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

BACKGROUND

The Intergovernmental Advisory Committee ("IAC") has reviewed an informal, non-binding document issued by the Commission's Wireless Bureau, released in the form of a Public Notice dated January 25, 2013 and titled "Wireless Telecommunications Bureau Offers Guidance on Interpretation of Section 6409(a) of The Middle Class Tax Relief and Job Creation Act of 2012" (the "Informal Guidance").

The IAC issues this recommendation to observe that it disagrees with certain aspects of the Informal Guidance. This Advisory Recommendation describes issues of concern and what we believe to be errors in the Informal Guidance. It recommends that, in any future action that would have formal or binding status, the Commission take certain different approaches both to the specific matters discussed in the Informal Guidance, and generally with regard to pre-decisional consultation with the IAC, as described below.

ISSUE #1: INTERPRETATION OF SUBECTION (a)(1) OF SECTION 6409

First, the IAC believes that the Informal Guidance, in its effort to offer guidance in interpreting subsection (a)(1) of Section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012 (hereafter, "Section 6409"), has mistakenly applied an interpretation of different language from a different context. The Congressional language in Section 6409(a)(1) referring to a "substantial change in physical dimensions" of a tower or base station is meaningfully different than the terminology "substantial increase in size" which was interpreted in the National Collocation Agreement referenced in the Informal Guidance. Section 6409(a)'s language and context is not

amenable to the kind of mechanical application that the Informal Guidance suggests be imported from the Nationwide Collocation Agreement.

The language of Section 6409 properly reflects Congressional sensitivity to the full range of esthetic, safety and other quality-of-life elements that go into state, local and tribal land use decisions regarding the placement of structures such as wireless antennas and base stations. A "substantial change in physical dimensions" may certainly occur even if the size of a tower were increasing less than ten percent. For example, if a tower were authorized at its current size because a tower perhaps 5% taller, or 3% wider, would adversely affect substantial safety, esthetic or quality-of-life elements at the particular location where it was originally authorized, a proposed change larger than that in the relevant dimension would represent a "substantial change in physical dimensions" with respect to that tower. The question of substantiality in the context of Section 6409(a) cannot be resolved by the adoption of mechanical percentages or numerical rules applicable anywhere and everywhere in the United States, but rather must be evaluated in the context of specific installations and a particular community's land use requirements and decisions. It is not plausible to understand Section 6409 as suddenly authorizing, for example, a blanket 10% increase in the height of every wireless antenna tower for collocation purposes in the entire country.

In addition, a change in attachments to a tower that results in no change in the tower's size, but results in, for example, new antennas that no longer meet local building code requirements for ice loads or wind resistance, simply could not be approved by a land use authority, given the threat to public safety. The Congressional language regarding "physical dimensions" allows the land use authority the necessary scope for public protection in such a case. The Informal Guidance, by focusing only on an arbitrary percentage increase in "size" of a tower or base station, suggests, incorrectly, that there is no such option to protect the public safety regarding a proposed code-non-compliant co-location. Surely, the Commission cannot intend that a co-location change to a tower that, while not substantially increasing the size of the tower, clearly and definitively violates state, local, or tribal safety codes and presents a danger to the public would qualify for mandatory approval.

ISSUE #2: DEFINING "BASE STATION"

The IAC observes the following with respect to the reference in the Informal Guidance proposing a definition of "base station" as that term is used in Section 6409:

The Informal Guidance cites a use of the term "base station" in a 2011 Commission annual report on mobile services ("the Annual Report"[1]), but then fails accurately to reflect the Annual Report's definition. The Annual Report defines a base station, using the word "and", as a facility that includes a collection of equipment parts: "A base station generally consists of radio transceivers, antennas, coaxial cable, a regular and backup power supply, and other associated electronics." The Informal Guidance misapplies the Commission's own definition by replacing the "and" with an "or" and suggests that "base station" can mean "a structure that currently

[1] Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, including Commercial Mobile Services, Fifteenth Report 26 FCC Rcd. 9664, 9841, at para. 308 [note: the correct page reference is 9841; the number is incorrectly transposed to "9481" in the Informal Guidance].

supports or houses an antenna, transceiver, or other associated equipment that constitutes part of a base station." With all due respect, a piece of a base station is not itself a base station. A mere equipment or power supply box, for example, is not in and of itself a base station, nor is a structure that supports or houses such boxes. A base station by the Commission's own definition is a set of equipment components that collectively provides a system for transmission and reception of personal wireless services. Any interpretation or application of Section 6409 should reflect that factual description.

The Informal Guidance also suggests that the term "base station" in Section 6409 includes relatively small, as well as larger, wireless facilities. The IAC notes that even if that is a correct interpretation it should be remembered that the Congressional intent in this section was with respect to state, local and tribal *land use regulation* and that the section does not evince an intent to abrogate signed contractual agreements between state, local and tribal governments acting in their capacities as property owners. Where, for example, a county government, as landlord rather than as land use regulator, has by contract or lease chosen, in its discretion, to authorize the installation of an antenna on a county courthouse rooftop of certain exact dimensions and specifications, Section 6409 does not require the county, acting in its capacity as landlord rather than its capacity as regulator of private land use, to allow the tenant to exceed to any extent those mutually and contractually agreed-upon exact dimensions and specifications. Any action by the Commission to treat formally the matters raised in Section 6409 and in the Informal Guidance should clarify that restrictions on state, local and tribal authority arising from Section 6409 apply in a land use regulation context and do not apply to state, local and tribal governments acting in a proprietary or contractual role.

ISSUE #3: GUIDANCE RELATED TO STATE, LOCAL AND TRIBAL GOVERNMENT RIGHTS

Lastly, the IAC believes that the suggestion in the Informal Guidance that state, local and tribal governments retain the right under Section 6409 to require the filing of an application with respect to an eligible facilities request is correct so far as it goes. However, meaningful guidance on this point should also make clear that such applications are not mere pro forma paperwork but rather reflect the role of the applicable state, local or tribal government as the threshold decision-maker on the questions of whether the requested modification constitutes an "eligible facilities request" and whether it would or would not "substantially change the physical dimensions" of the applicable tower or base station. If an applicant believes that the threshold decision-maker has exceeded its authority as to such determinations then there should be recourse to the appropriate forum for review.

RECOMMENDATIONS

To summarize, the IAC recommends that in any formal, binding actions that seek to cover the issues raised by Section 6409, as noted above, the Commission assure that (1) the misinterpretation of Section 6409(a)(1) in the Informal Guidance is corrected, (2) any definition of "base station" accurately incorporates the collective equipment concept reflected in the definition of "base station" in the Annual Report, (3) the scope of Section 6409 is properly understood as affecting state, local and tribal land use regulation and not proprietary or

contractual activity, and (4) state, local and tribal land use authorities are properly recognized as the threshold decisions-makers with respect to whether the standards for Section 6409's applicability are met in particular cases.

The IAC also recommends that in the future the Commission direct the Wireless Telecommunications Bureau, and other bureaus and offices of the Commission to consult with the IAC in advance of issuing outreach communications, such as the Informal Guidance, and other notices, announcements and initiatives that have direct relevance to the work of the IAC and the authority of state, local and tribal governments. Such advance consultation may help to avoid the kinds of issues that are raised by the Informal Guidance, as discussed above. Indeed, the IAC exists to offer the Commission and its staff timely and pre-decisional guidance and expertise on the perspectives and the legitimate interests of state, local, and tribal governments.

Approved on this 31st day of July, 2013.

INTERGOVERNMENTAL ADVISORY COMMITTEE

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Joyce Dickerson, Chair