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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[WT Docket No. 19-250 and RM-11849; FCC 20-75: FRS 16876]

Accelerating Wireless and Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment

AGENCY: Federal Communications Commission.

ACTION: Declaratory ruling.

SUMMARY: In this document, the Federal Communications Commission ("Commission" or "FCC") clarifies its rules implementing portions of the Spectrum Act of 2012 that streamline State and local review of applications to modify existing wireless infrastructure. The Declaratory Ruling clarifies the following: when the 60-day shot clock starts for local governments to review and approve an eligible modification; what constitutes a "substantial change" when a modification would increase the height of an existing structure, would require the addition of equipment cabinets, or would change the visual profile of a structure; and whether, within the context of the Commission's environmental review rules, an environmental assessment is required when an impact to historic properties has already been mitigated in the Commission's historic preservation review process.

DATES: This Declaratory Ruling was effective June 10, 2020.

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SUPPLEMENTARY INFORMATION: This is a summary of the FCC's Declaratory Ruling in WT Docket No. 19-250 and RM-11849, FCC 20-75, adopted on June 9, 2020, and released on June 10, 2020. The document is available for download at https://www.fcc.gov/edocs. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to FCC504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (TTY).

Synopsis

I. Declaratory Ruling

1. In this *Declaratory Ruling*, the Commission clarifies several key elements that determine whether a modification request qualifies as an eligible facilities request that a State or local government must approve within 60 days, and it clarifies when the 60-day shot clock for review of an eligible facilities request commences. These interpretations provide greater certainty to applicants for State and local government approval of wireless facility modifications, as well as to the reviewing government agencies, and these interpretations should accelerate the deployment of advanced wireless networks.

2. Specifically, the Commission clarifies that:

- The 60-day shot clock in §1.6100(c)(2) begins to run when an applicant takes the first procedural step in a locality's application process and submits written documentation showing that a proposed modification is an eligible facilities request;
- The phrase "with separation from the nearest existing antenna not to exceed twenty feet" in §1.6100(b)(7)(i) allows an increase in the height of the tower of up to twenty (20) feet between antennas, as measured from the top of an existing antenna to the bottom of a proposed new antenna on the top of a tower;
- The term "equipment cabinets" in §1.6100(b)(7)(iii) does not include relatively small electronic components, such as remote radio units, radio transceivers, amplifiers, or other

devices mounted on the structure, and up to four such cabinets may be added to an existing facility per separate eligible facilities request;

- The term "concealment element" in §1.6100(b)(7)(v) means an element that is part of a stealth-designed facility intended to make a structure look like something other than a wireless facility, and that was part of a prior approval;
- To "defeat" a concealment element under §1.6100(b)(7)(v), a proposed modification must cause a reasonable person to view a structure's intended stealth design as no longer effective; and
- The phrase "conditions associated with the siting approval" may include aesthetic conditions to minimize the visual impact of a wireless facility as long as the condition does not prevent modifications explicitly allowed under §1.6100(b)(7)(i) through (iv) (antenna height, antenna width, equipment cabinets, and excavations or deployments outside the current site) and so long as there is express evidence that at the time of approval the locality required the feature and conditioned approval upon its continuing existence.

3. Certain parties contend that the Commission lacks legal authority to adopt the rulings requested in the petitions, which they contend do not just clarify or interpret the rules established in 2014 but also change them, requiring that the Commission issue a Notice of Proposed Rulemaking followed by a Report and Order. As an initial matter, the Commission notes that it is not adopting all of the rulings requested in WIA's and CTIA's petitions for declaratory ruling because it finds incremental action to be an appropriate step at this juncture, particularly given, as mentioned above, that the Commission has continued to take steps to ease barriers to deployment of wireless infrastructure since adopting rules to implement Section 6409(a). The determinations in this *Declaratory Ruling* are intended solely to interpret and clarify the meaning and scope of the existing rules set forth in the *2014 Infrastructure Order*, in order to remove uncertainty and in light of the differing positions of the parties on these

questions. In addition, the Commission finds it appropriate to initiate a *Notice of Proposed Rulemaking* regarding tower site boundaries and excavation or deployment outside the boundaries of an existing tower site, in order to consider whether modifications of its rules are needed to resolve current disputes. The Commission intends, with these steps, to continue to advance the same goals that led it to adopt regulations implementing Section 6409(a) in the first instance—to avoid ambiguities leading to disputes that could undermine the goals of the Spectrum Act, i.e., to advance wireless broadband service.

