

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Practices)	WT Docket No. 13-238
)	
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)	WC Docket No. 11-59
)	
Amendment of Parts 1 and 17 of the Commission’s Rules Regarding Public Notice Procedures for Processing Antenna Structure Registration Applications for Certain Temporary Towers)	RM-11688 (terminated)
)	
2012 Biennial Review of Telecommunications Regulations)	WT Docket No. 13-32
)	

**COMMENTS OF THE NATIONAL ASSOCIATION
OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE NATIONAL
ASSOCIATION OF COUNTIES, THE NATIONAL LEAGUE OF CITIES, AND THE
UNITED STATES CONFERENCE OF MAYORS**

Stephen Traylor
Executive Director/General Counsel
NATOA
3213 Duke Street, #695
Alexandria, VA 22314
703-519-8035
straylor@natoa.org

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SUMMARY

The National Association of Telecommunications Officers and Advisors, the National Association of Counties, the National League of Cities, and The United States Conference of Mayors (collectively, “Commenters”) believe that the vast majority of wireless broadband infrastructure projects are processed and deployed in a timely manner, respecting not only the needs of providers, but also the desires of the communities they serve. Therefore, Commenters urge the Commission to refrain from adopting formal rules that would impose a one-size-fits-all interpretation of Section 6409, which, we believe, could prove to be unworkable to the extent that such rules could hinder deployment.

However, if the Commission feels compelled to take any action, we urge the Commission to proceed with caution in adopting any rules that may run afoul of well-established principles of Federalism and the Tenth Amendment to the United States Constitution. Further, we agree with the FCC’s Intergovernmental Advisory Committee that the Commission act in the “narrowest possible fashion.”

Commenters assert that local governments should be permitted to require the filing of an application with an eligible facilities request under 6409(a). Local governments have the right and obligation to ensure such a request complies with current health, safety, building, engineering, and electrical requirements, as well as compliance with fall zones and set-back ordinances.

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I. INTRODUCTION

The National Association of Telecommunications Officers and Advisors (“NATOA”),¹ the National Association of Counties (“NACo”),² the National League of Cities (“NLC”),³ and The United States Conference of Mayors (“USCM”)⁴ (collectively, “Commenters”), submit these comments in response to the Commission’s Notice of Proposed Rulemaking (“NPRM”), released September 26, 2013, in the above-captioned proceedings.

Commenters commend the Commission for actively seeking input from *all* stakeholders in an effort to better understand the various issues and interests involved in the deployment of advanced wireless broadband facilities. While various stakeholders’ approaches to “accelerating” deployment may differ, we believe it is safe to conclude that all of us have the same goals – to ensure that all Americans have “universal, affordable access” to advanced broadband services⁵ and that deployment is timely without compromising the public’s health and safety.⁶

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

³ NLC serves as a resource to and an advocate for the more than 19,000 cities, villages, and towns it represents.

⁴ USCM is the official nonpartisan organization of cities with populations of 30,000 or more. There are 1,192 such cities in the country today. Each city is represented in the Conference by its chief elected official, the mayor.

⁵ Pres. G.W. Bush, Address at Expo New Mexico, Albuquerque, N.M., (March 26, 2004).

⁶ For example, NACo “strongly supports legislation and administrative policies that help counties attract broadband services regardless of population or technology used.” Telecommunications and Technology, NACo American County Platform and Resolutions 2013-2014 at 144, available at <http://www.naco.org/legislation/Documents/TT-2013-2014-Platform-and-Resolutions.pdf>. Likewise, NLC “advocates for all levels of government (local, state, and federal) to facilitate the deployment of broadband networks and services through policies and regulations that favor government and private sector investments and further encourage development.” Chapter 7.01, NLC National Municipal Policy (2014); available at:

It is undeniable that the growing demand for wireless broadband services, coupled with the growing use of personal wireless devices, requires the deployment of additional infrastructure. But the need for additional equipment deployments must be balanced with the absolute need for local governments to maintain reasonable control and authority over the placement of these facilities in their communities. “[F]ederal policies should not undermine the ability of municipal officials to protect the health, safety and welfare of their residents by diminishing local authority to manage public rights-of-way, to zone, to collect just and fair compensation for the use of public assets, or to work cooperatively with the private sector to offer broadband services.”⁷ Indeed, “because disruption to streets and businesses can have a negative impact on public safety and industry, local governments should have control over allocation of the rights-of-way and be able to ensure that there is neither disruption to other ‘tenants’ or transportation nor any diminution of the useful life of the right-of-way.”⁸ While proof of cooperation between local governments and industry is evident by the sheer number of sites deployed to date, new technologies and wireless broadband services continue to create deployment challenges in some localities. And with the goal to deploy a new nationwide, interoperable, wireless broadband network for public safety communications (“FirstNet”) to both urban and rural America within the next several years, these challenges will only increase.

