proposals, this guidance does not constitute a legislative rule, and we disagree with commenters that a further rulemaking would be required. *See, e.g.,* NATOA Reply at 5 (arguing that a “good faith” standard would be “a change to—not a clarification of—the current rule”); Letter from Nancy Werner, General Counsel, NATOA, et. al. to Marlene H. Dortch, Secretary, FCC, WT Docket No. 19-250 et al., at 2 (filed Jun. 2, 2020) (NATOA June 2, 2020 *Ex Parte* Letter) (asserting that that clarification of what certain terms means should be preceded with notice and comment and codified in the Commission’s rules); San Diego Comments at 6-8. The localities’ comments are either directed at relief not granted in this *Declaratory Ruling* and are therefore outside its scope, or critical of interpretations that are exempt from the Administrative Procedures Act’s notice-and-comment requirements as “a declaratory order to terminate a controversy or remove uncertainty.” *See* 5 U.S.C. § 554(e). *See also, e.g., American Mining Congress v. Mine Safety and Health Org.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993) (upholding agency interpretive rules finding that certain X-ray readings qualify as “diagnoses” of lung disease within the meaning of agency’s regulations and observing that “[a] rule does not, in this inquiry, become an amendment [to an existing legislative rule] merely because it supplies crisper and more detailed lines than the authority being interpreted”).

<sup>47</sup> 2014 *Infrastructure Order*, 29 FCC Rcd at 12956, para. 214 & n.595.

<sup>48</sup> *Id.* at 12955, para. 212.

<sup>49</sup> *Id.* at 12956-57, paras. 215-16 (60 days is sufficient for eligible facilities request review).

<sup>50</sup> Commenters have provided examples of the type of documentation that they submit with their applications, including a checklist showing that the proposed modifications do not meet any of the criteria for a substantial change in the physical dimensions of the structure. *See* Letter from Thomas S. Anderson, Senior Attorney, Crown Castle, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 19-250 and RM-11849, at 2-3, Attach., Appx B at 9 (filed June 2, 2020) (Crown Castle June 2020 *Ex Parte* Letter); Letter from John A. Howes, Jr., Government Affairs Counsel, WIA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 19-250 and RM-11849, at 3 (filed June 1, 2020) (WIA June 2020 *Ex Parte* Letter).

<sup>51</sup> *Cf.* WIA Petition for Decl. Ruling at 8-9 (seeking ruling that “the Section 6409(a) shot clock begins to run once an applicant” makes “a good faith attempt to seek the necessary government approvals” by “submitting an EFR under any reasonable process,” *i.e.*, “upon initial written submission in the case where a state or local government requires any type of pre-application submission or meetings.”). Similarly, a number of providers request a ruling that the

(continued....)



18. In addition, we find that further clarifications are needed to achieve our goal of balancing local government flexibility with the streamlined review envisioned by section 6409(a). First, we clarify that a local government may not delay the triggering of the shot clock by establishing a “first step” that is outside of the applicant’s control or is not objectively verifiable. For example, if the first step required by a local government is that applicants meet with municipal staff before making any filing, the applicant should be able to satisfy that first step by making a written request to schedule the meeting—a step within the applicant’s control. In this example, the 60-day shot clock would start once the applicant has made a written request for the meeting and the applicant also has satisfied the second of our criteria (documentation). While we do not wish to discourage meetings between applicants and the local governments, as we recognize that such consultations may help avoid errors that localities have identified as leading to delays,<sup>52</sup> such meetings themselves should not be allowed to cause delays or prevent these requests from being timely approved. As an additional example, a local government could not establish as its first step a requirement that an applicant demonstrate that it has addressed all concerns raised by the public, as such a step would not be objectively verifiable.

19. Second, we clarify that a local government may not delay the triggering of the shot clock by defining the “first step” as a combination or sequencing of steps, rather than a single step. For example, if a local government defines the first step of its process as separate consultations with a citizens’ association, a historic preservation review board, and the local government staff, an applicant will trigger the shot clock by taking any one of those actions, along with satisfying the second of our criteria (documentation).<sup>53</sup> Once the shot clock has begun, it would not be tolled if the local government were to deny, delay review of, or require refiling of the application on the grounds that the local government’s separate consultation requirements were not completed.<sup>54</sup> While we expect applicants to act in good faith to fulfill reasonable steps set forth by a local government that can be completed within the 60 day period,<sup>55</sup> the local government would bear responsibility for ensuring that any steps in its process, as well as the substantive review of the proposed facility modification, are all completed within 60 days. If not, the eligible facilities request would be deemed granted under our rules.

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shot clock is not tolled by mandatory pre-application meetings or public hearings. *See, e.g.*, CTIA Comments at 12-13; Crown Castle Comments at 21-22; T-Mobile Comments at 4, 17; WISPA Comments at 6. Numerous providers support these proposals. *See, e.g.*, CTIA Comments at 13; AT&T Comments at 12-14; Crown Castle Comments at 22-23; Nokia Comments at 5-6; T-Mobile Comments at 16; Verizon Comments at 8-9; WISPA Comments at 6. By specifying concrete steps that are more specific and verifiable than the “good faith” standard that WIA proposed, we believe we will facilitate compliance by both localities and applicants. *See, e.g.*, NATOA Comments at 6 (criticizing WIA’s proposed “good faith” standard); San Diego Comments at 6-8 (same).

<sup>52</sup> *See, e.g.*, NLC Comments at 25-26; San Diego Comments at 29-30; Seattle Comments at 2 (asserting that applicants’ errors account for far more delays in the review process for eligible facilities requests than improper review processes and arguing that pre-application meetings help applicants avoid errors and thus expedite review).

<sup>53</sup> 47 CFR § 1.6100(c)(1).

<sup>54</sup> *See 2014 Infrastructure Order*, 29 FCC Red at 12957, para. 217 (“[A]n initial determination of incompleteness tolls the running of the [shot clock] period only if the State or local government provides notice to the applicant in writing within 30 days of the application’s submission [and]. . . clearly and specifically delineate[s] the missing information in writing. . . . Further, consistent with the documentation restriction established above, *the State or municipality may only specify as missing [such] information and supporting documents that are reasonably related to determining whether the request meets the requirements of Section 6409(a).*”) (emphasis added). *See also* 47 CFR § 1.6100(c)(1) (setting forth the documentation required to be submitted by the eligible facilities request applicant); 47 CFR § 1.6100(c)(3) (setting forth criteria for tolling of the shot clock).

<sup>55</sup> *See, e.g.*, NATOA *Ex Parte* Letter at 3 (raising concerns that an applicant could delay a meeting set by the locality to thwart the locality’s process); *see also* Letter from Colin Byrd, Mayor, City of Greenbelt, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 19-250 and RM-11849, at 2 (filed June 1, 2020) (Greenbelt *Ex Parte* Letter) (same).

20. Third, we clarify that a local government may not delay the start of the shot clock by declining to accept an applicant's submission of documentation intended to satisfy the second of our criteria for starting the shot clock. In addition, a local government may not delay the start of the shot clock by requiring an applicant to submit documentation that is not reasonably related to determining whether the proposed modification is an eligible facilities request.<sup>56</sup> We clarify how our documentation rules apply in the context of the shot clock to provide certainty that unnecessary documentation requests do not effectively delay the shot clock as part of the local government's "first step," even if providing that documentation would be within the applicant's control and could be objectively verified. For example, if a locality requires as the first step in its section 6409(a) process that an applicant meet with a local zoning board, that applicant would not need to submit local zoning documentation as well in order to trigger the shot clock.

21. Fourth, we note that a local government may use conditional use permits, variances, or other similar types of authorizations under the local government's standard zoning or siting rules, in connection with the consideration of an eligible facilities request. We clarify, however, that requirements to obtain such authorizations may not be used by the local government to delay the start of or to toll the shot clock under the section 6409(a) process. The shot clock would begin once the applicant takes the first step in whatever process the local government uses in connection with reviewing applications subject to section 6409(a) and satisfies the second of our criteria (documentation).<sup>57</sup> Subsequently, if the locality rejects the applicant's request to modify wireless facilities as incomplete based on requirements relating to such permits, variances, or similar authorizations, the shot clock would not be tolled and the application would be deemed granted after 60 days if the application constitutes an eligible facilities request under our rules.<sup>58</sup>

22. Fifth, we note that some jurisdictions have not established specific procedures for the review and approval of eligible facilities requests under section 6409(a). In those cases, we clarify that, for purposes of triggering the shot clock under section 6409(a), the applicant can consider the first

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<sup>56</sup> See 47 CFR § 1.6100(c)(1). This rule provides that "[w]hen an applicant asserts in writing that a request for modification is covered by this section, a State or local government may require the applicant to provide documentation or information only to the extent reasonably related to determining whether the request meets the requirements of this section. A State or local government may not require an applicant to submit any other documentation, including but not limited to documentation intended to illustrate the need for such wireless facilities or to justify the business decision to modify such wireless facilities." See also *2014 Infrastructure Order*, 29 FCC Rcd at 12956, para. 214 & n.595 (clarifying documentation requirements).

<sup>57</sup> We reject localities' suggestions that the shot clock should not commence until an applicant submits documentation required for all necessary permits, as such an approach is inconsistent with federal law. See 47 CFR § 1.6100(c)(1)-(2); see also Letter from Gerard Lederer, Joseph Van Eaton, Gail Karish, Andrew McCardle, Counsel for the City of Wilmington, DE et al., Best & Krieger LLP, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 19-250 and RM-11849, at 21-22 (filed Jun. 2, 2020) (*Wilmington Ex Parte Letter*) (suggesting that applicants should be required to submit documentation for all necessary permits before the shot clock starts). To the extent localities point to the *2018 Small Cell Order* as a reason that localities should be able to require documentation for all permits before the shot clock commences, we note that the applicable statutes provide different regimes for eligible facilities requests under section 6409 as compared to siting requests for small cells under section 332. See *Wilmington Ex Parte Letter* at 21-22 (arguing that the *2018 Small Cell Order* "suggests that on submission of an application, shot clocks begin running on all permits required to deploy; it follows that all materials relevant to an application must be submitted with the application").

<sup>58</sup> Localities may only toll the shot clock "by mutual agreement" or if the locality "determines that the application is incomplete." See 47 CFR § 1.6100(c)(3) (implementing section 6409(a) and setting forth the process for a locality to toll the timeframe for incompleteness); see also *Wilmington Ex Parte Letter* at 22 (filed Jun. 2, 2020) (arguing that the Commission should clarify the continued applicability of the "notice of incompleteness procedure" in section 1.6100(c)(3)(i)).

procedural step to be submission of the type of filing that is typically required to initiate a standard zoning or siting review of a proposed deployment that is not subject to section 6409(a).<sup>59</sup>

23. We find that these clarifications serve to remove uncertainty about the scope and meaning of various provisions of section 1.6100 consistent with the text, history, and purpose of the *2014 Infrastructure Order*.<sup>60</sup> We also note that the commencement of the shot clock does not excuse the applicant from continuing to follow the locality's procedural and substantive requirements (to the extent those requirements are consistent with the Commission's rules), including obligations "to comply with generally applicable building, structural, electrical, and safety codes or with other laws codifying objective standards reasonably related to health and safety."<sup>61</sup>

#### **B. Height Increase for Towers Outside the Public Rights-of-Way**

24. Adding new collocated equipment near or at the top of an existing tower can be an efficient means of expanding the capacity or coverage of a wireless network without the disturbances associated with building an entirely new structure. Adding this equipment to an existing tower would change the tower's physical dimensions, but if such a change is not "substantial," then a request to implement it would qualify as an eligible facilities request, and a locality would be required to approve it. Section 1.6100(b)(7)(i) provides that a modification on a tower outside of the public rights-of-way would cause a substantial change if it "increases the height of the tower by more than 10% or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater."<sup>62</sup>

25. Commenters assert that they have two different interpretations of the meaning of this language in section 1.6100(b)(7)(i). Industry commenters read section 1.6100(b)(7)(i) as allowing a new antenna to be added without being a substantial change if there is no more than twenty feet in

<sup>59</sup> Comparable modification requests might include applications to install, modify, repair, or replace wireless transmission equipment on a structure that is outside the scope of section 6409(a), or to mount cable television, wireline telephone, or electric distribution cables or equipment on outdoor towers or poles. Where the first step in the process is submission of the type of filing that is typically required for comparable modification requests, we note that applicants are not required to file any documentation that is inconsistent with the Commission's rules for eligible facilities requests under section 6409(a). See 47 CFR § 1.6100(c)(1).

<sup>60</sup> We note that sections 253 and 332(c)(7) generally prohibit local governments from making regulatory decisions that "prohibit or have the effect of prohibiting" the provision of personal wireless service or other forms of telecommunications service by any provider. See 47 U.S.C. §§ 253(a) and 332(c)(7)(B)(i)(I). Accordingly, localities' regulatory decisions affecting eligible facilities requests are subject to sections 253 and 332(c)(7) as well as section 6409(a). Unless one of the narrow statutory safe harbors applies, localities may not use procedural mechanisms to deny covered requests and may not deny individual eligible facilities requests in a manner that "materially inhibits the provision of such [telecommunications] services," including by materially inhibiting providers' ability to "densify[] a wireless network, introduce[e] new services or otherwise improv[e] service capabilities." *2018 Small Cell Order*, 33 FCC Red at 9104-05, para. 37. Nor may localities regulate in a manner that creates *de facto* moratoria in the context of eligible facilities requests, such as "frequent and lengthy delays in . . . issuing permits and processing applications" or imposing "onerous conditions." *2018 Moratorium Order*, 33 FCC Red at 7779-80, paras. 149-150. While some delay in deployment does not constitute a *de facto* moratorium, "[s]ituations cross the line into *de facto* moratoria where the delay continues for an unreasonably long or indefinite amount of time such that providers are discouraged from filing applications, or the action or inaction has the effect of preventing carriers from deploying certain types of facilities or technologies." *Id.* at 7781, para. 150.

<sup>61</sup> *2014 Infrastructure Order*, 29 FCC Red at 12951, para. 202.

<sup>62</sup> 47 CFR § 1.6100(b)(7)(i) (emphasis added). Section 1.6100(b)(7)(i) establishes different standards governing whether a "substantial change" would result from an increase in the height of a tower located outside of the public rights-of-way versus an increase in the height of a base station (*i.e.*, a structure other than a tower that supports collocated transmission equipment) or a tower located within the rights-of-way. Our focus here is on the definition of height increases for towers outside of the rights-of-way.

“separation” between the existing and new antennas, and that the size/height of the new antenna itself is irrelevant to the concept of “separation.”<sup>63</sup> Localities appear to be of the view, however, that such an interpretation strains what the statute and regulations would permit—creating different standards for antenna height depending on where it is located and leading to indefinite increases in antenna height under a streamlined process not designed for that purpose.<sup>64</sup> Adding an antenna array to a tower out of the public right-of-way that increases the height of the tower would not be considered a substantial change, by itself, if there is no more than twenty feet of separation between the nearest existing antenna. The phrase “separation from the nearest existing antenna” means the distance from the top of the highest existing antenna on the tower to the *bottom* of the proposed new antenna to be deployed above it. Thus, when determining whether an application satisfies the criteria for an eligible facilities request, localities should not measure this separation from the top of the existing antenna to the *top* of the new antenna, because the height of the new antenna itself should not be included when calculating the allowable height increase. Rather, under our interpretation, the word “separation” refers to the distance from the top of the existing antenna to the bottom of the proposed antenna. Interpreting “separation” otherwise to include the height of the new antenna could limit the number of proposed height increases that would qualify for section 6409(a) treatment, given typical antenna sizes and separation distances between antennas, which would undermine the statute’s objective to facilitate streamlined review of modifications of existing wireless structures.<sup>65</sup>

26. Specifically, and in response to commenters’ arguments regarding the language in section 1.6100(b)(7)(i), we find that our resolution today is consistent with the long-established interpretation of the comparable standard set forth in the 2001 *Collocation Agreement* for determining the maximum size of a proposed collocation that is categorically excluded from historic preservation review.<sup>66</sup> Commission staff explained, in a fact sheet released in 2002, that under this provision of the *Collocation Agreement*, if a “150-foot tower... already [has] an antenna at the top of the tower, the tower height could increase by up to 20 feet [*i.e.*, the “separation” distance] *plus* the height of a new antenna to be located at the top of the tower” without constituting a substantial increase in size.<sup>67</sup> That standard was the source of the standard for the allowable height increases for towers outside the rights-of-way that the Commission adopted in the 2014 *Infrastructure Order*.<sup>68</sup>

<sup>63</sup> See CTIA Comments at 10-11; Crown Castle Comments at 15-16; CTIA and Crown Castle urge the Commission to clarify that, in the case of a tower, section 1.6100(b)(7)(i) allows a new antenna to be added without constituting a substantial change if there is up to 20 feet in “separation” between the existing and new antennas. They assert that the size/height of the new antenna itself is irrelevant to the concept of “separation.” Both commenters argue that this interpretation is consistent with the Collocation NPA and is needed to counter locality attempts to include the dimensions of the new antenna itself into the 20 feet limit.

<sup>64</sup> See San Diego Comments at 47-48; *see also* San Diego Reply at 80-82 (arguing that the requested clarification would eliminate any maximum height limit for towers).

<sup>65</sup> *Contra* Letter from Jud Ashman, Mayor, City of Gaithersburg, MD, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 19-250 and RM-11849, at 2 (stating that Gaithersburg has generally interpreted the 10% or 20 feet height increase to include the new antenna).

<sup>66</sup> See National Programmatic Agreement for the Collocation of Wireless Antennas, 47 CFR pt. 1, Appx. B (*Collocation Agreement*), § I.E (a collocation on an existing tower causes a “substantial increase in the size of the tower” if it would increase the tower’s existing height by an amount more than “10%, or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to avoid interference with existing antennas.”).

<sup>67</sup> *Wireless Telecommunications Bureau and Mass Media Bureau Announce the Release of a Fact Sheet Regarding the March 16, 2001 Antenna Collocation Programmatic Agreement*, Public Notice, 17 FCC Rcd 508 (2002).

<sup>68</sup> 2014 *Infrastructure Order*, 29 FCC Rcd at 12946, para. 192.

27. Our interpretation also aligns with the clarification sought by WIA and other industry parties.<sup>69</sup> We reject the argument that this interpretation creates irrational inconsistencies among height increase standards depending on the type of structure and whether a tower is inside or outside the rights-of-way.<sup>70</sup> As we discussed in the *2014 Infrastructure Order*, limits on height and width increases should depend on the type and location of the underlying structure.<sup>71</sup> We therefore adopted the *Collocation Agreement*'s "substantial increase in size" test for towers outside the rights-of-way,<sup>72</sup> and we adopted a different standard for non-tower structures.<sup>73</sup> Localities are rearguing an issue already settled in the *2014 Infrastructure Order* when they urge that the same height increase standard should apply to different types of structures.<sup>74</sup> We also reject the argument that this interpretation would lead to virtually unconstrained increases in the height of such towers.<sup>75</sup> These concerns are unwarranted because the *2014 Infrastructure Order* already limits the cumulative increases in height from eligible modifications and nothing in this *Declaratory Ruling* changes those limits.<sup>76</sup>

28. Our clarification is limited to section 1.6100(b)(7)(i) and the maximum increase in the height of a tower outside the rights-of-way allowed pursuant to an eligible facilities request under section 6409(a). We remind applicants that "eligible facility requests covered by section 6409(a) must comply with any relevant Federal requirement, including any applicable Commission, FAA, NEPA, or section 106 [historic review] requirements."<sup>77</sup>

### C. Equipment Cabinets

29. To upgrade to 5G and for other technological and capacity improvements, providers often add equipment cabinets to existing wireless sites. Section 1.6100(b)(7)(iii) provides that a proposed modification to a support structure constitutes a substantial change if "it involves installation of more than the standard number of new equipment cabinets for the technology involved, but not to exceed four cabinets."<sup>78</sup> Some localities suggest that telecommunications transmission equipment manufactured with outer protective covers can be "equipment cabinets" under section 1.6100(b)(7)(iii) of the rules.<sup>79</sup> We

<sup>69</sup> WIA Petition for Decl. Ruling at 17-18; CTIA Comments at 10-11; Crown Castle Comments at 15-16.

<sup>70</sup> Cf. San Diego Comments at 47-48 (arguing that WIA's interpretation would create an inconsistency between the height increase standard for towers outside public rights-of-way and the standard for other structures).

<sup>71</sup> *2014 Infrastructure Order*, 29 FCC Rcd at 12946, para. 192.

<sup>72</sup> 47 CFR § 1.6100(b)(7)(i); *2014 Infrastructure Order*, 29 FCC Rcd at 12946, para. 192; *Collocation Agreement* § I.C(1).

<sup>73</sup> *2014 Infrastructure Order*, 29 FCC Rcd at 12946-47, para. 193; see 47 CFR § 1.6100(b)(7)(i) (stating a substantial change would occur for other eligible support structures when, "it increases the height of the structure by more than 10% or more than ten feet, whichever is greater").

<sup>74</sup> 47 CFR § 1.6100(b)(7)(i). See *2014 Infrastructure Order*, 29 FCC Rcd at 12946-48, paras. 193-95 (explaining reasons for different standards).

<sup>75</sup> San Diego Reply at 80-82 (quoting *2014 Infrastructure Order*, 29 FCC Rcd at 12949, para. 197).