A. Commencement of Shot Clock

4. Section 1.6100(c)(2) provides that the 60-day review period for eligible facilities requests begins "on the date on which an applicant submits a request seeking approval." If the local jurisdiction "fails to approve or deny a request seeking approval under this section within the timeframe for review (accounting for any tolling), the request shall be deemed granted." The *2014 Infrastructure Order* discusses the procedures that local governments need to implement in order to carry out their obligations to approve eligible facilities requests within 60 days; it does not, however, define the date on which an applicant is deemed to have submitted an eligible facilities request for purposes of triggering the 60-day shot clock.

5. There is evidence in the record that some local jurisdictions effectively postpone the date on which they consider eligible facilities requests to be duly filed (thereby delaying the commencement of the shot clock) by treating applications as incomplete unless applicants have complied with time-consuming requirements. Such requirements include meeting with city or county staff, consulting with neighborhood councils, obtaining various certifications, or making presentations at public hearings. While some stakeholders may have assumed that, after the *2014 Infrastructure Order*, local governments would develop procedures designed to review and approve covered requests within a 60-day shot clock period, many have not done so and instead continue to require applicants to apply for forms of authorizations that entail more "lengthy and onerous processes" of review. In such jurisdictions, applicants may need to obtain clearance from numerous, separate municipal departments, which could

make it difficult to ascertain whether or when the shot clock has started to run.

6. To address uncertainty regarding the commencement of the shot clock, the Commission clarifies that, for purposes of its 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.

7. By requiring that an applicant take the first procedural step required by the locality, the goal is to give localities "considerable flexibility" to structure their procedures for review of eligible facilities requests, but prevent localities from "impos[ing] lengthy and onerous processes not justified by the limited scope of review contemplated" by section 6409(a). In taking the first procedural step that the local jurisdiction requires as part of its applicable regulatory review process, applicants demonstrate that they are complying with a local government's procedures. The second criterion—requiring applicants to submit written documentation showing that the proposed modification is an eligible facilities request—is necessary because localities must have the opportunity to review this documentation to determine whether the proposed modification is an eligible facilities request that must be approved within 60 days. The Commission anticipates that the documentation sufficient to start the shot clock under the stated criteria might include elements like a description of the proposed modification and an explanation of how the proposed modification is an eligible facilities request. The Commission finds that these criteria strike a reasonable balance between local government flexibility and the streamlined review envisioned by Section 6409(a).

8. In addition, the Commission finds that further clarifications are needed to achieve its goal of balancing local government flexibility with the streamlined review envisioned by Section 6409(a). First, the Commission clarifies that a local government may not delay the triggering of the shot clock by

establishing a "first step" that is outside of the applicant's control or is not objectively verifiable. For example, if the first step required by a local government is that applicants meet with municipal staff before making any filing, the applicant should be able to satisfy that first step by making a written request to schedule the meeting—a step within the applicant's control. In this example, the 60-day shot clock would start once the applicant has made a written request for the meeting and the applicant also has satisfied the second of the criteria (documentation). The Commission does not wish to discourage meetings between applicants and the local governments, and it recognizes that such consultations may help avoid errors that localities have identified as leading to delays, but such meetings themselves should not be allowed to cause delays or prevent these requests from being timely approved. As an additional example, 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.

9. Second, the Commission clarifies that 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 the 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 Commission expects applicants to act in good faith to fulfill reasonable steps set forth by a local government that can be completed within the 60 day period, but the local government would bear responsibility for ensuring that any steps in its process, as well as the substantive review of the proposed facility modification, are all completed within 60 days. If not, the eligible facilities request would be deemed granted under the Commission's rules.

10. Third, the Commission clarifies that 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 the criteria for starting the shot clock. In addition, a local government may not delay the start of the shot clock by requiring an applicant to submit documentation that is not reasonably related to determining whether the proposed modification is an eligible facilities request. The Commission clarifies how its documentation rules apply in the context of the shot clock to provide certainty that unnecessary documentation requests do not effectively delay the shot clock as part of the local government's "first step," even if providing that documentation would be within the applicant's control and could be objectively verified. 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.

