INTERGOVERNMENTAL ADVISORY COMMITTEE

TO THE

FEDERAL COMMUNICATIONS COMMISSION

ADVISORY RECOMMENDATION NUMBER 2013 - 13

Response to Notice of Proposed Rulemaking
Adopted and Released September 26, 2013

In the Matter of:

Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies (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)); and

2012 Biennial Review of Telecommunications Regulations (WT Docket No. 13-32)

I. INTRODUCTION AND SUMMARY

The Intergovernmental Advisory Committee ("IAC") to the Federal Communications Commissions ("Commission") makes this Advisory Recommendation in connection with WT Docket No. 13-238. The IAC appreciates that the Commission has recognized that any action it takes must ensure that "infrastructure is deployed in a manner that appropriately protects the Nation's environmental and historic resources, and that is consistent with local community

needs, interests, and values."[1] Our concern is that the questions asked in the NPRM might result in federal requirements that lead to the opposite result. The IAC makes seven (7) specific recommendations to the Commission in this Docket:

1. The Commission's primary efforts should be focused on working with government and industry to collaborate on best practices and education regarding deployment of wireless communications facilities in a manner that meets the legitimate needs and interests of all parties and all Americans.

2. Where the Commission needs to adopt specific rules to clarify the intent of Congress, 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.

3. The Commission should confirm its initial proposal to adopt (NPRM, Para. 129) the IAC's earlier recommendation that 6409(a) is properly construed only to apply to zoning and similar land use regulation decisions regarding use of private property, and is not applicable to actions of state, local and tribal governments with respect to their own property, when such governments are acting as landlord or otherwise in a proprietary rather than regulatory capacity.

4. The Commission should not adopt any rules that waive or minimize the application of environmental or historic preservation laws on the siting of wireless communications facilities.

5. Any challenges to local government action, claiming a violation of Commission rules, should be addressed in local state courts and local federal courts. Localities should not be required to incur the expense of retaining legal counsel in Washington, D.C. and traveling long distances to defend local zoning actions.

6. With the limited exception of making any definitional rules applicable to the Commission's "shot clock" decision in WC Docket No. 11-59, the Commission should refrain from revisiting and expanding its findings and rules adopted in connection with that Docket.

7. The Commission should respect and heed the advice of government commenters in this Docket regarding the Tenth Amendment to the United States Constitution and the role of federalism in connection with this proceeding.

The IAC's current two-year authorization expires on December 2, 2013, and while the Commission has issued a Public Notice to reauthorize the IAC for another two-year term and to seek applications to a new IAC[2], the new IAC will not be appointed and be able to meet until, at the earliest, some time in the second quarter of 2014. Indeed, this Advisory Recommendation is

[1] *In re Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, et al.*, Notice of Proposed Rulemaking, FCC 13-122, WT Dkt. No. 13-238, WC Dkt. No. 11-59, RM-11688 (terminated), WT Dkt. 13-32, (rel. Sept. 26, 2013), at para. 3 ("NPRM").
[2] FCC Public Notice, DA 13-2086 (rel. Oct. 29, 2013).

being made before the Notice of Proposed Rulemaking for this Docket is even published in the Federal Register. The present IAC will not have an opportunity to review the Comments and Reply Comments to be filed in this Docket, and to follow up with additional advice and recommendations to the Commission based on such a review. Therefore, the IAC strongly encourages the Commission to move promptly in appointing a new IAC, and to refrain from taking any final action in connection with this Docket until a new IAC is authorized, meets and has an opportunity to review the content of this Docket and give its advice to the Commission based upon that additional information.

II. RECOMMENDATIONS

1. Continue collaborative efforts. In the NPRM, the Commission asks whether it should refrain from adopting rules at this time and specifically, whether the Commission should focus on collaborative efforts promoting deployment of wireless communications facilities.[3] Except as described below, the Commission's primary focus should be to continue its efforts at collaboration. The IAC has participated with the Commission in two public presentations involving industry and government, seeking to identify best practices, and educate all involved parties on how wireless facilities can best be deployed in a manner that meets the legitimate needs and interests of all parties.[4] The Commission has also supported the IAC's role in beginning the process for updating *A Local Government Official's Guide to Transmitting Antenna RF Emission Safety: Rules, Procedures, and Practical Guidance*.[5] The IAC hopes that the Commission Staff and the new IAC will continue and complete this work. Further, the Commission has encouraged national associations representing government and industry to meet and work amongst themselves to develop best practices to assist in educating their respective members about these issues. At present, and in part due to the Commission's encouragement, certain national associations representing local government and PCIA - the Wireless Infrastructure Association- have been meeting for these very purposes.[6]