<sup>76</sup> 47 CFR § 1.6100(b)(7)(i)(A); *2014 Infrastructure Order*, 29 FCC Rcd at 12948-49, paras. 196-97 (stating that "our substantial change criteria for changes in height should be applied as limits on cumulative changes; otherwise, a series of permissible small changes could result in an overall change that significantly exceeds our adopted standards.").

<sup>77</sup> *2014 Infrastructure Order*, 29 FCC Rcd at 12951, para. 203.

<sup>78</sup> See 47 CFR § 1.6100(b)(7)(iii). Section 1.6100(b)(7)(iii) imposes additional restrictions on equipment cabinet installations that constitute a substantial change in the context of towers in the public rights-of-way and base stations either within or outside the public rights-of-way. Petitioners do not raise issues regarding these additional provisions.

<sup>79</sup> San Diego Comments at 41-42, 44.



conclude that localities are interpreting “equipment cabinet” under section 1.6100(b)(7)(iii) too broadly to the extent they are treating equipment itself as a cabinet simply because transmission equipment may have protective housing. Nor does a small piece of transmission equipment mounted on a structure become an “equipment cabinet” simply because it is more visible when mounted above ground.<sup>80</sup> Consistent with common usage of the term “equipment cabinet” in the telecommunications industry, small pieces of equipment such as remote radio heads/remote radio units, amplifiers, transceivers mounted behind antennas, and similar devices are not “equipment cabinets” under section 1.6100(b)(7)(iii) if they are not used as physical containers for smaller, distinct devices.<sup>81</sup> Moreover, we note that section 1.6100(b)(3) defines an “eligible facilities request” (i.e., a request entitled to streamlined treatment under section 6409(a)) as any request for modification of an existing tower or base station that does not substantially change the physical dimensions of such tower or base station and that involves the collocation, removal or replacement of “transmission equipment.”<sup>82</sup> Interpreting “transmission equipment,” an element required in order for a modification to qualify for streamlined treatment, to be “equipment cabinets,” an element that is subject to numerical limits that can cause the modification not to qualify for streamlined treatment, would strain the intended purposes of sections 1.6100(b)(3) and 1.6100(b)(7)(iii). We do not address here other aspects of the definition of equipment cabinets on which industry commenters seek clarification.<sup>83</sup>

30. In addition, we clarify that the maximum number of additional equipment cabinets that can be added under the rule is measured for each separate eligible facilities request. According to WIA, one unidentified city in Tennessee interprets the term “not to exceed four cabinets” in section 1.6100(b)(7)(iii) as “setting a cumulative limit, rather than a limit on the number of cabinets associated with a particular eligible facilities request.”<sup>84</sup> We find that such an interpretation runs counter to the text of section 1.6100(b)(7)(iii), which restricts the number of “new” cabinets per eligible facilities request. The city’s interpretation ignores the fact that the word “it” in the rule refers to a “modification” and supports the conclusion that the limit on equipment cabinet installations applies separately to each eligible facilities request.<sup>85</sup>

<sup>80</sup> *Contra id.* at 44 (stating, “CTIA suggests that the difference is the size and location of the equipment enclosure, not its function. To adopt the industry’s definition is nonsensical given that it is the function that controls, and locational visibility matters. The industry omits the fact that RRUs located near the antennas creates substantial visible bulk, as do RRUs and associated equipment above ground, and that bulk is more visible than ground mounted cabinets or for new cabinets installed existing enclosures.”).

<sup>81</sup> *Accord* CTIA Petition for Decl. Ruling at 13; WIA Petition for Decl. Ruling at 13; Crown Castle Comments at 11. *Cf.* San Diego Comments at 42 & n.114 (citing technical documents referring to equipment cabinets as containers for smaller devices).

<sup>82</sup> 47 CFR § 1.6100(b)(3).

<sup>83</sup> We find this relief to suffice at this stage and thus do not address the industry parties’ contention that, in the portion of section 1.6100(b)(7)(iii) applicable to any eligible support structure, the term “equipment cabinets” applies only to cabinets installed on the ground and not to those mounted above ground level on the side of structures. *See* CTIA Petition for Decl. Ruling at 5, 13-14; WIA Petition for Decl. Ruling at 13-14; AT&T Comments at 8-10; Crown Castle Comments at 10-11; T-Mobile Comments at 4-5, 19-20; Verizon Comments at 9; *contra* San Diego Comments at 41-44; NLC Comments at 20-21.

<sup>84</sup> WIA Petition for Decl. Ruling at 13.

<sup>85</sup> This conclusion is also supported by the context of the rule as a whole. The number and size of preexisting cabinets are irrelevant to the limitation on equipment cabinets on eligible support structures, in contrast to the rest of the rule, which takes into account whether there are preexisting ground cabinets at the site and whether proposed new cabinets’ volume exceeds the volume of preexisting cabinets by more than 10%. 47 CFR § 1.6100(b)(7)(iii). Wilmington’s reliance on the cumulative height limit in section 1.6100(b)(7)(i)(A) undercuts its argument for a similar limit on equipment cabinets. Wilmington *Ex Parte* Letter at 15-17. The rule and 2014 *Infrastructure Order*

31. Several localities argue that this clarification would permit an applicant to add an unlimited number of new equipment cabinets to a structure so long as the applicant proposes adding them in increments of four or less.<sup>86</sup> We disagree that this clarification permits an unlimited number of cabinets on a structure. The text of section 1.6100(b)(7)(iii) limits the number of equipment cabinets per modification to no more than “the standard number of new equipment cabinets for the technology involved.”

#### **D. Concealment Elements**

32. Section 1.6100(b)(7)(v) states that a modification “substantially changes” the physical dimensions of an existing structure if “[i]t would defeat the concealment elements of the eligible support structure.”<sup>87</sup> The *2014 Infrastructure Order* provides that, “in the context of a modification request related to concealed or ‘stealth’-designed facilities —*i.e.*, facilities designed to look like some feature other than a wireless tower or base station—any change that defeats the concealment elements of such facilities would be considered a ‘substantial change’ under Section 6409(a).”<sup>88</sup> The *2014 Infrastructure Order* notes that both locality and industry commenters generally agreed that “a modification that undermines the concealment elements of a stealth wireless facility, such as painting to match the supporting façade or artificial tree branches, should be considered substantial under Section 6409(a).”<sup>89</sup>

33. Stakeholders subsequently have interpreted the definition of “concealment element” and the types of modifications that would “defeat” concealment in different ways. Petitioners and industry commenters urge the Commission to clarify that the term “concealment element” only refers to “a stealth facility or those aspects of a design that were specifically intended to disguise the appearance of a facility, such as faux tree branches or paint color.”<sup>90</sup> T-Mobile states that some localities are “proffering ‘creative or inappropriate’ regulatory interpretations of what a concealment element is.”<sup>91</sup> Locality commenters counter that there is more to concealment than “fully stealthed facilities and semi-stealthed monopines.”<sup>92</sup> They argue that the proposed changes would undermine the ability of local jurisdictions to enforce regulations designed to conceal equipment.<sup>93</sup> NLC asserts that many attributes of a site contribute to concealment, such as the “specific location of a rooftop site, or the inclusion of equipment in a particular architectural feature.”<sup>94</sup> Locality commenters contend that limiting concealment elements to features

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explicitly establish a cumulative limit on height increases but notably omits such a limit on equipment cabinets. 47 CFR § 1.6100(b)(7)(i)(A); *2014 Infrastructure Order*, 29 FCC Rcd at 12948-49, paras. 196-97.

<sup>86</sup> See, e.g., Letter from John Caulfield, City Manager, City of Lakewood, WA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 19-250 and RM-11849, at 1 (filed May 29, 2020) (Lakewood Ex Parte Letter); Greenbelt Ex Parte Letter at 2; NATOA June 2, 2020 Ex Parte Letter at 3.

<sup>87</sup> 47 CFR § 1.6100(b)(7)(v).

<sup>88</sup> *2014 Infrastructure Order*, 29 FCC Rcd at 12949-50, para. 200.

<sup>89</sup> *Id.* at 12949-50, para. 200.

<sup>90</sup> CTIA Petition for Decl. Ruling at 12; *see also* WIA Reply at 24; T-Mobile Comments at 4, 8; AT&T Comments at 7; ATC Comments at 9-10; Crown Castle Comments at 9-10.

<sup>91</sup> T-Mobile Comments at 7-8; *see also* AT&T Comments at 6-7; ATC Comments at 9-10; Crown Castle Comments at 8.

<sup>92</sup> NLC Comments at 17.

<sup>93</sup> Gwen Kennedy Comments at 1 (rec. Nov. 13, 2019) (filed on behalf of Loudoun County, Virginia) (Loudoun County Comments).

<sup>94</sup> NLC Comments at 17, 19.

identified in the original approval would negate land use requirements that were a factor in the original deployment but not specified as such.<sup>95</sup>

34. *Clarification of “Concealment Element.”* We clarify that concealment elements are elements of a stealth-designed facility intended to make the facility look like something other than a wireless tower or base station.<sup>96</sup> The *2014 Infrastructure Order* defines “concealed or ‘stealth’”-designed facilities as “facilities designed to look like some feature other than a wireless tower or base station,” and further provides that any change that defeats the concealment elements of *such* facilities would be considered a substantial change under section 6409(a).<sup>97</sup> Significantly, the *2014 Infrastructure Order* identified parts of a stealth wireless facility such as “painting to match the supporting façade or artificial tree branches” as examples of concealment elements.<sup>98</sup> We agree with industry commenters that concealment elements are those elements of a wireless facility installed for the purpose of rendering the “appearance of the wireless facility as something fundamentally different than a wireless facility,”<sup>99</sup> and that concealment elements are “confined to those used in stealth facilities.”<sup>100</sup>

35. We disagree with localities who argue that any attribute that minimizes the visual impact of a facility, such as a specific location on a rooftop site or placement behind a tree line or fence, can be a concealment element.<sup>101</sup> As localities acknowledged in comments they submitted in response to the *2013*

<sup>95</sup> NATOA Comments at 9; *see also* Chino Hills Comments at 2; NLC Comments at 18; NLC Reply at 6; Loudoun County Comments at 1. NATOA notes that many towers and collocations were approved “long before the enactment of Section 6409 and the Commission’s Rules [and there] was no way for municipalities to know that the conditions of approval would be ignored if they did not use magic words adopted years later.” NATOA Comments at 9; *see also* NLC Comments at 18; San Diego Comments at 38.

<sup>96</sup> *Contra* NATOA Comments at 8 (contending that Petitioners’ requests for clarification are a “substantial change to the Rules that would unreasonably narrow the common meaning of ‘concealment elements.’”); San Diego Comments at 31 (“The Petitioners’ arguments attempt to expand the scope of eligible facilities requests by narrowing the definition of concealment elements.”). The rules and *2014 Infrastructure Order* do not provide detailed guidance on when modifications “defeat the concealment elements” under section 1.6100(b)(7)(v), and we disagree that providing clarity on existing language constitutes a rule change. *Contra* Letter from Scott Hugill, City Manager, City of Mountainlake Terrace, to Marlene Dortch, Secretary, FCC, WT Docket No. 19-250 and RM-11849, at 2 (filed June 1, 2020).

<sup>97</sup> *2014 Infrastructure Order*, 29 FCC Rcd at 12950, para. 200.

<sup>98</sup> *Id.* at 12949-50, para. 200; *see also* WIA Petition for Decl. Ruling at 11 (“Faux tree branches serve no other purpose than to create the appearance that a tower is a tree. Painting a rooftop antenna to match the building serves no purpose other than to enhance the appearance of the building.”).

<sup>99</sup> WIA Petition for Decl. Ruling at 11; *see also* AT&T Reply at 6 (“[T]he Commission should clarify [] that (1) ‘concealment elements’ refer only to the ‘stealth’ elements of a structure that disguise the structure as something other than a wireless site . . . .”); CCA Comments at 7-8 (“In the *2014 Order*, the Commission described concealment elements as those tailored to make wireless facilities ‘look like some feature other than a wireless tower or base station,’ and specifically identified ‘painting to match the supporting façade’ and ‘artificial tree branches’ as examples.”); Letter from Cathleen Massey, Vice President of Regulatory Affairs, T-Mobile, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 19-250 et. al., at 2 & n.6 (filed May 13, 2020) (“the Commission should clarify that ‘concealment elements’ means ‘a stealth facility or those aspects of a deployment’s design that were specifically intended to disguise the appearance of a facility’”).

<sup>100</sup> CTIA Petition for Decl. Ruling at 10.

<sup>101</sup> *See* National League of Cities Comments at 16-17; *see also* NATOA Comments at 8-9. To the extent that municipalities argue that they have interpreted “concealment element” in the past differently from our clarification, this *Declaratory Ruling* should reduce the number of disputes between localities and applicants and help localities bring their procedures in compliance with section 6409(a). *See, e.g.,* Letter from Carol Helland, Director of Planning and Community Development, City of Redmond, CA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 19-250 and RM-11849, at 1 (filed June 2, 2020); NATOA *Ex Parte* at 3.



*Infrastructure NPRM*, “local governments often address visual effects and concerns in historic districts not through specific stealth conditions, but through careful placement” conditions.<sup>102</sup> Our rules separately address conditions to minimize the visual impact of non-stealth facilities under section 1.6100(b)(7)(vi) governing “conditions associated with the siting approval.”<sup>103</sup> The Commission narrowly defined concealment elements to mean the elements of a stealth facility, and no other conditions fall within the scope of section 1.6100(b)(7)(v).

36. We also clarify that, in order to be a concealment element under section 1.6100(b)(7)(v), the element must have been part of the facility that the locality approved in its prior review.<sup>104</sup> Our clarification that concealment elements must be related to the locality’s prior approval is informed by the *2014 Infrastructure Order* and its underlying record, which assumed that “stealth” designed facilities in most cases would be installed at the request of an approving local government.<sup>105</sup> Further, in the *2014 Infrastructure Order*, the Commission stated that a modification would be considered a substantial increase if “it would defeat the *existing* concealment elements of the tower or base station.”<sup>106</sup> We clarify that the term “existing” means that the concealment element existed on the facility that was subject to a prior approval by the locality. In addition, the record in the *2014 Infrastructure Order*, as relied upon by the Commission, characterized stealth requirements as identifiable, pre-existing elements in place before an eligible facilities request is submitted.<sup>107</sup>

37. Regarding the meaning of a prior approval in the context of an “existing” concealment element, we note that section 1.6100(b)(7)(i) provides that permissible increases in the height of a tower (other than a tower in the public rights-of-way) should be measured relative to a locality’s original approval of the tower or the locality’s approval of any modifications that were approved prior to the passage of the Spectrum Act.<sup>108</sup> We find it reasonable to interpret an “existing” concealment element relative to the same temporal reference points, which are intended to allow localities to adopt legitimate requirements for approval of an original tower at any time but not to allow localities to adopt these same requirements for a modification to the original tower (except for a modification prior to the Spectrum Act when localities would not have been on notice of the limitations in section 6409(a)).<sup>109</sup> In other words, the purpose of section 1.6100(b)(7)(v) is to identify and preserve prior local recognition of the need for such concealment, but not to invite new restrictions that the locality did not previously identify as

<sup>102</sup> See City of Alexandria, Virginia; City of Arlington, Texas; City of Bellevue Washington; City of Boston, Massachusetts; City of Davis, California; City of Los Angeles, California; Los Angeles County, California; City of McAllen, Texas; Montgomery County, Maryland; City of Ontario, California; Town of Palm Beach, Florida; City of Portland, Oregon; City of Redwood City, California; City of San Jose, California; Village of Scarsdale, New York; City of Tallahassee, Florida; Texas Coalition of Cities for Utility Issues; Georgia Municipal Association; International Municipal Lawyers Association; and American Planning Association (Alexandria et al.) Reply to *2013 Infrastructure NPRM* at 18-19; see also Alexandria et al. Comments to *2013 Infrastructure NPRM* at 19.

<sup>103</sup> 47 CFR § 1.6100(b)(7)(vi).

<sup>104</sup> See *2014 Infrastructure Order*, 29 FCC Rcd at 12945, 12949, paras. 188, 200.

<sup>105</sup> *Id.* at 12949-50, para. 200.

<sup>106</sup> See *id.* at 12945, para. 188 (emphasis added).

<sup>107</sup> See *2013 Infrastructure NPRM*, 28 FCC Rcd at 14284, para. 127.

<sup>108</sup> 47 CFR § 1.6100(b)(7)(i)(A).

<sup>109</sup> By permitting localities to rely on concealment elements required when approving modifications of towers prior to the Spectrum Act, we address in part locality concerns about concealment conditions imposed on older structures after an original approval. See, e.g., San Diego Comments at 38 (stating that WIA’s request for clarification that concealment elements must have been named in the initial approval “would unfairly and retroactively punish both communities and providers who had no notice, and therefore no reason to expect that regulation would be premised upon such a requirement”).

necessary. Accordingly, we clarify that under section 1.6100(b)(7)(v), a concealment element must have been part of the facility that was considered by the locality at the original approval of the tower or at the modification to the original tower, if the approval of the modification occurred prior to the Spectrum Act or lawfully outside of the section 6409(a) process (for instance, an approval for a modification that did not qualify for streamlined section 6409(a) treatment).

38. We are not persuaded by localities' arguments that our clarification would negate land use requirements that were a factor in the approval of the original deployment even if those requirements were not specified as a condition.<sup>110</sup> Our clarification does not mean that a concealment element must have been explicitly articulated by the locality as a condition or requirement of a prior approval. While specific words or formulations are not needed, there must be express evidence in the record to demonstrate that a locality considered in its approval that a stealth design for a telecommunications facility would look like something else, such as a pine tree, flag pole, or chimney. However, it would be inconsistent with the purpose of section 6409(a)—facilitating wireless infrastructure deployment—to give local governments discretion to require new concealment elements that were not part of the facility that was subject to the locality's prior approval.<sup>111</sup> We expect that this clarification will also promote the purpose of the rules to provide greater certainty to localities and applicants as to whether a concealment element exists.

39. *Clarification of "Defeat Concealment."* Next, we clarify that, to "defeat concealment," the proposed modification must cause a reasonable person to view the structure's intended stealth design as no longer effective after the modification. In other words, if the stealth design features would continue effectively to make the structure appear not to be a wireless facility, then the modification would not defeat concealment. Our definition is consistent with dictionary definitions and common usage<sup>112</sup> of the term "defeat" and is supported by the record.<sup>113</sup> Our clarification is necessary because, as industry commenters point out, some localities construe even small changes to "defeat" concealment, which delays deployment, extends the review processes for modifications to existing facilities, and frustrates the intent behind section 6409(a).<sup>114</sup>

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<sup>110</sup> NATOA Comments at 9.

<sup>111</sup> *Id.*; see also Chino Hills Comments at 2; NLC Comments at 18; NLC Reply at 6; Gwen Kennedy Comments at 1 (rec. Nov. 13, 2019) (filed on behalf of Loudoun County, Virginia) (Loudoun County Comments) (stating that the proposed clarifications would undermine the ability of local jurisdictions to enforce regulations designed to conceal equipment). NATOA insists that many towers and collocations were approved "long before the enactment of Section 6409 and the Commission's Rules [and there] was no way for municipalities to know that the conditions of approval would be ignored if they did not use magic words adopted years later." NATOA Comments at 9; see also NLC Comments at 18; San Diego Comments at 38 (stating that WIA's request for clarification that concealment elements must have been named in the initial approval "would unfairly and retroactively punish both communities and providers who had no notice, and therefore no reason to expect that regulation would be premised upon such a requirement").

<sup>112</sup> See *Defeat*, Black's Law Dictionary (11th ed. 2019) (*Defeat* means "2. To annul or render (something) void. 3. To vanquish; to conquer (someone or something). 4. To frustrate (someone or something).").

<sup>113</sup> See Crown Castle Comments at 9-10 (suggesting that, in order to defeat a concealment element, a modification "must entirely render the concealment void or useless"); AT&T Comments at 8 (stating that a modification must "materially change" the appearance of a concealment element for there to be "substantial change").

<sup>114</sup> T-Mobile Comments at 7-8; Crown Castle Comments at 9-10; CCA Comments at 5; see also ATC Reply at 6, n.13 (arguing that adoption of Petitioners' clarifications regarding "defeat" will "allow for appropriate, real world, case-by-case analysis of those elements which actually contribute to concealment"); AT&T Comments at 6-7; CTIA Comments at 8 ("localities are broadly treating the *entire structure* as a concealment element, or otherwise improperly invoking the rule to deem a modification to be substantial"); Crown Castle Comments at 8, n.20 (stating that there are "myriads" of ways that localities claim concealment is defeated, "even when not included in siting approval: increasing the height of a monopine; increasing the height of a light pole; failure to add screens to antenna;

(continued....)