11. Fourth, the Commission notes that a local government may use conditional use permits, variances, or other similar types of authorizations under the local government's standard zoning or siting rules, in connection with the consideration of an eligible facilities request. The Commission clarifies, however, that requirements to obtain such authorizations may not be used by the local government to delay the start of or to toll the shot clock under the section 6409(a) process. The shot clock would begin once the applicant takes the first step in whatever process the local government uses in connection with reviewing applications subject to section 6409(a) and satisfies the second of the criteria (documentation). The Commission rejects localities' suggestions that the shot clock should not commence until an applicant submits documentation required for all necessary permits, as such an approach is inconsistent with federal law. Subsequently, if the locality rejects the applicant's request to modify wireless facilities as incomplete based on requirements relating to such permits, variances, or similar authorizations, the shot clock would not be tolled and the application would be deemed granted after 60 days if the application constitutes an eligible facilities request under the Commission's rules. Localities may only toll the shot clock "by mutual agreement" or if the locality "determines that the application is

incomplete."

12. Fifth, the Commission notes that some jurisdictions have not established specific procedures for the review and approval of eligible facilities requests under Section 6409(a). In those cases, the Commission clarifies that, for purposes of triggering the shot clock under Section 6409(a), 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. Where the first step in the process is submission of the type of filing that is typically required for comparable modification requests, the Commission notes that applicants are not required to file any documentation that is inconsistent with the Commission's rules for eligible facilities requests under Section 6409(a).

13. The Commission finds that these clarifications serve to remove uncertainty about the scope and meaning of various provisions of Section 1.6100 consistent with the text, history, and purpose of the *2014 Infrastructure Order*. The Commission also 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."

B. Height Increase for Towers Outside the Public Rights-of-Way

14. Adding new collocated equipment near or at the top of an existing tower can be an efficient means of expanding the capacity or coverage of a wireless network without the disturbances associated with building an entirely new structure. Adding this equipment to an existing tower would change the tower's physical dimensions, but if such a change is not "substantial," then a request to

implement it would qualify as an eligible facilities request, and a locality would be required to approve it. Section 1.6100(b)(7)(i) provides that a modification on a tower outside of the public rights-of-way would cause a substantial change 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."

15. Commenters assert that they have two different interpretations of the meaning of this language in Section 1.6100(b)(7)(i). Industry commenters read Section 1.6100(b)(7)(i) as allowing a new antenna to be added without being a substantial change if there is no more than twenty feet in "separation" between the existing and new antennas, and that the size/height of the new antenna itself is irrelevant to the concept of "separation." Localities appear to be of the view, however, that such an interpretation strains what the statute and regulations would permit—creating different standards for antenna height depending on where it is located and leading to indefinite increases in antenna height under a streamlined process not designed for that purpose. Adding an antenna array to a tower out of the public right-of-way that increases the height of the tower would not be considered a substantial change, by itself, if there is no more than twenty feet of separation between the nearest existing antenna. The phrase "separation from the nearest existing antenna" means the distance from the top of the highest existing antenna on the tower to the *bottom* of the proposed new antenna to be deployed above it. Thus, when determining whether an application satisfies the criteria for an eligible facilities request, localities should not measure this separation from the top of the existing antenna to the *top* of the new antenna, because the height of the new antenna itself should not be included when calculating the allowable height increase. Rather, under the Commission's interpretation, the word "separation" refers to the distance from the top of the existing antenna to the bottom of the proposed antenna. Interpreting "separation" otherwise to include the height of the new antenna could limit the number of proposed height increases that would qualify for Section 6409(a) treatment, given typical antenna sizes and separation distances between antennas, which would undermine the statute's objective to facilitate streamlined review of

modifications of existing wireless structures.