The Commission should continue with its primary focus of bringing the parties together and collaborating on issues of mutual concern for a few reasons. First, as the evidence disclosed in response to the FCC's Notice of Inquiry in WC Docket No. 11-59 indicates, and as reported previously by representatives of the Wireless Bureau to the IAC, there is no broad-based, national problem that merits a one-size fits all rule from the Commission dictating local land use practices.[7] Unlike the late 1990s when there was an effort to avoid construction of new communications facilities in some communities, state, local and tribal governments today understand the importance of deploying networks to make 21st century broadband services available throughout our communities. Second, and as important, it is in the best interests of all parties, including the Commission, that the interested associations work together as much as

[3] NPRM at para. 98.
[4] FCC Public Notice, DA 12 – 13, Small Cell Technology and DAS Workshop on February 1, 2012; FCC Public Notice, DA 12 – 584, Collocation Workshop on May 1, 2012.
[5] See, http://transition.fcc.gov/statelocal/Local-Govt-Officials-Guide-Transmitting-Antenna-RF-Emission-Safety.pdf.
[6] NRPM, at para. 98, n. 217.
[7] 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, *Notice of Inquiry*, 26 FCC Rcd 5384 (2011) ("*NOI*").

reasonably possible. If the Commission displays a willingness to circumvent these voluntary efforts and preempt traditional areas of local land use authority, especially based upon a record as developed in the NOI which demonstrated no such need, the message from the Commission will be that collaborative efforts between the parties are an ineffective use of their time, and that despite these efforts, the Commission stands ready, willing and able to step in and render these collaborative efforts for naught. This is exactly the opposite of the message the Commission should be sending to the parties.

2. Any rules adopted by the Commission should be tailored as narrowly as possible. In our Advisory Recommendation No. 9, dated July 31, 2013, the IAC recognized that some definitional terms in connection with Section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012 needed to be clarified.[8] Given the limited time that the IAC has had to prepare this Advisory Recommendation, and the impending expiration of the IAC's authorization, this Advisory Recommendation will not be able to detail every issue with every definition that can potentially flow from the Commission's NPRM. We will, however, make a general recommendation of an interpretative approach for the Commission to take in understanding Section 6409, and then address the key terms from Section 6409 that need clarification, namely "wireless towers," "base station," "substantial change in physical dimensions" and "collocation."

As a fundamental matter, the IAC recommends generally that the Commission recognize that 6409(a) is in essence a statement by Congress that a collocation with, or modification of, an existing lawful wireless installation may not be, merely in and of itself, the basis for a local government denial of a request to perform an installation or other work; that there must be more than a *de minimis* effect on some legitimate local value (esthetics, safety, etc.) if a denial of a collocation or modification is to be enforceable. But conversely, if there is indeed more than a *de minimis* effect on safety, esthetics, etc. resulting from a proposed modification or collocation, then, once that threshold is met, the normal standards and procedures for wireless construction and installation must be applicable.[9] Exactly the same values and issues (to no lesser a degree and to no greater a degree) that arise with respect to evaluating the initial installation of a wireless facility also arise with respect to a collocation with or a modification of a wireless installation. The IAC recommends that definitional and other issues that may arise be evaluated in the context of this essential understanding: that there is no policy or rational basis to distinguish the substantive standards or procedural steps that are applicable to a public review of a proposed collocation or modification once a threshold is met that more than *de minimis* safety, esthetic or other legitimate public interests are implicated by the collocation or modification.

The Commission states that it does not intend to adopt rules that would have the effect of making it the "national zoning board."[10] Yet based upon the broad range of questions the NPRM asks regarding these terms, it appears that the Commission is indeed considering a level of involvement that would in effect make it the national zoning board. The IAC strongly recommends that the Commission resist the temptation to redound to itself land use and safety

[8] IAC Advisory Recommendation No. 2013- 9 (July 31, 2013).
[9] The Commission itself cites a "more than *de minimis*" standard as useful in this context in Paragraph 47 of the NPRM.
[10] NPRM, at para. 99.

determinations that can only be well adjudicated at a local level. The Commission by its nature is focused on communications issues and its priorities are inherently focused on the needs of providers and consumers of communications services. But it is the essence of local land use and safety regulation that a balance must be struck between communications-based priorities and other important public priorities on which the Commission has no special expertise; indeed, given that such priorities may in these matters require evaluation of uniquely local conditions the Commission may be particularly unqualified to make such evaluations. The IAC recommends that wherever any doubt exists as to whether the Commission or its staff should exert substantive or procedural authority over individual land use, regulatory and safety decisions, the Commission should refrain from doing so, and defer to the authority of the applicable local bodies and authorities, subject to review by courts with local jurisdiction.