<http://www.nlc.org/Documents/Influence%20Federal%20Policy/NMP/2014%20NATIONAL%20MUNICIPAL%20POLICY%20BOOK.pdf>.

⁷ Chapter 7.00(B), NLC National Municipal Policy (2014); available at:

<http://www.nlc.org/Documents/Influence%20Federal%20Policy/NMP/2014%20NATIONAL%20MUNICIPAL%20POLICY%20BOOK.pdf>.

⁸ Telecommunications and Technology, NACo American County Platform and Resolutions 2013-2014 at 143; available at:

<http://www.naco.org/legislation/Documents/American-County-Platform-and-Resolutions-2013-2014.pdf>.

But let there be no mistake – local governments actively encourage and want the continued deployment of wireless broadband facilities. Increased access and better wireless broadband services bring a wealth of benefits to America’s cities and counties, including increased economic development and job creation, telemedicine, distance learning, and improved civic engagement. And next generation 911 services will greatly enhance the health and safety of all our residents.⁹

However, coupled with local governments’ desire for increased deployment and access to these services is the equally valid proposition that deployment must be consistent with local permitting and zoning practices. For example, while few DAS deployments will lead to the disastrous results we witnessed in the 2007 Malibu Canyon fire,¹⁰ there are instances where planned deployments may, among other things, have negative effects on environmentally delicate areas, encroach onto historically preserved locations, and negatively affect the aesthetic sensibilities of our neighborhoods. Commenters acknowledge that there may be some instances where deployment does not occur as quickly as industry would like. But not all delays are unreasonable nor are they necessarily the sole cause of local governments.

For the most part, Commenters believe that the vast majority of projects in our communities are processed and deployed in a timely manner, respecting not only the needs of providers, but also the desires of the communities they serve. In fact, many communities, with industry input, have taken steps to streamline their siting practices in an effort to provide certainty in the permitting and zoning processes. Many communities have enacted ordinances that express a preference for collocations and subject such siting requests solely to an administrative review process that results in more efficient processing.

⁹ See, Comments of American Public Works Association, (filed Feb. 3, 2014).

¹⁰ See, Comments of the City of Alexandria, *et al.*, (filed Feb. 3, 2014).

Some may argue that the adoption of formal rules interpreting Section 6409 is necessary to ensure the timely and successful build-out of the FirstNet system. And perhaps some basic “rules of the road” may be necessary to facilitate its build-out across federal, state, tribal, and local jurisdictions. However, any assertion that local governments would serve as any sort of barrier to public safety infrastructure deployment is simply wrong. As representatives of local governments, we know firsthand how vitally important communications services are to police, fire, and other emergency response personnel – the vast majority of whom are local government employees.

Local governments have extensive experience planning, designing, and operating survivable communications networks. Local governments have constructed hundreds of land-mobile radio, fiber optic, and broadband wireless networks, developed concepts of operations, and performed network operations and monitoring. Any assertion that local governments would act in any manner to delay the deployment of FirstNet as a rationale for adopting overly board formal rules interpreting Section 6409 simply ignores the long-established role that local governments play in providing public safety communications and protecting life and property and must be dismissed out of hand by the Commission.

Commenters strongly believe that the Commission should refrain from adopting formal rules that would impose a one-size-fits-all interpretation of Section 6409, which, we believe, could prove to be unworkable to the extent that such rules could hinder deployment. Indeed, as others have pointed out in this proceeding, formal rules concerning equipment collocations, modifications, and replacements could hinder the deployment of *new* structures and spell the end for stealth facilities.¹¹ Rather, Commenters urge that the Commission work cooperatively with

¹¹ See, Comments of the City of Alexandria, *et al.*, (filed Feb. 3, 2014).

local governments and industry to revise its guidance on Section 6409. Further, we believe the Commission should encourage local governments and industry to continue their work on devising wireless broadband siting best practices. Also, we believe that joint FCC/industry/local government workshops and webinars are important vehicles to educate all interested parties on new wireless technologies and deployment practices and should continue.¹²

Finally, Commenters, like others,¹³ urge the Commission to proceed with caution in adopting any rules that may run afoul of well-established principles of Federalism and the Tenth Amendment to the United States Constitution. Local governments' authority, including the continuing ability to protect public safety, must be preserved.