16. Specifically, and in response to commenters' arguments regarding the language in Section 1.6100(b)(7)(i), the Commission find that its resolution is consistent with the long-established interpretation of the comparable standard set forth in the 2001 *Collocation Agreement* for determining the maximum size of a proposed collocation that is categorically excluded from historic preservation review. Commission staff explained, in a fact sheet released in 2002, that under this provision of the *Collocation Agreement*, if a "150-foot tower… already [has] an antenna at the top of the tower, the tower height could increase by up to 20 feet [*i.e.*, the "separation" distance] *plus* the height of a new antenna to be located at the top of the tower" without constituting a substantial increase in size. That standard was the source of the standard for the allowable height increases for towers outside the rights-of-way that the Commission adopted in the *2014 Infrastructure Order*.

17. The Commission's interpretation also aligns with the clarification sought by WIA and other industry parties. The Commission rejects the argument that this interpretation creates irrational inconsistences among height increase standards depending on the type of structure and whether a tower is inside or outside the rights-of-way. As the Commission discussed in the *2014 Infrastructure Order*, limits on height and width increases should depend on the type and location of the underlying structure. The Commission therefore adopted the *Collocation Agreement's* "substantial increase in size" test for towers outside the rights-of-way, and it adopted a different standard for non-tower structures. Localities are rearguing an issue already settled in the *2014 Infrastructure Order* when they urge that the same height increase standard should apply to different types of structures. The Commission also rejects the argument that this interpretation would lead to virtually unconstrained increases in the height of such towers. These concerns are unwarranted because the *2014 Infrastructure Order* already limits the cumulative increases in height from eligible modifications and nothing in this *Declaratory Ruling* changes those limits.

18. The clarification is limited to Section 1.6100(b)(7)(i) and the maximum increase in the

height of a tower outside the rights-of-way allowed pursuant to an eligible facilities request under Section 6409(a). The Commission reminds applicants that "eligible facility requests covered by Section 6409(a) must comply with any relevant Federal requirement, including any applicable Commission, FAA, NEPA, or Section 106 [historic review] requirements."

C. Equipment Cabinets

19. To upgrade to 5G and for other technological and capacity improvements, providers often add equipment cabinets to existing wireless sites. Section 1.6100(b)(7)(iii) provides that a proposed modification to a support structure constitutes a substantial change if "it involves installation of more than the standard number of new equipment cabinets for the technology involved, but not to exceed four cabinets." Some localities suggest that telecommunications transmission equipment manufactured with outer protective covers can be "equipment cabinets" under Section 1.6100(b)(7)(iii) of the rules. The Commission concludes that localities are interpreting "equipment cabinet" under Section 1.6100(b)(7)(iii) too broadly to the extent they are treating equipment itself as a cabinet simply because transmission equipment may have protective housing. Nor does a small piece of transmission equipment mounted on a structure become an "equipment cabinet" simply because it is more visible when mounted above ground. 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. Moreover, the Commission notes that Section 1.6100(b)(3) defines an "eligible facilities request" (i.e., a request entitled to streamlined treatment under Section 6409(a)) as any request for modification of an existing tower or base station that does not substantially change the physical dimensions of such tower or base station and that involves the collocation, removal or replacement of "transmission equipment." Interpreting "transmission equipment," an element required in order for a modification to qualify for streamlined treatment, to be "equipment cabinets," an element that is subject to numerical limits that can

cause the modification not to qualify for streamlined treatment, would strain the intended purposes of Sections 1.6100(b)(3) and 1.6100(b)(7)(iii). The Commission does not address here other aspects of the definition of equipment cabinets on which industry commenters seek clarification.

20. In addition, the Commission clarifies that the maximum number of additional equipment cabinets that can be added under the rule is measured for each separate eligible facilities request. According to WIA, one unidentified city in Tennessee interprets the term "not to exceed four cabinets" in Section 1.6100(b)(7)(iii) as "setting a cumulative limit, rather than a limit on the number of cabinets associated with a particular eligible facilities request." The Commission finds that such an interpretation runs counter to the text of Section 1.6100(b)(7)(iii), which restricts the number of "new" cabinets per eligible facilities request. The city's interpretation ignores the fact that the word "it" in the rule refers to a "modification" and supports the conclusion that the limit on equipment cabinet installations applies separately to each eligible facilities request. This conclusion is also supported by the context of the rule as a whole. The number and size of preexisting cabinets are irrelevant to the limitation on equipment cabinets on eligible support structures, in contrast to the rest of the rule, which takes into account whether there are preexisting ground cabinets at the site and whether proposed new cabinets' volume exceeds the volume of preexisting cabinets by more than 10%.

