TELECOM LAW FIRM PC

MEMORANDUM

FROM: Robert C. May III

DATE: September 13, 2019

RE: **WIA/CTIA Petition for Declaratory Ruling to Further Preempt Local Authority Over Expansions to Existing Wireless Facilities**

Subject: CLIENTS and FRIENDS ALERT: Initial Assessment and Invitation to Join a Coalition of Local Governments in Opposition

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I. EXECUTIVE SUMMARY

The Wireless Industry Association ("WIA") and CTIA – The Wireless Association ("CTIA") (collectively, the "Industry") recently petitioned the Federal Communications Commission ("FCC") for a declaratory ruling to further erode local government authority over expansions to existing wireless facilities. In the Petitions, the Industry asks the FCC to:

- mandate an essentially ministerial process that preempts public notice and an opportunity to be heard about changes that affect their property interests and community at large;
- allow applicants to undo careful concealment efforts on existing facilities unless the original permit approval contained specific findings that were never previously required;
- preempt local authority to require cell-site operators to clean up blight, nuisances and other code violations caused by their own neglect as a condition of approval for a proposed site expansion; and
- make it more difficult and expensive for local governments to exercise their legitimate police powers to protect public health, safety and welfare.

All local public agencies should oppose the Petitions. The Petitions also name 40 local public agencies as "bad actors" that—according to the wireless industry—intentionally flaunt the existing federal regulations. A cursory review indicates that these allegations are misleading or patently false and demand a response to establish an undistorted record.

Opposition will be through the notice-and-comment rulemaking process, which the FCC has fast-tracked. Opening comments are due **October 15, 2019** and replies are due **October 30, 2019**, followed by an indeterminate period for *ex parte* communications with the FCC while it deliberates.

Telecom Law Firm is assembling a coalition of local public agencies and municipal associations to share in the effort and spread the costs to oppose the Petitions. We have represented local governments and municipal associations in various FCC proceedings and judicial challenges, including the proceeding that created the rules the Industry now seeks to change. We would be honored to represent your municipality or organization through our coalition.

Our practice in these proceedings is to charge a one-time, flat fee per coalition member. The fee will be $3,500 per member, which covers the entire cost to handle the comment and reply to comments phases. *Ex parte* engagement with the FCC are billed separately to each member that wishes to participate due to the variable costs and travel expenses involved.

If your municipality or organization is interested in joining the coalition, please let us know as soon as possible. The timelines for preparing comments have already commenced, but we will be as flexible as possible for any interested party that wishes to join.

II. LEGAL AND PROCEDURAL BACKGROUND

The balance of this memorandum provides: (1) a general background on the relevant legal authorities implicated by the Petitions; (2) a summary of the issues raised by the Petitions; and (3) an initial assessment as to the potential responses in opposition and the associated costs. Please feel free to contact us with any questions.

A. Section 6409

In 2012, Congress adopted Section 6409 of the Middle-Class Tax Relief and Job Creation Act, which provides requires that State and local governments "may not deny, and shall approve" any "eligible facilities request" for a wireless site collocation or modification so long as it does not cause a "substant[ial] change in [that site's] physical dimensions."[1] Section 6409(a)(2) defines an "eligible facilities request" as a request to collocate, remove or replace transmission equipment on an existing wireless tower or base station. The statute does not define "substantial change".

[1] *See* 47 U.S.C. § 1455(a).

B. *2014 Infrastructure Order*

In 2014, the FCC adopted regulations to interpret key terms in this statute and impose certain substantive and procedural limitations on local review.[2] State and local governments nationwide opposed the *2014 Infrastructure Order* but the FCC denied a petition for reconsideration.[3] The Fourth Circuit ultimately upheld the rules on appeal.[4]

1. Substantive Limits and Defined Statutory Terms

The *2014 Infrastructure Order* implemented Section 6409 largely by defining terms left undefined in the statute itself. These definitions create substantive restrictions on how state and local governments evaluate eligible facilities requests.

