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NOTE: An Erratum is attached to the end of this document

Federal Communications Commission (F.C.C.)
Report and Order

IN THE MATTER OF ACCELERATION OF BROADBAND DEPLOYMENT BY IMPROVING WIRELESS FACILITIES SITING POLICIES

Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting 2012 Biennial Review of Telecommunications Regulations

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****1 *12865** By the Commission: Chairman Wheeler and Commissioners Clyburn, Rosenworcel, Pai, and O'Rielly issuing separate statements.

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****65** 199. We also reject the PCIA and Sprint proposal to expand the Collocation Agreement's fourth prong, as modified by the 2004 NPA, to allow applicants to excavate outside the leased or licensed premises. [539] Under the NPA, certain undertakings are excluded from the Section 106 review, including "construction of a replacement for an existing communications tower and any associated excavation that ... 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." [540] The NPA exclusion from Section 106 review, however, applies to replacement of "an existing communications tower." In contrast, as discussed above, "replacement," as used in Section 6409(a)(2)(C), relates only to the replacement of ""transmission equipment," [541] not the replacement of the supporting structures. Thus, the activities covered under Section 6409(a) are more nearly analogous to those covered under the Collocation Agreement than under the replacement towers exclusion in the NPA. We therefore agree with localities comments that any eligible facilities requests that involve excavation outside the premises should be considered a substantial change, as under the fourth prong of the Collocation Agreement's test. [542]

200. Based on our review of the record and various state statutes, we further find that a modification constitutes a substantial change in physical dimensions under Section 6409(a) if the change (1) would defeat the existing concealment elements of the tower or base station, or (2) does not comply with pre-existing conditions associated with the prior approval of construction or modification of the tower or base station. [543] The first of these criteria is widely supported by both wireless industry and ***12950** municipal commenters, who generally agree that a modification that undermines the concealment elements of a stealth wireless facility, such as painting to match the supporting facade or artificial tree branches, should be considered substantial under Section 6409 (a). [544] We agree with commenters 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). [545] Commenters differ on whether any other conditions previously placed on a wireless tower or base station should be considered in determining substantial change under Section 6409(a). After consideration, we agree with municipal commenters that a change is substantial if it violates any condition of approval of construction or modification imposed on the applicable wireless tower or base station, [546] unless the non-compliance is due to an increase in height, increase in width, addition of cabinets, or new excavation that does not exceed the corresponding "substantial change" thresholds we identify above. In other words, modifications qualify for Section 6409(a) only if they comply, for example, with conditions regarding fencing, access to the site, drainage, height or width increases that exceed the thresholds we adopt above, and other conditions of approval placed on the underlying structure. This approach, we find, properly preserves municipal authority to determine which structures are appropriate for wireless use and under what conditions, and reflects one of the three key priorities identified by the IAC in assessing substantial change. [547]

****66** 201. We agree with PCIA that legal, non-conforming structures should be available for modification under Section 6409(a), as long as the modification itself does not "substantially change" the physical dimensions of the supporting structure as defined here. [548] We accordingly reject municipal arguments that any modification of an existing wireless tower or base station that has "legal, non-conforming" status should be considered a ""substantial change" to its "physical dimensions." [549] As PCIA argues, the approach urged by municipalities could thwart the purpose of Section 6409(a) altogether, as simple changes to local zoning codes could immediately turn existing structures into legal, non-conforming uses unavailable for collocation under the statute. [550] Considering Congress's intent to ***12951** promote wireless facilities deployment by encouraging collocation on existing structures, and considering the requirement in Section 6409(a) that States and municipalities approve covered requests "[n] otwithstanding ... any other provision of law," we find the municipal commenters' proposal to be unsupportably restrictive. [551]

202. The record also reflects general consensus that wireless facilities modification under Section 6409(a) should remain subject to building codes and other non-discretionary structural and safety codes. [552] As municipal commenters indicate, many local

jurisdictions have promulgated code provisions that encourage and promote collocations and replacements through a streamlined approval process, while ensuring that any new facilities comply with building and safety codes and applicable Federal and State regulations. [553] Consistent with that approach on the local level, we find that Congress did not intend to exempt covered modifications from compliance with generally applicable laws related to public health and safety. [554] We therefore conclude that States and localities may require a covered request to comply with generally applicable building, structural, electrical, and safety codes or with other laws codifying objective standards reasonably related to health and safety, and that they may condition approval on such compliance. In particular, we clarify that Section 6409(a) does not preclude States and localities from continuing to require compliance with generally applicable health and safety requirements on the placement and operation of backup power sources, including noise control ordinances if any.

203. We further clarify that eligible facility requests covered by Section 6409(a) must still comply with any relevant Federal requirement, including any applicable Commission, FAA, NEPA, or Section 106 requirements. We find that this interpretation is supported in the record, addresses a concern raised by several municipal commenters and the IAC, and is consistent with the express direction in Section 6409(a) that the provision is not intended to relieve the Commission from the requirements of NEPA and NHPA. [555]

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****67** 204. In sum, we find that the definitions, criteria, and related clarifications we adopt for purposes of Section 6409(a) will provide clarity and certainty, reducing delays and litigation, and thereby facilitate the rapid deployment of wireless infrastructure and promote advanced wireless broadband services. At the same time, we conclude that our approach also addresses concerns voiced by municipal commenters and reflects the priorities identified by the IAC. [556] We conclude that this approach reflects a reasonable interpretation of the language and purposes of Section 6409(a) and will serve the public interest.

2. Application Review Process, Including Timeframe for Review

205. *Background*. In the *Infrastructure NPRM*, the Commission sought comment on whether Section 6409(a) places any particular limitations on the application filing and review process, and if so, how to implement such limitations. [557] The Commission proposed to find that State or local governments ***12952** at a minimum may require the submission of applications (so that the State or local government can determine whether Section 6409(a) applies), [558] and it sought comment on whether Section 6409(a) warrants rules limiting applicable fees, review procedures, or time for review. [559] In particular, the Commission sought comment on whether to limit State and local application review to resolving whether the request is in fact covered by Section 6409(a). [560] In this regard, the Commission sought comment on whether to impose limits on the kinds of information and documentation that States and localities may require in connection with an application that the applicant asserts is covered by Section 6409(a). [561] It specifically sought comment on whether to clarify that, when an applicant asserts that its application falls under Section 6409(a), States and localities may not require the submission of information or documents that are not relevant to determining whether the provision applies. [562]

206. The Commission further sought comment on whether, in the event it decides to adopt a time limit for State or local review, it should establish 90 days as a presumptively reasonable period of time for reviewing requests or if a shorter period is warranted in light of the narrow scope of review under Section 6409(a). [563] It further sought comment on whether a State or municipality may toll the review period if it notifies the applicant in writing that an application is incomplete and specifies the additional information or documentation required to complete the application. [564] In addition, given Congress's explicit language that a State or local government "may not deny, and shall approve" a covered application "[n]ot withstanding ... any other provision of law," the Commission proposed to preempt the application of any moratoria to covered requests under Section 6409(a). [565]