No. 20-71765 (and consolidated cases Nos. 20-72734 and 20-72749)

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LEAGUE OF CALIFORNIA CITIES, *et. al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

On Petitions for Review of an Order of the Federal Communications Commission

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INTRODUCTION

Wireless communications depend on a network of antennas and equipment placed on structures including towers, buildings, and utility poles. Local governments often use their zoning and land use authority to delay or block the installation of such equipment because of perceived aesthetic and other impacts. Congress has long sought to "reduc[e] the impediments imposed by local governments upon the installation of facilities for wireless communications." *City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 115 (2005).

In keeping with that congressional goal, Section 6409(a) of the Spectrum Act requires local governments to approve requests to "collocate," or add, new equipment onto existing wireless towers and other support structures where such requests do not "substantially change the physical dimensions" of those structures. 47 U.S.C. § 1455(a)(1). Such collocations are generally less expensive and intrusive than installing new structures.

The Federal Communications Commission ("FCC" or the "Commission") promulgated rules in 2014 to define which modifications constitute a "substantial[] change," and are accordingly exempt from Section 6409(a)'s mandatory approval. The rules establish size-related

criteria for changes in physical dimensions, and also provide that modifications are "substantial" if they would violate certain conditions the locality had previously imposed. 47 C.F.R. § 1.6100(b)(7)(i)-(vi). The rules also set a 60-day timeframe ("shot clock") for localities to determine whether a proposed modification is exempt from automatic approval under Section 6409(a) because it would constitute a "substantial" change in the physical dimensions of a wireless structure. 47 C.F.R. § 1.6100(c)(2).

The record in this proceeding showed that many localities narrowly interpreted these rules to maintain control over wireless deployment in the face of Section 6409(a)'s mandatory approval requirement. Some localities went so far as to interpret the provisions governing locally imposed conditions to mean that virtually any change to an existing facility is "substantial," and thereby exempt from mandatory approval under Section 6409(a).

In the ruling under review, the Commission clarified several of its rules governing what constitutes a substantial change, as well as the point at which the 60-day shot clock starts to run. It grounded these interpretations in the text, drafting history, and the Commission's contemporaneous explanation of the rules. In disputing these

interpretations, Petitioners and Intervenors (collectively, "the Localities") advance readings that are contrary to the language of the rules, and assert expansive local authority that is inconsistent with Section 6409(a). The petitions for review should be denied.

JURISDICTIONAL STATEMENT

Respondents agree with the Jurisdictional Statements in Petitioners' and Intervenors' briefs.

STATEMENT OF THE ISSUES

1. Are any of the FCC's interpretations legislative rules that required notice and comment?

2. Did the FCC reasonably interpret the phrase "submits a request" in its shot clock rule to mean taking the first step in a locality's Section 6409(a) review process and submitting documentation that a proposed modification qualifies for Section 6409(a) treatment?

3. Did the FCC reasonably interpret the word "separation" in the rule governing height to mean the space between two antennas?

4. Did the FCC reasonably interpret the provision that a change is substantial if "it involves installation" of "new equipment cabinets," "not to exceed four" as setting a per-modification limit, rather than a cumulative limit?

5. Did the FCC reasonably interpret the term "concealment elements" to mean elements that disguise a facility by making it look like something other than a wireless facility?

6. Is the FCC's interpretation of the terms "concealment elements" and "conditions" as applying to only those elements and conditions for which there exists "express evidence" a retroactive rule?

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in the statutory addendum bound with this brief.

STATEMENT OF THE CASE

A. Statutory Background

In order to "encourage the growth of a robust national telecommunications network," *Montgomery Cty., Md. v. FCC*, 811 F.3d 121, 124-25 (4th Cir. 2015), Congress passed the Spectrum Act, which made new radiofrequency spectrum available for commercial use, and established a nationwide public safety wireless broadband network. *See* Title VI of the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156, 201-255 (2012).

Section 6409(a) of the Spectrum Act preempts local review of certain modifications to existing wireless facilities. It provides:

> "a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station."

47 U.S.C. § 1455(a)(1). An "eligible facilities request" includes "any request for modification of an existing wireless tower or base station that involves . . . collocation of new transmission equipment." *Id.* § 1455(a)(2)(A).

B. The 2014 Rules

The Commission adopted rules implementing Section 6409(a) (the "rules") in 2014. *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 29 FCC Rcd 12865 (2014) ("*2014 Order*"). The rules are codified at 47 C.F.R. § 1.6100. The *2014 Order* recognized that collocating equipment on existing facilities is "often the most efficient and economical solution" for wireless providers to "support surging demand" for wireless infrastructure. *2014 Order*, 29 FCC Rcd at 12866, 12925, ¶¶ 2, 142. It also recognized that eliminating "expensive, cumbersome, and time-consuming" local review processes for collocation proposals "advance[s] Congress's goal of facilitating rapid deployment." *2014 Order*, 29 FCC Rcd at 12869, 12872 ¶¶ 9, 15.

1. Substantial Changes

The rules establish criteria for assessing whether a modification is exempt from automatic approval under Section 6409(a) because it "substantially change[s] the physical dimensions of [a] tower or base station." *2014 Order*, 29 FCC Rcd at 12944 ¶ 188 (quoting 47 U.S.C. § 1455(a)(1)).[1] To avoid "lengthy review processes that conflict with Congress' intent," the Commission rejected the "contextual" approach favored by municipal commenters in favor of a test "defined by specific, objective factors." *Id.* at 12945 ¶ 189.

The Commission's criteria incorporated a version of a test it had developed for measuring whether a collocation will cause a "substantial increase in size" to a tower for purposes of determining whether review is required under federal environmental and historic preservation laws. *2014 Order*, 29 FCC Rcd at 12945 ¶ 190; *see also id.*, 29 FCC Rcd at 12899-12900 ¶¶ 70-74; *see* Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, 47 C.F.R. Part 1, App. B (Mar. 16, 2001) ("Collocation Agreement") (SER-187). However, it "modif[ied] and

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[1] A "tower" is a structure designed to support wireless communications equipment; a "base station" includes any "structure that currently supports" such equipment. *2014 Order*, 29 FCC Rcd at 12935-12937 ¶¶ 167-172.

supplement[ed]" the test from the Collocation Agreement by adding two provisions preserving certain local siting requirements, and by addressing collocations on structures other than traditional towers (such as buildings). *2014 Order*, 29 FCC Rcd at 12945-12950 ¶¶ 190-200.

Height Increases. The criteria govern substantial changes in height for towers outside of the public right-of-way—which are usually located on private land, often in relatively remote locations, and can be hundreds of feet tall—and for other support structures, such as buildings or poles placed along roadways in the right-of-way. *2014 Order*, 29 FCC Rcd at 12946-12948 ¶¶ 192-195. For towers outside the right-of-way, a change in height is "substantial" if it increases the height 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. 47 C.F.R. § 1.6100(b)(7)(i). For other structures, height increases are substantial if they exceed the greater of "10% or more than ten feet." *Id.*

The increase in height is generally measured from a baseline of "the dimensions of the tower or base station, inclusive of originally approved appurtenances and any modifications that were approved

prior to the passage of the Spectrum Act." 47 C.F.R. § 1.6100(b)(7)(i). Any antenna replacement would be measured by reference to that baseline and not from the "last approved change." *2014 Order*, 29 FCC Rcd at 12948 ¶ 197. "[O]therwise," the Commission explained, "a series of permissible small changes could result in an overall change that significantly exceeds" the adopted standards. *Id.* ¶ 196.