But recognizing the Commission may feel compelled to take some action and impose some formal rules interpreting Section 6409, we offer the following comments.

II. THE COMMISSION MUST TAKE A NARROW APPROACH IN INTERPRETING AND IMPLEMENTING SECTION 6409 OF THE MIDDLE CLASS TAX RELIEF AND JOB CREATION ACT OF 2012

The Commission asks whether it should adopt rules interpreting and implementing Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 ("Spectrum Act").¹⁴ Commenters believe that any rules the Commission *might* adopt must ensure the reasonable and responsible deployment of wireless facilities while neither unduly advantaging nor disadvantaging providers or local governments. At this juncture, Commenters do not address all the issues and various proposed definitions brought up in the NPRM. It is our intent to review the submissions of interested parties and come to a reasoned decision as to whether we

¹² All Commenters are actively involved in educating our members on rights-of-way practices and the deployment of wireless facilities through webinars, conferences, workshops, and publications.

¹³ See, Comments of Colorado Communications and Utility Alliance, *et al.*, (filed Feb. 3, 2014).

¹⁴ *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Practices*, WT Docket No. 13-238 (filed Sept. 26, 2013) at ¶ 90.

are in agreement or disagreement with any offered definition or issue and share those decisions with the Commission at a later date. However, Commenters' position on a number of items is clear cut and we share those opinions now.

At the outset, Commenters respectfully remind the Commission of the requirements surrounding statutory construction. True, Congress did not provide a definition for several words and phrases in Section 6409. However, the canons of construction teach that absent evidence of some special usage, statutory terms should be understood according to their ordinary meaning.¹⁵ The United States Supreme Court regularly uses and references the "common English usage" standard.¹⁶ "In the absence of an indication to the contrary, words in a statute are assumed to bear their 'ordinary, contemporary, common meaning.'"¹⁷ As such, Commenters agree with the FCC's Intergovernmental Advisory Committee ("IAC") recommendation that, if the Commission opts to adopt any specific rules interpreting Section 6409(a) it "should do so in the narrowest possible fashion, and refrain from expanding federal preemption in areas of traditional local, state, and tribal government authority."¹⁸ Failure to do so would result in crafting a federal policy that would "undermine the ability of [local government] officials to protect the health, safety and welfare of their residents by diminishing local authority to manage public rights-of-

¹⁵ See, William Eskridge, Jr. Phillip Frickey & Elizabeth Garrett, LEGISLATION AND STATUTORY INTERPRETATION 251-53 (2000).

¹⁶ See, e.g., *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 860 (1984) and *National Credit Union Administration v. First National Bank & Trust Co.*, 522 U.S. 479, 500- 502 (1998).

¹⁷ *Walters v. Metro. Ed. Enters., Inc.*, 519 U.S. 202, 207 (1997) (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388 (1993)).

¹⁸ See Intergovernmental Advisory Committee to the Federal Communications Commission: Advisory Recommendation Number 2013-9, "Response to Wireless Telecommunications Bureau's Guidance on Interpretation of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012," dated July 31, 2013 ("IAC Recommendation"). This document has been filed in WC Docket No. 11-59 (Aug. 2, 2013) and is also available at: <http://www.fcc.gov/encyclopedia/intergovernmental-advisory-committee-comments>.

way, to zone, to collect just and fair compensation for the use of public assets, or to work cooperatively with the private sector to offer broadband services.”¹⁹

Commenters believe that by adopting a narrow approach, such as that recommended by the IAC and others,²⁰ the Commission can strike a proper balance between increased wireless facilities deployment and local government authority and management over the public rights-of-way.

Further, Commenters urge the Commission to carefully consider the comments it receives in this proceeding and, as it considers if and how to interpret and implement Section 6409, that it do so by hewing narrowly to plain English standards so that even a lay person can understand the provisions of the law, or, as others have stated, “how the average person would define those terms.”²¹

Some will argue that the Commission must adopt a specific numeric standard in its definitions. For the reasons we articulate here, and consistent with the comments filed by many individual local governments, we disagree. If the Commission is convinced that a numeric standard is required, however, Commenters request that the Commission carefully consider underlying engineering and other technical standards; recognize those instances where reasonable experts might disagree; and try to chart a middle ground between competing interests.

