SUMMARY OF FCC RULE CLARIFICATIONS FOR APPLICATIONS TO MODIFY WIRELESS FACILITIES UNDER SECTION 6409(a)

On June 9, 2020, the Federal Communications Commission adopted a Declaratory Ruling ("Ruling") intended to clarify the Commission's existing rules regarding the types of wireless siting applications local governments may not deny, and must approve within 60 days or the permit will be deemed granted. The changes described in the Ruling took effect on June 10, 2020.

The Ruling may require local governments to revise their wireless siting ordinances, regulations, processes and/or permit forms. Because the Ruling took immediate effect, it is important to review wireless siting practices as soon as possible to ensure they are in compliance with the rule clarifications.

The item also includes a Notice of Proposed Rulemaking ("NPRM") seeking comment on proposals to expand the rules to allow must-approve placement of wireless facilities in locations that have never been reviewed or approved for wireless deployments. Comments will be due twenty days after publication in the Federal Register and replies comments are due ten days after the comment deadline. While we understand this is a very short timeline, we strongly encourage members to file comments and/or reply comments in this docket.

Declaratory Ruling:

The Ruling attempts to clarify several provisions of the FCC's rules implementing Section 6409(a) of the 2012 Spectrum Act.[1] Section 6409 states 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." In 2014, the Commission issued rules to implement this Section, which can be found at 47 C.F.R. § 1.6100. Among other things, the existing rules establish a 60-day shot clock in which local governments must approve an eligible facilities request ("EFR") and define certain terms including EFR, and "substantial change." The Ruling will impact when the shot clock commences and expands the definition of "substantial change" to allow more modifications to qualify for expedited, must-approve status under Section 6409. Below is a summary of these changes, as well as an unrelated change to the requirements for conducting environmental assessments that is also part of the Ruling.

- *Commencement of Shot Clock Under section 1.6100(c)(2)*: The existing rules require local governments to approve an application for an EFR within 60 days from the date the application is filed, unless the application is not in fact an EFR. The 60 days is tolled where the local government determines that the application is incomplete and provides written

[1] 47 U.S.C. § 1455(a) ("Section 6409").

notice of incompleteness to the applicant within 30 days of receipt of the application. The Ruling attempts to clarify when the shot clock commences for purposes of this rule.

- Under the new Ruling, "[F]or 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."
- The "first procedural step" cannot be "outside of the applicant's control" and must be "objectively verifiable."
    - As an example, if the first step in the process is a meeting with local government staff, the applicant satisfies that step and starts the clock by making a written request for the meeting (so long as the second step is also satisfied by the applicant providing the requisite documentation). Note that the clock does not start when the meeting happens; it starts when the applicant asks for the meeting because the ask is within the applicant's control.
    - "[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."
- "[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). 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."
    - The Ruling makes clear that local governments "bear responsibility for ensuring that any separate consultations, as well as the substantive review of the proposed facility modification, are all completed within 60 days." While the Ruling states the Commission's expectation that applicants will "act in good faith to fulfill reasonable steps" to complete the application in 60 days, it does not provide for tolling of the 60 day clock if an applicant cannot or will not attend mandatory meetings, for example. The application will be deemed granted after 60 days even if these requirements were not completed by the applicant.
- "[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" or "by requiring an applicant to submit documentation other than the documentation required under our rules."
    - "[U]nnecessary documentation requests" do not stop the commencement of the shot clock even if providing that documentation would be within the applicant's control and could be objectively verified (*i.e.*, would meet the first step described above).
    - "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."
  - Local governments may use conditional use permits, variances, or similar types of authorizations under standard zoning or siting rules, but these authorizations cannot be used to delay the start of the shot clock. The clock will begin to run when the applicant takes the first step in the jurisdiction's 6409(a) approval process and will not be tolled for incompleteness based on requirements for these other types of authorizations.
  - Where a jurisdiction has not established specific procedures for reviewing 6409(a) applications, "the applicant can consider the first 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)."
    - "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."
  - The Ruling notes 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.'"
    - As noted above, however, the Ruling does not toll the shot clock in the event the applicant fails to follow these requirements.

- *Height Increases for Towers Outside the Rights-of-Way*: The Commission's existing rules provide that a modification on a tower outside the public rights-of-way is a "substantial change" that is not an EFR 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." The Ruling clarifies that "the word 'separation' refers to the distance from the top of the existing antenna to the bottom of the proposed antenna" and "the height of the new antenna itself should not be included when calculating the allowable height increase." In other words, a local government cannot deny a 6409(a) application to add more than twenty feet to the height of a tower outside the

rights-of-way, provided that there is no more than twenty feet between the top of the original tower and the bottom of the new antenna array.

- *Equipment Cabinets*: The existing rules provide that a modification to an existing facility is a substantial change that is not subject to Section 6409 if, among other things, it "involves installation of more than the standard number of new equipment cabinets for the technology involved, but not to exceed four cabinets." The new Ruling defines what an "equipment cabinet" is and states that the limit in the rule is not cumulative, effectively allowing an unlimited number of new cabinets to be added to a wireless site so long as each application complies with the "standard number…not to exceed four" limit set forth in the rule.
    - "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."
    - "[T]he maximum number of additional equipment cabinets that can be added under the rule is measured for each separate eligible facilities request." It is not a cumulative limit.