40. *Examples of Whether Modifications Defeat Concealment Elements.* We offer the following examples to provide guidance on concealment elements and whether or not they have been defeated to help inform resolution of disputes should they arise:

- In some cases, localities take the position that the placement of coaxial cable on the outside of a stealth facility constitutes a substantial change based on the visual impact of the cable. Coaxial cables typically range from 0.2 inches to slightly over a half-inch in diameter,<sup>115</sup> and it is unlikely that such cabling would render the intended stealth design ineffective at the distances where individuals would view a facility.<sup>116</sup>
- In other cases, localities have interpreted any change to the color of a stealth tower or structure as defeating concealment.<sup>117</sup> Such interpretations are overly broad and can frustrate Congress's intent to expedite the section 6409(a) process. A change in color must make a reasonable person believe that the intended stealth is no longer effective.<sup>118</sup> Changes to the color of a stealth structure can occur for many reasons, including for example, the discontinuance of the previous color. An otherwise compliant eligible facilities request will not defeat concealment in this case merely because the modification uses a slightly different paint color. Further, if the new equipment is shielded by an existing shroud that is not being modified, then the color of the equipment is irrelevant because it is not visible to the public and would not render an intended concealment ineffective. Therefore, such a change would not defeat concealment.<sup>119</sup>
- WIA reports that a locality in Colorado claims that a small increase in height on a stealth monopine, which is less than the size thresholds of section 1.6100(b)(7)(i)-(iv), defeats concealment and therefore constitutes a substantial change.<sup>120</sup> We clarify that such a

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any change to branches on a stealth tree; addition of opaque fencing; enclosing of equipment within shelters; increasing the width of a canister on a flagpole or utility pole; and external cabling on a non-camouflaged monopole”).

<sup>115</sup> RS Components, Ltd., *Everything You Need to Know About Coaxial Cable*, <https://uk.rs-online.com/web/generalDisplay.html?id=ideas-and-advice/coaxial-cable-guide>.

<sup>116</sup> See, e.g., Letter from Jim Ferrell, Mayor, City of Federal Way, WA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 19-250 and RM-11849, at 2 (filed June 1, 2020) (presenting hypotheticals involving the visibility of coaxial cables).

<sup>117</sup> WIA Petition for Decl. Ruling at 3 (“In many cases, these requirements are not mandated by local codes but are imposed on an ad hoc basis by local jurisdictions.”); T-Mobile Reply at 14; AT&T Reply at 6-7; NLC Reply at 17-18; see also Letter from Alexi Maltas, Senior Vice President and General Counsel, Competitive Carriers Association, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (filed July 12, 2019) (CCA 2019 Letter).

<sup>118</sup> The 2014 *Infrastructure Order* noted that “a replacement of exactly the same dimensions could still violate concealment elements if it does not have the same camouflaging paint as the replaced facility.” 29 FCC Rcd at 12949, para. 200, n.543. For such a change in paint color to defeat concealment, however, the color of the stealth tower must make a reasonable person believe that the modified facility will no longer resemble the stealth designed facility.

<sup>119</sup> In a further example, according to Crown Castle, two cities in California—San Diego and Cerritos—take the position that additions or modifications of antennas on faux trees defeat concealment even if the appearance of the faux tree remains the same. See, e.g., Letter from Kenneth Simon, Senior Vice President and General Counsel, Crown Castle, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1 (filed Aug. 10, 2018) (Crown Castle August 2018 *Ex Parte* Letter); see also T-Mobile Reply at 13. Additional faux branches would need to render the intended disguise (resembling a tree, in this example) ineffective in order to defeat concealment.

<sup>120</sup> WIA Petition for Decl. Ruling at 10.

change would not defeat concealment if the change in size does not cause a reasonable person to view the structure's intended stealth design (i.e., the design of the wireless facility to resemble a pine tree) as no longer effective after the modification.

- If a prior approval included a stealth-designed monopine that must remain hidden behind a tree line, a proposed modification within the thresholds of section 1.6100(b)(7)(i)-(iv) that makes the monopine visible above the tree line would be permitted under section 1.6100(b)(7)(v). First, the concealment element would not be defeated if the monopine retains its stealth design in a manner that a reasonable person would continue to view the intended stealth design as effective. Second, a requirement that the facility remain hidden behind a tree line is not a feature of a stealth-designed facility; rather it is an aesthetic condition that falls under section 1.6100(b)(7)(vi). Under that analysis, as explained in greater detail below, a proposed modification within the thresholds of section 1.6100(b)(7)(i)-(iv) that makes the monopine visible above the tree line likely would be permitted under section 1.6100(b)(7)(vi).

#### **E. Conditions Associated with the Siting Approval**

41. Section 1.6100(b)(7)(vi) states that a modification is a substantial increase if “[i]t does not comply with conditions associated with the siting approval of the construction or modification of the eligible support structure or base station equipment, provided however that this limitation does not apply to any modification that is non-compliant only in a manner that would not exceed the thresholds identified in § 1.61001(b)(7)(i) through (iv).” Industry commenters argue that changes specifically allowed under section 1.6100(b)(7)(i)-(iv) should not constitute a substantial change under section 1.6100(b)(7)(vi).<sup>121</sup> For example, the record shows that some localities claim that small increases in the size of a structure, such as increasing its height or increasing the width of its cannister, are a substantial change because they wrongly characterize any increase to a structure's visual profile or negative aesthetic impact as defeating a concealment element—even if the size changes would be within the allowances under our rules.<sup>122</sup>

42. Conditions associated with the siting approval under section 1.6100(b)(7)(vi) may relate to improving the aesthetics, or minimizing the visual impact, of non-stealth facilities (facilities not addressed under section 1.6100(b)(7)(v)). However, localities cannot merely assert that a detail or feature of the facility was a condition of the siting approval; there must be express evidence that at the time of approval the locality required the feature and conditioned approval upon its continuing existence in order for non-compliance with the condition to disqualify a modification from being an eligible facilities request.<sup>123</sup> Even so, like any other condition under section 1.6100(b)(7)(vi), such an aesthetics-related

<sup>121</sup> T-Mobile Comments at 18-19; *see also* WIA Reply at 24-25.

<sup>122</sup> T-Mobile Comments at 9-10; *see also* Nokia Comments at 6-7; Crown Castle August 2018 *Ex Parte* Letter at 16 (claiming that a California locality treats the dimensions of “every aspect” of a project as a concealment element); WIA Petition for Decl. Ruling at 11 (stating that a city in California does not allow weatherproof enclosure expansions greater than 36 inches). Additionally, WIA offers examples of localities that take the position that any increase in height on a monopine, even if below the substantial change threshold of section 1.6100(b)(7)(i)-(iv), defeats concealment and therefore constitutes a substantial change. WIA Petition for Decl. Ruling at 10.

<sup>123</sup> Several localities argue that this clarification would place a requirement on a locality to show express evidence that a feature was required and that the locality conditioned approval on its continuing existence, in order for non-compliance with the condition to disqualify a modification from being an eligible facilities request. *See, e.g.,* Lakewood *Ex Parte* Letter at 2; Greenbelt *Ex Parte* Letter at 2; NATOA June 2, 2020 *Ex Parte* Letter at 4. Our clarification is a restatement of the basic principle that applicants should have clear notice of what is required by a condition and how long the requirement lasts. We clarify that in order for a locality to disqualify a modification as an eligible facilities request based on an applicant's noncompliance with a condition of the original approval, the locality must show that the condition existed at the time of the original approval. Such showing would demonstrate that the applicant was on notice that noncompliance with the condition could result in disqualification.

condition still cannot be used to prevent modifications specifically allowed under section 1.6100(b)(7)(i)-(iv) of our rules.<sup>124</sup> Consistent with “commonplace [] statutory construction that the specific governs the general,” we clarify that where there is a conflict between a locality’s general ability to impose conditions under (vi) and modifications specifically deemed not substantial under (i)-(iv), the conditions under (vi) should be enforced only to the extent that they do not prevent the modification in (i)-(iv).<sup>125</sup> In other words, when a proposed modification otherwise permissible under section 1.6100(b)(7)(i)-(iv) cannot reasonably comply with conditions under section 1.6100(b)(7)(vi), the conflict should be resolved in favor of permitting the modifications. For example, a local government’s condition of approval that requires a specifically sized shroud around an antenna could limit an increase in antenna size that is otherwise permissible under section 1.6100(b)(7)(i). Under section 1.6100(b)(7)(vi), however, the size limit of the shroud would not be enforceable if it purported to prevent a modification to add a larger antenna, but a local government could enforce its shrouding condition if the provider reasonably could install a larger shroud to cover the larger antenna and thus meet the purpose of the condition.

43. By providing guidance on the relationship between section 1.6100(b)(7)(i)-(iv) and 1.6100(b)(7)(vi), including the limitations on conditions that a locality may impose, we expect there to be fewer cases where conditions, especially aesthetic conditions, are improperly used to prevent modifications otherwise expressly allowed under section 1.6100(b)(7)(i)-(iv).<sup>126</sup> We reaffirm that beyond the specific conditions that localities may impose through section 1.6100(b)(7)(vi), localities can enforce “generally applicable building, structural, electrical, and safety codes” and “other laws codifying objective standards reasonably related to health and safety.”<sup>127</sup>

44. *Examples of Aesthetics Related Conditions.* Petitioners and both industry and locality commenters have provided numerous examples of disputes involving modifications to wireless facilities. Using examples from the record,<sup>128</sup> and assuming that the locality has previously imposed an aesthetic-related condition under section 1.6100(b)(7)(vi), we offer examples to provide guidance on the validity of the condition to decrease future disputes and to help inform resolution of disputes should they arise:

- If a city has an aesthetic-related condition that specified a three-foot shroud cover for a three-foot antenna, the city could not prevent the replacement of the original antenna with a four-foot antenna otherwise permissible under section 1.6100(b)(7)(i) because the new antenna cannot fit in the shroud. As described above, if there was express evidence that the shroud was a condition of approval, the city could enforce its shrouding condition if the provider reasonably could install a four-foot shroud to cover the new four-foot antenna. The city also could enforce a shrouding requirement that is not size-specific and that does not limit modifications allowed under section 1.6100(b)(7)(i)-(iv).
- T-Mobile claims that some localities consider existing walls and fences around non-camouflaged towers to be concealment elements that have been defeated if new

<sup>124</sup> See, e.g., Crown Castle August 2018 *Ex Parte* Letter at 13 (“Imposing size-based ‘concealment elements’ is nothing more than an attempt to evade the specific, objective size criteria that the Commission adopted in the 2014 *Infrastructure Order*.”); see also AT&T Comments at 6-7 (“If such generic features as height, width, or equipment could be construed as concealment elements, the concealment exception would swallow the rule, nullifying the Section 6409(a) protections adopted by Congress.”); T-Mobile Comments at 9; WIA Petition for Decl. Ruling at 10 (“[T]he record in this proceeding reflects that some jurisdictions are interpreting this language so broadly that the exception swallows the rule.”); ATC Comments at 9.

<sup>125</sup> *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992).

<sup>126</sup> See, e.g., *Douglas Cty. v. Crown Castle USA, Inc.*, 2020 WL 109208, Case No. 18-cv-03171 (D. Colo., Jan. 9, 2020).

<sup>127</sup> 2014 *Infrastructure Order*, 29 FCC Rcd at 12951, para. 202.

<sup>128</sup> See San Diego Reply at 44-60 (pictures of multiple structures that commenters consider to be concealed).



equipment is visible over those walls or fences.<sup>129</sup> First, such conditions are not concealment elements; rather, they are considered aesthetic conditions under section 1.6100(b)(7)(vi). Such conditions may not prevent modifications specifically allowed by section 1.6100(b)(7)(i)-(iv). However, if there were express evidence that the wall or fence were conditions of approval to fully obscure the original equipment from view, the locality may require a provider to make reasonable efforts to extend the wall or fence to maintain the covering of the equipment.

- If an original siting approval specified that a tower must remain hidden behind a tree line, a proposed modification within the thresholds of section 1.6100(b)(7)(i)-(iv) that makes the tower visible above the tree line would be permitted under section 1.6100(b)(7)(vi), because the provider cannot reasonably replace a grove of mature trees with a grove of taller mature trees to maintain the absolute hiding of the tower.<sup>130</sup>
- In a similar vein, San Francisco has conditions to reduce the visual impact of a wireless facility, including that it must be set back from the roof at the front building wall.<sup>131</sup> San Francisco states that it will not approve a modification if the new equipment to be installed does not meet the set back requirement. Even if a proposed modification within the thresholds of section 1.6100(b)(7)(i)-(iv) exceeds the required set back, San Francisco could enforce its set back condition if the provider reasonably could take other steps to reduce the visual impact of the facility to meet the purpose of its condition.

#### **F. Environmental Assessments After Execution of Memorandum of Agreement**

45. The Commission's environmental rules implementing the National Environmental Policy Act categorically exclude all actions from environmental evaluations, including the preparation of an environmental assessment, except for defined actions associated with the construction of facilities that may significantly affect the environment.<sup>132</sup> Pursuant to section 1.1307(a) of the Commission's rules, applicants currently submit an environmental assessment for those facilities that fall within specific categories, including facilities that may affect historic properties protected under the National Historic Preservation Act.<sup>133</sup> Under our current process, an applicant submits an environmental assessment for

<sup>129</sup> Letter from Cathleen Massey, Vice-President of Regulatory Affairs, T-Mobile USA, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 3-4 (filed Aug. 30, 2019) (T-Mobile 2019 Letter).

<sup>130</sup> We disagree with the argument of local authorities that this interpretation conflicts with how the Commission explained the *2014 Infrastructure Order* in a brief to the Fourth Circuit almost five years ago. *Wilmington Ex Parte* Letter at 2. In that brief, the Commission addressed the general question of whether previous reliance on a tree for concealment could be defeated by later installing an additional facility that rose above the tree line. *See* Brief for Respondents, *Montgomery County v. FCC*, Nos. 15-1240 et al. (4th Cir. filed July 20, 2015). The Commission's argument in that brief cannot be interpreted to make any *de minimis* increase above the tree line a substantial increase under the Commission's rule. Nor did it distinguish between the application of the concealment provisions of the rule to a "stealth" structure and the limitations in the rule applicable to aesthetic conditions. In any event, in light of extensive subsequent experience as documented in the record of this proceeding, we believe that the rule applicable to stealth facilities should be construed in each individual case to depend upon whether the design would be viewed as no longer effective in view of the modified facilities. *See also, e.g., SNR Wireless LicenseCo, LLC v. FCC*, 868 F.3d 1021, 1037 (D.C. Cir. 2017) (staff level actions do not bind the agency as a whole); *Appalachian Power Co. v. Train*, 620 F.2d 1040, 1045-46 (4th Cir. 1980) (similar); *Malkan FM Associates v. FCC*, 935 F.2d 1313, 1319 (D.C. Cir. 1992) (similar).

<sup>131</sup> San Francisco Reply at 3.

<sup>132</sup> 47 CFR §§ 1.1306, 1.1307; *see also* 42 U.S.C. § 4321 *et seq.*

<sup>133</sup> 47 CFR § 1.1307(a).

facilities that may affect historic properties, even if the applicant has executed a memorandum of agreement<sup>134</sup> with affected parties to address those adverse effects.<sup>135</sup>

46. We clarify on our own motion that an environmental assessment is not needed when the FCC and applicants have entered into a memorandum of agreement to mitigate effects of a proposed undertaking on historic properties, consistent with section VII.D of the Wireless Facilities Nationwide Programmatic Agreement,<sup>136</sup> if the only basis for the preparation of an environmental assessment was the potential for significant effects on such properties. We expect this clarification should further streamline the environmental review process.

47. Section 1.1307(a)(4) of the Commission's rules requires an environmental assessment if a proposed communications facility may have a significant effect on a historic property.<sup>137</sup> The Commission adopted a process to identify potential effects on historic properties by codifying the Wireless Facilities Nationwide Programmatic Agreement as the means to comply with section 106 of the National Historic Preservation Act.<sup>138</sup> If adverse effects on historic properties are identified during this process, the Wireless Facilities Nationwide Programmatic Agreement requires that the applicant consult with the State Historic Preservation Officer and/or Tribal Historic Preservation Officer, and other interested parties to avoid, minimize, or mitigate the adverse effects.<sup>139</sup>

48. When such effects cannot be avoided, under the terms of the Wireless Facilities Nationwide Programmatic Agreement, the applicant, the State Historic Preservation Officer and/or Tribal Historic Preservation Officer, and other interested parties may proceed to negotiate a memorandum of agreement that the signatories agree fully mitigates all adverse effects. The agreement is then sent to Commission staff for review and signature.<sup>140</sup> Under current practice, even after a memorandum of agreement is executed, an applicant is still required to prepare an environmental assessment and file it with the Commission.<sup>141</sup> The Commission subsequently places the environmental assessment on public notice, and the public has 30 days to file comments/oppositions.<sup>142</sup> If the environmental assessment is determined to be sufficient and no comments or oppositions are filed, the Commission issues a Finding of No Significant Impact and allows an applicant to proceed with the project.<sup>143</sup>

49. In this *Declaratory Ruling* we clarify that an environmental assessment is unnecessary after an adverse effect on a historic property is mitigated by a memorandum of agreement.<sup>144</sup> Applicants

<sup>134</sup> A memorandum of agreement is a mechanism to address adverse effects on historic properties or Indian religious sites. See Wireless Facilities Nationwide Programmatic Agreement at § VII.D.

<sup>135</sup> FCC, Tower and Antenna Siting, National Historic Preservation Act, The Nationwide Programmatic Agreements, <https://www.fcc.gov/wireless/bureau-divisions/competition-infrastructure-policy-division/tower-and-antenna-siting>.

<sup>136</sup> Wireless Facilities Nationwide Programmatic Agreement, 47 CFR pt. 1, Appx. C. The Wireless Facilities Nationwide Programmatic Agreement was executed by the Advisory Council on Historic Preservation (ACHP), the National Conference on State Historic Preservation Officers, and the FCC.

<sup>137</sup> 47 CFR § 1.1307(a)(4).

<sup>138</sup> See Wireless Facilities Nationwide Programmatic Agreement, 47 CFR pt. 1, Appx. C.

<sup>139</sup> Wireless Facilities Nationwide Programmatic Agreement at § VII.D.1.

<sup>140</sup> *Id.* at § VII.D.4.

<sup>141</sup> FCC, Tower and Antenna Siting, National Historic Preservation Act, The Nationwide Programmatic Agreements, <https://www.fcc.gov/wireless/bureau-divisions/competition-infrastructure-policy-division/tower-and-antenna-siting>.

<sup>142</sup> FCC, Tower and Antenna Siting, The National Environmental Policy Act, FCC's NEPA Process, <https://www.fcc.gov/wireless/bureau-divisions/competition-infrastructure-policy-division/tower-and-antenna-siting>.

<sup>143</sup> *Id.*

<sup>144</sup> See Council on Environmental Quality, Executive Office of the President, and Advisory Council on Historic Preservation, NEPA and NHPA: A Handbook for Integrating NEPA and Section 106 at 11, 21 (2013)

already are required to consider alternatives to avoid adverse effects prior to executing a memorandum of agreement.<sup>145</sup> The executed agreement demonstrates that the applicant: has notified the public of the proposed undertaking; has consulted with the State Historic Preservation Officer and/or Tribal Historic Preservation Officers, and other interested parties to identify potentially affected historic properties; and has worked with such parties to agree on a plan to mitigate adverse effects.<sup>146</sup> This mitigation eliminates any significant adverse effects on a historic property, and each memorandum of agreement must include as a standard provision that the memorandum of agreement “shall constitute full, complete, and adequate mitigation under the NHPA . . . and the FCC’s rules.”<sup>147</sup>

50. We note that section 1.1307(a) requires an applicant to submit an environmental assessment if a facility “may significantly affect the environment,” which includes facilities that may affect historic properties, endangered species, or critical habitats.<sup>148</sup> As a result of the mitigation required by a memorandum of agreement, we conclude that any effects on historic properties remaining after the agreement is executed would be below the threshold of “significance” to trigger an environmental assessment.<sup>149</sup> After the memorandum of agreement is executed, a proposed facility should no longer “have adverse effects on identified historic properties” within the meaning of section 1.1307(a)(4)<sup>150</sup> and, therefore, should no longer be within the “types of facilities that may significantly affect the environment.”<sup>151</sup> If none of the other criteria for requiring an environmental assessment in section 1.1307(a) exist, then such facilities automatically fall into the broad category of actions that the Commission has already found to “have no significant effect on the quality of the human environment and are categorically excluded from environmental processing.”<sup>152</sup> The Commission’s rules should be read in light of the scope of our obligation under section 106 and the ACHP’s rules, which explicitly state that such a memorandum of agreement “evidences the agency official’s compliance with section 106.”<sup>153</sup> We

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[https://ceq.doe.gov/docs/ceq-publications/NEPA\\_NHPA\\_Section\\_106\\_Handbook\\_Mar2013.pdf](https://ceq.doe.gov/docs/ceq-publications/NEPA_NHPA_Section_106_Handbook_Mar2013.pdf) (2013 NHPA/NEPA Handbook).

<sup>145</sup> Standard language in the template of the FCC’s memoranda of agreement provides that the applicant, “consistent with the FCC’s environmental rules has considered and evaluated a number of alternatives for the project and concluded that these options are either unavailable . . . or do not meet the technical requirements necessary to satisfy the coverage needs of the telecommunications system to be supported by the antennas.” FCC, *Tower and Antenna Siting, The Nationwide Programmatic Agreements*, <https://www.fcc.gov/wireless/bureau-divisions/competition-infrastructure-policy-division/tower-and-antenna-siting>.

<sup>146</sup> Wireless Facilities Nationwide Programmatic Agreement at §§ IV, V, VI, VII.

<sup>147</sup> This provision is standard language in the FCC’s memoranda of agreement, and it is included in the template located on the Commission’s website. See FCC, *Tower and Antenna Siting, National Historic Preservation Act, The Nationwide Programmatic Agreements*, <https://www.fcc.gov/wireless/bureau-divisions/competition-infrastructure-policy-division/tower-and-antenna-siting>.