Congress directed that Section 6409 and its mandatory collocation requirements apply to "wireless towers." The Commission must define this term in a way that makes clear that a wireless tower is a structure built *for the primary purpose* of attaching antennas and other ancillary wireless communications facilities. A tower is not *any* structure that has the capability of hosting antennas and other wireless communications facilities. It is not an office building, it is not a church steeple, and it is not a water tank. Indeed, if any structure capable of hosting an antenna was defined by the Commission as a wireless tower, then a single family home in a residential neighborhood would be considered, per Commission fiat, to be a wireless tower, simply because it is capable of having an antenna attached. The Congressional use of the term "wireless towers" does not suggest that the Commission should interpret a Congressional intent to define the term any way other than a vertical tower structure built for the primary purpose of housing wireless communications facilities.

Similarly, the term "base stations" must be interpreted narrowly, as we pointed out in Advisory Recommendation No. 9.[11] Even the Commission itself has previously interpreted this term in a more reasonable manner than it is suggesting through the informal guidance issued on January 25, 2013. The Commission should heed the IAC's advice in Recommendation No. 9.

In Advisory Recommendation No. 9 the IAC also addressed the issue of "substantial change in physical dimensions." Congress said nothing about height. A change in physical dimensions, whether it is height, weight, bulk, or visual impact, must be considered. Any change in physical dimensions that would (1) violate a building or safety code; (2) violate a federal law or regulation such as an environmental law, historic preservation law, FCC RF emissions standards, FAA requirements, etc.; or (3) violate the conditions of approval under which the site construction was initially authorized, should be considered a substantial change in the physical dimensions. If the Commission defines a substantial change more broadly, it needs to carefully consider what will likely be the unintended consequences of its actions. Local governments nationwide will henceforth refuse to approve applications for new facilities, knowing that future proposed changes that the local government would ordinarily consider substantial, and would indeed subject any other land use to a variety of federal, state and local legal requirements, will be mandatorily approved per FCC rule. Given that future applications for new facilities, if approved, would require compliance with FCC rules mandating collocation even if the collocation violated local codes, FCC or FAA regulations, federal or state environmental or

[11] *Supra*, n. 8.

historic preservation laws, or conditions imposed on the original site approval, very few new facilities will ever be approved. This is not the message that the Commission wants to send to local governments nationwide.

The Commission describes the term "collocation" as "the mounting or installation of an antenna on an existing tower, building or structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes."[12] The NPRM asks if the Commission should consider collocation to be an application to place an antenna on any existing structure (i.e., wireless tower) that is capable of holding these facilities, even if none have been previously approved or installed.[13] Here again, we caution the Commission to avoid erroneous assumptions. Collocation must mean that a wireless tower site or base station has not only been approved for the attachment of wireless communications facilities, but that such facilities already exist at that location, and the new application is to *collocate* additional facilities on that site.

Based upon the way the Commission has asked its questions in the NPRM, the possibility exists that the Commission will adopt federal rules that consider a single family detached home to be a wireless tower, and an application to place the first antenna on the roof of that home to be a collocation for which Congress has mandated approval, despite the fact that it may be specifically prohibited by local zoning laws. If the Commission truly intends not to become the national zoning board, it must make any definitional interpretations as narrow, straightforward and common sense-based as possible. Indeed, even asking the questions that could lead to these broad, sweeping categorizations, signals to the public that the Commission is giving serious consideration to whether to adopt the kinds of rules that will make it a *de facto* national zoning board.