Basic definitions include:

- "***Collocation***" means "[t]he mounting or installation of transmission equipment on an [existing wireless tower or base station] for the purpose of transmitting and/or receiving radio frequency signals for communications purposes."[5]

- "***Transmission equipment***" broadly includes "equipment that facilitates transmission for any [FCC]-licensed or authorized wireless communication service."[6]

- "***Tower***" means any structure built solely or primarily to support transmission equipment, whether it actually supports any equipment or not.[7]

- "***Base station***" means a non-tower structure in a fixed location approved for use as a wireless support structure by the local jurisdiction that actually supports transmission equipment at the time a collocation or modification request is submitted.[8]

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[2] *See In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd. 12865 (Oct. 17, 2014) (codified as 47 C.F.R. §§ 1.6100, *et seq.*) [hereinafter "*2014 Infrastructure Order*"]. The FCC originally codified the rules as 47 C.F.R. §§ 1.40001, *et seq.*, but recently re-designated them as 47 C.F.R. §§ 1.6100, *et seq*.

[3] See *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Order, 30 FCC Rcd. 2907 (Apr. 2, 2015).

[4] *See Montgomery Cty. v. FCC*, 811 F.3d 121 (4th Cir. 2015).

[5] *See* 47 C.F.R. § 1.6100(b)(2); *see also 2014 Infrastructure Order* at ¶¶ 178–81 (discussion what constitutes a collocation under Section 6409).

[6] *See* 47 C.F.R. §§ 1.6100(b)(8); *see also 2014 Infrastructure Order* at ¶¶ 158–60 (describing examples for transmission equipment).

[7] 47 C.F.R. § 1.6100(b)(9); *see also 2014 Infrastructure Order* at ¶ 166.

[8] *See* 47 C.F.R. § 1.6100(b)(1); *see also 2014 Infrastructure Order* at ¶ 166. The term "base station" can include DAS and small cells. *See* 47 C.F.R. § 1.6100(b)(1)(ii).

The FCC regulations also provide that whether a tower or base station "exists" depends on both its *physical* and *legal* status.[9] Section 6409 does not mandate approval for collocations and modifications when the support structure was constructed or deployed without proper local review, was not required to undergo local review or involves equipment that was not properly approved.[10] This rule attempts to preserve the local government's authority to review wireless facilities in the first instance and withhold statutory benefits under Section 6409 in cases where the site operator deployed equipment without all required prior approvals.

"***Substantial change***" is defined by a six-part test that involves: (1) thresholds for height increases, (2) width increases, (3) new equipment cabinets, (4) new excavation, (5) changes to concealment elements and (6) permit compliance.[11] A project that exceeds any one threshold causes a substantial change. Additionally, the FCC considers a substantial change to occur when the project replaces the entire support structure or violates a generally applicable law or regulation reasonably related to public health and safety.[12] State and local jurisdictions cannot consider any other criteria or threshold for a substantial change.

Different thresholds apply to towers on private property than to all other sites. Standards for base stations apply to towers in the right-of-way, with some minor exceptions. The thresholds are summarized as follows:

- **Height:** An increase in height causes a substantial change to a tower when it increases the tower height by 10% or an additional array not to exceed 20 feet (whichever is greater).[13] For base stations, the limit is 10% or 10 feet (whichever is greater).[14] The height limit is a *cumulative* limit.[15] For towers, the cumulative limit is measured from the overall height that existed on the date Congress enacted Section 6409 (*i.e.*, February 22, 2012) because the equipment will be vertically separated.[16] For almost all base stations, the cumulative limit is measured from the original structure height because the equipment will be horizontally separated.[17]

- **Width:** An increase in width causes a substantial change to a tower when it adds an appurtenance that protrudes more than 20 feet or the tower width at the

[9] *See* 47 C.F.R. § 1.6100(b)(5); *see also 2014 Infrastructure Order* at ¶ 174.
[10] *See 2014 Infrastructure Order* at ¶ 174 ("[I]f a tower or base station was constructed or deployed without proper review, was not required to undergo siting review, or does not support transmission equipment that received another form of affirmative State or local regulatory approval, the governing authority is not obligated to grant a collocation application under Section 6409.").
[11] 47 C.F.R. § 1.6100(b)(7); *see also 2014 Infrastructure Order* at ¶ 190.
[12] *See 2014 Infrastructure Order* at ¶¶ 199, 202.
[13] *See* 47 C.F.R. § 1.6100(b)(7)(i).
[14] 47 C.F.R. § 1.6100(b)(7)(i).
[15] *See id.* § 1.6100(b)(7)(i)(A); *see also 2014 Infrastructure Order* at ¶ 196.
[16] *See* 47 C.F.R. § 1.6100(b)(7)(i)(A); *see also 2014 Infrastructure Order* at ¶ 197.
[17] *See* 47 C.F.R. § 1. 6100(b)(7)(i)(A); *see also 2014 Infrastructure Order* at ¶ 197.