<sup>148</sup> 47 CFR § 1.1307(a).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* § 1.1307(a)(4).

<sup>151</sup> *Id.* § 1.1307(a) (introductory paragraph).

<sup>152</sup> *Id.* § 1.1306(a); 2013 NHPA/NEPA Handbook at 21 (“New facilities and collocations that do not affect historic properties may be categorically excluded from NEPA.”). We note that nothing in this *Declaratory Ruling* changes the scope or application of section 1.1307(c), which allows any person to submit a petition seeking an environmental assessment for any communications facility deployment otherwise categorically excluded, and (d), which allows a Bureau to require an applicant to submit an environmental assessment even if a proposed deployment would be otherwise categorically excluded. 47 CFR § 1.1307(c) and (d).

<sup>153</sup> 36 CFR § 800.6(b)-(c); see also 54 U.S.C. § 300101 *et seq.*



remind applicants that an environmental assessment is still required if the proposed project may significantly affect the environment in ways unrelated to historic properties.<sup>154</sup>

#### IV. NOTICE OF PROPOSED RULEMAKING

51. Section 1.6100(b)(7)(iv) provides that “[a] modification substantially changes the physical dimensions of an eligible support structure if . . . [i]t entails any excavation or deployment outside the current site[.]”<sup>155</sup> In other words, a proposed modification that entails any excavation or deployment outside the current site of a tower or base station is not eligible for section 6409(a)’s streamlined procedures. Section 1.6100(b)(6) defines “site” for towers outside of the public rights-of-way as “the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site, and, for other eligible support structures, further restricted to that area in proximity to the structure and to other transmission equipment already deployed on the ground.”<sup>156</sup>

52. In its Petition for Declaratory Ruling, WIA requests that the Commission clarify that “current site,” for purposes of section 1.6100(b)(7)(iv), is the *currently* leased or owned compound area.<sup>157</sup> Industry commenters argue that current “site” means the property leased or owned by the applicant at the time it submits an application to make a qualifying modification under section 6409(a).<sup>158</sup> Industry commenters state that their proposed clarification merely affirms the plain meaning of the rule.<sup>159</sup> They assert that such clarification is needed because many local governments interpret section 1.6100(b)(6) as referring to the original site and wrongly claim that a modification is not entitled to section 6409(a) if it entails any deployment outside of those original boundaries.<sup>160</sup>

53. WIA’s Petition for Rulemaking also requests that the Commission amend its rules to establish that a modification would not cause a “substantial change” if it entails excavation or facility deployments at locations of up to 30 feet in any direction outside the boundaries of a macro tower compound.<sup>161</sup> Industry commenters contend that it is often difficult to collocate transmission equipment on existing macro towers without expanding the compounds surrounding those towers in order to deploy additional equipment sheds or cabinets on the ground.<sup>162</sup> They argue that such deployments are becoming increasingly necessary to house multiple carriers’ facilities on towers built in the past to support the needs of a single carrier and to facilitate the extensive network densification needed for rapid 5G deployment.<sup>163</sup> WIA states that this proposal is consistent with the Wireless Facilities Nationwide Programmatic Agreement,<sup>164</sup> which excludes from section 106 historic preservation review “the construction of a

<sup>154</sup> 47 CFR § 1.1307(a)(1)-(3), (6)-(8); *see also* note to section 1.1307(d) (requiring environmental assessment filings for certain proposed facilities that may affect migratory birds); Wilmington *Ex Parte* Letter at 23-24 (stating that if the Commission is going to eliminate the requirement for an environmental assessment addressing effects on historic properties when a memorandum of agreement is executed, it should clarify that it must still fully consider the potential for other environmental effects).

<sup>155</sup> 47 CFR § 1.6100(b)(7)(iv).

<sup>156</sup> *Id.* § 1.6100(b)(6).

<sup>157</sup> WIA Petition for Decl. Ruling at 9-11.

<sup>158</sup> *See, e.g., id.* at 18; CTIA Comments at 11; AT&T Comments at 9; Crown Castle Comments at 18.

<sup>159</sup> AT&T Comments at 19; Crown Castle at 18; CTIA Comments at 11; WIA Comments at 11.

<sup>160</sup> *See* AT&T Comments at 19; American Tower Comments at 19; Crown Castle Comments at 28.

<sup>161</sup> WIA Petition for Rulemaking at 3-11.

<sup>162</sup> ATC Comments at 5-8; Crown Castle Comments at 31-32; CTIA Comments at 15-16; WIA Comments at 7.

<sup>163</sup> WIA Petition for Rulemaking at 7; ATC Comments at 7-8; AT&T Comments at 29; Crown Castle Comments at 31; CTIA Comments at 15-16; WIA Comments at 6-7; WISPA Comments at 8.

<sup>164</sup> WIA Petition for Decl. Ruling at 10.

replacement for any existing communications tower” that, *inter alia*, “does not expand the boundaries of the leased or owned property surrounding the tower by more than 30 feet in any direction or involve excavation outside these expanded boundaries or outside any existing access or utility easement related to the site.”<sup>165</sup>

54. Local governments argue that the definition of “site” should not be interpreted to mean the applicant’s leased or owned property on the date it submits its eligible facilities request.<sup>166</sup> They assert that this interpretation would permit providers to expand the boundaries of a site without review and approval by a local government by entering into leases that increase the area of a site after the locality’s initial review.<sup>167</sup> NLC argues that it would lead to “extensive bypassing of local review for property uses not previously reviewed and approved to support wireless equipment.”<sup>168</sup> Localities also generally oppose the compound expansion proposal because they argue that excavation of up to 30 feet beyond a tower’s current site cannot be considered insubstantial.<sup>169</sup> Moreover, several cities argue that the Commission considered and rejected this proposal in the 2014 *Infrastructure Order* and that circumstances have not changed that would warrant a policy reversal.<sup>170</sup>

55. In light of the different approaches recommended by the industry and localities, we seek comment on whether we should revise our rules to resolve these issues and, if so, in what manner. In particular, we propose to revise the definition of “site” in section 1.6100(b)(6) to make clear that “site” refers to the boundary of the leased or owned property surrounding the tower and any access or utility easements currently related to the site as of the date that the facility was last reviewed and approved by a locality. We further propose to amend section 1.6100(b)(7)(iv) so that modification of an existing facility that entails ground excavation or deployment of up to 30 feet in any direction outside the facility’s site will be eligible for streamlined processing under section 6409(a).

56. Alternatively, we seek comment on whether we should revise the definition of site in section 1.6100(b)(6), as proposed above, without making the proposed change to section 1.6100(b)(7)(iv) for excavation or deployment of up to 30 feet outside the site. As another option, we seek comment on whether to define site in section 1.6100(b)(6) as the boundary of the leased or owned property surrounding the tower and any access or utility easements related to the site *as of the date an applicant submits a modification request*. Commenters should describe the costs and benefits of these approaches, as well as any other alternatives that they discuss in comments, and provide quantitative estimates as appropriate.

## V. PROCEDURAL MATTERS

57. *Comment Filing Procedures.* Pursuant to sections 1.415 and 1.419 of the Commission’s rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission’s Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://apps.fcc.gov/ecfs/>.

<sup>165</sup> Wireless Facilities Nationwide Programmatic Agreement at § III.B.

<sup>166</sup> NLC Comments at 10-12; NATOA Comments at 11-12.

<sup>167</sup> NLC Comments at 10-12; NATOA Comments at 11-12.

<sup>168</sup> NLC Comments at 10-12; *see also* NATOA Comments at 11.

<sup>169</sup> San Diego Comments at 53; NLC Comments at 4-5, 10-12; NATOA Comments at 14-15.

<sup>170</sup> San Diego Comments at 49-53.

- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing.
- Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701. U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.
- Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID-19. See FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy, Public Notice, DA 20-304 (March 19, 2020). <https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy>.
- During the time the Commission's building is closed to the general public and until further notice, if more than one docket or rulemaking number appears in the caption of a proceeding, paper filers need not submit two additional copies for each additional docket or rulemaking number; an original and one copy are sufficient.

58. *People with Disabilities.* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

59. *Ex Parte Rules—Permit-But-Disclose.* This proceeding shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission's *ex parte* rules.<sup>171</sup> Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with Rule 1.1206(b). In proceedings governed by Rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

60. *Initial Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>172</sup> the Commission has prepared an Initial Regulatory Flexibility Analysis

<sup>171</sup> 47 CFR § 1.1200 *et seq.*

<sup>172</sup> See 5 U.S.C. § 603.

(IRFA) of the possible significant economic impact on small entities of the policies and actions addressed in the *Notice of Proposed Rulemaking*. The IRFA is set forth in Appendix B. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the *Notice of Proposed Rulemaking*, and should have a separate and distinct heading designating them as responses to the IRFA.

61. *Paperwork Reduction Act*. This *Declaratory Ruling and Notice of Proposed Rulemaking* does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

62. *Congressional Review Act*. The Commission has determined, and the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, concurs that this rule is “non-major” under the Congressional Review Act, 5 U.S.C. § 804(2). The Commission will send a copy of this *Declaratory Ruling and Notice of Proposed Rulemaking* to Congress and the Government Accountability Office pursuant to 5 U.S.C. § 801(a)(1)(A).

## VI. ORDERING CLAUSES

63. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i)-(j), 7, 201, 253, 301, 303, 309, 319, and 332 of the Communications Act of 1934, as amended, and section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012, as amended, 47 U.S.C. §§ 151, 154(i)-(j), 157, 201, 253, 301, 303, 309, 319, 332, 1455 that this *Declaratory Ruling* in WT Docket No. 19-250 and *Notice of Proposed Rulemaking* in RM-11849 IS hereby ADOPTED.

64. IT IS FURTHER ORDERED that this *Declaratory Ruling* SHALL BE effective upon release. It is our intention in adopting the foregoing *Declaratory Ruling* that, if any provision of the *Declaratory Ruling*, or the application thereof to any person or circumstance, is held to be unlawful, the remaining portions of such *Declaratory Ruling* not deemed unlawful, and the application of such *Declaratory Ruling* to other person or circumstances, shall remain in effect to the fullest extent permitted by law.

65. IT IS FURTHER ORDERED that, pursuant to 47 CFR § 1.4(b)(1), the period for filing petitions for reconsideration or petitions for judicial review of this *Declaratory Ruling* will commence on the date that this *Declaratory Ruling* is released.

66. IT IS FURTHER ORDERED that the Commission’s Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Declaratory Ruling and Notice of Proposed Rulemaking*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

67. IT IS FURTHER ORDERED that this *Declaratory Ruling and Notice of Proposed Rulemaking* SHALL BE sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

**APPENDIX A**

## Comments and Reply Comments

**Comments**

ACT—The App Association

Alamo Improvement Association

Ameren Service Company; American Electric Power Service Corporation; Duke Energy Corporation;  
Entergy Corporation; Oncor Electric Delivery Company LLC; Southern Company; Tampa  
Electric Company

American Tower Corporation

AT&amp;T

Chevy Chase Village

City of Brea, California

City of Chino Hills

City of Coconut Creek

City of College Park

City of Costa Mesa

City of Frederick

City of Fort Bragg, California

City of Gaithersburg

City of Huntington Beach

City of Newport News, Virginia

City of New York

City of Ojai

City of San Diego, Cal.; City of Beaverton, Or.; City of Boulder, Colo.; Town of Breckenridge, Colo.;  
City of Carlsbad, Cal.; City Of Cerritos, Cal.; Colorado Communications And Utility Alliance;  
City Of Coronado, Cal.; Town Of Danville, Cal.; City of Encinitas, Cal.; City of Glendora, Cal.;  
King County, Wash.; City of Lacey, Wash.; City of La Mesa, Cal.; City of Lawndale, Cal.;  
League of Oregon Cities; League of California Cities; City of Napa, Cal.; City of Olympia,  
Wash.; City of Oxnard, Cal.; City of Pleasanton, Cal.; City of Rancho Palos Verdes, Cal.; City of  
Richmond, Cal.; Town of San Anselmo, Cal.; City of San Marcos, Cal.; City of San Ramon, Cal.;  
City of Santa Cruz, Cal.; City of Santa Monica, Cal.; City of Solana Beach, Cal.; City of South  
Lake Tahoe, Cal.; City of Tacoma, Wash.; City of Thousand Oaks, Cal.; Thurston County,  
Wash.; City of Tumwater, Wash. (San Diego)

City of Seattle

Communications Workers of America

Competitive Carriers Association

Consumer Technology Association

Crown Castle International Corp.

CTIA

East Bay Neighborhoods for Responsible Technology

ExteNet Systems, Inc.

Free State Foundation

Gwen Kennedy (on behalf of Loudon County, Virginia)

Margaret Phillips

Maryland Municipal League

Comments of The National Association of Telecommunications Officers and Advisors; The United States  
Conference of Mayors; and The National Association of Counties (NATOA)National League of Cities; Clark County, Nevada; Cobb County, Georgia; Howard County, Maryland;  
Montgomery County, Maryland; The City of Ann Arbor, Michigan; The City of Arlington,  
Texas; The City of Bellevue, Washington; The City of Boston, Massachusetts; The City of  
Burlingame, California; The Town of Fairfax, California; The City of Gaithersburg, Maryland;  
The City of Greenbelt, Maryland; The Town of Hillsborough, California; The City of Kirkland,



Washington; The City of Lincoln, Nebraska; The City of Los Angeles, California; The City of Monterey, California; The City of Myrtle Beach, South Carolina; The City of New York, New York; The City of Omaha, Nebraska; The City of Portland, Oregon; The City of San Bruno, California; The Michigan Coalition to Protect Public Rights-Of-Way; The Texas Municipal League; and The Texas Coalition of Cities for Utility Issues (NLC)

Nokia

States of California and Nevada Chapter of the National Association of Telecommunications Officers and Advisors (SCAN NATOA, Inc.)

T-Mobile USA, Inc.

Town of Chesapeake Beach

Town of Kensington, Maryland

Verizon

WIA–The Wireless Infrastructure Association

Wireless Internet Service Providers Association

### **Reply Comments**

American Tower Corporation

AT&T

City and County of San Francisco

City of San Diego, CA; City of Beaverton, Or.; City of Boulder, Colo.; Town of Breckenridge, Colo.; City of Carlsbad, Cal.; City of Cerritos, Cal.; Colorado Communications And Utility Alliance; City of Coronado, Cal.; Town of Danville, Cal.; City of Encinitas, Cal.; City of Glendora, Cal.; King County, Wash.; City of Lacey, Wash.; City of La Mesa, Cal.; City of Lawndale, Cal.; League of Oregon Cities; League of California Cities; City of Napa, Cal.; City of Olympia, Wash.; City of Oxnard, Cal.; City of Pleasanton, Cal.; City of Rancho Palos Verdes, Cal.; City of Richmond, Cal.; Town of San Anselmo, Cal.; City of San Marcos, Cal.; City of San Ramon, Cal.; City of Santa Cruz, Cal.; City of Santa Monica, Cal.; City of Solana Beach Cal.; City of South Lake Tahoe, Cal.; City of Tacoma, Wash.; City of Thousand Oaks, Cal.; Thurston County, Wash.; City of Tumwater, Wash. (San Diego)

Competitive Carriers Association

Consumer Technology Association

Crown Castle International Corp.

CTIA

ExteNet Systems, Inc.

National Association of Telecommunications Officers and Advisors; United States Conference of Mayors; National Association of Counties (NATOA *et. al.*)

National League of Cities; Clark County, NV; Cobb County, GA; Howard County, MD; Montgomery County, MD; City of Ann Arbor, MI; City of Arlington, TX; City of Baltimore, MD; City of Bellevue, WA; City of Boston, MA; City of Burien, WA; City of Burlingame, CA; City of Culver City, CA; Town of Fairfax, CA; City of Gaithersburg, MD; City of Greenbelt, MD; Town of Hillsborough, CA; City of Kirkland, WA; City of Lincoln, NE; City of Los Angeles, CA; City of Monterey, CA; City of Myrtle Beach, SC; City of New York, NY; City of Omaha, NE; City of Ontario, CA; City of Piedmont, CA; City of Portland, OR; City of San Bruno, CA; Michigan Coalition To Protect Public Rights-of-Way; Texas Municipal League; The Texas Coalition of Cities For Utility Issues (NLC *et. al.*)

Nina Beety

R Street Institute

The City of Frederick

T-Mobile USA, Inc.

Wireless Infrastructure Association (WIA)

## APPENDIX B

## Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>1</sup> the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities of the policies and rules proposed in this Notice of Proposed Rulemaking (*Notice*). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of the *Notice*. The Commission will send a copy of the *Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).<sup>2</sup> In addition, the *Notice* and IRFA (or summaries thereof) will be published in the *Federal Register*.<sup>3</sup>

**A. Need for, and Objectives of, the Proposed Rules**

2. The *Notice* proposes to revise the definition of “site” in section 1.6100(b)(6) to make clear that “site” refers to the boundary of the leased or owned property surrounding the tower and any access or utility easements related to the site as of the date the facility was last reviewed and approved by a locality. It also proposes to amend section 1.6100(b)(7)(iv) to allow for streamlined procedures under the section 6409 of the Commission’s rules to cover modifications to an existing facility that entail ground excavation or deployment of up to 30 feet in any direction outside the boundary of the site.

3. The *Notice* seeks comment on whether the Commission should revise the definition of “site” in section 1.6100(b)(6) without making the proposed change for excavation or deployment of up to 30 feet outside the boundary of the site. The *Notice* also seeks comment on an alternative definition—whether to define “site” in section 1.6100(b)(6) as the boundary of the leased or owned property surrounding the tower and any access or utility easements related to the site *as of the date an applicant submits a modification request*. Finally, the *Notice* asks commenters to describe the costs and benefits of each approach, as well as any other alternatives, and quantitative estimates as appropriate.

4. Section 1.6100(b)(7)(iv) of the Commission’s rules provides that “a modification substantially changes the physical dimensions of an eligible support structure if . . . [i]t entails any excavation or deployment outside the current site[.]”<sup>4</sup> Accordingly, a proposed modification that entails any excavation outside the current site of a tower or base station is not eligible for streamlined approval by State or local governments under section 6409(a). Section 1.6100(b)(6) defines “site” for towers outside of the public rights-of-way as “the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site, and, for other eligible support structures, further restricted to that area in proximity to the structure and to other transmission equipment already deployed on the ground.”<sup>5</sup>

5. Industry commenters argue that current “site” means the property leased or owned by the applicant at the time it submits an application to make a qualifying modification under section 6409(a).<sup>6</sup> Industry commenters state that their proposed clarification merely affirms the plain meaning of the rule.<sup>7</sup>

<sup>1</sup> See 5 U.S.C. § 603. The RFA, 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>2</sup> See 5 U.S.C. § 603(a).

<sup>3</sup> See *id.*

<sup>4</sup> 47 CFR § 1.6100(b)(7)(iv).

<sup>5</sup> 47 CFR § 1.6100(b)(6).

<sup>6</sup> See e.g., WIA Petition for Decl. Ruling at 18; CTIA Comments at 11; AT&T Comments at 9; Crown Castle Comments at 18.

<sup>7</sup> AT&T Comments at 19; Crown Castle at 18; CTIA Comments at 11; WIA Comments at 11.

They state that such clarification is needed, because many local governments interpret section 1.6100(b)(6) as referring to the original site and wrongly claim that a modification is not entitled to section 6409(a) if it entails any deployment outside of those original boundaries.<sup>8</sup> Local governments oppose WIA's interpretation, saying it would permit providers to expand the boundaries of a site without review and approval by a local government by entering into leases that increase the area of a site after the locality's initial review.<sup>9</sup>

6. Section 1.6100(b)(7)(iv) provides that "a modification substantially changes the physical dimensions of an eligible support structure if . . . [i]t entails any excavation or deployment outside the current site[.]"<sup>10</sup> However "site" is defined, a proposed modification is not eligible for streamlined processing under section 6409(a) if it is on a tower outside a right-of-way and involves excavation outside the site.<sup>11</sup> WIA and other industry commenters urge the Commission to amend this rule so that "excavation or facility deployments at locations up to 30 feet in any direction outside the current boundaries of a macro tower compound" would not constitute a substantial change in the physical dimensions.<sup>12</sup>

7. Industry commenters contend that it is often difficult to collocate transmission equipment on existing macro towers without expanding the compounds surrounding those towers in order to deploy additional equipment sheds or cabinets on the ground.<sup>13</sup> They argue that such deployments are becoming increasingly necessary to house multiple carriers' facilities on towers built in the past to support the needs of a single carrier and to facilitate the extensive network densification needed for rapid 5G deployment.<sup>14</sup> In contrast, local governments generally oppose the compound expansion proposal arguing that excavation of up to a 30-foot beyond a tower's current site cannot be considered insubstantial.<sup>15</sup> Moreover, several cities argue that the Commission considered and rejected this proposal in the *2014 Infrastructure Order* and that circumstances have not changed that would warrant a policy reversal.<sup>16</sup>

## **B. Legal Basis**

8. The proposed action is authorized pursuant to sections 1, 4(i)-(j), 7, 201, 253, 301, 303, 309, 319, and 332 of the Communications Act of 1934, as amended, and section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012, as amended, 47 U.S.C. §§ 151, 154(i)-(j), 157, 201, 253, 301, 303, 309, 319, 332, 1455.

## **C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply**

9. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules and policies, if adopted.<sup>17</sup> The

<sup>8</sup> See AT&T Comments at 19; American Tower Comments at 19; Crown Castle Comments at 28.