Equipment cabinets. The Commission also determined that a modification is substantial if "it involves installation of more than the standard number of new equipment cabinets for the technology involved, but not to exceed four cabinets." 47 C.F.R. § 1.6100(b)(7)(iii).

"Concealment elements" and other "conditions." The Commission determined that a change is substantial if "it would defeat the concealment elements of the eligible support structure." 47 C.F.R. § 1.6100(b)(7)(v). The Commission explained that "both wireless industry and municipal commenters . . . generally agree that a modification that undermines the concealment elements of a stealth wireless facility, such as painting to match the supporting facade or artificial tree branches, should be considered substantial." *2014 Order*, 29 FCC Rcd at 12949-12950 ¶ 200. The Commission agreed 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)." *Id.*

"Commenters differ[ed]," however, on "whether any other conditions previously placed on a wireless tower or base station should be considered in determining substantial change." *Id.* The Commission concluded that violations of other local conditions are a substantial change, "unless the non-compliance is due to an increase in height, increase in width, addition of cabinets, or new excavation that does not exceed the corresponding 'substantial change' thresholds" in Sections 1.6100(b)(7)(i)-(iv). *2014 Order*, 29 FCC Rcd at 12950 ¶ 200; *see* 47 C.F.R. § 1.6100(b)(7)(vi).[2] The Commission did not define "conditions," but it gave the examples "fencing, access to the site, drainage, [or] height or width increases that exceed the thresholds." *2014 Order*, 29 FCC Rcd at 12950 ¶ 200.

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[2] The rules were originally numbered as 47 C.F.R. § 1.40001, and have subsequently been renumbered. *See* 83 Fed. Reg. 51886 (Oct. 15, 2018).

2. The "Shot Clock"

Section 6409(a) does not establish a time frame within which the locality must determine whether a modification is an "eligible facilities request" that the locality "shall approve." 47 U.S.C. § 1455(a)(1). In response to evidence of delay, the Commission explained that "approval within a reasonable period of time" is "implicit in the statutory requirement" of mandatory approval. *2014 Order*, 29 FCC Rcd at 12955 ¶ 212. Otherwise, a locality "could evade its statutory obligation to approve covered applications by simply failing to act on them," or "impose lengthy and onerous processes not justified by the limited scope of review contemplated by the provision." *Id.*

The rules therefore provide that "[w]ithin 60 days of the date on which an applicant submits a request seeking approval under [the rules implementing Section 6409(a)], the State or local government shall approve the application unless it determines that the application is not covered." 47 C.F.R. § 1.6100(c)(2). Localities may require "the applicant to provide documentation or information only to the extent reasonably related to determining whether the request meets the requirements of [the rules implementing Section 6409(a)]." 47 C.F.R. § 1.6100(c)(1). "The 60-day period begins to run when the application is

filed, and may be tolled" by mutual agreement or if the application is incomplete, 47 C.F.R. § 1.6100(c)(3), but only as to "documents that are reasonably related to determining whether the request meets the requirements of Section 6409(a)." *2014 Order*, 29 FCC Rcd at 12957 ¶ 217.

3. Public Health And Safety

The Commission also determined that localities "may require a covered request to comply with generally applicable building, structural, electrical, and safety codes or with other laws codifying objective standards reasonably related to health and safety." *2014 Order*, 29 FCC Rcd at 12951 ¶ 202.

C. Montgomery County v. FCC

A number of localities filed suit challenging the rules. The U.S. Court of Appeals for the Fourth Circuit rejected those challenges in *Montgomery County v. FCC*, 811 F.3d 121, 124 (4th Cir. 2015). The court explained that there was "no question" that the statutory term "substantially change" was ambiguous, and that the Commission's objective criteria are reasonable in light of "underlying Congressional concern that municipal permit review processes were hindering efforts to expand wireless networks." *Id.* at 124-125.

The Court also rebuffed the localities' argument that they must be allowed to conduct a contextual, "case-by-case" inquiry into "whether the proposal would represent a 'substantial' modification." *Id.* at 130-131. The court explained that the localities' argument "takes issue with the fact that the Spectrum Act displaces discretionary municipal control over certain facility modification requests," even though that result is "exactly what Congress intended." *Id.* The Fourth Circuit concluded that by limiting "protracted review," the Commission's criteria are "entirely consistent with this purpose." *Id.*

The court also rejected the argument that the Commission erred by extending Section 6409(a) treatment to "facilities that localities initially approved only on the condition that the facility not be modified in the future." *Id.* at 132. The court concluded that the Commission's approach of reviewing applications based on the substantial change criteria, "regardless of the circumstances under which a provider obtained permission to build a facility," is "faithful to the text of Section 6409(a), which does not contain any exemptions for facilities that exist on condition of non-modification." *Id.*

D. Proceedings Below

In 2019, two wireless industry groups filed a request with the FCC for a declaratory ruling to address "areas of uncertainty and inconsistent application" of the rules. CTIA, Petition for Declaratory Ruling at i, WT Docket Nos. 17-19, 17-84 (Sept. 6, 2019) (SER-111); *see also* Wireless Infrastructure Association (WIA), Petition for Declaratory Ruling at 1, WT Docket No. 17-79 (Aug. 27, 2019) (SER-151). The Commission published notice and sought comment on the two petitions. *Wireless Telecommunications Bureau and Wireline Competition Bureau Seek Comment on WIA Petition for Rulemaking, WIA Petition for Declaratory Ruling, and CTIA Petition for Declaratory Ruling*, Public Notice, WT Docket No. 19-250, 34 FCC Rcd 8099 (Sept. 13, 2019) (2-ER-318). In May 2020, the Commission published on its website the draft declaratory ruling for consideration at the next Commission meeting. WT Docket No. 19-250 (rel. May 19, 2020) (SER-3). Throughout the proceeding, more than 70 local governments submitted more than 650 pages of comments and letters regarding the petitions and the draft ruling. 1-ER-10 n.34.

On June 10, 2020, the Commission issued a declaratory ruling, which sought to clarify the shot clock and substantial change rules in

ways that "ensure fidelity to the language of those rules and the decisions Congress made in Section 6409(a)." Declaratory Ruling and Notice of Proposed Rulemaking, *Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, 35 FCC Rcd. 5977, 5979 ¶ 4 (2020) ("*Declaratory Ruling*") (1-ER-6).

1. Commencement Of The Shot Clock

The rules provide that localities must determine whether a request is covered by Section 6409(a) "[w]ithin 60 days of the date on which an applicant submits a request." 47 C.F.R. § 1.6100(c)(2). The record showed 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 such applications as incomplete unless applicants have complied with time-consuming requirements" such as meeting with neighborhood groups. *Declaratory Ruling* ¶ 15 (1-ER-12).

In the *Declaratory Ruling*, the Commission clarified that an applicant has "submitted a request for approval that triggers the running of the shot clock" when the applicant (1) "takes the first

procedural step that the local jurisdiction requires as part of its applicable regulatory review process under Section 6409(a)," and (2) "submits written documentation showing that a proposed modification is an eligible facilities request." *Declaratory Ruling* ¶ 16 (1-ER-13). The "first step" must be within "the applicant's control" and "objectively verifiable." *Id.* ¶ 18 (1-ER-14). For example, if the first step is a meeting with municipal staff, an applicant satisfies the requirement by requesting a meeting. *Id.*

The Commission explained that its clarification preserves "flexibility to structure [local] processes for review of eligible facilities requests," but prevents localities from "'imposing lengthy and onerous processes not justified by the limited scope of review contemplated'"—i.e., review "to determine whether the proposed modification is an eligible facilities request that must be approved within 60 days." *Declaratory Ruling* ¶ 17 (quoting *2014 Order*, 29 FCC Rcd at 12955 ¶ 212) (1-ER-13).