21. Several localities argue that this clarification would permit an applicant to add an unlimited number of new equipment cabinets to a structure so long as the applicant proposes adding them in increments of four or less. The Commission disagrees that this clarification permits an unlimited number of cabinets on a structure. The text of Section 1.6100(b)(7)(iii) limits the number of equipment cabinets per modification to no more than "the standard number of new equipment cabinets for the technology involved."

D. Concealment Elements

22. Section 1.6100(b)(7)(v) states that a modification "substantially changes" the physical dimensions of an existing structure if "[i]t would defeat the concealment elements of the eligible support

structure." The *2014 Infrastructure Order* provides 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)." The *2014 Infrastructure Order* notes that both locality and industry commenters generally agreed that "a modification that undermines the concealment elements of a stealth wireless facility, such as painting to match the supporting façade or artificial tree branches, should be considered substantial under Section 6409(a)."

23. Stakeholders subsequently have interpreted the definition of "concealment element" and the types of modifications that would "defeat" concealment in different ways. Petitioners and industry commenters urge the Commission to clarify that the term "concealment element" only refers to "a stealth facility or those aspects of a design that were specifically intended to disguise the appearance of a facility, such as faux tree branches or paint color." T-Mobile states that some localities are "proffering 'creative or inappropriate' regulatory interpretations of what a concealment element is." Locality commenters counter that there is more to concealment than "fully stealthed facilities and semi-stealthed monopines." They argue that the proposed changes would undermine the ability of local jurisdictions to enforce regulations designed to conceal equipment. NLC asserts that many attributes of a site contribute to concealment, such as the "specific location of a rooftop site, or the inclusion of equipment in a particular architectural feature." Locality commenters contend that limiting concealment elements to features identified in the original approval would negate land use requirements that were a factor in the original deployment but not specified as such.

24. *Clarification of "Concealment Element."* The Commission clarifies that concealment elements are elements of a stealth-designed facility intended to make the facility look like something other than a wireless tower or base station. The *2014 Infrastructure Order* defines "concealed or 'stealth'"-designed facilities as "facilities designed to look like some feature other than a wireless tower or base station," and further provides that any change that defeats the concealment elements of *such*

facilities would be considered a substantial change under Section 6409(a). Significantly, the *2014 Infrastructure Order* identified parts of a stealth wireless facility such as "painting to match the supporting façade or artificial tree branches" as examples of concealment elements. The Commission agrees with industry commenters that concealment elements are those elements of a wireless facility installed for the purpose of rendering the "appearance of the wireless facility as something fundamentally different than a wireless facility," and that concealment elements are "confined to those used in stealth facilities."

25. The Commission disagrees with localities who argue that any attribute that minimizes the visual impact of a facility, such as a specific location on a rooftop site or placement behind a tree line or fence, can be a concealment element. As localities acknowledged in comments they submitted in response to the *2013 Infrastructure NPRM*, "local governments often address visual effects and concerns in historic districts not through specific stealth conditions, but through careful placement" conditions. The Commission's rules separately address conditions to minimize the visual impact of non-stealth facilities under Section 1.6100(b)(7)(vi) governing "conditions associated with the siting approval." The Commission narrowly defined concealment elements to mean the elements of a stealth facility, and no other conditions fall within the scope of Section 1.6100(b)(7)(v).

26. The Commission also clarifies that, in order to be a concealment element under Section 1.6100(b)(7)(v), the element must have been part of the facility that the locality approved in its prior review. The Commission's clarification that concealment elements must be related to the locality's prior approval is informed by the *2014 Infrastructure Order* and its underlying record, which assumed that "stealth" designed facilities in most cases would be installed at the request of an approving local government. Further, in the *2014 Infrastructure Order*, the Commission stated that a modification would be considered a substantial increase if "it would defeat the *existing* concealment elements of the tower or base station." The Commission clarifies that the term "existing" means that the concealment element existed on the facility that was subject to a prior approval by the locality. In addition, the record in the

2014 Infrastructure Order, as relied upon by the Commission, characterized stealth requirements as identifiable, pre-existing elements in place before an eligible facilities request is submitted.