The IAC also notes that the Commission has asked whether Section 6409(a) permits limitations on which officials may review an application.[14] The NPRM further asks whether the Commission should direct whether administrative staff as opposed to an elected board should review all applications. The IAC cannot overstate how inappropriate it would be from a legal, Constitutional sense, as well as from a policy standpoint, for a federal agency to dictate to every state, local and tribal government in this nation who the appropriate people are within each jurisdiction to review land use applications. To be sure, most land use applications are reviewed for completeness by a jurisdiction's administrative staff. Still, it would be contrary to principles of federalism for a federal agency to dictate to every state, local and tribal government who in these jurisdictions must review certain land use applications for completeness. *Nothing* in Section 6409 suggests that Congress intended a federal mandate for who in each jurisdiction has authority to review an application. Consistent with our recommendation that the Commission should only adopt narrow rules defining key terms in Section 6409, the IAC recommends that the Commission not involve itself in determining which state, local and tribal officials are authorized to review collocation applications, and which officials are precluded from doing so. As we noted

[12] NPRM, at para. 113.
[13] NPRM, at para. 111. ("Does 'existing' require only that the structure be previously constructed at the time of the collocation application, or does this term also require that the structure be used at that time as a tower or base station?")
[14] NPRM, at para. 132.

in Advisory Recommendation 9, the initial decision regarding an application should be made by the governmental entity to which the application is made.[15]

3. Adopt IAC's previous recommendation. As the IAC previously recommended,[16] 6409(a) is properly construed only to apply to state, local and tribal government action in the zoning and land use regulation context, where state, local or tribal government limits the use of private property for reasons arising from state, local and tribal police power authority. Section 6409(a) cannot reasonably be construed to be applicable to actions of state, local and tribal governments acting in a proprietary capacity, to restrain proprietary decisions as to how public property can or should be used and the terms and conditions of such use. Congress and the Commission have not attempted to mandate that proprietary rights give way to forced occupancy by wireless facilities either with respect to private or public property. Neither Congress nor the Commission has sought to require land owners (public or private) to include cellphone towers or base stations on their property, or to require land owners to allow modifications to facilities landlords have previously chosen to allow. The initial assumption of both Sec.332(c)(7)(B) and Sec. 6409 is that any limitations on local authority are only applicable in a context in which a land owner as an initial matter has chosen to allow an installation (or collocation or modification) and the remaining issue is whether local land use regulation is going to prevent the land owner from proceeding with the installation it has chosen to allow as a proprietary matter.

The IAC recommends that the Commission follow through on its proposal to adopt the IAC's earlier recommendation on this issue.[17] In the NPRM, the Commission asked for comment on how to draw the line between regulatory and proprietary action for this purpose. The IAC recommends that the line can be drawn relatively easily by a principle that provides that if the entity that lawfully controls the proprietary authority regarding who may occupy a parcel of land and on what terms is a private, non-governmental entity, then any government restrictions on such occupancy would be treated as regulatory for this purpose, otherwise the government itself would be exercising propriety authority and federal law limits on the scope of regulatory authority would be inapplicable. The Commission also asks in the NPRM whether Section 6409(a) would "impose no limits" on a government landlord's ability to refuse or delay action on a collocation request. The IAC recommends that the proper response, consistent with the above analysis is that indeed Section 6409(a) imposes no such limits and does not empower the Commission to impose such limits, any more than it limits or authorizes the Commission to impose limits on a private landlord's decision to refuse or delay action on a collocation request affecting the private landlord's property.

4. Do not adopt any rules that waive or minimize the application of environmental or historic preservation laws. Many local governments, under auspices of state legislation, have created historic districts or districts respecting special environmental aspects. Within these districts, local governments, at the behest of their citizens, have created rules and procedures for original construction and modification of existing structures so that local boards review applications to ensure both public safety of the proposed construction and its appropriateness to the other structures or features of the district. For example, a community with an historically

[15] *Supra*, n. 8.
[16] *Id.*
[17] *Id.*

significant neighborhood with Civil War-era homes and brick streets may require new construction to retain that era's ambiance by limiting height. A 20-story high rise apartment would presumably detract from such a neighborhood's historic value. Communication towers that are "camouflaged" as trees might be accepted in balancing the community's needs for modern communications capabilities with its historic preservation efforts. Such preservation efforts often include specific recognition of tourist spending that could be lost if the historic "look" of the neighborhood is violated.

Similarly, communities develop wildlife preservation areas, recognize the sanctity of Native American burial grounds, and recognize other unique geologic, geographic, historic, natural areas with value to the local community and beyond. Local decisions concerning the siting and upgrading of communications towers seek to balance the community's need for modern communications capabilities and protection of the unique attributes of the community.