<sup>9</sup> NLC Comments at 10-12; NATOA Comments at 11-12.

<sup>10</sup> 47 CFR § 1.6100(b)(7)(iv).

<sup>11</sup> See 47 CFR § 1.6100(b)(6).

<sup>12</sup> WIA Petition for Rulemaking at 9-11.

<sup>13</sup> American Tower Comments at 5-8; Crown Castle Comments at 31-32; CTIA Comments at 15-16; WIA Comments at 7.

<sup>14</sup> WIA Petition for Rulemaking at 7; American Tower Comments at 7-8; AT&T Comments at 29; Crown Castle Comments at 31; CTIA Comments at 15-16; WIA Comments at 6-7; WISPA Comments at 8.

<sup>15</sup> San Diego Comments at 53-53; NLC Comments at 4-5, 12-14; NATOA Comments at 14-15.

<sup>16</sup> See e.g., San Diego Comments at 49-53.

<sup>17</sup> 5 U.S.C. § 603(b)(3).



RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>18</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>19</sup> A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.<sup>20</sup>

10. *Small Businesses, Small Organizations, Small Governmental Jurisdictions.* Our actions, over time, may affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three broad groups of small entities that could be directly affected herein.<sup>21</sup> First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the Small Business Administration’s (SBA) Office of Advocacy, in general a small business is an independent business having fewer than 500 employees.<sup>22</sup> These types of small businesses represent 99.9% of all businesses in the United States, which translates to 30.7 million businesses.<sup>23</sup>

11. Next, the type of small entity described as a “small organization” is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”<sup>24</sup> The Internal Revenue Service (IRS) uses a revenue benchmark of \$50,000 or less to delineate its annual electronic filing requirements for small exempt organizations.<sup>25</sup> Nationwide, for tax year 2018, there were approximately 571,709 small exempt organizations in the U.S. reporting revenues of \$50,000 or less according to the registration and tax data for exempt organizations available from the IRS.<sup>26</sup>

12. Finally, the small entity described as a “small governmental jurisdiction” is defined generally as “governments of cities, counties, towns, townships, villages, school districts, or special

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<sup>18</sup> 5 U.S.C. § 601(6).

<sup>19</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

<sup>20</sup> 15 U.S.C. § 632.

<sup>21</sup> See 5 U.S.C. § 601(3)-(6).

<sup>22</sup> See SBA, Office of Advocacy, “What’s New With Small Business?”, <https://cdn.advocacy.sba.gov/wp-content/uploads/2019/09/23172859/Whats-New-With-Small-Business-2019.pdf> (Sept 2019).

<sup>23</sup> *Id.*

<sup>24</sup> 5 U.S.C. § 601(4).

<sup>25</sup> The IRS benchmark is similar to the population of less than 50,000 benchmark in 5 U.S.C § 601(5) that is used to define a small governmental jurisdiction. Therefore, the IRS benchmark has been used to estimate the number small organizations in this small entity description. See Annual Electronic Filing Requirement for Small Exempt Organizations — Form 990-N (e-Postcard), “Who must file,” <https://www.irs.gov/charities-non-profits/annual-electronic-filing-requirement-for-small-exempt-organizations-form-990-n-e-postcard>. We note that the IRS data does not provide information on whether a small exempt organization is independently owned and operated or dominant in its field.

<sup>26</sup> See Exempt Organizations Business Master File Extract (EO BMF), “CSV Files by Region,” <https://www.irs.gov/charities-non-profits/exempt-organizations-business-master-file-extract-eo-bmf>. The IRS Exempt Organization Business Master File (EO BMF) Extract provides information on all registered tax-exempt/non-profit organizations. The data utilized for purposes of this description was extracted from the IRS EO BMF data for Region 1-Northeast Area (76,886), Region 2-Mid-Atlantic and Great Lakes Areas (221,121), and Region 3-Gulf Coast and Pacific Coast Areas (273,702) which includes the continental U.S., Alaska, and Hawaii. This data does not include information for Puerto Rico.

districts, with a population of less than fifty thousand.”<sup>27</sup> U.S. Census Bureau data from the 2017 Census of Governments<sup>28</sup> indicate that there were 90,075 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States.<sup>29</sup> Of this number there were 36,931 general purpose governments (county<sup>30</sup>, municipal and town or township<sup>31</sup>) with populations of less than 50,000 and 12,040 special purpose governments - independent school districts<sup>32</sup> with enrollment populations of less than 50,000.<sup>33</sup> Accordingly, based on the 2017 U.S. Census of Governments data, we estimate that at least 48,971 entities fall into the category of “small governmental jurisdictions.”<sup>34</sup>

13. *Wireless Telecommunications Carriers (except Satellite)*. This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless internet access, and wireless video services.<sup>35</sup> The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees.<sup>36</sup> For this industry, U.S. Census Bureau data for 2012 show that there

<sup>27</sup> 5 U.S.C. § 601(5).

<sup>28</sup> See 13 U.S.C. § 161. The Census of Governments survey is conducted every five (5) years compiling data for years ending with “2” and “7”. See also Census of Governments, <https://www.census.gov/programs-surveys/cog/about.html>.

<sup>29</sup> See U.S. Census Bureau, 2017 Census of Governments – Organization Table 2. Local Governments by Type and State: 2017 [CG1700ORG02]. <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>. Local governmental jurisdictions are made up of general purpose governments (county, municipal and town or township) and special purpose governments (special districts and independent school districts). See also Table 2. CG1700ORG02 Table Notes\_Local Governments by Type and State\_2017.

<sup>30</sup> See U.S. Census Bureau, 2017 Census of Governments - Organization, Table 5. County Governments by Population-Size Group and State: 2017 [CG1700ORG05]. <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>. There were 2,105 county governments with populations less than 50,000. This category does not include subcounty (municipal and township) governments.

<sup>31</sup> See U.S. Census Bureau, 2017 Census of Governments - Organization, Table 6. Subcounty General-Purpose Governments by Population-Size Group and State: 2017 [CG1700ORG06]. <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>. There were 18,729 municipal and 16,097 town and township governments with populations less than 50,000.

<sup>32</sup> See U.S. Census Bureau, 2017 Census of Governments - Organization, Table 10. Elementary and Secondary School Systems by Enrollment-Size Group and State: 2017 [CG1700ORG10]. <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>. There were 12,040 independent school districts with enrollment populations less than 50,000. See also Table 4. Special-Purpose Local Governments by State Census Years 1942 to 2017 [CG1700ORG04], CG1700ORG04 Table Notes\_Special Purpose Local Governments by State\_Census Years 1942 to 2017.

<sup>33</sup> While the special purpose governments category also includes local special district governments, the 2017 Census of Governments data does not provide data aggregated based on population size for the special purpose governments category. Therefore, only data from independent school districts is included in the special purpose governments category.

<sup>34</sup> This total is derived from the sum of the number of general purpose governments (county, municipal and town or township) with populations of less than 50,000 (36,931) and the number of special purpose governments - independent school districts with enrollment populations of less than 50,000 (12,040), from the 2017 Census of Governments - Organizations Tables 5, 6, and 10.

<sup>35</sup> See U.S. Census Bureau, 2017 NAICS Definition, “517312 Wireless Telecommunications Carriers (except Satellite)”, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517312&search=2017%20NAICS%20Search>.

<sup>36</sup> See 13 CFR § 121.201, NAICS Code 517312 (previously 517210).

were 967 firms that operated for the entire year.<sup>37</sup> Of this total, 955 firms employed fewer than 1,000 employees and 12 firms employed 1000 employees or more.<sup>38</sup> Thus under this category and the associated size standard, the Commission estimates that the majority of Wireless Telecommunications Carriers (except Satellite) are small entities.

14. The Commission's own data—available in its Universal Licensing System—indicate that, as of August 31, 2018 there are 265 Cellular licensees that will be affected by our actions.<sup>39</sup> The Commission does not know how many of these licensees are small, as the Commission does not collect that information for these types of entities. Similarly, according to internally developed Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) Telephony services.<sup>40</sup> Of this total, an estimated 261 have 1,500 or fewer employees, and 152 have more than 1,500 employees.<sup>41</sup> Thus, using available data, we estimate that the majority of wireless firms can be considered small.

15. *All Other Telecommunications.* The “All Other Telecommunications” category is comprised of establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation.<sup>42</sup> This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems.<sup>43</sup> Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.<sup>44</sup> The SBA has developed a small business size standard for “All Other Telecommunications”, which consists of all such firms with annual receipts of \$35 million or less.<sup>45</sup> For this category, U.S. Census Bureau data for 2012 show that there were 1,442 firms that operated for the entire year.<sup>46</sup> Of those firms, a total of 1,400 had annual receipts less than \$25 million and 15 firms had

<sup>37</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ5, *Information: Subject Series: Estab and Firm Size: Employment Size of Firms for the U.S.: 2012*, NAICS Code 517210, <https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517210&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false&vintage=2012>.

<sup>38</sup> *Id.* Available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees. The largest category provided is for firms with “1000 employees or more.”

<sup>39</sup> See <http://wireless.fcc.gov/uls>. For the purposes of this IRFA, consistent with Commission practice for wireless services, the Commission estimates the number of licensees based on the number of unique FCC Registration Numbers.

<sup>40</sup> See Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, Trends in Telephone Service at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-301823A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-301823A1.pdf).

<sup>41</sup> See *id.*

<sup>42</sup> See U.S. Census Bureau, *2017 NAICS Definition*, “517919 All Other Telecommunications”, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=517919&search=2017+NAICS+Search&search=2017>.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> See 13 CFR § 121.201, NAICS Code 517919.

<sup>46</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ4, *Information: Subject Series - Estab and Firm Size: Receipts Size of Firms for the U.S.: 2012*, NAICS Code 517919, <https://data.census.gov/cedsci/table?text=EC1251SSSZ4&n=517919&tid=ECNSIZE2012.EC1251SSSZ4&hidePreview=false>.

annual receipts of \$25 million to \$49,999,999.<sup>47</sup> Thus, the Commission estimates that the majority of “All Other Telecommunications” firms potentially affected by our action can be considered small.

16. *Fixed Microwave Services.* Microwave services include common carrier,<sup>48</sup> private-operational fixed,<sup>49</sup> and broadcast auxiliary radio services.<sup>50</sup> They also include the Upper Microwave Flexible Use Service<sup>51</sup>, Millimeter Wave Service<sup>52</sup>, Local Multipoint Distribution Service (LMDS),<sup>53</sup> the Digital Electronic Message Service (DEMS),<sup>54</sup> and the 24 GHz Service,<sup>55</sup> where licensees can choose between common carrier and non-common carrier status.<sup>56</sup> There are approximately 66,680 common carrier fixed licensees, 69,360 private and public safety operational-fixed licensees, 20,150 broadcast auxiliary radio licensees, 411 LMDS licenses, 33 24 GHz DEMS licenses, 777 39 GHz licenses, and five 24 GHz licenses, and 467 Millimeter Wave licenses in the microwave services.<sup>57</sup> The Commission has not yet defined a small business with respect to microwave services. The closest applicable SBA category is Wireless Telecommunications Carriers (except Satellite)<sup>58</sup> and the appropriate size standard for this category under SBA rules is that such a business is small if it has 1,500 or fewer employees.<sup>59</sup> For this industry, U.S. Census Bureau data for 2012 show that there were 967 firms that operated for the entire year.<sup>60</sup> Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.<sup>61</sup> Thus under this SBA category and the associated size standard, the Commission estimates that a majority of fixed microwave service licensees can be considered small.

17. The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA’s small business size standard. Consequently, the Commission estimates that there are up to 36,708

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<sup>47</sup> *Id.*

<sup>48</sup> See 47 CFR Part 101, Subparts C and I.

<sup>49</sup> See 47 CFR Part 101, Subparts C and H.

<sup>50</sup> Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission’s Rules. See 47 CFR Part 74. Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

<sup>51</sup> See 47 CFR Part 30.

<sup>52</sup> See 47 CFR Part 101, Subpart Q.

<sup>53</sup> See 47 CFR Part 101, Subpart L.

<sup>54</sup> See 47 CFR Part 101, Subpart G.

<sup>55</sup> See *id.*

<sup>56</sup> See 47 CFR §§ 101.533, 101.1017.

<sup>57</sup> These statistics are based on a review of the Universal Licensing System on September 22, 2015.

<sup>58</sup> See U.S. Census Bureau, 2017 NAICS Definition, “517312 Wireless Telecommunications Carriers (except Satellite)”, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517312&search=2017%20NAICS%20Search>.

<sup>59</sup> See 13 CFR § 121.201, NAICS Code 517312 (previously 517210).

<sup>60</sup> See U.S. Census Bureau, 2012 Economic Census of the United States, Table ID: EC1251SSSZ5, Information: Subject Series, Estab and Firm Size: Employment Size of Firms for the U.S.: 2012, NAICS Code 517210, [https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517210&tid=ECNSIZE2012.EC1251SSSZ5&hidePrev](https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517210&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false&vintage=2012)

<sup>61</sup> *Id.* Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees. The largest category provided is for firms with “1000 employees or more.”

common carrier fixed licensees and up to 59,291 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that may be small and may be affected by the rules and policies discussed herein. We note, however, that the microwave fixed licensee category includes some large entities.

18. *FM Translator Stations and Low Power FM Stations.* FM translators and Low Power FM Stations are classified in the category of Radio Stations and are assigned the same NAICS Code as licensees of radio stations.<sup>62</sup> This U.S. industry, Radio Stations, comprises establishments primarily engaged in broadcasting aural programs by radio to the public.<sup>63</sup> Programming may originate in their own studio, from an affiliated network, or from external sources.<sup>64</sup> The SBA has established a small business size standard which consists of all radio stations whose annual receipts are \$41.5 million dollars or less.<sup>65</sup> U.S. Census Bureau data for 2012 indicate that 2,849 radio station firms operated during that year.<sup>66</sup> Of that number, 2,806 operated with annual receipts of less than \$25 million per year, 17 with annual receipts between \$25 million and \$49,999,999 million and 26 with annual receipts of \$50 million or more.<sup>67</sup> Therefore, based on the SBA's size standard we conclude that the majority of FM Translator Stations and Low Power FM Stations are small.

19. *Location and Monitoring Service (LMS).* LMS systems use non-voice radio techniques to determine the location and status of mobile radio units. For purposes of auctioning LMS licenses, the Commission has defined a "small business" as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not to exceed \$15 million.<sup>68</sup> A "very small business" is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not to exceed \$3 million.<sup>69</sup> These definitions have been approved by the SBA.<sup>70</sup> An auction for LMS licenses commenced on February 23, 1999 and closed on March 5, 1999. Of the 528 licenses auctioned, 289 licenses were sold to four small businesses.

20. *Multichannel Video Distribution and Data Service (MVDDS).* MVDDS is a terrestrial fixed microwave service operating in the 12.2-12.7 GHz band. The Commission adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. It defined a very small business as an entity with average annual gross revenues not exceeding \$3 million for the preceding three years; a small business as an entity with average annual gross revenues not exceeding \$15 million for the preceding three years; and an entrepreneur as an entity with average annual gross revenues not exceeding \$40 million for the preceding

<sup>62</sup> See U.S. Census Bureau, *2017 NAICS Definition, "515112 Radio Stations"*, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=515112&search=2017+NAICS+Search&search=2017>.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> See 13 C.F.R. 121.201, NAICS Code 515112.

<sup>66</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ4, *Information: Subject Series – Estab and Firm Size: Receipts Size of Firms for the U.S.:2012*, NAICS Code 515112, <https://data.census.gov/cedsci/table?text=EC1251SSSZ4&n=515112&tid=ECNSIZE2012.EC1251SSSZ4&hidePreview=false>.

<sup>67</sup> *Id.*

<sup>68</sup> Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, PR Docket No. 93-61, *Second Report and Order*, 13 FCC Rcd 15182, 15192 para. 20 (1998); see also 47 CFR § 90.1103.

<sup>69</sup> *Id.*

<sup>70</sup> See Letter from Aida Alvarez, Administrator, Small Business Administration to Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, FCC (Feb. 22, 1999).



three years.<sup>71</sup> These definitions were approved by the SBA.<sup>72</sup> On January 27, 2004, the Commission completed an auction of 214 MVDDS licenses (Auction No. 53). In this auction, ten winning bidders won a total of 192 MVDDS licenses.<sup>73</sup> Eight of the ten winning bidders claimed small business status and won 144 of the licenses. The Commission also held an auction of MVDDS licenses on December 7, 2005 (Auction 63). Of the three winning bidders who won 22 licenses, two winning bidders, winning 21 of the licenses, claimed small business status.<sup>74</sup>

21. *Multiple Address Systems.* Entities using Multiple Address Systems (MAS) spectrum, in general, fall into two categories: (1) those using the spectrum for profit-based uses, and (2) those using the spectrum for private internal uses. With respect to the first category, Profit-based Spectrum use, the size standards established by the Commission define “small entity” for MAS licensees as an entity that has average annual gross revenues of less than \$15 million over the three previous calendar years.<sup>75</sup> A “Very small business” is defined as an entity that, together with its affiliates, has average annual gross revenues of not more than \$3 million over the preceding three calendar years.<sup>76</sup> The SBA has approved these definitions.<sup>77</sup> The majority of MAS operators are licensed in bands where the Commission has implemented a geographic area licensing approach that requires the use of competitive bidding procedures to resolve mutually exclusive applications.

22. The Commission’s licensing database indicates that, as of April 16, 2010, there were a total of 11,653 site-based MAS station authorizations. Of these, 58 authorizations were associated with common carrier service. In addition, the Commission’s licensing database indicates that, as of April 16, 2010, there were a total of 3,330 Economic Area market area MAS authorizations. The Commission’s licensing database also indicates that, as of April 16, 2010, of the 11,653 total MAS station authorizations, 10,773 authorizations were for private radio service. In 2001, an auction for 5,104 MAS licenses in 176 EAs was conducted.<sup>78</sup> Seven winning bidders claimed status as small or very small businesses and won 611 licenses. In 2005, the Commission completed an auction (Auction 59) of 4,226 MAS licenses in the Fixed Microwave Services from the 928/959 and 932/941 MHz bands. Twenty-six winning bidders won a total of 2,323 licenses. Of the 26 winning bidders in this auction, five claimed small business status and won 1,891 licenses.

23. With respect to the second category, Internal Private Spectrum use consists of entities that use, or seek to use, MAS spectrum to accommodate their own internal communications needs, MAS

<sup>71</sup> Amendment of Parts 2 and 25 of the Commission’s Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range; Amendment of the Commission’s Rules to Authorize Subsidiary Terrestrial Use of the 12.2–12.7 GHz Band by Direct Broadcast Satellite Licensees and their Affiliates; and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers, Ltd. to Provide A Fixed Service in the 12.2–12.7 GHz Band, *Memorandum Opinion and Order and Second Report and Order*, 17 FCC Rcd 9614, 9711, para. 252 (2002).

<sup>72</sup> See Letter from Hector V. Barreto, Administrator, U.S. Small Business Administration, to Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC (Feb. 13, 2002).

<sup>73</sup> See “*Multichannel Video Distribution and Data Service Spectrum Auction Closes; Winning Bidders Announced*,” Public Notice, 19 FCC Rcd 1834 (2004).

<sup>74</sup> See “*Auction of Multichannel Video Distribution and Data Service Licenses Closes; Winning Bidders Announced for Auction No. 63*,” Public Notice, 20 FCC Rcd 19807 (2005).

<sup>75</sup> See Amendment of the Commission’s Rules Regarding Multiple Address Systems, *Report and Order*, 15 FCC Rcd 11956, 12008, para. 123 (2000).

<sup>76</sup> *Id.*

<sup>77</sup> See Letter from Aida Alvarez, Administrator, Small Business Administration, to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, FCC (June 4, 1999).

<sup>78</sup> See “*Multiple Address Systems Spectrum Auction Closes*,” Public Notice, 16 FCC Rcd 21011 (2001).

serves an essential role in a range of industrial, safety, business, and land transportation activities. MAS radios are used by companies of all sizes, operating in virtually all U.S. business categories, and by all types of public safety entities. For the majority of private internal users, the definition developed by the SBA would be more appropriate than the Commission's definition. The closest applicable definition of a small entity is the "Wireless Telecommunications Carriers (except Satellite)" definition under the SBA size standards.<sup>79</sup> The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees.<sup>80</sup> For this category, U.S. Census Bureau data for 2012 show that there were 967 firms that operated for the entire year.<sup>81</sup> Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.<sup>82</sup> Thus under this category and the associated small business size standard, the Commission estimates that the majority of firms that may be affected by our action can be considered small.

24. *Non-Licensee Owners of Towers and Other Infrastructure.* Although at one time most communications towers were owned by the licensee using the tower to provide communications service, many towers are now owned by third-party businesses that do not provide communications services themselves but lease space on their towers to other companies that provide communications services. The Commission's rules require that any entity, including a non-licensee, proposing to construct a tower over 200 feet in height or within the glide slope of an airport must register the tower with the Commission's Antenna Structure Registration ("ASR") system and comply with applicable rules regarding review for impact on the environment and historic properties.