27. Regarding the meaning of a prior approval in the context of an "existing" concealment element, the Commission notes that Section 1.6100(b)(7)(i) provides that permissible increases in the height of a tower (other than a tower in the public rights-of-way) should be measured relative to a locality's original approval of the tower or the locality's approval of any modifications that were approved prior to the passage of the Spectrum Act. The Commission finds it reasonable to interpret an "existing" concealment element relative to the same temporal reference points, which are intended to allow localities to adopt legitimate requirements for approval of an original tower at any time but not to allow localities to adopt these same requirements for a modification to the original tower (except for a modification prior to the Spectrum Act when localities would not have been on notice of the limitations in Section 6409(a)). In other words, the purpose of Section 1.6100(b)(7)(v) is to identify and preserve prior local recognition of the need for such concealment, but not to invite new restrictions that the locality did not previously identify as necessary. Accordingly, the Commission clarifies that under Section 1.6100(b)(7)(v), a concealment element must have been part of the facility that was considered by the locality at the original approval of the tower or at the modification to the original tower, if the approval of the modification occurred prior to the Spectrum Act or lawfully outside of the Section 6409(a) process (for instance, an approval for a modification that did not qualify for streamlined Section 6409(a) treatment).

28. The Commission is not persuaded by localities' arguments that this clarification would negate land use requirements that were a factor in the approval of the original deployment even if those requirements were not specified as a condition. The clarification does not mean that a concealment element must have been explicitly articulated by the locality as a condition or requirement of a prior approval. 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. However, it would be inconsistent with the purpose of Section 6409(a)—facilitating wireless infrastructure deployment—to give local governments discretion to require new concealment elements that were not part of the facility that was subject to the locality's prior approval. The Commission expects that this clarification will also promote the purpose of the rules to provide greater certainty to localities and applicants as to whether a concealment element exists.

29. *Clarification of "Defeat Concealment."* Next, the Commission clarifies that, to "defeat concealment," the proposed modification must 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 Commission's definition is consistent with dictionary definitions and common usage of the term "defeat" and is supported by the record. The clarification is necessary because, as industry commenters point out, some localities construe even small changes to "defeat" concealment, which delays deployment, extends the review processes for modifications to existing facilities, and frustrates the intent behind Section 6409(a).

30. *Examples of Whether Modifications Defeat Concealment Elements*. The Commission offers the following examples to provide guidance on concealment elements and whether or not they have been defeated to help inform resolution of disputes should they arise:

- In some cases, localities take the position that the placement of coaxial cable on the outside of a stealth facility constitutes a substantial change based on the visual impact of the cable. Coaxial cables typically range from 0.2 inches to slightly over a half-inch in diameter, and it is unlikely that such cabling would render the intended stealth design ineffective at the distances where individuals would view a facility.
- In other cases, localities have interpreted any change to the color of a stealth tower or structure as defeating concealment. Such interpretations are overly broad and can frustrate Congress's intent

to expedite the Section 6409(a) process. A change in color must make a reasonable person believe that the intended stealth is no longer effective. Changes to the color of a stealth structure can occur for many reasons, including for example, the discontinuance of the previous color. 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. Therefore, such a change would not defeat concealment.

- WIA reports that a locality in Colorado claims that a small increase in height on a stealth monopine, which is less than the size thresholds of Section 1.6100(b)(7)(i) through (iv), defeats concealment and therefore constitutes a substantial change. The Commission clarifies that such a change 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) through (iv) that makes the monopine visible above the tree line would be permitted under Section 1.6100(b)(7)(v). First, 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. Second, a requirement that the facility remain hidden behind a tree line is not a feature of a stealth-designed facility; rather it is an aesthetic condition that falls under Section 1.6100(b)(7)(vi). Under that analysis, as explained in greater detail below, a proposed modification within the thresholds of Section 1.6100(b)(7)(i) through (iv) that makes the monopine visible above the tree line likely would be permitted under Section 1.6100(b)(7)(vi).