Any efforts to transfer those evaluations from the local, state, or tribal communities to the FCC will result in significant loss of community values at the local level, overwhelm the FCC's staff with appeals by local communities, and subject the Commission to increased Congressional accusations of being insensitive to elected officials' constituents.

5. Challenges to local action should be made in local state and federal courts. The Commission should not address remedies for violations of any rules that might be adopted. First, if the Commission pursues the IAC recommendations, the rules adopted will be limited in scope and focus primarily on definitional terms. Regardless, however, of the scope of the rules adopted, local zoning jurisdictions that are challenged in connection with their actions taken in local zoning matters should be permitted to defend themselves in local courts. Unlike the wireless industry, which regularly funds attorneys to pursue its interests at the Commission, local governments operate in a more limited geographical sphere. Generally, only the largest cities and counties retain Washington, D.C. legal counsel. Smaller communities and any sized community facing financial challenges will be less likely to defend themselves against threats of a legal challenge if they know that they will be forced to incur the costs of engaging special counsel and traveling to Washington, D.C. to participate in a forum in which most have no experience working. Here again, if the Commission is honest in its intent not to become the national zoning board, then it will respect local governments' rights to defend their land use decisions in local courts (or federal courts located in close proximity) and not force all disputes related to these local land use matters to be heard by an administrative agency in Washington, D.C.

6. Refrain from revisiting and expanding the Commission's findings and rules adopted in connection with the "Shot Clock" Docket. The IAC appreciates the Commission's stated intention that it does not intend to "revisit any aspect of our 2009 Declaratory Ruling."[18] To the extent that the Commission adopts reasonably narrow definitions as recommended by the IAC, the IAC does not object to those definitions being extended to rules interpreting 47 U.S.C. Sec. 332(c)(7). However, the Commission need not dictate to localities when an application is complete. Most local governments have specific application requirements outlined in local codes or regulations. If an applicant believes that local rules are not clear, or a locality is not

[18] NPRM, at para. 152.

following its rules, it has a remedy in local court. Further, the IAC is concerned with how the Commission can assure the public that it has no intention of revising "any aspect" of the 2009 Declaratory Ruling, yet in the same proceeding, reopen the idea of imposing a "deemed granted" remedy to any application where a local government may violate the shot clock.[19] In the 2009 Declaratory Ruling the Commission considered, and explicitly rejected, the imposition of a "deemed granted" remedy. The IAC recommends that the Commission make clear that its statement that it will not revisit any aspect of the 2009 Declaratory Ruling means that it will *not* be considering an imposition of a "deemed granted" remedy.

7. The Tenth Amendment to the United States Constitution and principles of federalism significantly limit any action that the Commission may take. The IAC also appreciates that the Commission has noted in multiple sections of the NPRM that the Tenth Amendment and principles of federalism may impact how it can act in this proceeding.[20] The IAC shares these concerns. Given the limited period of time in which the IAC has to provide these Recommendations, it is premature to weigh in on the Constitutional implications of the individual questions the Commission has raised in the NPRM. However, the IAC is aware that national local government organizations like NATOA, National League of Cities and the National Association of Counties, and independent local government entities, will be analyzing these issues in their Comments, and will advocate that the Tenth Amendment and principles of federalism dictate that the Commission should not be involved in adopting rules that govern the local zoning process in the manner contemplated in the NPRM. The IAC urges the Commission to heed the advice to be provided in those Comments.

III. CONCLUSION

The IAC appreciates the opportunity to comment on this matter, albeit briefly because of the conclusion of our term of office. We encourage the Commission to consider our comments and recommendations in the context of these questions: a) Are the problems that the telecommunications industry purports to exist as a result of alleged state, local and tribal government obstruction so pervasive that the Commission must act to preserve and enhance the deployment of next generation telecommunications services? b) If the Commission grants the relief requested by some members of the telecommunications industry, will the Commission and its staff be overwhelmed by the number of appeals brought before it? and c) What is an appropriate balance of federal and non-federal responsibilities under the Tenth Amendment of the U.S. Constitution?

All public officials strive to balance policy and technological progress with achieving community support, affordability, reasonable alternatives, and potential consequences of action/inaction. We request the Commission to consider what venue is most capable of balancing the telecommunications needs of a community and other public objectives.

Approved on this 2nd day of December, 2013.

INTERGOVERNMENTAL ADVISORY COMMITTEE

[19] NPRM, at para. 161.
[20] NPRM, at paras. 99, 125, 132, and 138.

Joyce Dickerson, Chair