



June 2, 2020

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

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

Secretary Dortch:

The National Association of Telecommunications Officers and Advisors (“NATOA”),¹ the National League of Cities (“NLC”),² the National Association of Counties (“NACo”),³ The United States Conference of Mayors (“USCM”)⁴ and the National Association of Towns and Townships (“NATaT”)⁵ (“Local Governments”) write to reiterate our concerns with the draft Declaratory Ruling and Notice of Proposed Rulemaking in Docket 19-250 (“draft Ruling”), currently on the agenda for the Commission’s June 9, 2020 meeting.

As we noted in our *ex parte* letter of May 22, 2020, local governments are on the front lines of our nation’s defense against a growing public health crisis and need a strong yet flexible federal partner capable of providing adequate opportunity to address concerns related to the draft Ruling. Though billed as clarifications, the draft Ruling requires, at a minimum, every local government

¹ NATOA’s membership includes local government officials and staff members from across the nation whose responsibility it is to develop and administer communications policy and the provision of such services for the nation’s local governments.

² NLC is the oldest and largest organization representing cities and towns across America. NLC represents 19,000 cities and towns of all sizes across the country.

³ NACo represents county governments, and provides essential services to the nation’s 3,069 counties.

⁴ USCM is the official nonpartisan organization of cities with populations of 30,000 or more. There are more than 1,400 such cities in the country today. Each city is represented in the Conference by its chief elected official, the mayor.

⁵ NATaT represents the interests of more than 10,000 towns and townships across the country at the federal level.

to review current ordinances, policies, application forms and staff training to ensure compliance with the new order. This would come just over a year after local governments were required to revise wireless siting ordinances and standards in response to the Commission’s last small cell order.⁶ Local governments are facing unprecedented health and safety issues and looming budget shortfalls. Adding more work and costs to that burden—on the heels of similar Commission-mandated siting changes in 2019—weakens our intergovernmental partnership and places wireless providers ahead of the many other priorities local governments need to address during this pandemic.

The burden of the draft Ruling is exacerbated by the imposition of the changes as a declaratory ruling rather than through a rulemaking. Though many local governments expressed concerns with the Petitions for Declaratory Ruling and Petitions for Rulemaking filed in this docket by WIA and CTIA, none had the benefit of responding to Commission-proposed rules or clarifications. The Petitions lacked clarity regarding which rule changes or clarifications the petitioners were seeking, and, as between the two Petitions, the requests were not entirely consistent.⁷ This hampered local governments’ ability to provide specific feedback on the practical implications of the proposals, and certainly did not allow for comment on the specific actions the Commission is now contemplating.⁸

Further, several of the “clarifications” set out in the draft Ruling constitute rule changes, not clarifications. For example, the draft Ruling defines the terms “concealment element” and “defeat,” two terms currently used but not defined in the 6409(a) rules.⁹ The current rules include a number of defined terms, and thus one would reasonably expect that other terms the Commission has defined would similarly be found in the rules themselves, not buried in a declaratory ruling. The draft Ruling goes further, defining the word “existing” for purposes of “concealment elements,” though the word “existing” is not used in this portion of the current rule at all.¹⁰ The draft Ruling, then, would insert a new word into the existing rule, undoubtedly a rule change that requires the appropriate rulemaking process.

⁶ 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 (2018) (“2018 Infrastructure Order”).

⁷ NATOA, NLC and USCM *Ex Parte* Letter dated March 2, 2020.

⁸ The draft Ruling makes note of the many instances in which the Commission does not adopt the changes sought in the Petitions, but rather proffers solutions not raised by the parties. *See, e.g.*, Draft Ruling at ¶ 13; n. 33 (“We ... clarify some of the limitations raised by WIA that apply to ‘conditions of approval’ under section 1.6100(b)(7)(vi)” and “offer other clarifications”); n. 34 (“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.”); ¶ 17 and n. 47. The Commission’s process has not allowed for comment on these proposals, which were not previously suggested in the record. Further, as the draft acknowledges, the comments submitted in response to the Petitions may not be on point for the new proposals set forth in the draft, once again reflecting the lack of adequate opportunity for interested parties to make their voices heard in this proceeding. *See* Draft Ruling at ¶ 16; n. 43 (“The localities’ comments are directed at relief not granted in this Declaratory Ruling and are therefore outside its scope.”).

⁹ Draft Ruling at ¶ 33; 38; 47 C.F.R. § 1.6100(b)(7)(v).

¹⁰ *Id.* at ¶ 36.