¹⁹ Chapter 7.00(B), NLC National Municipal Policy (2014); available at: <http://www.nlc.org/Documents/Influence%20Federal%20Policy/NMP/2014%20NATIONAL%20MUNICIPAL%20POLICY%20BOOK.pdf>. Similarly, “Federal and state governments must recognize the authority of local governments to protect the public investment, to balance competing demands on [the public rights-of-way] and to require fair and reasonable compensation from communications providers for use of the public rights-of-way on a nondiscriminatory (but not necessarily identical) basis.” Telecommunications and Technology, NACo American County Platform and Resolutions 2013-2014; available at: <http://www.naco.org/legislation/Documents/American-County-Platform-and-Resolutions-2013-2014.pdf>.

²⁰ See, Comments of Colorado Communications and Utility Alliance, *et al.* (filed Feb. 3, 2014).

²¹ *Id.*

In other words, the Commission should not place its thumb on the side of the scale for either providers or local governments.

Showing deference to and a willingness to respect the authority and interests of local governments, the Commission asks whether there are any matters where it should wait to develop rules to allow more flexibility for developing solutions.²² To this end, Commenters request that the Commission strongly encourage industry and local government representatives to develop voluntary siting best practices, along with the development of an informal dispute resolution process to remove parties from an adversarial relationship to a partnership process designed to bring about the best result for all involved.²³ Commenters believe that on the whole deployment has been moving forward and we are unaware of systemic problems with the implementation of Section 6409. We believe a workable solution for all is for industry and local government representatives to meet to address specific instances of alleged delay and work to resolve issues that may hinder the continued deployment of wireless infrastructure.

However, while we prefer to take a wait and see approach before diving into the particulars of any proposed definition, there are several Commission proposals that give us pause and that we believe must be addressed at this time. The first involves proposed definitions for ‘wireless tower or base station.’ Despite recognizing that definitions already exist for these terms elsewhere in Commission rules and documents, the Commission proposes that these terms include “structures that support or house an antenna, transceiver, or other associated equipment...

²² *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Practices*, WT Docket No. 13-238 (filed Sept. 26, 2013) at ¶ 98.

²³ *See*, Comments of the National League of Cities, *et al.*, *In the Matter of 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*, WC Docket No. 11-59 (filed July 18, 2011) at 50.

even if they were not built for the sole or primary purpose of providing such support.”²⁴

Commenters suggest that consistency among and across existing Commission rules and documents is important and urge the Commission not to depart from existing definitions lightly.

While many types of structures, including buildings, water towers, streetlights, and utility poles may support antennae or other base station equipment, we do not agree that these structures should fall within the definition of “tower” or “base station” as used in the phrase “existing wireless tower or base station” simply because an antennae or base station is currently located on such a structure. While we agree that it may be appropriate to locate wireless tower or base station equipment on a particular building, water tower, or pole, the mere existence of such a structure does not and should not bring it within the purview of Section 6409(a). Each of these types of structures has a very different and important primary purpose and any request to locate a wireless tower or base station equipment should be evaluated on an individual basis with an eye to whether the proposed wireless use is compatible with the structure's primary purpose. Including these types of structures in an overbroad definition of “tower” or “base station” has the potential of removing local government oversight, especially in the area of public health and safety.

Another definition that gives us pause is that proposed for the word “existing.” The modifier “existing” in the phrase “existing wireless tower or base station” simply cannot be divorced from the phrase it modifies. Utilizing plain English standards, “existing” must be understood in terms of whether a wireless tower or base station actually, currently, occupies space. It must *exist*!

²⁴ *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Practices*, WT Docket No. 13-238 (filed Sept. 26, 2013) at ¶ 108.

The Commission cannot stretch the definition of base station to include “structures” nor can the plain meaning of “tower” be altered to include any structure to which an antenna may be attached whose *primary* purpose is not to support wireless towers or base station equipment. The Commission must recognize that such a definition stretches beyond the actual meaning of the statutory language, and could only be explained as the Commission’s making of inferences and importing meanings beyond what would be considered the ordinary meaning of these terms.