2. Substantial Changes

Height Increases. The rules provide that for towers outside the public right-of-way,[3] a height increase is 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." 47 C.F.R. § 1.6100(b)(7)(i). The Commission clarified that the phrase "separation from the nearest existing antenna" means the space between the antennas—i.e., "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." *Declaratory Ruling* ¶ 25 (1-ER-17).

The Commission explained that its reading of the rule was based on the "long-established interpretation of the comparable standard" in the Collocation Agreement. *Declaratory Ruling* ¶ 26 (1-ER-17) (citing *Wireless Telecommunications Bureau and Mass Media Bureau Announce the Release of a Fact Sheet Regarding the March 16, 2001 Antenna Collocation Programmatic Agreement,* Public Notice, 17 FCC

[3] The *Declaratory Ruling* does not address towers in the right-of-way or the height of other structures, such as utility poles. *Declaratory Ruling* n.62 (1-ER-16).

Rcd 508 (2002) ("Fact Sheet")). The guidance it cited explained that under the Collocation Agreement, "the tower height could increase by up to 20 feet *plus* the height of a new antenna." *Id.* The Commission rejected the argument that this would "lead to virtually unconstrained increases in the height of such towers," because the baseline provision, 47 C.F.R. § 1.6100(b)(7)(i)(A), "already limit[s] the cumulative increases in height" by measuring any increase from the height of the tower and antennas as originally approved or modified pre-Spectrum Act. *Declaratory Ruling* ¶ 27 (1-ER-18).

Equipment Cabinets. Under the rules, a modification is 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." 47 C.F.R. § 1.6100(b)(7)(iii). In the *Declaratory Ruling*, the Commission clarified that the four-cabinet limit "is measured for each separate eligible facilities request," and is not a cumulative limit. *Declaratory Ruling* ¶ 30 (1-ER-19). The Commission explained that to interpret the four-cabinet limit as cumulative would "run[] counter to the text of section 1.6100(b)(7)(iii), which restricts the number of 'new' cabinets per eligible facilities request." *Id.* It also "ignores the fact that the word 'it' in the rule refers to a 'modification'"

of an eligible support structure. *Id.*; *see* 47 C.F.R. § 1.6100(b)(7), (b)(7)(iii). The *Declaratory Ruling* rejected the argument that "this clarification would permit an applicant to add an unlimited number of new equipment cabinets" because the rule limits each modification to "the standard number of new equipment cabinets for the technology involved." *Id.* ¶ 31 (citing 47 C.F.R. § 1.6100(b)(7)(iii)) (1-ER-20).

The *Declaratory Ruling* also clarified that, consistent with industry usage and the structure of the rules, "equipment cabinets" refers only to "physical containers for smaller, distinct devices," and not to "transmission equipment manufactured with outer protective covers." *Declaratory Ruling* ¶ 29 & n.81 (1-ER-18, 19).

Concealment Elements. The record showed that some localities considered "any attribute that minimizes the visual impact of a facility" to be a "concealment element" under 47 C.F.R. § 1.6100(b)(7)(v). *Declaratory Ruling* ¶¶ 35, 40 (1-ER-21, 24). The Commission rejected this view. It explained that "concealment elements" are the "elements of a stealth-designed facility intended to make the facility look like something other than a wireless tower or base station," such as a chimney or a tree. *Declaratory Ruling* ¶ 34 (1-ER-21). They are "defeated" when a modification "cause[s] a reasonable person to view

the structure's intended stealth design as no longer effective after the modification," *Declaratory Ruling* ¶ 39 (1-ER-23), such as by making a facility that was originally constructed to look like a tree no longer resemble a tree. The Commission explained that its interpretation was consistent with language in the *2014 Order* that "defines 'concealed or 'stealth'-designed' facilities as 'facilities designed to look like some feature other than a wireless tower or base station.'" *Declaratory Ruling* ¶ 34 (quoting *2014 Order*, 29 FCC Rcd at 12950 ¶ 200) (1-ER-21).

The Commission clarified that other "conditions to minimize the visual impact of non-stealth facilities" are "separately address[ed]" as "conditions associated with the siting approval" under Section 1.6100(b)(7)(vi). *Id.* ¶ 35 (1-ER-22). For example, a height increase that makes a wireless facility designed to look like a tree visible above a tree line does not "defeat" concealment under Section 1.6100(b)(7)(v) if the facility continues to look like a tree, even if a local condition limited the facility's height to hide it behind the tree line. *Declaratory Ruling* ¶ 40 (1-ER-24). The Commission explained that the requirement to remain behind the tree line was not a "concealment" element, but rather a

"condition[] associated with the siting approval" covered by Section 1.6100(b)(7)(vi). *Id.*

The *Declaratory Ruling* also addressed concerns that localities were treating "new restrictions that the locality did not previously identify" as "concealment elements." *Declaratory Ruling* ¶ 37 (1-ER-22). It clarified that 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," as demonstrated by "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." *Id.* ¶¶ 36, 38 (1-ER-22, 23).

The Commission rejected the argument that the rule imposes a requirement for "specific words" that 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." *Declaratory Ruling* ¶ 38; *see also id.* ¶ 33 & n.95 (1-ER-23, 21). The Commission explained that the requirement "does not mean that a concealment element must have been explicitly articulated," and that "specific words or formulations are not needed." *Id.* ¶ 38 (1-ER-23).

Conditions associated with the siting approval. Under the Commission's rules, a modification is a substantial increase if it "does not comply with conditions associated with the siting approval of the construction or modification" of the support structure. 47 C.F.R. § 1.6100(b)(7)(i)-(iv). This criterion does not apply, however, to any "modification that is non-compliant only in a manner that would not exceed the thresholds" for height, width, cabinets, and excavation in Sections 1.6100(b)(7)(i)-(iv) (the "numeric criteria"). *Id.*

The record showed that some localities treat "small increases in the size of a structure" as substantial changes "even if the size changes would be within the allowances" set by the numeric criteria. *Declaratory Ruling* ¶ 41 (1-ER-25). The Commission clarified 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)." *Id.* ¶ 42 (1-ER-26). For example, "[i]f 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," but it could "enforce its shrouding condition if the provider reasonably could install a four-foot shroud to cover the new four-foot antenna." *Id.* ¶ 44 (1-ER-26). In contrast, a locality could not enforce a condition requiring a facility to remain hidden behind a tree line, because a provider cannot reasonably replace the existing tree line with one composed of taller trees. *Id.* The Commission explained that this interpretation is consistent with the "commonplace [ ] statutory construction that the specific" rules regarding modifications "govern[ ] the general" ability of a locality to enforce conditions on approval. *Declaratory Ruling* ¶ 42 (1-ER-25).[4]

The Commission also explained that, as with concealment elements, "localities cannot merely assert that a detail or feature of the facility was a condition of the siting approval." *Id.* Rather, "there must

[4] The *Declaratory Ruling* rejected the argument that this interpretation was inconsistent with a statement in the Commission's brief in *Montgomery County*. *Declaratory Ruling* n.130 (1-ER-27). The Commission explained that the brief had not addressed the distinction between "concealment" and other "conditions," and that if there was any discrepancy, the interpretation in the *Declaratory Ruling* controlled, particularly in light of the agency's "extensive subsequent experience." *Id.*

be express evidence that at the time of approval the locality required the feature and conditioned approval upon its continuing existence." *Id.* The Commission explained that this is a "restatement of the basic principle that applicants should have clear notice of what is required by a condition and how long the requirement lasts," but that "show[ing] that the condition existed at the time of the original approval" was sufficient to demonstrate such notice. *Declaratory Ruling* ¶ 42 & n.123 (1-ER-25).