In addition to the significant procedural concerns set forth above, Local Governments are concerned about the practical impacts of the draft Ruling. Our prior filings in this docket addressed some aspects of the proposals in the draft Ruling, and we add the following with respect to several of the issues raised by the draft item:¹¹

- *Commencement of Shot Clock Under section 1.6100(c)(2)*: The proposal on when the shot clock will begin to run unnecessarily interferes with local zoning processes and will require changes to local processes that cannot be implemented before the Ruling takes effect. While the draft acknowledges the benefits of preapplication meetings and purports to allow for these and other meetings required by local laws,¹² it commences the 60-day shot clock before those meetings take place and does not address tolling with respect to these meetings. The draft appears to suggest that if a locality sets a required meeting for a date certain, but the applicant claims it is inconvenient or otherwise delays the process from continuing on the local government’s schedule, that delay does not toll the shot clock. This would allow an applicant to thwart these processes entirely knowing that the application will inevitably be deemed granted after the 60th day.
- *Equipment Cabinets*: The draft Ruling states that the maximum number of equipment cabinets that can be added to an existing wireless site without constituting a substantial change—which is four—is not cumulative. This effectively permits an unlimited number of equipment cabinets to be added to wireless sites so long as the applicant asks for them in increments of four or less. A limitless number of new equipment cabinets surely is a “substantial change” under a reasonable interpretation of that term.
- *Concealment Elements*: The draft Ruling undermines local efforts to maintain the character and livability of our communities by drastically limiting what constitutes a “concealment element” for purposes of original tower approvals. Local governments use a range of tools to conceal wireless towers, including height limits and set backs. The draft could be read to nullify all but those conditions that require a wireless facility to look like something other than a wireless facility, regardless of how integral height or similar characteristics were to ensuring the approved concealment would be effective. In other words, the draft Ruling effectively rewrites existing land use approvals to retroactively reclassify concealment requirements as aesthetic conditions (and then, as explained below, guts existing protections for aesthetic conditions).

As noted above, this is a rule change disguised as mere clarification. Many local governments will be required to modify their zoning codes and processes to conform to these changes to preserve their ability to enforce concealment requirements going forward. A declaratory ruling with an immediate effective date will not provide local governments

¹¹ Given the short timeframe between the release of the draft and the sunshine period, we are not able to address every concern with the proposals in the draft Ruling. Again, we request that the Commission delay consideration of this item to provide local governments more time to fully respond to the significant changes set forth in the draft Ruling.

¹² Draft Ruling at ¶ 18.

with the opportunity to make these adjustments, nor to ensure that as a whole their zoning practices continue to conform to the dictates of the 2018 Infrastructure Order.¹³

- *Conditions of Siting Approvals:* Similarly, the draft undermines existing local zoning protections—such as conditions of approval related to things like aesthetics and minimizing the visual impacts of wireless facilities—by retroactively requiring express evidence that at the time of approval, “the locality required the feature and conditioned approval upon its continuing existence”

Even more troubling, the draft appears to allow a 6409(a) applicant to make modifications that undermine conditions that meet this new test if complying with the conditions does not meet an ambiguous new reasonableness standard.¹⁴ Rather than provide the clarity the draft Ruling seeks, this standard injects new uncertainty. Worse still, it all but eliminates Section 1.6100(b)(7)(vi) of the rules. An applicant need only claim they cannot reasonably comply with an existing condition of approval and the “conflict” is “resolved in favor of permitting the modifications.”¹⁵

The 6409(a) rules apply to eligible facilities requests on private property and in public rights of way, and on structures ranging from macro towers to streetlights. The concerns addressed above with respect to additional cabinets and limitations on concealment and aesthetic requirements are exacerbated when applied to deployments in the rights of way and on non-macro tower structures. The draft Ruling downplays things like cabling on the outside of a facility, asserting “it is extremely unlikely that such cabling would render the intended stealth design ineffective at the distances where individuals would view a facility.”¹⁶ The “facility” may well be a utility pole or light standard in a residential neighborhood or downtown historic district where things like external cabling, paint color and shroud size are not trivial. We are deeply concerned that the draft Ruling does not adequately consider how the changes would operate across the range of locations and many structures that may be “base stations” under the rules.

Finally, we are opposed to the NPRM that suggests changes to the existing rules regarding excavation or deployment outside the boundaries of an existing, approved tower site. Such a rule would violate the letter and spirit of Section 6409(a), which Congress limited to modifications to “existing” wireless towers and base stations. Any area outside the boundaries of the approved wireless site cannot, under any reasonable interpretation, be considered an existing wireless site that Congress intended to be effectively exempt from land use review. We urge the Commission not to pursue this unlawful interpretation of Section 6409(a). If the Commission intends to move forward with the NPRM, we respectfully request more time to provide comments than the 20 days set forth in the draft. Given the significant impact the global pandemic is having on local governments, 20 days is not a reasonable period of time to afford local governments a meaningful opportunity to participate in this proceeding.

¹³ See, e.g., 2018 Infrastructure Order at ¶ 86.

¹⁴ Draft Ruling at ¶ 41.

¹⁵ *Id.*

¹⁶ *Id.* at 39.

We appreciate your consideration of the Local Governments' concerns and urge the Commission not to approve this item at the upcoming Commission meeting.

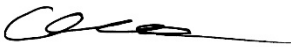
Sincerely,



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