25. As of March 1, 2017, the ASR database includes approximately 122,157 registration records reflecting a "Constructed" status and 13,987 registration records reflecting a "Granted, Not Constructed" status. These figures include both towers registered to licensees and towers registered to non-licensee tower owners. The Commission does not keep information from which we can easily determine how many of these towers are registered to non-licensees or how many non-licensees have registered towers.<sup>83</sup> Regarding towers that do not require ASR registration, we do not collect information as to the number of such towers in use and therefore cannot estimate the number of tower owners that would be subject to the rules on which we seek comment. Moreover, the SBA has not developed a size standard for small businesses in the category "Tower Owners." Therefore, we are unable to determine the number of non-licensee tower owners that are small entities. We believe, however, that when all entities owning 10 or fewer towers and leasing space for collocation are included, non-licensee tower owners number in the thousands. In addition, there may be other non-licensee owners of other wireless infrastructure, including Distributed Antenna Systems (DAS) and small cells that might be affected by the measures on which we seek comment. We do not have any basis for estimating the number of such non-licensee owners that are small entities.

26. The closest applicable SBA category is All Other Telecommunications<sup>84</sup>, and the appropriate size standard consists of all such firms with gross annual receipts of \$38 million or less.<sup>85</sup> For

<sup>79</sup> See 13 CFR § 121.201, NAICS Code 517312 (formerly 517210).

<sup>80</sup> *Id.*

<sup>81</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ5, *Information: Subject Series: Estab and Firm Size: Employment Size of Firms for the U.S.: 2012*, NAICS Code 517210, <https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517210&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false&vintage=2012>.

<sup>82</sup> Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees. The largest category provided is for firms with "1000 employees or more."

<sup>83</sup> We note, however, that approximately 13,000 towers are registered to 10 cellular carriers with 1,000 or more employees.

<sup>84</sup> See U.S. Census Bureau, *2017 NAICS Definition*, "517919 All Other Telecommunications", <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=517919&search=2017+NAICS+Search&search=2017>.

this category, U.S. Census Bureau data for 2012 show that there were 1,442 firms that operated for the entire year.<sup>86</sup> Of these firms, a total of 1,400 had gross annual receipts of less than \$25 million and 15 firms had annual receipts of \$25 million to \$49,999,999.<sup>87</sup> Thus, under this SBA size standard a majority of the firms potentially affected by our action can be considered small.

27. *Personal Radio Services.* Personal radio services provide short-range, low-power radio for personal communications, radio signaling, and business communications not provided for in other services. Personal radio services include services operating in spectrum licensed under Part 95 of our rules.<sup>88</sup> These services include Citizen Band Radio Service, General Mobile Radio Service, Radio Control Radio Service, Family Radio Service, Wireless Medical Telemetry Service, Medical Implant Communications Service, Low Power Radio Service, and Multi-Use Radio Service.<sup>89</sup> There are a variety of methods used to license the spectrum in these rule parts, from licensing by rule, to conditioning operation on successful completion of a required test, to site-based licensing, to geographic area licensing. All such entities in this category are wireless, therefore we apply the definition of Wireless Telecommunications Carriers (except Satellite)<sup>90</sup>, pursuant to which the SBA's small entity size standard is defined as those entities employing 1,500 or fewer persons.<sup>91</sup> For this industry, U.S. Census Bureau data for 2012 show that there were 967 firms that operated for the entire year.<sup>92</sup> Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.<sup>93</sup> Thus under this category and the associated size standard, the Commission estimates that the majority of firms can be considered small. We note however, that many of the licensees in this category are individuals and not small entities. In addition, due to the mostly unlicensed and shared nature of the spectrum utilized in many of these services, the Commission lacks direct information upon which to base an estimation of the number of small entities that may be affected by our actions in this proceeding.

28. *Private Land Mobile Radio Licensees.* Private land mobile radio (PLMR) systems serve an essential role in a vast range of industrial, business, land transportation, and public safety activities. Companies of all sizes operating in all U.S. business categories use these radios. Because of the vast array of PLMR users, the Commission has not developed a small business size standard specifically

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<sup>85</sup> See 13 CFR § 121.201, NAICS Code 517919.

<sup>86</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ4, *Information: Subject Series - Estab and Firm Size: Receipts Size of Firms for the U.S.: 2012*, NAICS Code 517919, <https://data.census.gov/cedsci/table?text=EC1251SSSZ4&n=517919&tid=ECNSIZE2012.EC1251SSSZ4&hidePreview=false>.

<sup>87</sup> *Id.*

<sup>88</sup> 47 CFR Part 90.

<sup>89</sup> The Citizens Band Radio Service, General Mobile Radio Service, Radio Control Radio Service, Family Radio Service, Wireless Medical Telemetry Service, Medical Implant Communications Service, Low Power Radio Service, and Multi-Use Radio Service are governed by subpart D, subpart A, subpart C, subpart B, subpart H, subpart I, subpart G, and subpart J, respectively, of Part 95 of the Commission's rules. See generally 47 CFR Part 95.

<sup>90</sup> See U.S. Census Bureau, *2017 NAICS Definition*, "517312 Wireless Telecommunications Carriers (except Satellite)", <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517312&search=2017%20NAICS%20Search>.

<sup>91</sup> See 13 CFR § 121.201, NAICS Code 517312 (previously 517210).

<sup>92</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ5, *Information: Subject Series: Estab and Firm Size: Employment Size of Firms for the U.S.: 2012*, NAICS Code 517210, <https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517210&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false&vintage=2012>.

<sup>93</sup> *Id.* Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees. The largest category provided is for firms with "1000 employees or more."

applicable to PLMR users. The closest applicable SBA category is Wireless Telecommunications Carriers (except Satellite) which encompasses business entities engaged in *radiotelephone communications*.<sup>94</sup> The appropriate size standard for this category under SBA rules is that such a business is small if it has 1,500 or fewer employees.<sup>95</sup> For this industry, U.S. Census Bureau data for 2012 show that there were 967 firms that operated for the entire year.<sup>96</sup> Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.<sup>97</sup> Thus under this category and the associated size standard, the Commission estimates that the majority of PLMR Licensees are small entities.

29. According to the Commission's records, a total of approximately 400,622 licenses comprise PLMR users.<sup>98</sup> Of this number there are a total of approximately 3,174 PLMR licenses in the 4.9 GHz band;<sup>99</sup> 29,187 PLMR licenses in the 800 MHz band;<sup>100</sup> and 3,374 licenses in the frequencies range 173.225 MHz to 173.375 MHz.<sup>101</sup> The Commission does not require PLMR licensees to disclose information about number of employees, and does not have information that could be used to determine how many PLMR licensees constitute small entities under this definition. The Commission however believes that a substantial number of PLMR licensees may be small entities despite the lack of specific information.

30. *Public Safety Radio Licensees.* As a general matter, Public Safety Radio Pool licensees include police, fire, local government, forestry conservation, highway maintenance, and emergency medical services.<sup>102</sup> Because of the vast array of public safety licensees, the Commission has not

<sup>94</sup> See U.S. Census Bureau, 2017 NAICS Definition, "517312 Wireless Telecommunications Carriers (except Satellite)", <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517312&search=2017%20NAICS%20Search>.

<sup>95</sup> See 13 CFR § 121.201, NAICS Code 517312 (formerly 517210).

<sup>96</sup> See U.S. Census Bureau, 2012 Economic Census of the United States, Table ID: EC1251SSSZ5, Information: Subject Series: Estab and Firm Size: Employment Size of Firms for the U.S.: 2012, NAICS Code 517210, [https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517210&tid=ECNSIZE2012.EC1251SSSZ5&hidePrev](https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517210&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false&vintage=2012)

<sup>97</sup> *Id.* Available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees. The largest category provided is for firms with "1000 employees or more."

<sup>98</sup> This figure was derived from Commission licensing records as of September 19, 2016. Licensing numbers change on a daily basis. This does not indicate the number of licensees, as licensees may hold multiple licenses. There is no information currently available about the number of PLMR licensees that have fewer than 1,500 employees.

<sup>99</sup> Based on an FCC Universal Licensing System search of January 26, 2018. Search parameters: Radio Service = PA – Public Safety 4940-4990 MHz Band; Authorization Type = Regular; Status = Active.

<sup>100</sup> Based on an FCC Universal Licensing System search of May 15, 2017. Search parameters: Radio Service = GB, GE, GF, GJ, GM, GO, GP, YB, YE, YF, YJ, YM, YO, YP, YX; Authorization Type = Regular; Status = Active.

<sup>101</sup> This figure was derived from Commission licensing records as of August 16, 2013. Licensing numbers change daily. We do not expect this number to be significantly smaller today. This does not indicate the number of licensees, as licensees may hold multiple licenses. There is no information currently available about the number of licensees that have fewer than 1,500 employees.

<sup>102</sup> See subparts A and B of Part 90 of the Commission's Rules, 47 C.F.R. §§ 90.1-90.22. Police licensees serve state, county, and municipal enforcement through telephony (voice), telegraphy (code), and teletype and facsimile (printed material). Fire licensees are comprised of private volunteer or professional fire companies, as well as units under governmental control. Public Safety Radio Pool licensees also include state, county, or municipal entities that use radio for official purposes. State departments of conservation and private forest organizations comprise forestry service licensees that set up communications networks among fire lookout towers and ground crews. State and local governments are highway maintenance licensees that provide emergency and routine communications to aid other

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developed a small business size standard specifically applicable to public safety licensees. The closest applicable SBA category is Wireless Telecommunications Carriers (except Satellite) which encompasses business entities engaged in radiotelephone communications.<sup>103</sup> The appropriate size standard for this category under SBA rules is that such a business is small if it has 1,500 or fewer employees.<sup>104</sup> For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.<sup>105</sup> Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.<sup>106</sup> Thus under this category and the associated size standard, the Commission estimates that the majority of firms can be considered small. With respect to local governments, in particular, since many governmental entities comprise the licensees for these services, we include under public safety services the number of government entities affected. According to Commission records, there are a total of approximately 133,870 licenses within these services.<sup>107</sup> There are 3.121 licenses in the 4.9 GHz band, based on an FCC Universal Licensing System search of March 29, 2017.<sup>108</sup> We estimate that fewer than 2,442 public safety radio licensees hold these licenses because certain entities may have multiple licenses.

31. *Radio Stations.* This Economic Census category “comprises establishments primarily engaged in broadcasting aural programs by radio to the public. Programming may originate in their own studio, from an affiliated network, or from external sources.”<sup>109</sup> The SBA has established a small business size standard for this category as firms having \$41.5 million or less in annual receipts.<sup>110</sup> U.S. Census Bureau data for 2012 show that 2,849 radio station firms operated during that year.<sup>111</sup> Of that

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public safety services to keep main roads safe for vehicular traffic. Emergency medical licensees use these channels for emergency medical service communications related to the delivery of emergency medical treatment. Additional licensees include medical services, rescue organizations, veterinarians, persons with disabilities, disaster relief organizations, school buses, beach patrols, establishments in isolated areas, communications standby facilities, and emergency repair of public communications facilities.

<sup>103</sup> See U.S. Census Bureau, 2017 NAICS Definition, “517312 Wireless Telecommunications Carriers (except Satellite)”, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517312&search=2017%20NAICS%20Search>.

<sup>104</sup> See 13 CFR § 121.201, NAICS Code 517312 (formerly 517210).

<sup>105</sup> See U.S. Census Bureau, 2012 Economic Census of the United States, Table ID: EC1251SSSZ5, Information: Subject Series: Etab and Firm Size: Employment Size of Firms for the U.S.: 2012, NAICS Code 517210, <https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517210&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false&vintage=2012>.

<sup>106</sup> *Id.* Available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees. The largest category provided is for firms with “1000 employees or more.”

<sup>107</sup> This figure was derived from Commission licensing records as of June 27, 2008. Licensing numbers change on a daily basis. We do not expect this number to be significantly smaller today. This does not indicate the number of licensees, as licensees may hold multiple licenses. There is no information currently available about the number of public safety licensees that have less than 1,500 employees.

<sup>108</sup> Based on an FCC Universal Licensing System search of March 29, 2017. Search parameters: Radio Service = PA – Public Safety 4940-4990 MHz Band; Authorization Type = Regular; Status = Active.

<sup>109</sup> See U.S. Census Bureau, 2017 NAICS Definition, “515112 Radio Stations,” <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=515112&search=2017+NAICS+Search&search=2017>.

<sup>110</sup> See 13 CFR § 121.201, NAICS Code 515112.

<sup>111</sup> See U.S. Census Bureau, 2012 Economic Census of the United States, Table ID: EC1251SSSZ4, Information: Subject Series – Etab and Firm Size: Receipts Size of Firms for the U.S.: 2012, NAICS Code 515112, <https://data.census.gov/cedsci/table?text=EC1251SSSZ4&n=515112&tid=ECNSIZE2012.EC1251SSSZ4&hidePreview=false>.



number, 2,806 firms operated with annual receipts of less than \$25 million per year and 17 with annual receipts between \$25 million and \$49,999,999 million.<sup>112</sup> Therefore, based on the SBA's size standard the majority of such entities are small entities.

32. According to Commission staff review of the BIA/Kelsey, LLC's Media Access Pro Radio Database as of January 2018, about 11,261 (or about 99.9 percent) of 11,383 commercial radio stations had revenues of \$38.5 million or less and thus qualify as small entities under the SBA definition.<sup>113</sup> The Commission has estimated the number of licensed commercial AM radio stations to be 4,580 stations and the number of commercial FM radio stations to be 6,726, for a total number of 11,306.<sup>114</sup> We note the Commission has also estimated the number of licensed noncommercial (NCE) FM radio stations to be 4,172.<sup>115</sup> Nevertheless, the Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

33. We also note, that in assessing whether a business entity qualifies as small under the above definition, business control affiliations must be included.<sup>116</sup> The Commission's estimate therefore likely overstates the number of small entities that might be affected by its action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, to be determined a "small business," an entity may not be dominant in its field of operation.<sup>117</sup> We further note, that it is difficult at times to assess these criteria in the context of media entities, and the estimate of small businesses to which these rules may apply does not exclude any radio station from the definition of a small business on these basis, thus our estimate of small businesses may therefore be over-inclusive. Also, as noted above, an additional element of the definition of "small business" is that the entity must be independently owned and operated. The Commission notes that it is difficult at times to assess these criteria in the context of media entities and the estimates of small businesses to which they apply may be over-inclusive to this extent.

34. *Satellite Telecommunications.* This category comprises firms "primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications."<sup>118</sup> Satellite telecommunications service providers include satellite and earth station operators. The category has a small business size standard of \$35 million or less in average annual receipts, under SBA rules.<sup>119</sup> For this category, U.S. Census Bureau data for 2012 show that there were a total of 333 firms that operated for the entire year.<sup>120</sup> Of this total, 299 firms had annual

<sup>112</sup> *Id.*

<sup>113</sup> BIA/Kelsey, MEDIA Access Pro Database (viewed Jan. 26, 2018).

<sup>114</sup> Broadcast Station Totals as of March 31, 2020, Press Release (MB April 6, 2020) (March 31, 2020 Broadcast Station Totals), <https://docs.fcc.gov/public/attachments/DOC-363515A1.pdf>.

<sup>115</sup> *Id.*

<sup>116</sup> "[Business concerns] are affiliates of each other when one concern controls or has the power to control the other, or a third party or parties controls or has power to control both." 13 C.F.R. § 121.103(a)(1).

<sup>117</sup> 13 C.F.R. § 121.102(b).

<sup>118</sup> See U.S. Census Bureau, 2017 NAICS Definition, "517410 Satellite Telecommunications", <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=517410&search=2017+NAICS+Search&search=2017>.

<sup>119</sup> See 13 CFR § 121.201, NAICS Code 517410.

<sup>120</sup> See U.S. Census Bureau, 2012 Economic Census of the United States, Table ID: EC1251SSSZ4, Information: Subject Series - Estab and Firm Size: Receipts Size of Firms for the U.S.: 2012, NAICS Code 517410, <https://data.census.gov/cedsci/table?text=EC1251SSSZ4&n=517410&tid=ECNSIZE2012.EC1251SSSZ4&hidePreview=false&vintage=2012>.

receipts of less than \$25 million.<sup>121</sup> Consequently, we estimate that the majority of satellite telecommunications providers are small entities.

35. *Television Broadcasting.* This Economic Census category “comprises establishments primarily engaged in broadcasting images together with sound.”<sup>122</sup> These establishments operate television broadcast studios and facilities for the programming and transmission of programs to the public.<sup>123</sup> These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, from an affiliated network, or from external sources. The SBA has created the following small business size standard for such businesses: those having \$41.5 million or less in annual receipts.<sup>124</sup> The 2012 Economic Census reports that 751 firms in this category operated in that year.<sup>125</sup> Of that number, 656 had annual receipts of \$25,000,000 or less, and 25 had annual receipts between \$25,000,000 and \$49,999,999.<sup>126</sup> Based on this data we therefore estimate that the majority of commercial television broadcasters are small entities under the applicable SBA size standard.

36. The Commission has estimated the number of licensed commercial television stations to be 1,377.<sup>127</sup> Of this total, 1,258 stations (or about 91 percent) had revenues of \$38.5 million or less, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on November 16, 2017, and therefore these licensees qualify as small entities under the SBA definition. In addition, the Commission has estimated the number of licensed noncommercial educational television stations to be 384.<sup>128</sup> Notwithstanding, the Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities. There are also 2,300 low power television stations, including Class A stations (LPTV) and 3,681 TV translator stations.<sup>129</sup> Given the nature of these services, we will presume that all of these entities qualify as small entities under the above SBA small business size standard.

37. We note, however, that in assessing whether a business concern qualifies as “small” under the above definition, business (control) affiliations<sup>130</sup> must be included. Our estimate, therefore likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition,

<sup>121</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard of annual receipts of \$35 million or less.

<sup>122</sup> See U.S. Census Bureau, *2017 NAICS Definition*, “515120 Television Broadcasting”, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=515120&search=2017+NAICS+Search&search=2017>.

<sup>123</sup> *Id.*

<sup>124</sup> See 13 CFR § 121.201, NAICS Code 515120.

<sup>125</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ4, *Information: Subject Series – Estab and Firm Size: Receipts Size of Firms for the U.S.: 2012*, NAICS Code 515120, <https://data.census.gov/cedsci/table?text=EC1251SSSZ4&n=515120&tid=ECNSIZE2012.EC1251SSSZ4&hidePreview=false>.

<sup>126</sup> *Id.*

<sup>127</sup> *Broadcast Station Totals* as of June 30, 2018, Press Release (MB, rel. Jul. 3, 2018) (June 30, 2018 Broadcast Station Totals Press Release), <https://docs.fcc.gov/public/attachments/DOC-352168A1.pdf>.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> “[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has the power to control both.” 13 C.F.R. § 21.103(a)(1).

another element of the definition of “small business” requires that an entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television broadcast station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive. Also, as noted above, an additional element of the definition of “small business” is that the entity must be independently owned and operated. The Commission notes that it is difficult at times to assess these criteria in the context of media entities and its estimates of small businesses to which they apply may be over-inclusive to this extent.

38. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and “wireless cable,” transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)).<sup>131</sup>

39. *BRS* - In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than \$40 million in the previous three calendar years.<sup>132</sup> The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 86 incumbent BRS licensees that are considered small entities (18 incumbent BRS licensees do not meet the small business size standard).<sup>133</sup> After adding the number of small business auction licensees to the number of incumbent licensees not already counted, there are currently approximately 133 BRS licensees that are defined as small businesses under either the SBA or the Commission’s rules.

40. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas.<sup>134</sup> The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years (small business) received a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed \$3 million and do not exceed \$15 million for the preceding three years (very small business) received a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed \$3 million for the preceding three years (entrepreneur) received a 35 percent discount on its winning bid.<sup>135</sup> Auction 86 concluded in 2009 with the sale of 61 licenses.<sup>136</sup> Of the ten winning bidders, two bidders that claimed small business status won

<sup>131</sup> *Amendment of Parts 21 and 74 of the Commission’s Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, Report and Order, 10 FCC Rcd 9589, 9593, para. 7 (1995).

<sup>132</sup> 47 CFR § 21.961(b)(1).

<sup>133</sup> 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA’s small business size standard of 1500 or fewer employees.

<sup>134</sup> *Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86*, Public Notice, 24 FCC Rcd 8277 (2009).

<sup>135</sup> *Id.* at 8296 para. 73.

<sup>136</sup> *Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period*, Public Notice, 24 FCC Rcd 13572 (2009).

4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

41. *EBS* - Educational Broadband Service has been included within the broad economic census category and SBA size standard for Wired Telecommunications Carriers since 2007. Wired Telecommunications Carriers are comprised of establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.”<sup>137</sup> The SBA’s small business size standard for this category is all such firms having 1,500 or fewer employees.<sup>138</sup> U.S. Census Bureau data for 2012 show that there were 3,117 firms that operated that year.<sup>139</sup> Of this total, 3,083 operated with fewer than 1,000 employees.<sup>140</sup> Thus, under this size standard, the majority of firms in this industry can be considered small. In addition to U.S. Census Bureau data, the Commission’s Universal Licensing System indicates that as of October 2014, there are 2,206 active EBS licenses. The Commission estimates that of these 2,206 licenses, the majority are held by non-profit educational institutions and school districts, which are by statute defined as small businesses.<sup>141</sup>

#### **D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities**

42. The excavation or deployment boundaries of an eligible facilities request poses significant policy implications associated with the Commission’s section 6409(a) rules. We anticipate that any rule changes that result from the *Notice* will provide certainty for providers, state and local governments, and other entities interpreting the section 6409(a) rules. In the *Notice*, we seek comment on changes to our rules regarding the definition of a “site” surrounding a tower, as well as streamlined treatment pursuant to the section 6409 rules for an excavation or deployments outside the boundaries of an existing tower site.<sup>142</sup> The Commission does not believe that our resolution of these matters will create any new reporting, recordkeeping, or other compliance requirements for small entities or others that will be impacted by our decision.