STANDARD OF REVIEW

When faced with an agency's interpretation of its own regulation, the Court "first determine[s] whether the regulation is 'genuinely ambiguous,'" using "all the standard tools of interpretation," including "text, structure, history, and purpose." *Attias v. Crandall*, 968 F.3d 931, 937 (9th Cir. 2020) (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414-15 (2019)). If "uncertainty does not exist" as to the regulation's meaning, it just "means what it means." *Kisor*, 139 S. Ct. at 2415. If the regulation is ambiguous, the Court will defer to the agency's interpretation so long as it "is 'reasonable,' is based on the agency's 'substantive expertise,' 'reflect[s] [the agency's] fair and considered judgment,' and represents 'the agency's authoritative or official

position.'" *Attias*, 968 F.3d at 937 (quoting *Kisor*, 139 S. Ct. at 2415-17). Otherwise, the Court "accord[s] the [Commission's] interpretation a measure of deference" based on its "power to persuade." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

The Administrative Procedure Act's arbitrary-and-capricious standard "requires that agency action be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). The "deferential" standard "simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *Id.*

SUMMARY OF THE ARGUMENT

In the *Declaratory Ruling*, the Commission clarified aspects of its rules implementing the Spectrum Act in a manner that removes uncertainty and carries out Congress's goal of removing impediments that localities have posed to wireless deployment. The *Declaratory Ruling* interprets the existing rules; it does not amend them or adopt new ones. Because the Commission's interpretations are reasonable

readings of its existing rules that embody the agency's fair and considered judgment as to their meaning, they should be upheld.

1. Because each interpretation in the *Declaratory Ruling* is consistent with the rule it interprets, none is a legislative rule. And even if the *Declaratory Ruling* had adopted a legislative rule, any procedural error would be harmless because the Commission issued the *Declaratory Ruling* after notice and comment, and the Localities have not identified any arguments they did not have the opportunity to make in advance of the *Declaratory Ruling*'s adoption. On the merits, the Commission's interpretations of its rules are reasonable and reasonably explained.

2. The Commission reasonably interpreted the phrase "submits a request" in 47 C.F.R. § 1.6100(c)(2), which establishes a 60-day "shot clock" to determine whether a modification is eligible to proceed under Section 6409(a), to mean taking the first step in a locality's process for reviewing applications under Section 6409(a), plus submission of documentation to show that a proposed modification qualifies for such treatment. The tolling provision states that the shot clock begins when the "application is filed." As the Commission recognized, to permit other pre-application procedures to toll the deadline, even though they

might have nothing to do with the determination of whether the application would effectuate a substantial change within the meaning of Section 6409(a), is inconsistent with the text of the rule and would undermine the goals of the shot clock and Congress's purposes in promoting wireless deployment.

3. The Commission reasonably interpreted the phrase "the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet" in the provision governing height increases for towers outside the public right-of-way. 47 C.F.R. § 1.6100(b)(7)(i). "Separation from the nearest existing antenna" means the space between the two antennas; the rule thus sets a limit of one antenna plus twenty feet, and not twenty feet in total. This interpretation is consistent with the plain meaning of "separation," avoids the surplusage that would occur if the twenty feet included the antenna, and is consistent with the rule's history. Given that the Commission interpreted the rule against a backdrop of standard antenna heights of less than ten feet, the rule is neither unascertainable nor inconsistent with Section 6409(a)'s "substantially change" standard.

4. The Commission reasonably interpreted the rule providing that a modification is 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," to set a limit of four cabinets per modification, and not a cumulative limit of four cabinets total. 47 C.F.R. § 1.6100(b)(7)(iii). This interpretation is consistent with the language of the rule and its structure. And because cabinet installations are limited by other aspects of the cabinet rule, other substantial change criteria, and practical considerations, the interpretation does not allow "unlimited" cabinets on a wireless facility.

5. The Commission reasonably distinguished between "concealment elements" that make a wireless facility look like something other than a wireless facility, and all other "conditions associated with the siting approval." 47 C.F.R. § 1.6100(b)(7)(v), (vi). The Commission's interpretation of "concealment elements" to refer only to elements on stealth facilities is consistent with the Commission's explanation in its *2014 Order*, which distinguished "concealment elements of a stealth wireless facility" from other "conditions," including conditions related to height and fencing. By contrast, the Localities' contrary reading, which would interpret the

term "concealment elements" to mean any feature that reduces the visibility of a facility, would effectively nullify the requirement that localities cannot impose "conditions" that are inconsistent with the Commission's size-related substantial change criteria for a significant number—if not the vast majority—of locally imposed conditions.

6. Finally, the Commission reasonably interpreted "concealment elements" and "conditions" to include only those requirements for which "express evidence" exists. This standard clarifies the application of these provisions to future requests for Section 6409(a) treatment, and thus is not retroactive. In any event, the Localities have no legitimate reliance interest in interpreting the rules to allow them to enforce conditions for which there is no demonstrable evidence.

ARGUMENT

I. THE RULE CLARIFICATIONS ARE NOT NEW RULES REQUIRING NOTICE AND COMMENT

In order to resolve "ongoing uncertainty" regarding the application of the Spectrum Act and the Commission's implementing rules "to aspects of State and local government review of modifications to existing wireless equipment," *Declaratory Ruling* ¶ 2 (1-ER-5), the *Declaratory Ruling* clarified several aspects of the rules to "ensure

fidelity to the language of those rules and the decisions Congress made in section 6409(a)" to streamline deployment of wireless facilities, *id.* ¶ 4 (1-ER-6). As we show, each of the Commission's clarifications is reasonable and consistent with the text of the rules, which promote Congress's purpose of removing impediments to the rapid deployment of much-needed wireless infrastructure. None is a new rule.

The Commission properly issued the *Declaratory Ruling* pursuant to its authority to "issue a declaratory ruling terminating a controversy or removing uncertainty." 47 C.F.R. § 1.2; *see Declaratory Ruling* n.46 (1-ER-13). Rule 1.2 derives from Section 554(e) of the APA, and does not require notice and comment. *See Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 397 (9th Cir. 1996) (citing 5 U.S.C. § 554(e)) ("[t]he agency . . . may issue a declaratory order to terminate a controversy or remove uncertainty"); *see also City of Arlington, Tex. v. FCC*, 668 F.3d 229, 240-246 (5th Cir. 2012), *aff'd*, 569 U.S. 290 (2013).