E. Conditions Associated with the Siting Approval

31. Section 1.6100(b)(7)(vi) states that a modification is a substantial increase if "[i]t 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 § 1.61001(b)(7)(i) through (iv)." Industry commenters argue that changes specifically allowed under Section 1.6100(b)(7)(i) through (iv) should not constitute a substantial change under Section 1.6100(b)(7)(vi). For example, the record shows that some localities claim that small increases in the size of a structure, such as increasing its height or increasing the width of its cannister, are a substantial change because they wrongly characterize any increase to a structure's visual profile or negative aesthetic impact as defeating a concealment element—even if the size changes would be within the allowances under the Commission's rules.

32. 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)). However, 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 so, 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) through (iv) of the Commission's rules. Consistent with "commonplace [] statutory construction that the specific governs the general," the Commission clarifies that where there is a conflict between a locality's general ability to impose conditions 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). In other words, when a proposed modification otherwise

permissible under Section 1.6100(b)(7)(i) through (iv) cannot reasonably comply with conditions under Section 1.6100(b)(7)(vi), the conflict should be resolved in favor of permitting the modifications. 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.

33. By providing guidance on the relationship between Section 1.6100(b)(7)(i) through (iv) and 1.6100(b)(7)(vi), including the limitations on conditions that a locality may impose, the Commission expects there to be fewer cases where conditions, especially aesthetic conditions, are improperly used to prevent modifications otherwise expressly allowed under Section 1.6100(b)(7)(i) through (iv). The Commission reaffirms that beyond the specific conditions that localities may impose through Section 1.6100(b)(7)(vi), localities can enforce "generally applicable building, structural, electrical, and safety codes" and "other laws codifying objective standards reasonably related to health and safety."

34. *Examples of Aesthetics Related Conditions*. Petitioners and both industry and locality commenters have provided numerous examples of disputes involving modifications to wireless facilities. Using examples from the record, and assuming that the locality has previously imposed an aesthetic-related condition under Section 1.6100(b)(7)(vi), the Commission offers examples to provide guidance on the validity of the condition to decrease future disputes and to help inform resolution of disputes should they arise:

- 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) through (iv).

- T-Mobile claims that some localities consider existing walls and fences around non-camouflaged towers to be concealment elements that have been defeated if new equipment is visible over those walls or fences. First, such conditions are not concealment elements; rather, 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) through (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) through (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.

- In a similar vein, San Francisco has conditions to reduce the visual impact of a wireless facility, including that it must be set back from the roof at the front building wall. San Francisco states that it will not approve a modification if the new equipment to be installed does not meet the set back requirement. Even if a proposed modification within the thresholds of Section 1.6100(b)(7)(i) through (iv) exceeds the required set back, San Francisco 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.

F. Environmental Assessments After Execution of Memorandum of Agreement

35. The Commission's environmental rules implementing the National Environmental Policy Act categorically exclude all actions from environmental evaluations, including the preparation of an environmental assessment, except for defined actions associated with the construction of facilities that may significantly affect the environment. Pursuant to Section 1.1307(a) of the Commission's rules, applicants currently submit an environmental assessment for those facilities that fall within specific categories, including facilities that may affect historic properties protected under the National Historic Preservation Act. Under the Commission's current process, an applicant submits an environmental assessment for facilities that may affect historic properties, even if the applicant has executed a memorandum of agreement with affected parties to address those adverse effects.

36. The Commission clarifies on its 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 Section VII.D of the Wireless Facilities Nationwide Programmatic Agreement, if the only basis for the preparation of an environmental assessment was the potential for significant effects on such properties. The Commission expects this clarification should further streamline the environmental review process.

37. Section 1.1307(a)(4) of the Commission's rules requires an environmental assessment if a proposed communications facility may have a significant effect on a historic property. The Commission adopted a process to identify potential effects on historic properties by codifying the Wireless Facilities Nationwide Programmatic Agreement as the means to comply with Section 106 of the National Historic Preservation Act. If adverse effects on historic properties are identified during this process, the Wireless Facilities Nationwide Programmatic Agreement requires that the applicant consult with the State Historic Preservation Officer and/or Tribal Historic Preservation Officer, and other interested parties to avoid, minimize, or mitigate the adverse effects.