appurtenance (whichever is greater).[18] The threshold for base stations is six feet from the support structure and includes new equipment mounted to building facade.[19] Unlike height increases, no cumulative limit applies to width increases.

- **Equipment Cabinets:** A collocation or modification to a tower causes a substantial change when it adds more than the standard number of equipment cabinets for the technology involved (not to exceed four).[20] For base stations, a substantial change also includes any new equipment cabinets when no ground-mounted equipment cabinets exist at the current structure or the addition of ground cabinets more than 10% taller or more voluminous than any current ground cabinets.[21] Although the rules distinguish between ground-mounted cabinets and all other cabinets, the FCC does not define an "equipment cabinet."

- **Ground Disturbance:** A collocation or modification causes a substantial change to a tower when it involves excavation or deployments outside the "site" area.[22] For base stations, the threshold is expanded to include excavation or deployments outside the "site" or "area in proximity to the structure and to other transmission equipment already deployed on the ground."[23] The FCC defines "site" as the leased or owned areas and associated easements for access and utilities, but does not define "proximity" for this purpose.[24]

- **Concealment Elements:** A collocation or modification causes a substantial change when it would "defeat the concealment elements of the support structure."[25] Although the FCC does not provide much guidance on what change might "defeat" a concealment element, the regulations suggest that the applicant must do at least as much to conceal the new equipment as it did to conceal the originally-approved equipment.[26]

- **Prior Permit Conditions:** Lastly, a collocation or modification causes a substantial change when it would violate a prior condition attached to the original site approval, so long as the condition does not conflict with the thresholds for a substantial change in height, width, excavation or equipment cabinets (but not concealment).[27]

[18] *See* 47 C.F.R. § 1. 6100(b)(7)(ii); *see also 2014 Infrastructure Order* at ¶ 194.
[19] See 47 C.F.R. § 1. 6100(b)(7)(ii); *see also 2014 Infrastructure Order* at ¶ 194.
[20] *See* 47 C.F.R. § 1. 6100(b)(7)(iii).
[21] *See id*.
[22] *See id.* §§ 1. 6100(b)(7)(iv), (b)(6); *see also 2014 Infrastructure Order* at ¶ 198–99.
[23] *See* 47 C.F.R. §§ 1. 6100(b)(7)(iv), (b)(6); *see also 2014 Infrastructure Order* at ¶ 198–99.
[24] *See* 47 C.F.R. § 1. 6100(b)(6).
[25] *See id.* § 1. 6100(b)(7)(v).
[26] *See 2014 Infrastructure Order* at ¶ 200.
[27] *See* 47 C.F.R. § 1.6100(b)(7)(vi); *see also 2014 Infrastructure Order* at ¶ 200.

2. Procedural Limitations and Remedies

The *2014 Infrastructure Order* limits the process by which pubic agencies review and act on eligible facilities requests. When an applicant requests approval pursuant to Section 6409, the state or local government (1) may only require the applicant to provide information reasonably related to the determination on whether the proposed project meets the criteria for an eligible facilities request; and (2) must approve or deny the application within 60 days from submittal.[28] The shot clock may be tolled for incomplete applications or by mutual consent.[29] If the state or local government fails to act within the 60-day shot clock, the applicant may deem the application granted by written notice. The state or local government may then challenge the deemed-granted notice.