The Commission routinely uses declaratory rulings to clarify unclear statutory and regulatory terms. *See City of Arlington*, 668 F.3d at 235 (declaratory ruling resolved meaning of statutory phrase "a reasonable period of time"); *Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 535 (D.C. Cir. 2007) (declaratory ruling addressed regulatory status of

various kinds of calling cards). And even if declaratory rulings were not generally exempt from notice and comment, the determinations in the *Declaratory Ruling* are at most interpretive rules, *see Gunderson v. Hood*, 268 F.3d 1149, 1154 (9th Cir. 2001), which likewise are not required to be preceded by APA notice and comment. *See* 5 U.S.C. § 553(b)(3)(A), (d)(2).

Petitioners contend that the interpretations are legislative rules because they "amend[ ]" the rules. Brief of Petitioners League of Calif. Cities, *et al*. ("LOCC") 30-32. Not so. An interpretation "amends" a legislative rule "only if it is inconsistent" with that rule. *Erringer v. Thompson*, 371 F.3d 625, 632 (9th Cir. 2004) (citing *Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082, 1088 (9th Cir. 2003)).[5] And as we show, each of the *Declaratory Ruling's* clarifications is reasonable and consistent with the rules.[6]

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[5] The test is not whether the interpretation uses words of command such as "must," as Intervenors erroneously suggest (at 17).

[6] The Commission's interpretations are reasonable constructions of the rules' "text, structure . . . and purpose." *Kisor*, 139 S. Ct. at 2415; *see Attias*, 968 F.3d at 939. But in any event, the "character and context" of the FCC's interpretation of any "genuine ambiguity" in the rules "entitles it to controlling weight." *Kisor*, 139 S. Ct. at 2415-2416. The *Declaratory Ruling* was adopted by the Commission and published in the Federal Register, and so it represents "the agency's 'authoritative'

At points, the *Declaratory Ruling* "supplies crisper and more detailed" lines than the original rules, but this does not transform an interpretation into a legislative rule—"[i]f that were so, no rule could pass as an interpretation of a legislative rule unless it were confined to parroting the rule." *Am. Min. Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993)*; see Amazon.com, Inc. v. Comm'r of Internal Revenue*, 934 F.3d 976, 990 (9th Cir. 2019) ("clearing up what was previously ambiguous" is an interpretation). Courts regularly uphold interpretations that, as here, explain the scope or application of the rules they interpret. *See Lane v. Salazar*, 911 F.3d 942, 949 (9th Cir. 2018) (interpreting "threats" to include statements that were not intended as threatening); *Gunderson*, 268 F.3d at 1154 (interpreting "explosives" to include "ammunition").

None of Petitioners' preferred interpretations establishes that any of the rules had an original meaning at odds with the *Declaratory*

[and] 'official position.'" *Nat'l Lifeline Ass'n v. FCC*, 983 F.3d 498, 511 (D.C. Cir. 2020) (quoting *Kisor*, 139 S. Ct. at 2416). It rests on the Commission's "substantive expertise" in wireless facilities, which does not "fall[] more naturally into a judge's bailiwick." *Goffney v. Becerra*, 995 F.3d 737, 745 (9th Cir. 2021) (quoting *Kisor*, 139 S. Ct. at 2417). And it represents the Commission's "fair and considered" view of the rules. *Kisor*, 139 S. Ct. at 2417.

Ruling. Petitioners' reliance on cases involving interpretations that were contrary to the established or indisputable meaning of the rules they interpreted is therefore beside the point. In *Hemp Industries*, (LOCC 29), the agency interpreted a rule to cover products that the text and history showed were "consciously omitted from the scope of the current regulation." 333 F.3d at 1091. In *National Family Planning & Reproductive Health Association, Inc. v. Sullivan*, (LOCC 35), the agency's interpretation was contrary to "the Supreme Court's accepted interpretation of the clear meaning of the underlying regulation." 979 F.2d 227, 234 (D.C. Cir. 1992). Neither situation is present here.

In any event, even if notice and comment had been required, it was furnished in this case, and therefore any error would have been harmless. The Commission sought comment in the Federal Register on the WIA and CTIA petitions,[7] which asked the Commission to clarify all the terms ultimately addressed in the *Declaratory Ruling*. *Declaratory Ruling* ¶ 9 (1-ER-8); *see, e.g.,* CTIA Petition at 5 (SER-119) (seeking clarification that "the term 'concealment element' . . . applies only to a

[7] *Comment Sought on WIA Petitions for Declaratory Ruling and Rulemaking and CTIA Petition for Declaratory Ruling*, 84 Fed. Reg. 50810, 50810 (Sept. 26, 2019).

stealth facility or design element"); WIA Petition at 17 (SER-167) (seeking clarification on whether the "separation provision" refers to "the antenna plus separation together" or "the separation alone"). More than 70 municipalities filed comments and letters, including on the draft *Declaratory Ruling*. *Declaratory Ruling* n.34 (1-ER-10). Petitioner City of Boston, for example, joined a 33-page comment on the draft *Declaratory Ruling*. 2-ER-121-160.

Moreover, Petitioners (LOCC 46-47) do not "identify a single additional comment that they would have made" if the Commission had proceeded through a rulemaking, *U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 41 (D.C. Cir. 2005), or any issue for which they had "no opportunity to present their evidence," *Sprint Corp. v. FCC*, 315 F.3d 369, 377 (D.C. Cir. 2003). Rather, the Commission addressed "all of the substantive issues" now raised on appeal. *City of Arlington,* 668 F.3d at 244 (any error in proceeding by declaratory ruling held harmless). Under the circumstances, then, no point would be served by affording the Localities a further opportunity for comment.

II. THE COMMISSION REASONABLY INTERPRETED THE SHOT CLOCK RULE

The Commission reasonably clarified the phrase "submits a request" in the rule providing that "[w]ithin 60 days of the date on which an applicant submits a request seeking approval under this section," the locality "shall approve the application unless it determines that the application is not covered by [Section 6409(a)]." 47 C.F.R. § 1.6100(c)(2). The Commission made clear that an applicant "submits a request" when it (1) "takes the first procedural step that the local jurisdiction requires as part of its applicable regulatory review process under Section 6409(a)," and (2) "submits written documentation showing that a proposed modification is an eligible facilities request," *Declaratory Ruling* ¶ 16 (1-ER-13).

This interpretation is consistent with the language and purpose of the shot clock rules. Those rules provide that "[w]hen an applicant asserts in writing that a request for modification is covered" by Section 6409(a), the only documentation the locality can require from the applicant is documentation that is "reasonably related to determining whether the request meets the requirements of [Section 1.6100]." 47

C.F.R. § 1.6100(c)(1).[8] Section 1.6100(c)(2), titled "Timeframe for review," provides that once the "applicant submits a request seeking approval" under Section 6409(a), the locality has 60 days either to "approve the application" or to determine it is not covered by Section 6409(a). 47 C.F.R. § 1.6100(c)(2). To "submit a request" under Section 1.6100(c)(2) therefore means to provide the "request" for streamlined approval and the supporting "application"—i.e., the documentation reasonably related to showing the modification is covered, as required by Section 1.6100(c)(1). The uniform 60-day time frame that runs from the submission of that documentation is consistent with the rules' goal of establishing a "specific and absolute timeframe" for determining whether a modification is covered by Section 6409(a) or not. *2014 Order*, 29 FCC Rcd at 12956-12957 ¶¶ 214-215. Otherwise, localities could "effectively postpone the date on which they consider eligible

[8] A locality may also require the application to include documentation of compliance with non-discretionary health and safety requirements necessary for permitting, *2014 Order*, 29 FCC Rcd at 12956 ¶ 214 & n.595, and the commencement of the shot clock "does not excuse the applicant from continuing" to comply with those obligations. *Declaratory Ruling* ¶ 23 (1-ER-16). The *Declaratory Ruling* does not address whether authorizations relating to health and safety rules must be processed within 60 days. *Id.* n.36 (1-ER-11).

facilities requests to be duly filed," and "thereby delay[] the commencement of the shot clock," by "treating applications as incomplete unless applicants have complied with time-consuming requirements" having nothing to do with the issue of whether the proposal amounted to substantial change in an existing structure. *Declaratory Ruling* ¶ 15 (1-ER-12). *See Montgomery Cty*., 811 F.3d at 128 (upholding "deemed grant" provision of the rules on the grounds that they "ensure that collocations are not mired in the type of protracted approval processes that the Spectrum Act was designed to avoid").