38. When such effects cannot be avoided, under the terms of the Wireless Facilities

Nationwide Programmatic Agreement, the applicant, the State Historic Preservation Officer and/or Tribal Historic Preservation Officer, and other interested parties may proceed to negotiate a memorandum of agreement that the signatories agree fully mitigates all adverse effects. The agreement is then sent to Commission staff for review and signature. Under current practice, even after a memorandum of agreement is executed, an applicant is still required to prepare an environmental assessment and file it with the Commission. The Commission subsequently places the environmental assessment on public notice, and the public has 30 days to file comments/oppositions. If the environmental assessment is determined to be sufficient and no comments or oppositions are filed, the Commission issues a Finding of No Significant Impact and allows an applicant to proceed with the project.

39. In this *Declaratory Ruling* the Commission clarifies that an environmental assessment is unnecessary after an adverse effect on a historic property is mitigated by a memorandum of agreement. Applicants already are required to consider alternatives to avoid adverse effects prior to executing a memorandum of agreement. The executed agreement demonstrates that the applicant: has notified the public of the proposed undertaking; has consulted with the State Historic Preservation Officer and/or Tribal Historic Preservation Officers, and other interested parties to identify potentially affected historic properties; and has worked with such parties to agree on a plan to mitigate adverse effects. This mitigation eliminates any significant adverse effects on a historic property, and each memorandum of agreement must include as a standard provision that the memorandum of agreement "shall constitute full, complete, and adequate mitigation under the NHPA . . . and the FCC's rules."

40. The Commission notes that Section 1.1307(a) requires an applicant to submit an environmental assessment if a facility "may significantly affect the environment," which includes facilities that may affect historic properties, endangered species, or critical habitats. As a result of the mitigation required by a memorandum of agreement, the Commission concludes that any effects on historic properties remaining after the agreement is executed would be below the threshold of "significance" to trigger an environmental assessment. After the memorandum of agreement is executed,

a proposed facility should no longer "have adverse effects on identified historic properties" within the meaning of Section 1.1307(a)(4) and, therefore, should no longer be within the "types of facilities that may significantly affect the environment." If none of the other criteria for requiring an environmental assessment in Section 1.1307(a) exist, then such facilities automatically fall into the broad category of actions that the Commission has already found to "have no significant effect on the quality of the human environment and are categorically excluded from environmental processing." The Commission's rules should be read in light of the scope of the Commission's obligation under Section 106 and the ACHP's rules, which explicitly state that such a memorandum of agreement "evidences the agency official's compliance with section 106." The Commission reminds applicants that an environmental assessment is still required if the proposed project may significantly affect the environment in ways unrelated to historic properties.

II. PROCEDURAL MATTERS

41. *Paperwork Reduction Act*. This *Declaratory Ruling* does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

42. *Congressional Review Act*. The Commission has determined, and the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, concurs that this rule is "non-major" under the Congressional Review Act, 5 U.S.C. 804(2). The Commission will send a copy of this *Declaratory Ruling* to Congress and the Government Accountability Office pursuant to 5 U.S.C. 801(a)(1)(A).

III. ORDERING CLAUSES

43. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i)-(j), 7, 201, 253, 301, 303,

309, 319, and 332 of the Communications Act of 1934, as amended, and Section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012, as amended, 47 U.S.C. 151, 154(i) through (j), 157, 201, 253, 301, 303, 309, 319, 332, 1455 that this *Declaratory Ruling* in WT Docket No. 19-250 and RM-11849 IS hereby ADOPTED.

44. IT IS FURTHER ORDERED that this *Declaratory Ruling* SHALL BE effective upon release. It is the Commission's intention in adopting the foregoing *Declaratory Ruling* that, if any provision of the *Declaratory Ruling*, or the application thereof to any person or circumstance, is held to be unlawful, the remaining portions of such *Declaratory Ruling* not deemed unlawful, and the application of such *Declaratory Ruling* to other person or circumstances, shall remain in effect to the fullest extent permitted by law.

45. IT IS FURTHER ORDERED that, pursuant to 47 CFR 1.4(b)(1), the period for filing petitions for reconsideration or petitions for judicial review of this *Declaratory Ruling* will commence on the date that this *Declaratory Ruling* is released.

46. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Declaratory Ruling* to the Chief Counsel for Advocacy of the Small Business Administration.

47. IT IS FURTHER ORDERED that this *Declaratory Ruling* SHALL BE sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION

Marlene Dortch,
Secretary

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