43. Specifically, we propose to amend the definition of the term “site” in section 1.6100(b)(6) to make clear that “site” refers to the current boundary of the leased or owned property surrounding the tower and any access or utility easements currently related to the site on the date the facility was last reviewed and approved by a locality. In addition, we propose to change the Commission’s rules to allow streamlined treatment under the section 6409 rules for “compound expansions” (i.e. excavation or facility deployments outside the current boundaries of a macro tower compound) of up to 30 feet in any direction outside the boundary of a site. This change to the existing rule, which was requested by industry commenters, is opposed by state and local government jurisdictions, and was previously considered but not adopted by the Commission in the 2014

<sup>137</sup> See U.S. Census Bureau, 2017 NAICS Definition, “517311 Wired Telecommunications Carriers” (partial definition), <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517311&search=2017>.

<sup>138</sup> See 13 CFR § 121.201, NAICS Code 517311 (previously 517110).

<sup>139</sup> See U.S. Census Bureau, 2012 Economic Census of the United States, Table ID: EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.: 2012*, NAICS Code 517110, <https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517110&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false>.

<sup>140</sup> *Id.*

<sup>141</sup> The term “small entity” within SBREFA applies to small organizations (non-profits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6).

<sup>142</sup> 47 CFR § 1.6100(b)(6), (7)(iv).

*Infrastructure Order*. The *Notice* also seeks comment on whether to revise the definition of “site” without making the proposed change to allow for excavation or deployment of up to 30 feet outside the site. It seeks further comment on whether to define site in section 1.6100(b)(6) as the boundary of the leased or owned property surrounding the tower and any access or utility easements related to the site *as of the date an applicant submits a modification request*.

44. We do not anticipate rule changes resulting from the *Notice* to cause any new recordkeeping, reporting, or compliance requirements for entities preparing eligible facilities requests under section 6409(a) because entities are required to submit construction proposals outlining the work to be done regardless of whether the project qualifies as an eligible facilities request under section 6409(a). Additionally, while we do not anticipate that any action we take on the matters raised in the *Notice* will require small entities to hire attorneys, engineers, consultants, or other professionals to comply, the Commission cannot quantify the cost of compliance with the potential changes discussed in the *Notice*. As part of our invitation for comment however, we request that parties discuss any tangible benefits and any adverse effects as well as alternative approaches and any other steps the Commission should consider taking on these matters. We expect the information we receive in comments to help the Commission identify and evaluate relevant matters for small entities, including compliance costs and other burdens that may result from the matters raised in the *Notice*.

#### **E. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered**

45. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in developing its approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for such small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.<sup>143</sup>

46. The Commission believes that clarifying the parameters of excavation or deployment within or around a “site” under section 1.6100 will provide more certainty to relevant parties and enable small entities and others to navigate more effectively state and local application processes. As a result, we anticipate that any clarifying rule changes on which the *Notice* seeks comment may help reduce the economic impact on small entities that may need to deploy wireless infrastructure by reducing the cost and delay associated with the deployment of such infrastructure.

47. To assist the Commission in its evaluation of the economic impact on small entities, and of such a rule change generally, and to better explore options and alternatives, the *Notice* asks commenters to discuss any benefits or drawbacks to small entities associated with making such a rule change. Specifically, we inquire whether there are any specific, tangible benefits or harms from changing the definition of “site” or applying section 6409(a)’s streamlined process to compound expansions, which may include an unequal burden on small entities.

48. The Commission is mindful that there are potential impacts from our decisions for small entity industry participants as well as for small local government jurisdictions. We are hopeful that the comments we receive illuminate the effect and impact of the proposed regulations in the *Notice* on small entities and small local government jurisdictions, the extent to which the regulations would relieve any burdens on small entities, including small local government jurisdictions, and whether there are any alternatives the Commission could implement that would achieve the Commission’s goals while at the same time minimizing or further reducing the economic impact on small entities, including small local government jurisdictions.

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<sup>143</sup> See 5 U.S.C. § 603(c)(1)-(4).



49. The Commission expects to consider more fully the economic impact on small entities following its review of comments filed in response to the *Notice*. The Commission's evaluation of the comments filed in this proceeding will shape the final alternatives we consider, the final conclusions we reach, and any final actions we ultimately take in this proceeding to minimize any significant economic impact that may occur on small entities, including small local government jurisdictions.

**F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules**

50. None.

**STATEMENT OF  
CHAIRMAN AJIT PAI**

Re: *Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, RM-11849

Promoting American leadership in 5G wireless technology has been one of my top priorities since becoming Chairman. To that end, the FCC has been executing my 5G FAST plan, which includes three key components: pushing more spectrum into the marketplace, making it easier to deploy wireless infrastructure, and modernizing outdated regulations to expedite the deployment of fiber for wireless backhaul.

With respect to spectrum, the Commission has left no stone unturned in its quest to make a mix of low-, mid-, and high-band spectrum available for 5G services. Over the past 18 months, the Commission has concluded three auctions for high-band spectrum, making nearly 5,000 megahertz of spectrum available for next-generation wireless services. Our most recent auction, Auction 103, offered licenses for 3,400 megahertz of spectrum—the largest offering in the Commission's history. Carriers are acting quickly to put this spectrum to use for 5G service. And the Commission continues to work on making additional low-band spectrum available. We are nearing the end of the post-incentive auction repack, which is making available 600 MHz band spectrum for 5G on a nationwide basis, and we have reformed rules for the 800 MHz and 900 MHz bands.

But perhaps the FCC's most intense work over the course of the last couple of years has involved making additional mid-band spectrum available for 5G. Specifically, we adopted rule changes last July to liberate the 2.5 GHz band and put more of this underused spectrum to work for mobile broadband (including adopting a priority filing window to make this spectrum available for service to rural Tribes). Thanks to Commissioner O'Rielly's efforts, we've improved rules for operations in the 3.5 GHz band and done the necessary coordination and technical work in the band. As a result, 150 megahertz of 3.5 GHz band spectrum is available today for the deployment of innovative services, and we'll begin an auction of 70 megahertz of Priority Access Licenses on July 23, 2020. We've adopted service rules to make available 280 megahertz of spectrum in the C-band for 5G and are on track to auction that spectrum on December 8 of this year. And just recently, we announced that satellite incumbents have agreed to expedite the relocation process, so this 280 megahertz of spectrum will be available for 5G on an accelerated basis. None of this was easy. There were plenty of technical, political, and other challenges along the way. Nevertheless, the FCC majority persisted. And we're getting major results.

Of course, in addition to pushing more spectrum into the marketplace, a key component of the Commission's 5G FAST strategy has been updating our wireless infrastructure policies to encourage private-sector investment in the physical building blocks of 5G networks. And today's Declaratory Ruling and Notice of Proposed Rulemaking does just that. Commissioner Carr has spearheaded the Commission's efforts to update our wireless infrastructure policies. And this item, which was developed under his leadership, will clear up some of the confusion that has surrounded our rules implementing section 6409(a) of the Spectrum Act of 2012. These regulations apply when wireless infrastructure companies want to upgrade the equipment on existing structures, such as replacing antennas on a macro tower or adding antennas to a building.

These clarifications will accelerate the build out of 5G infrastructure by avoiding misunderstandings and reducing the number of disputes between local governments and wireless infrastructure builders—disputes that lead to delays and lawsuits. With today's action, we continue to advance the same goal that underlay the Spectrum Act and inspired the Commission's section 6409(a) regulations in the first place—avoiding unnecessary ambiguities and roadblocks in order to advance wireless broadband service for all Americans.

Now, there are some who argue that we should have slowed down or stopped our work on today's Declaratory Ruling because of the COVID-19 pandemic. I could not disagree more. The COVID-19 pandemic isn't a reason to slow down our efforts to expand wireless connectivity. It's a reason to speed them up. The pandemic has highlighted the need for all Americans to have broadband connectivity as soon as possible. Telehealth, remote learning, telework, precision agriculture—all of these things require broadband. And it is an iron law that you can't have broadband without broadband infrastructure.

And the argument that local governments have not had a sufficient opportunity to weigh in on these issues has no merit. The petitions on which we are acting today were filed in August and September of 2019, well before the COVID-19 pandemic. And the entire period for public comment on those petitions took place last year—also well before the COVID-19 pandemic.

These calls for delay are nothing new. Earlier this year, for example, some insisted that we should do absolutely nothing to make C-band spectrum available unless and until Congress passed a law on the subject. How's that advice looking now? If we had followed that politically-motivated counsel, we would *still* be stuck at square one, half a year later, with no prospect of movement. Instead, we're on track for a major C-band spectrum auction this year. The same old tactic is now applied to wireless infrastructure. Wait until . . . whenever, we are told. But waiting to deploy more wireless infrastructure isn't going to deliver advanced wireless services to American consumers, and it isn't going to make the United States the global leader in 5G.

The bottom line is this: It's easy to *say* that you favor moving forward quickly on 5G, but what actually matters is to *do* it. So I appreciate Commissioners O'Rielly and Carr for not just saying, but doing what's necessary to usher in the next generation of wireless technology for the American people.<sup>1</sup>

Thank you to the team that worked hard on this item. From the Wireless Telecommunications Bureau, including Paul D'Ari, Garnet Hanly, Kari Hicks, William Holloway, Susannah Larson, Belinda Nixon, Dana Shaffer, Donald Stockdale, Cecilia Sulhoff, and Joel Taubenblatt, and also Jiaming Shang and David Sieradzki, both formerly of the Wireless Telecommunications Bureau; from the Office of General Counsel, Deborah Broderson, Mike Carlson, David Horowitz, Linda Oliver, Bill Richardson, and Anjali Singh; from the Office of Economics and Analytics, Catherine Mataves and Patrick Sun; from the Wireline Competition Bureau, Adam Copeland, Elizabeth Drogula, and Michael Ray; from the Enforcement Bureau, Daniela Arregui and Jason Koslofsky; and from the Office of Communications Business Opportunities, Chana Wilkerson.

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<sup>1</sup> Cf. *Seinfeld*, "The Alternate Side," Season 3, Episode 11 (Dec. 4, 1991) ("See, you know how to take the reservation, you just don't know how to *hold* the reservation. And that's really the most important part of the reservation, the holding. Anybody can just take them."), available at <https://www.youtube.com/watch?v=dSZYsyrP3Co>.

**STATEMENT OF  
COMMISSIONER MICHAEL O'RIELLY**

Re: *Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, RM-11849

Today, the Commission refocuses its infrastructure efforts on the foundation of wireless networks – the macro tower. The Commission has taken several steps to reduce the regulatory burdens on siting small cells, but similar updates for macros have been lagging. A business plan centered on small cells and millimeter waves may work in our largest cities, but traditional towers and mid bands will be needed throughout much of the United States, especially in rural areas, where small cells do not, generally-speaking, make the most sense, at least at the current time.

I started pushing for a review of the barriers facing macro tower siting around five years ago, as industry started to consider what a 5G suburban and rural network build would look like. While it is unfortunate that we didn't get to this sooner, I am grateful that Commissioner Carr has honored his word to me that we would address hurdles that some localities have placed in the way of large tower siting. With significant progress being made on mid-band frequencies, it is imperative that we facilitate the deployment of macro towers that will be used to deliver the myriad of offerings mid-band spectrum will enable. And, as I have said before, our actions are precipitated by the behavior of a few bad actors, and here we address some of the problems being experienced. I fully recognize that many, if not most, local and state governments see the great benefit that these networks will bring and are actively working to fulfill the needs and demands of their citizens.

While the Commission took steps in 2014, pursuant to Congress's direction under Section 6409 of the Spectrum Act of 2012, to set localities straight on unacceptable activity that when it came to collocating facilities, some entities are still slowing down progress or doing what they can to stop wireless innovation from reaching consumers. Today, we clarify how some of our rules implemented in response to section 6409 should be interpreted, such as when the shot clock begins, how to measure height increases for towers when adding additional antennas, what is an equipment cabinet, and the treatment of concealment elements, among others. I am pleased that, at my request, further details were provided about the documentation needed to start the shot clock and to evidence that concealment elements were envisioned when obtaining a locality's approval. Such guidance is necessary so that all parties understand expectations and to avoid disputes down the road. While I understand some have asked that we delay today's action due to some concerns, many of the clarifications are straightforward and should reduce the burdens on locality staff reviewing applications. And, these clarifications are needed to facilitate the expansion of 5G networks by wireless providers and help entities like FirstNet meet their public safety obligations.

Additionally, the notice portion of today's item seeks comment on a proposal to allow minimal compound expansions under section 6409 streamlined processing. I am pleased that my request was accepted to make this a proposal, as opposed to simply seeking comment. Over the years, tower companies have repeatedly come to me with the challenges they face when compound expansions are needed to accommodate additional equipment for collocation purposes. And, there is a good foundation for such a change, as the construction of replacement towers that do not expand a compound by more than 30 feet are excluded from historic preservation review under a nationwide programmatic agreement. I expect that an order on this proposal will be presented before the Commission as quickly as possible.

Moreover, localities should note that the Commission is taking these matters seriously and will continue to issue such orders if our intent is being contravened or our rules implemented incorrectly. We will be ready to follow up on any issue, including those that we did not cover here, such as the

inappropriate use of other local permitting processes to hold up infrastructure siting or charging excessive fees.

Finally, I thank everyone involved for bringing this item to a vote and the staff for their continued efforts to facilitate infrastructure deployment. Now that we have clarified some areas where there were “misunderstandings” over the rules for streamlined collocations, it is time to conclude the ultimate collocation problem – twilight towers. The Commission needs to resolve this quagmire so that these towers can hold additional antennas, which are needed to provide wireless services to the American people.

I will approve the item.



**STATEMENT OF  
COMMISSIONER BRENDAN CARR**

Re: *Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, RM-11849

Two years is about how long it takes to build a new macro tower. The process typically includes zoning, construction, and electrical permits; city council presentations and public town halls; environmental and historical preservation reviews; negotiation about aesthetics and design—and that's all *after* a provider has studied demand, engineered the signal, and bought land.

It's a lengthy, involved, expensive process. And in some ways you can understand why. Building a couple hundred foot tall structure doesn't happen every day, and once it's built, a tower can provide service for decades.

Local governments, industry, and Congress have concluded that there's often a better way. Reusing macro towers through collocating multiple providers and updating equipment can provide the public the benefits it deserves—wide coverage and fast connections—while avoiding the cost and delays associated with building new towers from scratch. It's common sense that putting new equipment on old towers is less intrusive and requires less regulatory review than new tower construction.

I had the chance to see how straightforward a collocation can be last week. That's when I drove out to a farm in Maryland and joined a tower crew that was swapping out 2G antennas for 5G ones on a macro tower. Take a look.

<https://twitter.com/BrendanCarrFCC/status/1268263380420354053>

Aaron and Charlie are among the 25,000 tower techs building broadband across the country literally with their hands. While their jobs are far from easy, the project they completed in about an hour last week was among their easiest: taking off an old antenna and attaching a new one.

Congress encouraged collocations like these by making them simpler through Section 6409 of the Spectrum Act. That law says that local governments “may not deny, and shall approve” any tower modification “that does not substantially change [its] physical dimensions.” In 2014, the Commission wrote rules to implement the law, in particular defining what constitutes “substantial change.”

In the last six years, those rules have been used to upgrade thousands of towers. The upgrades enabled 4G LTE service, especially on macro towers in rural America. They're being used now to build America's world-leading 5G networks. And they're benefiting communities by reducing the potential for redundant towers, creating less costly and disruptive infrastructure.

There have been some bumps along the way, and those are partly due to our 2014 rules. In some instances, our definition of “substantial change” wasn't as clear as it could have been, and there have been some disagreements over how to interpret our 60-day shot clock for local government approval. Those disagreements—the lack of clarity in our rules—can themselves slow down Internet builds. We aim to resolve those ambiguities in this declaratory ruling and notice. I'll highlight a few of the key actions we take today.

- We explain that the 60-day shot clock we adopted in 2014 begins when a provider takes the first procedural step that the locality specifies and shows in writing that the project qualifies for expedited consideration. The myriad processes that have grown outside of our shot clock should be brought back within it. Sixty days means 60 days.

- We clarify that when we use the term “concealment element,” we’re referring to those elements that make a stealthed tower look like something else—a clock tower or a tree, for example. A change becomes substantial and so doesn’t qualify for expedited approval if a reasonable person would think that the modified tower no longer looks like that clock tower or tree.
- And we note that localities can place a number of conditions on new construction of a tower that can’t be circumvented through this expedited process. However, there has to be express evidence that a condition really was a condition of approval.

I am proud of the thorough and thoughtful process the Commission took to craft this item, and I especially thank the Wireless Telecommunications Bureau and its infrastructure team for their skill and diligence. The two petitions that prompted this order came to us more than nine months ago. We sought comment on the petitions, and at the request of local governments and utilities, we extended the comment period into November. The record that developed was robust. We heard from infrastructure builders, broadband providers, local governments, and everyday Americans alike.

Localities were especially active. We heard from 70 local governments and their associations, and they provided us nearly 700 pages of detailed comments. They made a substantial contribution to this order, and their positions carried the day on several issues we decide. For example, we require industry to make written submissions before they can claim that the shot clock starts, and we protect a broad swath of localities’ conditions of tower approval.

In the end, by bringing greater clarity to our rules, our decision reduces disagreements between providers and governments. And it separates the wheat from the chaff—the more difficult approval decisions, such as whether and how to construct a new tower, from the easier ones, such as whether to allow an existing tower to be upgraded.

It’s also important that we act now because providing more broadband for more Americans has never been so important. It’s at the forefront of our minds during this COVID-19 pandemic as kids learn from home, parents provide for their families away from the office, patients access critical care outside of hospitals, and we all connect to each other at a distance. Making upgrades easier is at the heart of 6409 and this order—and it comes at a time when we need as much capacity as we can get. So I am glad that we move forward today with clarifications that will help tower crews connect even more communities.

Our decision here is also the latest step in a series that the FCC has taken since 2017 to modernize our approach to 5G. Back then, it cost too much and took too long to build Internet infrastructure in this country. So we updated the environmental and historic preservation rules that were slowing down small cell builds. We built on the commonsense reforms adopted by the states and reined in outlier conduct. And we streamlined the process for swapping out utility poles to add wireless equipment, among other reforms.

I thank Chairman Pai for tapping me to lead this infrastructure work. The Commission has unleashed private sector investment that already is delivering results for the American people. The very first commercial 5G service launched here, in the U.S., in 2018. By the end of that year, 14 communities had 5G service. Halfway through 2019, that figure expanded to more than 30. And one provider alone has now committed to building 5G to 99 percent of the U.S. population.

America’s momentum for 5G is now unmistakable. You can see it not only in big cities like New York or San Francisco, but in places like Sioux Falls, South Dakota where 5G small cells are live and in rural communities like the one I visited last week in Maryland where macro towers are beaming 5G

through farms and forests. Our infrastructure work will continue until every community has a fair shot at next-generation connectivity.

We call our decision today the 5G Upgrade Order because it will accelerate wireless service upgrades for the benefit of so many Americans. It will be an upgrade for rural America, as families who never had a choice in wireless will get new service. It will be an upgrade for first responders, as dedicated networks and expanded capacity are built on existing towers. And it will be an upgrade for all of us, as our networks blow past previous technologies to world-leading 5G.

I'm grateful for the strong support this order has received from dozens of leaders in local governments and in Congress, infrastructure builders, farmers and ranchers, first responders, and technologists. And I especially want to thank the Commission staff without whom this 5G Upgrade Order would not exist:

From the Wireless Telecommunications Bureau: Paul D'Ari, Garnet Hanly, Kari Hicks, William Holloway, Susannah Larson, Belinda Nixon, Dana Shaffer, Donald Stockdale, Cecilia Sulhoff, and Joel Taubenblatt, and also Jiaming Shang and David Sieradzki, both formerly of the Wireless Telecommunications Bureau.

From the Office of General Counsel: Deborah Broderson, Michael Carlson, David Horowitz, Linda Oliver, Bill Richardson, and Anjali Singh.

From the Office of Economics and Analytics: Catherine Mataves and Patrick Sun.

From the Wireline Competition Bureau: Adam Copeland, Elizabeth Drogula, and Michael Ray.

From the Enforcement Bureau: Daniela Arregui and Jason Koslofsky.

And from the Office of Communications Business Opportunities: Chana Wilkerson.

Thank you for your contributions to this order. It has my support.

**STATEMENT OF  
COMMISSIONER JESSICA ROSENWORCEL,  
DISSENTING**

Re: *Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, RM-11849

Let's start with the numbers.

More than 113,000 people have died in the cruel pandemic that is affecting communities across the country. Nearly 43 million Americans have filed for unemployment benefits as the economy reels from this public health catastrophe. The unemployment rate is now at its highest levels since the Great Depression. Protests have erupted in all 50 states as we face a nationwide reckoning over racial injustice.

We can't say with certainty where this overwhelming series of events takes us next. I pray it is toward a more just future. I hope it is one where the truths we hold to be self-evident are apparent not only in word but in deed.

But we can say with certainty that state and local governments are on the front line in all of these crises. That means they are dealing with an epic combination of illness, joblessness, food insecurity, social distancing, and public safety challenges—at the same time.

