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	)	RM-11849
Modification Requests Under Section 6409(a) of	)	
the Spectrum Act of 2012	)	
	)	
Accelerating Wireline Broadband Deployment by	)	WC Docket No. 17-84
Removing Barriers to Infrastructure Investment	)	

COMMENTS OF
THE FREE STATE FOUNDATION[*]

These comments are filed in response to the Commission's request for comments on Petitions for Declaratory Ruling filed by CTIA and WIA regarding the agency's interpretation of Section 6409(a) of the Spectrum Act of 2012, and also on WIA's related Petition for Rulemaking. These comments focus on the importance of clarifying the meaning of Section 6409(a) and the Commission's rules to best ensure that minor modifications to existing cell towers and base stations are eligible for streamlined approval as Congress intended. Also, these comments recommend adoption of a rule to the effect that Section 6409(a) prohibits local government fees for eligible facilities requests that exceed reasonable costs. Removal of local regulatory barriers to infrastructure upgrades is essential to enabling speedy deployment of next-generation wireless networks, especially 5G networks.

[*] These comments express the views of Randolph J. May, President of the Free State Foundation, and Seth L. Cooper, Senior Fellow and Director of Policy Studies. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is an independent, nonpartisan free market-oriented think tank.

In passing the Spectrum Act, Congress intended that collocations (or new antenna installations) and other small modifications of existing wireless infrastructure not be delayed or effectively prohibited by local regulatory processes. Under Section 6409(a) of the Spectrum Act: "[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."

Rapid densification of advanced 4G LTE networks and deployment of 5G networks depends on wireless infrastructure being timely upgraded with state-of-the-art equipment, including new antenna placements on existing cell towers. However, the Petitioners and other wireless infrastructure providers in this proceeding have identified specific instances in which local governments have delayed or effectively prohibited streamlined approval of minor modifications to existing infrastructure that appears to constitute "eligible facilities requests" (EFRs) under Section 6409(a). Subjecting such minor modifications to new requirements, unreasonable administrative delays, or fees exceeding applications-related costs thwart Congress's intent behind Section 6409(a).

On prior occasions, the Commission has observed local regulatory processes that posed barriers to wireless infrastructure siting. To its credit, the agency previously has rendered interpretations of statutory provisions and adopted agency rules that have removed such barriers.[1] In this proceeding, the Commission should build on its track record to facilitate 4G and 5G upgrades.

[1] *See, e.g.*, Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, et al., WT Docket Nos. 13-238 and 13-32, WC Docket No. 11-59, Report & Order (rel. Oct. 2014), *affirmed by Montgomery Co. v. FCC*, 811 F.3d 121 (4th Cir. 2015); Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, et al., WT Docket Nos. 17-79 and 17-84, Declaratory Ruling and Third Report and Order (rel. Sept. 27, 2018) (2018 *Wireless Infrastructure Order*).

By issuing a declaratory ruling clarifying the meaning of Section 6409(a), the Commission can ensure that EFRs receive the streamlined treatment they are entitled to under the Spectrum Act. As further described in the appendix to this comment,[2] the Commission ought to clarify circumstances in which EFRs may not be denied based on "concealment elements." For instance, it should declare that local governments evaluating EFRs may only consider concealment elements in place when the cell site was originally approved. The Commission should clarify that shot clocks for local decisionmaking on proposed modifications begin to run upon applicants' good faith attempts to request approval, and also that wireless infrastructure providers are allowed to make such modifications if shot clocks lapse without action and local governments withhold permit approval paperwork. Furthermore, the Commission should declare that Section 6409(a) prohibits imposing new conditions on EFRs.

In addition to those clarifications identified in the appendix, the Commission should consider making other clarifications requested by the Petitioners. For example, it should specify its meanings of the terms "equipment cabinet" and "base station" in its rules to provide greater certainty regarding the scope of EFRs under Section 6409(a).

Moreover, the Commission should adopt a rule that EFR-related fees imposed by local governments cannot exceed cost-based amounts. Such a rule would be consistent with the Commission's conclusion in its *Wireless Infrastructure Order* (2018) that fees

[2] *See* Seth L. Cooper, "FCC Should Clear Local Obstacles to Wireless Infrastructure Upgrades," Perspectives from FSF Scholars, Vol. 14, No. 26 (Sept. 25, 2019) (included as Appendix to this comment), available at: https://freestatefoundation.org//wp-content/uploads/2019/09/FCC-Should-Clear-Local-Obstacles-to-Wireless-Infrastructure-Upgrades-092519.pdf.

charged for small wireless facilities in rights-of-ways be "a reasonable approximation of its costs."[3] Unreasonably high fees hinder upgrades, contrary to Section 6409(a)'s intent.

For the foregoing reasons, the Commission should act in accordance with the views expressed herein.

Respectfully submitted,

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[3] 2018 *Wireless Infrastructure Order*, ¶ 76 (interpreting Section 253(c)'s provision that fees charged be "fair and reasonable").

Appendix

Perspectives from FSF Scholars
September 25, 2019
Vol. 14, No. 26

FCC Should Clear Local Obstacles to Wireless Infrastructure Upgrades

by

Seth L. Cooper *

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 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 A. 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).