The Commission's interpretation is not undermined by the provision titled "Tolling of the timeframe for review," as Petitioners assert (LOCC 29-32). That provision states that "[t]he 60-day period begins to run when the application is filed, and may be tolled" only under specified conditions. 47 C.F.R. § 1.6100(c)(3). The "application" in Section 1.6100(c)(3) refers to the same application referenced in Section 1.6100(c)(2)—i.e., the documentation showing Section 6409(a) eligibility. It is "filed" when it is submitted as part of the request for Section 6409(a) treatment, as provided for in Section 1.6100(c)(2). Both the Rules and the *2014 Order* describe the "request" and "application"

in tandem. *See* 47 C.F.R. § 1.6100(c)(2) (after "an applicant submits a *request* seeking approval under this section, the [locality] shall approve the *application*"); *2014 Order*, 29 FCC Rcd at 12955 ¶ 211 (explaining that the locality may require applicants to "file request[s] for approval," and that localities "must have an opportunity to review [those] applications to determine whether they are covered by Section 6409(a)"). Thus, Petitioners are incorrect when they contend (LOCC 31) that the interpretation "allow[s] the shot clock to commence without a filed application."

Petitioners argue (LOCC 52) that the "filed application" in Section 1.6100(c)(3) cannot refer simply to submission of information to establish that a modification is an eligible facilities request. But they do not offer an alternative interpretation of "application" or "filed," other than to suggest the rule was intended to preserve pre-application processes, such as meetings with stakeholder groups. *See* LOCC 31. But the Commission made clear in adopting the rules that the shot clock was designed to eliminate precisely those "lengthy and onerous processes." *2014 Order*, 29 FCC Rcd at 12955 ¶ 212. Moreover, the *2014 Order* explained that Section 6409(a) review considers a "restricted application record tailored to the requirements of that

provision," that "may be complete for purposes of Section 6409(a) review but may not include all of the information the [locality] requires to assess applications not subject to Section 6409(a)." *2014 Order*, 29 FCC Rcd at 12958 ¶ 220. That "filed" in Section 1.6100(c)(3) was not meant to incorporate each jurisdiction's general "filing" requirements is further supported by the rest of the tolling provision, which counts the tolling notice requirement from "receipt of the application," not when it is "filed," and reiterates that localities can only require documentation "meeting the standard under [Section 1.6100(c)(1)]." 47 C.F.R. § 1.6100(c)(3)(i).

For the same reasons, the interpretation is not a "material change" to the meaning of "submitted," as Petitioners assert (LOCC 51). In any event, the Commission's explanation that the clarification is necessary to prevent localities from "effectively postpon[ing]" the shot clock, *see Declaratory Ruling* ¶ 15; *see also id.* ¶¶ 14-23 (1-ER-12-16), exceeds the "minimal explanation" required to justify a change. *Rancheria v. Jewell*, 776 F.3d 706, 714 (9th Cir. 2015). Petitioners are also incorrect (LOCC 51-56) that the interpretation is arbitrary in light of evidence that some applicants have also caused delay. The focus of the proceeding—in line with Congress's goals in the Spectrum Act—

was on streamlining state and local review processes in order to remove barriers to wireless infrastructure deployment. *Declaratory Ruling*, ¶¶ 2-4 (1-ER-3-4). And it is well settled that the Commission "need not solve every problem before it in the same proceeding." *City of Portland v. United States*, 969 F.3d 1020, 1047 (9th Cir. 2020).

III. THE COMMISSION REASONABLY INTERPRETED "SEPARATION" IN THE TOWER HEIGHT PROVISION

A. The Separation Interpretation Is Consistent With The Text Of The Rule

The Commission reasonably interpreted the word "separation" to mean the space between two antennas in the provision governing height increases for towers outside the right-of-way. Section 1.6100(b)(7)(i) provides that modifications to such towers are substantial if they increase the tower by "the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet." The *Declaratory Ruling* explained that "separation" means "the distance from the top of the existing antenna to the bottom of the proposed antenna." *Declaratory Ruling* ¶ 25 (1-ER-17). Thus, a modification is substantial if it exceeds the height of one antenna array plus twenty feet of separation between antennas—not if it exceeds an increase of twenty feet in total. *Declaratory Ruling* ¶¶ 25-26 (1-ER-16-17).

This interpretation is consistent with the "plain meaning" of the rule. *Safe Air For Everyone v. U.S. EPA*, 488 F.3d 1088, 1097 (9th Cir. 2007). The rule sets the threshold at "the height of one antenna array," qualified by the limitation "with separation from the nearest existing antenna not to exceed twenty feet." It is the "separation" that is "not to exceed twenty feet." "Separation" means the "intervening space" or "gap" between the two antennas, https://www.merriam-webster.com/dictionary/separation; it is not naturally read to *include* the additional antenna.

This interpretation also avoids surplusage. If the rule were intended to provide that a modification is substantial if it increases the height of the structure by more than twenty feet, there would have been no need to include the separation clause. The Commission could simply have set the threshold at "twenty feet." *See Cty. Of Amador v. United States Dep't of the Interior*, 872 F.3d 1012, 1026 (9th Cir. 2017) (phrase is surplusage if it could be removed "with almost no effect"). In this regard, we note, the rule governing the height of structures in the public rights-of-way sets the limit at the greater of 10% or "ten feet," with no separation provision. 47 C.F.R. § 1.6100(b)(7)(i).

The interpretation is also consistent with the explanation of the comparable standard in the Collocation Agreement, issued by Commission staff in a fact sheet shortly after the agreement was finalized. *Declaratory Ruling* ¶ 26 (1-ER-17). The fact sheet explained that the rule allows an increase of "up to 20 feet plus the height of the new antenna." Fact Sheet, 17 FCC Rcd at 513. The contemporaneous interpretation by Commission staff of the Collocation Agreement upon which the Commission grounded its rules directly supports the Commission's reading here.

Intervenors contend that "differences between the language and purpose of Section 6409(a) and the *Collocation Agreement*" preclude the Commission's reliance on the Collocation Agreement to justify its interpretation of the tower height rule. Brief of Intervenors City and County of San Francisco et al. ("Intervenors") at 37-39. But Intervenors ignore that the Commission incorporated the Collocation Agreement language into the rule. Having done so, the Commission appropriately looked to the prior interpretation of the identical language to shed light on its meaning. *See Medina Tovar v. Zuchowski*, 982 F.3d 631, 636 (9th Cir. 2020) (when a term is "transplanted from another legal source, it brings the old soil with it").

