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FCC Should Clear Local Obstacles to Wireless Infrastructure Upgrades

by

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For consumers to benefit from next-generation mobile wireless networks, timely upgrades need to be made to existing cell towers and base stations. Yet some local governments have created administrative roadblocks to wireless infrastructure providers' making even minor modifications, including upgrades that fit within cell site uses that were previously permitted. The FCC should promptly issue interpretations of federal law in order to remove local regulatory roadblocks and ensure streamlined approval for minor modifications to existing wireless infrastructure.

Federal law provides that "non-substantial" modifications to existing cell sites ought to be eligible for streamlined approval. And on September 13, the FCC issued a notice requesting public comments on this matter. Wireless service providers seeking to modify their infrastructure in order to make use of newly available spectrum bands, to implement new dynamic spectrum sharing and Wi-Fi offloading arrangements, and to otherwise modernize their equipment ought to enjoy flexibility and streamlined processes when those modifications are minor. Moreover, making upgrades to cell towers and base stations is necessary to retire 3G networks and to migrate wireless consumers to advanced 4G LTE networks as well as new 5G networks.

Availability of the latest wireless network technologies is essential for economic growth, improved public safety, and enhanced wireless network speeds and reliability. [Accenture](#) has projected that 5G will create \$275 billion in investment, 3 million jobs, and \$500 billion in gross

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domestic product. Also, 5G network capabilities will create cost savings of millions for cities that adopt smart public lighting, smart public transportation, and other 5G-enabled functions.

Congress passed Section 6409(a) of the Spectrum Act for the purpose of removing local administrative delays in approving collocations (or new antenna installations) and other minor modifications to existing wireless infrastructure. According to Section 6409(a): "[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" (emphasis added).

In its 2014 *Wireless Infrastructure Order*, the FCC defined the parameters of collocations and other modifications that substantially change the dimensions of existing infrastructure as well as those that do not and thus constitute "eligible facilities requests" meriting streamlined approval. For instance, the Commission determined that substantial changes include: increases in height by more than 20 feet or 10%, whichever is greater, made to towers outside of public rights-of-way; increases in height by more than 10 feet or 10%, whichever is greater, made to towers or base stations located in public rights-of-way; changes that would defeat existing concealment elements of a tower or base station; and changes involving excavations or deployments outside the site of the existing tower or base station.

Despite the requirements set forth in Section 6409(a) and in the FCC's rules, some local governments have tried to put up resistance to even minor modifications of existing cell sites. For instance, some local governments faced with proposed non-substantial infrastructure modifications have tried to significantly expand previously existing "concealment elements" requirements for camouflaging cell sites or have tried to impose broad new concealment requirements. Such local governments have then claimed that proposed modifications would defeat their newly established concealment elements, and thereby denied approval. According to wireless infrastructure providers, some local governments have used what amount to bureaucratic delay tactics. Apparently, such tactics include use of slow permit application processes and failure to timely provide permit paperwork. The effect of those tactics is the obstruction of non-substantial modifications to existing towers and base stations without formal denials that would trigger rights and remedies for wireless infrastructure providers under federal law. These and similar types of delay and obstruction tactics constitute regulatory barriers to investment in infrastructure.

The Commission is now seeking comments on a pair of petitions filed by wireless industry associations requesting that the agency clarify the meaning of Section 6409(a) in a number of respects. Clarification can remove some of the local regulatory roadblocks that wireless infrastructure providers have faced by providing interpretations of this statutory provision in at least the following areas:

- Applicability to all state and local governments – The Commission should clarify that Section 6409(a) and the agency's rules apply to all state and local governments with authority over applications to deploy new or replacement equipment on existing cell towers and base stations;

- Concealment Elements – The Commission should clarify that concealment elements are excluded from the measuring criteria for determining whether a proposed modification is an eligible facilities request; it should clarify that the only concealment element requirements that local governments may consider when evaluating eligible facilities requests are those that existed when the permit to construct the cell tower or base station permit was originally approved; it should clarify that non-substantial changes to existing towers and base stations that do not materially change perception of the site are not disqualified from streamlined approval; and it should clarify that local governments are preempted from adopting new blanket requirements that all modifications to pre-existing cell sites must be camouflaged;
- Start of Shot Clocks – The Commission should clarify that shot clocks (or presumptively reasonable 60-day review periods) for local government decisions on eligible facilities requests begin to run upon applicants' good faith attempts to request approval;
- Denials of Paperwork for Permits Deemed Granted – The Commission should clarify that when local governments fail to act on permit applications for eligible facilities requests within the shot clock periods, applicants can make the proposed modifications even if local governments have not issued new permit paperwork;
- No Conditional Approval – The Commission should clarify that local governments cannot impose processes or conditions on approvals for eligible facilities requests, as any such conditions are contrary to Section 6409(a) and defeat the statutory provision's essential purpose.

By clarifying the meaning of Section 6409(a) in the ways listed above, the force of federal law via agency preemption would bar impermissible local government actions regarding non-substantial modifications to existing towers and base stations. Such clarifications would not put the FCC in the shoes of local government officials. Rather, local governments would be supplied with clearer guidelines as to what administrative processes and actions are impermissible when they are confronted with alleged "eligible facilities requests." And the Commission's adoption of clarifications regarding Section 6409(a) would ensure wireless infrastructure providers have timelier access to judicial review when eligible facilities requests are denied streamlined approval by local governments.

In its *2019 Broadband Deployment Report*, the FCC acknowledged that its goal is to identify and remove barriers to broadband infrastructure investment. The Commission can further that goal and clear away local obstacles to deployment of next generation wireless networks by providing guiding interpretations of federal law regarding minor modification to existing infrastructure.

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Further Reading

Daniel Lyons, "[D.C. Circuit Decision Represents Setback for Next-Generation Network Deployment Efforts](#)," *Perspectives from FSF Scholars*, Vol. 14, No. 19 (August 15, 2019).

Seth L. Cooper, "[FCC Report Indicates a Competitive Communications Marketplace: Future Reports Should Make Cross-Platform Substitution Findings](#)," *Perspectives from FSF Scholars*, Vol. 14, No. 6 (February 26, 2019).

[Comments of the Free State Foundation](#) – Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services, WT Docket No. 18-203 (July 26, 2018).

Seth L. Cooper, "[FCC's Proposals Promoting Infrastructure Deployment Don't Violate Anti-Commandeering Rule](#)," *Perspectives from FSF Scholars*, Vol. 13, No. 29 (July 17, 2018).

Gregory J. Vogt, "[STREAMLINE 5G Processes to Match the Speed of Business](#)," *FSF Blog* (July 9, 2018).

[Comments of the Free State Foundation](#), Accelerating Wireless Broadband by Removing Barriers to Infrastructure Deployment, WT Docket No. 17-79 (June 15, 2017).