With respect to application requirements, the *2014 Infrastructure Order* preserves "considerable flexibility in determining precisely what information or documentation to require" for a complete application.[30] Although the FCC specifically prohibited requirements to demonstrate "the need for the proposed modification", it generally did not define specific permissible or impermissible requirements.[31] The FCC also encouraged state and local governments to combine the Section 6409 review with other permit review processes (such as entitlement and construction), which necessarily would allow for additional disclosures related to those permit applications.[32]

III. THE PETITIONS FOR DECLARATORY RULING

On August 27, WIA petitioned the FCC for a declaratory ruling to alter the *2014 Infrastructure Order* regulations. WIA (formerly known as PCIA) is a trade group and lobbyist for the wireless infrastructure industry. On September 9, CTIA filed a similar petition that piggybacks off WIA and requests essentially the same rule changes or clarifications. The Petitions are combined into a single docket, WT Docket No. 19-250.

A. Proposed Rule Changes

The Petitions contain detailed and specific requests to change existing rules and add new ones. These include requests to:

1. Preempt state and local authority to:
    a. hold public hearings for eligible facilities requests;
    b. establish specialized local processes for eligible facilities requests;
    c. exercise discretion over whether a proposed change defeats existing concealment elements;
    d. require applicants to cure code violations;

[28] *See 2014 Infrastructure Order* at ¶¶ 214–15.
[29] See *id.* at ¶¶ 217–18.
[30] *See id.* at ¶ 214.
[31] *See id*.
[32] *See id.* at ¶¶ 214 n.595, 220.

e. enforce local limitations on the number and size of antennas per site; and
f. impose new conditions on approved Section 6409 applications.

2. Redefine regulatory terms to expand by-right modifications and collocations, which include:
    a. increasing the threshold for height increases;
    b. excluding tower and pole-mounted cabinets from the per-modification limit on new cabinets;
    c. limiting "concealment element" to only "stealth" facilities and further limiting the definition to only those stealthing features specifically called out in the original approval as a concealment element;
    d. prohibiting proportionality to nearby structures or natural features as an enforceable concealment element;

3. Expand specifically prohibited application requirements, which include:
    a. radio frequency ("RF") emissions safety and exposure reports;
    b. original permit records for the underlying tower or base station;
    c. equipment inventories;
    d. landscape plans;
    e. title reports; and
    f. public notice materials (e.g., mailers and posted signs).

4. Extend the 60-day shot clock to cover all other permits and approvals necessary for construction (e.g., excavation, traffic control, stormwater, fire, etc.).

5. Require detailed written findings for denials and allow the shot clock to run out on denials with procedural defects.

6. Permit applicants to lawfully construct facilities without locally-issued construction permits if the application is deemed-granted.

Most (if not all) these rule changes conflict with the underlying rationales for why the FCC either adopted the existing rules or declined similar requests in prior rulemaking proceedings. The proposals also present statutory interpretation problems and raise serious constitutional questions about due process and the limits on federal authority to compel states and local governments to regulate according to federal standards.

B. Alleged "Bad-Actor" Municipalities

As support for the Petitions, the Industry offers anecdotal evidence about alleged "bad-actor" municipalities who seek to frustrate Section 6409 and its implementation. Although many anecdotes do not contain enough information to identify which local government allegedly engaged in bad-faith conduct (let alone verify that the anecdote is true), the Petitions names 40 cities, counties and other public agencies. Many named local governments are in California.

The named public agencies are:

Atlanta, Georgia	King County, Washington	Prince George's County, Md.
Bartlett, Tennessee	La Mesa, California	Richmond, California
Beaverton, Oregon	Lane County, Oregon	Rockville, Maryland
Cal. Division of State Architect	Lemon Grove, California,	San Diego, California
Carlsbad, California	Little Silver, New Jersey	San Marcos, California
Cass County, Missouri	Maricopa County, Arizona	Seattle, Washington
Cerritos, California	Marysville, Washington	Solana Beach, California
Chula Vista, New Mexico	Miami, Florida	Thousand Oaks, California
Concord, California	Missoula County, Montana	Thurston County, Washington
Coral Springs, Florida	Montgomery County, Maryland	Vista, California
DeKalb County, Georgia	Mount Vernon, New York	Whatcom County, Washington
El Cajon, California	North Hills, New York	Worchester County, Maryland
Encinitas, California	Portland, Oregon	
Escondido, California	Poway, California	

This defamatory tactic often works well for the industry. The FCC does not require that industry anecdotes be supported by any evidence or that the municipalities maligned even be notified and given an opportunity to defend themselves.