B. The Separation Interpretation Is Consistent With Other Aspects Of The Statute And Rules

The Localities do not argue that the Commission's interpretation of the separation clause is inconsistent with its text. Instead, they argue that it is inconsistent with other aspects of Section 6409(a) or the rules. There is no inconsistency.

1. The Separation Interpretation Is Consistent With Section 6409(a)

The Localities contend that the separation interpretation (and the *Declaratory Ruling* as a whole) is inconsistent with Section 6409(a) because it ignores whether modifications "substantially change the physical dimensions of [the] tower or base station." *See* Brief of Petitioners City of Boston et al. ("Boston") at 26-30, 56-57; Intervenors at 33-36. The Localities are incorrect.

As LOCC acknowledges (Br. 57), antennas "typically range between four and eight feet tall," and the Commission's reading took place against the backdrop of "typical antenna sizes." *Declaratory Ruling* ¶ 25 (1-ER-17). The Localities fail to explain why a threshold of one antenna plus twenty feet (i.e., typically less than 30 feet) is not consistent with a reasonable interpretation of "substantial change" to a tower that can be hundreds of feet tall. *See Montgomery Cty.*, 811 F.3d

at 129, 131 & 130 n.7 (concluding that the categorization of a ten-foot increase to a 37.5-foot utility pole as "insubstantial" was not "an unreasonable interpretation of the term 'substantial'"). And Congress's refusal to define more specifically the use of the term "substantial change" leaves the Commission with broad discretion to flesh out its contours. *Id.* at 129-30.

This interpretation does not treat the antenna height as "irrelevant," as Intervenors assert (at 33-36), merely because antennas come in a range of sizes. Nothing in Section 6409(a) requires the Commission to set the threshold in terms of feet, rather than in terms of a quantity of equipment of a certain typical size. *See Montgomery Cty.*, 811 F.3d at 130 n.6 (rejecting argument that Commission's criteria must "address[ ] in each instance the height, depth, width, and volume of each object"). Although Petitioners contend (LOCC 58) that some broadcast antennas can be "several hundred feet tall," they do not point to any evidence that such large antennas are collocated on existing towers, or could be collocated in compliance with structural codes, FAA regulations, and other limitations that continue to apply. *See Declaratory Ruling* ¶ 28 (1-ER-18); *2014 Order*, 29 FCC Rcd at 12951 ¶¶ 202-203. The Commission was under no obligation to address far-

fetched hypotheticals, *Am. Min. Cong. v. EPA*, 965 F.2d 759, 771 (9th Cir. 1992), and the Commission's power to waive its rules in appropriate circumstances remains in any event available to deal with outlier cases*, see* 47 C.F.R. § 1.925; *Montgomery Cty.*, 811 F.3d at 131 n.8.

The Commission also did not err in considering Congress's "objective to facilitate streamlined review." *Declaratory Ruling* ¶ 25 (1-ER-17). Consideration of a regulation's "purpose" is a traditional interpretive tool, *Rubalcaba v. Garland*, 998 F.3d 1031, 1037-1039 (9th Cir. 2021), and the regulation was entirely in keeping with Congress's goals of "encourag[ing] the growth of a robust national telecommunications network," *Montgomery Cty,* 811 F.3d at 124-125; *see 2014 Order*, 29 FCC Rcd at 12872 ¶ 15. Intervenors draw a false distinction when they claim (at 35) that the standard is "whether the proposed modification 'substantially change[s]' the physical dimensions of an existing facility—*not* whether the interpretation of Section 6409(a) results in more, or fewer, applications" being covered. In fleshing out the meaning of "substantial," the Commission did not err in considering whether the lines it drew are consistent with Congress's deployment goals. *See Rubalcaba*, 998 F.3d at 1039.

Intervenors argue that one of the purposes of Section 6409(a) was to "limit[] the class of modifications entitled to the statute's protection." Intervenors 36. In doing so, they turn the statute on its head. Section 6409(a) *streamlines* local review processes for modifications that do not "substantially change the physical dimensions of such tower[s] or base station[s]." 47 U.S.C. § 1455(a)(1). Although the exception preserves certain "local land use values," *2014 Order*, 29 FCC Rcd at 12938 ¶ 174, nothing in Section 6409(a) suggests Congress intended the Commission to interpret the streamlining provision narrowly. And none of the cases Intervenors cite (at 36) suggests that the twenty-feet-plus-one-antenna strikes an unreasonable balance. *See Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1197 (9th Cir. 2008) (in implementing a "broad" statutory mandate, an agency has "discretion to balance" competing considerations).

2. The Separation Interpretation Does Not Permit "Cumulative" Increases

Petitioners contend (LOCC 57-59) that the Commission's interpretation of the term "separation" conflicts with the height rule by permitting "cumulative" increases. Not so. The interpretation clarifies the *size* of the threshold in Section 1.600(b)(7)(i) as one antenna array

plus a separation of no more than 20 feet. It does not change the *baseline* for measuring whether that threshold has been exceeded under Section 1.6100(b)(7)(i)(A): "the dimensions of the tower or base station, inclusive of originally approved appurtenances and any modifications that were approved prior to the passage of the Spectrum Act." Any antenna replacement is measured by reference to that baseline and not from the "last approved change." *2014 Order*, 29 FCC Rcd at 12948 ¶ 197. All the *Declaratory Ruling* does is specify how the allowable increase is to be measured from that baseline. Thus, as the Commission explained, concerns about cumulative increases in height by reason of its interpretation are "unwarranted," because nothing in the *Declaratory Ruling* changes the rule's "limits [on] cumulative increases in height from eligible modifications." *Declaratory Ruling* ¶ 27 (1-ER-18).

Finally, the interpretation does not fail for not being "ascertainable," as Petitioners assert (LOCC 60-62). The rules establish "objective" criteria for determining substantial change, *2014 Order*, 29 FCC Rcd at 12944 ¶ 188, even if they do not limit those criteria to those measured in fixed numeric terms.

IV. The Equipment Cabinet Interpretation Is Reasonable

A. The Interpretation Is Consistent With The Text Of The Rule

The rules provide that "[a] modification substantially changes the physical dimensions of an eligible support structure if . . . it involves installation of more than the standard number of new equipment cabinets for the technology involved, but not to exceed four cabinets." 47 C.F.R. § 1.6100(b)(7), (b)(7)(iii). The *Declaratory Ruling* clarified that the direction "not to exceed four cabinets" is not a cumulative limit, but is instead "measured for each separate eligible facilities request." *Declaratory Ruling* ¶ 30 (1-ER-19).

The Commission's clarification is consistent with the plain language of the rule. The antecedent of "it" in the phrase "it involves installation" is the term "modification," as the Commission explained. *See Declaratory Ruling* ¶ 30 (1-ER-19). The rule also sets the limit based on "new" equipment cabinets, which only has meaning if existing cabinets are excluded. *Id.*; *see Larson v. Saul*, 967 F.3d 914, 923 (9th Cir. 2020) (interpretations should give effect to "every clause and word").

It is also consistent with the structure of the rules. *See Declaratory Ruling* n.85 (1-ER-19). The baseline provision for height increases, 47 C.F.R. § 1.6100(b)(7)(i)(A), shows that the Commission knows how to limit cumulative increases. *See 2014 Order*, 29 FCC Rcd at 12948 ¶¶ 196-197. The fact that it did so for height, but not for cabinets, provides a strong inference that no such limit applies to cabinets. *See Medina Tovar*, 982 F.3d at 635 (where language is included in one provision, exclusion in the same statute presumed intentional).