Moreover, all of this work is being carried out with fewer resources than ever before. That's because social distancing has reduced consumer spending and wages, causing tax revenues to plummet. At the same time, the demand for funding basic social services has gone up. This has created an unprecedented strain on state and local budgets.

So understandably mayors and governors across the country are ringing the alarm. They are wrestling with historic crises and struggling to find a new way forward in a period of profound civil unrest. They want to be heard by Washington. But today's decision demonstrates that at the Federal Communications Commission we're not listening.

Let me explain why. Today's decision seeks to clarify how the agency interprets Section 6409 of the Middle Class Tax Relief and Job Creation Act. That sounds technocratic. But it goes to the heart of what role cities and towns get to play in decisions about the communications infrastructure in their backyard. That's important for communities across the country and for our national wireless ambitions.

Today the FCC adopts a declaratory ruling that requires every state and local government to immediately review and update their current ordinances, policies, and application systems involving wireless towers. They have to rework the way they process new requests, how they measure tower height, what they do with requests to add more equipment, and how they conceal structures to preserve the visual character of their communities. Addressing these things is not unreasonable. But these clarifications can be hard to put into practice and they were shared with state and local governments for the first time only three weeks ago—and my goodness, they've been busy.

So it's no wonder that we have heard from the National League of Cities. We've heard from the United States Conference of Mayors. We've heard from the National Association of Counties. We've heard from the National Association of Telecommunications Officers and Advisors. We've heard from the National Association of Towns and Townships. Together they represent more than 19,000 cities, 3,069 counties, and 10,000 towns across the country.

You know what they want? It's not radical. They want a bit more time to weigh in on our decision, so they can be in a better place to implement it. They want this time because their resources are strained by a deadly virus, economic calamity, and civil unrest. As 24 members of the United States House of Representatives Committee on Energy and Commerce noted last week, "[i]f local governments are forced to respond to this Declaratory Ruling instead of focusing on their public health and safety responses, it very well may put Americans' health and safety at risk."

But the FCC has decided to ignore this modest request for time to review. I don't get it. Why can't we acknowledge what is happening around us?

The sad truth is that this is not the first time we've given short shrift to the pleas of local governments who are strained by these historic days. It was just a few weeks ago when city officials and local firefighters asked the FCC to give them more time to weigh in on the court remand of our misguided decision to roll back net neutrality. But we didn't grant their request.

However, when companies suggested they needed more time to clear the 3.5 GHz band because of the pandemic, we were quick to oblige. We pushed back the start of our next spectrum auction too, again citing business disruptions caused by the coronavirus. The FCC even granted an extension of time to a foreign company it is investigating as a national security threat to the United States.

Why can't we offer the same courtesy to state and local governments? The law demonstrates a clear congressional policy in favor of removing locally imposed and unreasonably discriminatory obstacles to modifying existing facilities in order to foster the rapid deployment of wireless infrastructure. I know. As congressional staff, I helped write it. But some of the decisions we make today seem to be less about speeding up routine approvals under this law and more about lowering the costs of non-routine approvals by retrofitting them into this process too.

If we want to see infrastructure expand broadly and equitably across this country it takes federal and state and local authorities working together to do so. History proves this is true. And in these historic times this agency should not be ramrodding this effort through without listening to cities and towns across the country. They called for a bit more time. But the Federal Communications Commission hung up. I dissent.



**STATEMENT OF COMMISSIONER GEOFFREY STARKS  
DISSENTING**

Re: *Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, RM-11849

More than 106,000 people have died from COVID-19 so far and unemployment has hit its highest levels since the Great Depression. The school year is ending, and millions of children have missed months of in-classroom instruction. And in the last 2 weeks, the recent protests have brought millions of people into the streets of cities across the country to demonstrate for justice. This is a true moment in American history.

State and local governments form the front line for all of these issues. They run the public hospitals and emergency response units treating the sick, dispense benefits to the unemployed, operate the schools struggling to provide distance learning to our children, and oversee the police departments that are both the focus on the demonstrations and helping to keep us safe. Even in good times, they operate on tight budgets and limited resources.

For State and local governments across the country, tax revenues are declining due to the economic fallout of COVID-19, even as they must increase their expenditures to respond to the pandemic and the demonstrations. Replacing retiring employees is out of the question, and layoffs and furloughs are under consideration, even as these governments prepare their budgets for the next year.

That is the moment in time in which we place today's item. Let me be clear -- I support the deployment of infrastructure to improve service and connect more Americans. Low-income and minority families in particular rely on wireless service, and I hope that any benefits from today's item will result in improved service and more affordable offerings for all neighborhoods, not just those with the wealthiest Americans. Moreover, tower technician jobs offer a path to financial security for many Americans even in these uncertain times. Finally, streamlining the infrastructure approval process has had broad support. Congress intended to provide a quick path for approval of straightforward modifications when it adopted Section 6409, and a unanimous Commission adopted implementing rules back in 2014.

But this isn't the right way to achieve those goals. Instead of reducing burdens, today's Declaratory Ruling imposes new obligations on local governments at a time where they have the least amount of time and resources. Instead of providing clarity, it creates uncertainty. Because of these issues, I'm concerned that today's decision may actually slow the growth of advanced wireless service rather than accelerating it.

Those who support this decision claim that it's necessary because local governments have unreasonably blocked straightforward modifications to existing wireless sites, insisting on burdensome and unnecessary meetings and documentation. According to the petitions, these alleged practices have slowed or prevented upgrades that would provide advanced services and allow more Americans to realize the promise of 5G. Supporters claim that we must act now to encourage the growth of these services.

This is starkly different from what these parties are publicly and commercially saying elsewhere. Just recently, T-Mobile announced that it now offers 5G coverage in all 50 states. AT&T says it remains on track to offer nationwide 5G sometime this summer, and Verizon plans to offer 5G service in 60 cities by the end of 2020. DISH remains committed to building a standalone nationwide 5G network in the next few years, and the major tower companies have asserted that even COVID-19 hasn't slowed down their buildout efforts.

Moreover, despite today's challenges, local governments continue to take timely action on applications from these companies and their partners. Even [industry](#) has recognized the [efforts](#) of local governments to maintain operations while their offices must be closed, including allowing electronic filing via online portals and email, creating drop boxes for hard copies of documents, and waiving and modifying requirements regarding permits, filing fees and public meetings.

Given the unusual circumstances and the extraordinary efforts by local governments to continue the timely processing of applications, I'm deeply disappointed that we rejected the reasonable request for more time to review the draft order submitted on behalf of local governments across the country and supported by 24 Members of Congress. While it's true that the Petitions underlying this decision were filed last Fall, as today's decision repeatedly notes, we do not adopt the recommendations proposed in those filings. It was only with the release of the draft Declaratory Ruling just three weeks ago that commenters learned that the Commission was even considering certain issues, let alone specific outcomes. Indeed, even the Commissioners only saw the current version yesterday, which contains substantive differences from the original draft.

Even under the best of circumstances, three weeks would not be enough notice for such an important decision, which will affect communities around the nation. At a minimum, we should have deferred our consideration of this item to allow interested parties more time to analyze and comment on the draft decision. But I would have gone further and dealt with these issues through a rulemaking proceeding, with notice of our proposed approach and an opportunity for public comment.

I do agree that our rules could use clarification, but the item here consistently misses the mark. For example, we should clearly define when the Section 6409 shot clock starts. But while the Declaratory Ruling acknowledges the value of preliminary reviews and meetings, it nevertheless starts the shot clock before those events take place and provides no flexibility to adjust once an applicant submits its paperwork and requests that first meeting. Under today's decision, once an applicant has taken these actions, the local government must ensure that every other step in the process is completed before the shot clock expires. This approach not only places an unfair burden on the local governments but could lead to disputes between governments and applicants about the reasonableness of any requirement and whether it can be accomplished within the 60-day shot clock period. We should have done a rulemaking to discuss these issues and how to avoid such outcomes.

There are other issues. In many cases, local governments approved sites years ago, well before passage of the Spectrum Act. Particularly for smaller cities, it's unlikely that their decisions explain the intent behind a particular requirement affecting a site's appearance. Yet today's Declaratory Ruling states that, unless the regulator can provide express evidence in the record demonstrating that a requirement was intended to disguise the nature of the equipment as something other than a wireless facility, the local government must give streamlined treatment to any changes. Moreover, for changes in appearance that don't disguise the nature of the equipment but merely make it harder to notice, the Declaratory Ruling establishes a standard that effectively preempts any requirement that the applicant claims it cannot reasonably meet.

The confusion doesn't stop there. This decision explicitly states that the number of equipment cabinets that can be added to a site is measured for each eligible facilities request and rejects the interpretation that the relevant rule sets a cumulative limit. The local governments are justifiably confused about whether today's decision effectively eliminates any limitation on the number of equipment cabinets that may be added over time. Today's decision disagrees with the suggestion that there's no such limit but fails to explain exactly how a local government would derive it. A rulemaking could have clearly spelled out our expectations.

Taken as a whole, rather than clarifying our policies and expediting approvals, the posture of this Declaratory Ruling is likely to lead to time-consuming and costly disputes about intent and reasonableness between local governments and industry; and furthermore, it is likely to lead to protracted litigation. Moreover, because of the substantial burdens we place on local governments' review of modifications to existing sites, those governments may even give greater scrutiny to initial siting requests, leading to additional frustration and delays.

These problems would be serious in a proposed rulemaking, but the process followed here raises the stakes even higher. Because this is a Declaratory Ruling, it applies retroactively to decisions that may be decades old.<sup>1</sup> This decision will create uncertainty regarding existing sites across the country. Moreover, doing this via a Declaratory Ruling will place an undue burden on local governments that are unfamiliar with the Commission. A clerk in a small city may not realize that a proposed site modification will require her to review not only the Code of Federal Regulations but the language of this decision and our 2014 order.

I wish that we had addressed these issues in a rulemaking proceeding, like the one we initiate today regarding proposed excavations and the meaning of the term "current site." While I have serious reservations about the approach proposed in the NPRM, I agree that we should receive input from the public before we act further in this area, although I would have provided more time for that input. I hope that we reconsider that timetable, given all the other demands currently faced by local governments. I dissent.

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<sup>1</sup> See *Connect America Fund Developing a Unified Intercarrier Compensation Regime*, Order on Remand and Declaratory Ruling, WC Docket No. 10-90 *et al.*, FCC 19-131 at para. 26 (rel. Dec. 17, 2019) ("As a general matter, declaratory rulings are adjudicatory and are presumed to have retroactive effect.") (citations omitted).

## CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2020, I sent or will cause to be sent copies of the foregoing Petition for Review and Corporate

Disclosure Statement to the following parties by the manner indicated:

### ***Respondents:***

*By Overnight Service  
and electronic mail*

Thomas M. Johnson Jr.  
General Counsel  
FCC  
445 12<sup>th</sup> Street, S.W.  
Room 8-A741  
Washington, DC 20054  
Email: [LitigationNotice@FCC.gov](mailto:LitigationNotice@FCC.gov)

*By Overnight Service*

The Honorable William Barr  
Attorney General of the United States  
United States Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington DC 20530

### ***Participants in the agency proceedings:***

*By First Class Mail*

ACT | The App Association  
Joel Thayer  
1401 K St. NW, Ste. 501  
Washington, DC 20005

Alamo Improvement Association  
Roger Smith  
PO Box 156, Alamo Plaza-Space 180-A  
Alamo, CA 94507

Ameren Service Corporation, *et al.*  
c/o Langley & Bromberg LLC  
Eric B. Langley  
Robin F. Bromberg  
R. Rylee Zalanka  
2700 U.S. Highway 280, Suite 240E  
Birmingham, AL 35223

American Tower Corporation  
c/o Telecommunications Law  
Professionals PLLC  
Dennis P. Corbett  
Michael Lazarus  
Jessica DeSimone Gyllstrom  
1025 Connecticut Ave, NW Suite 1011  
Washington, DC 20036

*Counsel for Amren Service Corporation; American Electric Power Service Corporation; Duke Energy Corporation; Entergy Corporation; Oncor Electric Delivery Company LLC; Southern Company; and Tampa Electric Company*

American Tower Corporation  
Richard Rossi  
10 Presidential Way  
Woburn, MA 01801

AT&T Services, Inc.  
c/o Sidley Austin LLP  
James P. Young  
Christopher T. Shenk  
Alice A. Wang  
1501 K Street, N.W.  
Washington, DC 20005

Chevy Chase Village  
Shana R. Davis-Cook  
Village Manager  
5906 Connecticut Avenue  
Chevy Chase, MD 20815

City of Brea  
Mayor Christine Marick  
1 Civic Center Circle  
Brea, CA 92821

City of Coconut Creek  
Mayor Sandra L. Welch  
4800 West Copans Road  
Coconut Creek, FL 33063

American Tower Corporation  
Jacob Lopes  
3500 Regency Parkway, Suite 100  
Cary, NC 27518

AT&T Services, Inc.  
Robert Vitanza  
Gary L. Phillips  
David L. Lawson  
1120 20th Street, N.W.  
Washington, DC 20036

City and County of San Francisco  
Dennis J. Herrera  
Theresa L. Mueller  
William K. Sanders  
1 Dr. Carlton B. Goodlett Place  
Room 234  
San Francisco, CA 94102

City of Chino Hills  
Mayor Cynthia Moran  
14000 City Center Drive  
Chino Hills, CA 91709

City of College Park  
c/o Council Baradel  
Suellen Ferguson  
8400 Baltimore Avenue, Suite 375



College Park, MD 20740

City of Costa Mesa  
c/o Jones & Mayer  
Scott E. Porter  
3777 N. Harbor Blvd.  
Fullerton, CA 92835

City of Fort Bragg  
Mr. Tom Z. Varga  
416 N. Franklin Street  
Fort Bragg, CA 95437

City of Frederick  
Mayor Michael C. O'Connor  
101 North Court Street  
Frederick, MD 21701

City of Gaithersburg  
Mayor Jud Ashman  
31 South Summit Avenue  
Gaithersburg, MD 20877

City of Huntington Beach  
Mayor Erik Peterson  
2000 Main Street  
Huntington Beach, CA 92648

City of New York  
100 Church Street  
New York, NY 10007

City of Newport News  
Joseph M. DuRant  
2400 Washington Ave., Ninth Floor  
Newport News, VA 23607

City of Ojai  
James Vega, City Manager  
401 S. Ventura Street  
Ojai, CA 93023

City of Seattle  
Alice Lawson  
700 5th Ave, Suite 2700  
Seattle, WA 98124

Communications Workers of America  
Debbie Goldman  
501 Third Street NW  
Washington, DC 20001

Competitive Carriers Association  
Alexi Maltas  
601 New Jersey Ave. NW, Suite 820  
Washington, DC 20001

Consumer Technology Association  
Michael Petricone  
Jamie Susskind  
1919 S. Eads Street  
Arlington, VA 22202

Crown Castle International Corp.  
Kenneth J. Simon  
Thomas S. Anderson  
1220 Augusta Drive #600

CTIA  
Thomas C. Power  
1400 16th Street NW, Suite 600  
Washington, DC 20036

Houston, TX 77057

East Bay Neighborhoods For  
Responsible Technology  
Alice Lee, M.D.  
321 Iron Horse Court  
Alamo, CA 94507

The Free State Foundation  
Randolph J. May  
Seth L. Cooper  
P.O. Box 60680  
Potomac, MD 20859

Margaret Phillips  
83 Webster Road  
Weston, MA 02493

National Association of  
Telecommunications Officers and  
Advisors (NATOA), *et al.*  
Nancy L. Werner  
3213 Duke Street #695  
Alexandria, VA 22314

*Counsel for NATOA, the United  
States Conference of Mayors and the  
National Association of Counties*

ExteNet Systems, Inc.  
H. Anthony Lehv  
Michael A. Hill  
Haran C. Rashes  
3030 Warrenville Road, Suite 340  
Lisle, IL 60532

Loudoun County  
Gwen Kennedy  
PO Box 7000  
1 Harrison Street S.E.  
Leesburg, VA 20177

Maryland Municipal League  
Scott Hancock  
1212 West Street  
Annapolis, MD 21401

National League of Cities, *et al.*  
c/o Best Best & Krieger LLP  
Gerard Lavery Lederer  
Joseph Van Eaton  
Gail Karish  
John Gasparini  
2000 Pennsylvania Avenue N.W.  
Suite  
5300 Washington, DC 20006

*Counsel for National League of Cities;  
Clark County, Nevada; Cobb County,  
Georgia; Howard County, Maryland;  
Montgomery County, Maryland; City of  
Ann Arbor, Michigan; City of  
Arlington, Texas; City of Bellevue,  
Washington; City of Boston,  
Massachusetts; City of Burlingame,*

*California; Town of Fairfax,  
California; City of Gaithersburg,  
Maryland; City of Greenbelt,  
Maryland; Town of Hillsborough,  
California; City of Kirkland,  
Washington; City of Lincoln, Nebraska;  
City of Los Angeles, California; City of  
Monterey, California; City of Myrtle  
Beach, South Carolina; City of New  
York, New York; City of Omaha,  
Nebraska; City of Portland, Oregon;  
City of San Bruno, California; Texas  
Municipal League; Texas Coalition of  
Cities For Utilities Issues; City of  
Wilmington, Delaware; City of Takoma  
Park, Maryland; City of Rye, New  
York; City of Rockville, Maryland; City  
of Piedmont, California; City of  
Corona, California; City of  
Brookhaven, Georgia; Town of Fairfax,  
California; Howard County, Maryland;  
and King County, Washington*

National League of Cities, *et al.*  
c/o Kitch Drutchas Wagner Valitutti  
& Sherbrook LLP  
Michael J. Watza  
One Woodward Avenue, Suite 2400  
Detroit, MI 48226

Nina Beety  
277 Mar Vista Drive  
Monterey, CA 93940

*Counsel for Michigan Coalition to  
Protect Public Rights-of-Way*

Nokia  
Brian Hendricks  
Jeffrey Marks  
Lauren McCarty  
601 Pennsylvania Avenue, NW

R Street Institute  
Tom Struble  
Jeffrey Westling  
1212 New York Avenue, Suite 900  
Washington, DC 20005

South Building, Suite 900  
Washington, DC 20004

SCAN NATOA, Inc.  
Javan N. Rad  
100 N. Garfield Ave., Room N-210  
Pasadena, CA 91101

T-Mobile USA, Inc.  
Cathleen A. Massey  
William J. Hackett  
David M. Crawford  
601 Pennsylvania Avenue, NW  
North Building, Suite 800  
Washington, DC 20004

Town of Kensington  
Mayor Tracey Furman  
3710 Mitchell Street  
Kensington, MD 20895

Wireless Infrastructure Association  
John A. Howes, Jr.  
2111 Wilson Blvd., Suite 210  
Arlington, VA 22201

SCAN NATOA, Inc.  
Suzanne Bartole  
1600 Pacific Highway, Room 208  
San Diego, CA 92101

Town of Chesapeake Beach  
Sharon Humm  
8200 Bayside Road  
P.O. Box 400  
Chesapeake Beach, MD 20732

Verizon  
Katharine R. Saunders  
Tamara L. Preiss  
Andre J. Lachance  
Roy E. Litland  
William H. Johnson  
1300 I Street N.W., Suite 500 East  
Washington, DC 20005

Wireless Internet Service Providers  
Association  
c/o Lerman Senter PLLC  
Stephen E. Coran  
Kevin M. Cookler  
2001 L Street, NW, Suite 400  
Washington, DC 20036

/

/

/

/

Dated: June 22, 2020

Respectfully submitted,

THE LEAGUE OF CALIFORNIA  
CITIES; THE LEAGUE OF OREGON  
CITIES; CITY OF GLENDORA, CAL.;  
CITY OF RANCHO PALOS VERDES,  
CAL.; and CITY OF TORRANCE,  
CAL.,

By: /s/ Robert C. May III  
Robert C. May III  
TELECOM LAW FIRM, PC  
3570 Camino del Rio North  
Suite 102  
San Diego, California 92108  
Telephone: (619) 272-6200  
Fax: (619) 376-2300  
Email: [tripp@telecomlawfirm.com](mailto:tripp@telecomlawfirm.com)



## **CERTIFICATE OF COMPLIANCE**

In accordance with the Court's CM/ECF User's Manual, I hereby certify that:

1. All required privacy redactions have been made;
2. Hard copies of this pleading that may be required to be submitted to the Court are exact copies of the ECF filing; and
3. The ECF submission has been scanned for viruses with the most recent version of a commercial virus scanning programs, Sophos Core Agent version 2.7.7, Sophos Endpoint Advanced version 10.8.7 and Sophos Intercept X 2.0.17, and, according to these programs, the ECF submission is free of viruses.

Dated: June 22, 2020

Respectfully submitted,

THE LEAGUE OF CALIFORNIA  
CITIES; THE LEAGUE OF OREGON  
CITIES; CITY OF GLENDORA, CAL.;  
CITY OF RANCHO PALOS VERDES,  
CAL.; and CITY OF TORRANCE,  
CAL.,

By: /s/ Robert C. May III  
Robert C. May III  
TELECOM LAW FIRM, PC  
3570 Camino del Rio North

Suite 102  
San Diego, California 92108  
Telephone: (619) 272-6200  
Fax: (619) 376-2300  
Email: [tripp@telecomlawfirm.com](mailto:tripp@telecomlawfirm.com)