However, this tactic's effectiveness wanes when the record contains counterevidence. When the FCC relies on contested facts in the record, it must provide a logical explanation for its decision to credit one perspective over the other. Counterevidence in the record puts pressure on the FCC to explain its partiality for the industry and lays the groundwork for a successful judicial challenge. It will be critically important to identify unnamed municipalities, investigate the alleged misconduct and provide the FCC with counterevidence.

IV. POTENTIAL RESPONSE AND ESTIMATED BUDGET

All public agencies should oppose the Petitions in the notice and comment rulemaking proceeding that will follow. The FCC's recent *Small Cell Order* significantly abrogated existing local authority and now the Industry seeks to further erode local control over future expansions to existing facilities. Like the *Small Cell Order*, the Petitions seek to shift burdens and costs from the industry to local governments.

Arguments that should be raised against the Petitions include, but are not limited to:

- Almost all the proposed regulations sought by WIA's Petition directly conflict with 47 U.S.C. § 332(c)(7)(B), which the U.S. Supreme Court interprets as an exclusive list of limitations on local authority over wireless facilities deployment. Whereas §

332(c)(7)(B)(ii) requires local governments to "act" within a reasonable time and § 332(c)(7)(B)(v) establishes a 30-day limitations period for lawsuits *against the local government* for a failure to act or adverse final action, the proposed regulations would allow the shot clock to continue to run after the local government acts and fabricate an entirely new limitations period on local governments to bring claims *against the applicant*. These rules would turn the statute and Congress' intent to preserve local authority upside down and inside out.

- Proposed procedural restrictions conscript state and local public agencies into federal rubber-stampers, which violates the Tenth Amendment and raises serious Fifth Amendment due process concerns.

- Looser standards proposed for a "substantial change" undo substantial efforts by state and local public agencies to mitigate the adverse impacts unsightly and/or unconcealed facilities impose on the communities around them. In particular, the suggestion that "concealment" should only count if supported by specific findings is a pure *ex post facto* regulation that punishes local communities for failing to meet a standard applied to their past decisions that never existed.

- Proposed restrictions on RF emissions safety compliance evaluations is inconsistent with both the Telecommunications Act (which preempts local authority only to the extent the proposed facilities are actually compliant with federal standards) and prior FCC decisions (which have declined to preempt local compliance evaluations precisely because public agencies have a legitimate governmental interest in this assessment).

- The "evidence" presented by WIA is either unreliable, intentionally misleading and/or patently false. Moreover, substantial evidence in the *2014 Infrastructure Order* demonstrated that nearly all "delays" were caused or significantly contributed to by applicants' general failure to submit complete applications and timely respond to incomplete notices. Very little has changed since 2014 and many local government staff still receive woefully incomplete applications and wait months-on-end for responses to their incomplete notices.

The FCC has fast-tracked the Petitions as opening comments are due October 15 and replies are due October 30. FCC proceedings typically involve a 30-day comment window immediately followed by a 30-day period to file replies to the initial comments. Here, the FCC noticed the Petitions faster than expected and has cut the reply period in half. After the reply period closes, the FCC has no deadline to take action on the Petitions and interested parties may continue to engage with the FCC through the *ex parte* process until the item is placed on an FCC meeting agenda.

Telecom Law Firm is assembling a coalition of local governments and municipal associations and coordinating with other local-government advocates. This approach allows us to pool limited resources, crystalize more compelling facts in the record and

present the best possible defense. Robert May and Dr. Jonathan Kramer would serve as lead counsel for the coalition.

The per-member contribution would be $3,500 in a one-time flat fee paid in advance. This contribution includes the time and expense to: (1) investigate and evaluate alleged bad-actor anecdotes; (2) research other counter evidence for the record; (3) draft, edit and file comments and replies to comments; and (4) coordinate with coalition members and provide regular status updates. This estimate does not include *ex parte* meetings with the FCC; coalition members that wish to participate in *ex partes* would be billed separately.

We would be honored to represent your municipality or organization in this proceeding. Please let us know if you are interested in participation or if you have any questions.

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