III. “MAY NOT DENY AND SHALL APPROVE” MUST BE CONDITIONED ON COMPLIANCE WITH LOCAL CONCERNS

Section 6409(a) mandates that a local government “may not deny and shall approve” an eligible facilities request for a modification, collocation, or replacement of transmission equipment of an existing wireless tower or base station. Commenters assert that such a request must comply with, but not necessarily limited to, current health, safety, building, engineering, and electrical requirements, as well as compliance with fall zones and set-back ordinances. Surely it was not the intent of Congress to permit the willy nilly deployment of wireless facilities in a manner that could endanger life or property. Nor is it out of line to assert that operators, too, must acknowledge and accept such a requirement. Indeed, for providers to hold otherwise would be tantamount to admitting a total lack of concern for the public’s health and safety.

As such, local governments should be permitted to require the filing of an application with an eligible facilities request under 6409(a). Local governments have the right and obligation to be informed of construction within their jurisdiction, even if it is for a collocation, replacement, or modification of equipment on existing facilities.

Because the Commission is not familiar with every wireless tower, base station, DAS, or other wireless equipment location or proposed collocation, there is a need for local governments to independently review such requests. While we recognize that industry and providers intend to

collocate, replace, or modify their infrastructure in compliance with a local community's considerations, mistakes can – and do – happen. Such requirements can be overlooked or missed, not due to any nefarious circumstance, but simply because human beings can be fallible. Therefore, local governments should have the right to condition approval on same.

IV. SECTION 6409 DOES NOT APPLY TO A LOCAL GOVERNMENT ACTING IN ITS PROPRIETARY ROLE

Commenters agree with the IAC that Section 6409 “does not evince an intent to abrogate signed contractual agreements between state, local and tribal governments acting in their capacities as property owners” and that any restrictions based on local land use regulation “do not apply to state, local and tribal governments acting in a proprietary or contractual role.”²⁵ In other words, when the city or county is acting as a landlord, Section 6409 does not require the entity to exceed any “mutually and contractually agreed-upon exact dimensions and specifications.”²⁶ When the landlord is a public entity, Section 6409 cannot act to undermine the contractual obligations and limitations of the parties. The Commission has signaled its intent to adopt this interpretation and Commenters urge the Commission to do so.²⁷

V. THE COMMISSION SHOULD NOT REVISIT ITS “SHOT CLOCK” ORDER

Commenters agree with others that the Commission should not revisit its 2009 “Shot

²⁵ See, Intergovernmental Advisory Committee to the Federal Communications Commission: Advisory Recommendation Number 2013-9, “Response to Wireless Telecommunications Bureau’s Guidance on Interpretation of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012,” dated July 31, 2013 (“IAC Recommendation”). This document has been filed in WC Docket No. 11-59 (Aug. 2, 2013) and is also available at: <http://www.fcc.gov/encyclopedia/intergovernmental-advisory-committee-comments>.

²⁶ *Id.*

²⁷ *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Practices*, WT Docket No. 13-238 (filed Sept. 26, 2013) at ¶ 129.

Clock” order.²⁸ Indeed, the very issue raised in the NPRM, namely, whether there should be a “deemed granted” remedy for violations of Section 332(c)(7) was rejected by the Commission in its order. Its rationale for doing so then is as pertinent as it is today –

We reject the Petition’s proposals that we go farther and either deem an application granted when a State or local government has failed to act within a defined timeframe or adopt a presumption that the court should issue an injunction granting the application. Section 332(c)(7)(B)(v) states that when a failure to act has occurred, aggrieved parties should file with a court of competent jurisdiction within 30 days and that “[t]he court shall hear and decide such action on an expedited basis.” This provision indicates Congressional intent that courts should have the responsibility to fashion appropriate case-specific remedies.

Commenters urge the Commission to stand by its earlier decision and reject industry calls to modify its 2009 order.

VI. CONCLUSION

For the reasons outlined above, Commenters urge the Commission to tread lightly in this proceeding. We look forward to evaluating industry’s positions and look forward to working with all stakeholders as this proceeding progresses.

Respectfully submitted,



Stephen Traylor
Executive Director/General Counsel
NATOA
3213 Duke Street, #695
Alexandria, VA 22314
703-519-8035
February 3, 2014

²⁸ Order on *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165 (2009) (“2009 Shot Clock Order”).