- *Concealment Elements*: The existing rules provide that a modification to an existing facility is a substantial change that is not subject to Section 6409 if it would "defeat the concealment elements of the eligible support structure." The Ruling defines the term "concealment elements" as well as what would "defeat" these elements.
    - The Ruling defines concealment elements as "elements of a stealth-designed facility intended to make the facility look like something other than a wireless tower or base station."
        - In order to be considered a concealment element under the rules, "the element must have been part of the facility that the locality approved in its prior review."
        - "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."
        - The Ruling characterizes "[siting] conditions to minimize the visual impact of non-stealth facilities" as "conditions associated with siting approval" that are separately addressed in section 1.6100(b)(7)(vi) of the existing rules. (As described below, the Ruling alters the protections for siting conditions under section 1.6100(b)(7)(vi).) These will not be treated as "concealment elements" for purposes of the rules even if the original siting approval intended them as concealment measures.
    - Concealment is "defeated" only if the proposed modification would "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."
- The Ruling includes specific examples:
    - For coaxial cabling on the outside of a stealth facility: "[I]t is unlikely that such cabling would render the intended stealth design ineffective at the distances where individuals would view a facility."
    - "A change in color must make a reasonable person believe that the intended stealth is no longer effective. … 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."
    - "[A] small increase in height on a stealth monopine, which is less than the size thresholds of section 1.6100(b)(7)(i)-(iv) … 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)."
        - 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.
        - A requirement that the facility remain hidden behind a tree line is not a feature of a stealth-designed facility; it is an aesthetic condition that falls under section 1.6100(b)(7)(vi) and under the Commission's new interpretation of that section (described 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)."

- *Conditions of Siting Approvals*: The existing rules provide that a modification to an existing facility is a substantial change that is not subject to Section 6409 if it "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 §1.40001(b)(7)(i) through (iv)." In other words, conditions of approval attached to the original approval of the wireless facility cannot be undermined by an EFR so long as those conditions still allow changes the rules define as not "substantial changes" for purposes of Section 6409. The Ruling states that even conditions that are consistent with the rules may be avoided—the applicant is entitled to Section 6409 must-approve status—under certain circumstances.

- "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)) [but] 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."
- Even where the express evidence exists, "like any other condition under section 1.6100(b)(7)(vi), such an aesthetics-related condition still cannot be used to prevent modifications specifically allowed under section 1.6100(b)(7)(i)-(iv) of our rules." Where there is a conflict between conditions imposed 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)."
    - "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."
- The Ruling provides additional specific examples:
    - "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)."
    - Existing walls and fences around non-camouflaged towers are not concealment elements; 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."
- "Even if a proposed modification within the thresholds of section 1.6100(b)(7)(i)-(iv) exceeds a required set back, [a jurisdiction] 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."

- *Environmental Assessments:* This issue is not addressed in Section 6409 and thus is not a clarification of the associated rules in 47 C.F.R. § 1.6100. It is, however, included in the Ruling. The Commission states that, "[w]e 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 36 CFR § 800.6(b), if the only basis for the preparation of an environmental assessment was the potential for significant effects on such properties."

Notice of Proposed Rulemaking:

The NPRM seeks comment on changes to existing 6409(a) rules regarding excavation or deployment outside the boundaries of an existing tower site (for towers outside the rights-of-way). The current rules provide 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[.]" The term "site" is currently defined as follows: "For towers other than towers in the public rights-of-way, 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."

The NPRM notes disagreement regarding the appropriate scope of this term, with industry suggesting the "site" should be "the property leased or owned by the applicant at the time it submits an application to make a qualifying modification under section 6409(a)" even if that is larger than the site originally approved for the wireless deployment. Industry also suggests "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."

By contrast, the NPRM notes "[l]ocal 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. 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. … 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."

The NPRM "propose[s] 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)." This appears to propose the local governments' more limited view of the term "site" but permit industry's request to allow deployments up to thirty feet outside the site.

The NPRM also seeks comment on alternatives, including "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." (Emphasis in original.)

Note that Section 6409(a) refers to "existing" wireless towers and base stations. The current rules define "existing" as a "constructed tower or base station" that "has been reviewed and approved under the applicable zoning or siting process, or under another State or local regulatory review process, provided that a tower that has not been reviewed and approved because it was not in a zoned area when it was built, but was lawfully constructed, is existing for purposes of this definition." In other words, the Commission's definition of what is "existing" requires that the tower or base station has been reviewed and approved under the applicable siting process. The expansion of the "site" to include areas up to thirty feet outside the site that was reviewed and approved for wireless deployment would seem to contradict the definition of "existing."

Further, note that the current definition of "site" for towers outside the rights-of-way includes "any access or utility easements currently related to the site." The proposal to allow deployments within thirty feet of the "site" would thus seem to allow deployments up to thirty feet from these easements. These easements may reach far beyond the tower site, such a long access driveway or a utility easement from the tower to utilities in the rights-of-way. The result would be must-approve wireless deployments perhaps hundreds of feet away from the immediate tower site, including in public rights-of-way.