The Localities contend that the Court can draw no such inference. *See* Boston 37-38; Intervenors 31. But the Commission expressly sought comment on how to measure changes, *2014 Order*, 29 FCC Rcd at 12941 ¶ 182, received comments advocating cumulative limits, *id.*, 29 FCC Rcd at 12944 ¶ 187, and expressly limited its discussion of cumulative limits to height and width. *See id.*, 29 FCC Rcd at 12948 ¶ 196 ("substantial change criteria for changes *in height* should be applied as limits on cumulative changes") (emphasis added); *id.* n.536 (addressing width).[9] It thus can hardly be said that the Commission

[9] Intervenors (at 30) omit the words "in height" from the Commission's statement that "our substantial change criteria for changes in height

"did not address" whether the four-cabinet limit is cumulative, as Petitioners assert (Boston 38).[10]

The argument also ignores textual differences between the height and cabinet provisions. The height provision assesses each modification based on the "increase" in height, a term that requires a baseline (i.e., an increase over what?). 47 C.F.R. § 1.6100(b)(7)(i), (i)(A). In contrast, the cabinet provision measures each modification based on the "installation" of "new equipment cabinets." 47 C.F.R. § 1.6100(b)(7)(iii). The Commission reasonably read the language of the rule to mean four per modification, regardless of how many cabinets came before.

B. The Cabinet Interpretation Is Consistent With Other Aspects Of The Rules And The Statute

Petitioners' arguments do not disturb the Commission's conclusion that interpreting the cabinet provision to set a cumulative limit is

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should be applied as limits on cumulative changes." *2014 Order*, 29 FCC Rcd at 12948 ¶ 196.

[10] For the same reason, the Commission's interpretation of the cabinet rule is not undermined by Petitioners' assertion (Boston 38-39) that the criteria developed to implement the National Historic Preservation Act and the National Environmental Policy Act measure impacts "individually and cumulatively" in a way that differs from the *Declaratory Ruling*.

"counter to the text." *Declaratory Ruling* ¶ 30 (1-ER-19). And their arguments that the interpretation is contrary to other aspects of the rules or Section 6409(a) are unpersuasive.

1. For any modification to be covered by Section 6409(a), it must modify an "existing" eligible support structure, 47 U.S.C. § 1455(a)(1); 47 C.F.R. § 1.6100(b)(3), and "[a] constructed tower or base station is existing . . . if it has been reviewed and approved under the applicable zoning or siting process," *id.* § 1.6100(b)(5). Intervenors contend (at 32-33) that once an "existing" structure has been modified pursuant to Section 6409(a), "any additional cabinets beyond the first four would . . . no longer be to an 'existing' tower or base station" and that, therefore, all proposed modifications must be measured from the structure as approved by the local government before any modifications authorized under Section 6409(a). That makes no sense.

If a modification authorized by Section 6409(a) were to transform an "existing" structure into one that is not "existing," then only the first collocation on *any* structure would be covered by Section 6409(a). That result is contrary to the *2014 Order*, which expressly contemplated that the rules would address multiple covered collocations per facility. *See, e.g.*, *2014 Order*, 29 FCC Rcd at 12938 ¶ 174 (distinguishing the "first"

deployment that brings a facility "within the scope of Section 6409(a)" from "subsequent collocations"). Moreover, Intervenors' interpretation would render unnecessary the provision specifying that "changes in height" should be measured from the pre-Spectrum Act structure. *See Declaratory Ruling* n.85 (1-ER-19) (citing 47 C.F.R. § 1.6100(b)(7)(i)(A)).

2. Petitioners further contend that the Commission's interpretation would allow the streamlined installation of an "unlimited" number of cabinets without local review. *See* Boston 39; *see also id.* 36-48; Intervenors 28-32. But as the *Declaratory Ruling* explained, the number of cabinets that can be added in an eligible facilities request is limited by both the rules and by practical considerations.

The cabinet rule provides that a modification is a substantial change if it would add more than "the standard number of new equipment cabinets for the technology involved." *Declaratory Ruling* ¶ 31 (1-ER-20) (quoting 47 C.F.R. § 1.6100(b)(7)(iii)). Although the Localities argue (Boston 41-43, Intervenors 31-31) that the "standard number" limitation is not a "meaningful restriction," it does exclude from streamlined review modifications involving an unusually large number of cabinets.

The rules also foreclose "unlimited" cabinets, because any increase in the number of cabinets must remain inside the other substantial change thresholds to qualify for Section 6409(a) treatment. *See* 47 C.F.R. § 1.6100(b)(7) (change is substantial if it meets "any" of the criteria). The cabinet rule itself contains additional limitations on ground-mounted cabinets and their volume. *Id.* § 1.6100(b)(7)(iii).

The record in this proceeding also showed that there are additional practical "constraints on the number of [cabinets] on a structure." CTIA Reply Comments at 18-19 (SER-71-72). These include "loading requirements," "space availability," and "separation requirements." *Id.*; *see also* T-Mobile Reply Comments at 9 ("safety codes" and "general engineering principles") (SER-103). Intervenors contend (at 31-32) that these limitations cannot "*in all cases* result in no substantial change," but, again, the presence of hypothetical outlier cases does not render the Commission's interpretation unreasonable. *See supra* at 44.

C. The Localities' Policy Arguments Are Unavailing

The Localities' policy arguments are equally unavailing. Although Petitioners suggest (Boston 44-45) that a four-cabinet limit would result in less substantial deployments, nothing in Section 6409(a) requires the

Commission to ensure the *least* substantial deployment, particularly in light of Congress's desire in the Spectrum Act to facilitate wireless deployment.

Petitioners also contend (Boston 46-47) that Commission's reading is inconsistent with the Commission's rules governing new wireless deployments under 47 U.S.C. § 332(c), because collocations of new cabinets could "expand[] the facility well beyond the limits" of the originally approved deployment. But a cumulative four-cabinet limit could have the same result, and so their objection would apply to their own preferred reading of the rules. In any event, this Court has recognized that Section 6409 and Section 332 have "critical differences" that can permit different regulatory approaches. *See City of Portland*, 969 F.3d at 1044-1045 (failure to explain differences in shot clocks under Sections 6409 and 332 not arbitrary).

Petitioners separately challenge (Boston 44-45) the *Declaratory Ruling*'s interpretation of the term "equipment cabinet" to refer to "physical containers for smaller, distinct devices," and to exclude "small pieces of equipment" that some localities treated as "cabinets" because the equipment has a protective outer cover. *See Declaratory Ruling* ¶ 29 (1-ER-19). Petitioners do not dispute that the Commission's

definition of "cabinet" is consistent with usage in the industry and the structure of the rules, as the Commission found. *Id.*; *see* Boston 44 (definition "not inherently wrong").[11] They instead argue the Commission should have "considered separate limits on the number of pieces of equipment if it determined that equipment should no longer be covered by the existing rule." Boston 45. This policy argument ignores that, as explained above, other substantial change criteria continue to apply to modifications that add such equipment.

V. THE COMMISSION REASONABLY INTERPRETED "CONCEALMENT ELEMENTS" AND OTHER "CONDITIONS"

A. The Commission's Interpretation Of "Concealment Elements" Is Consistent With The Language And Structure Of The Rules

The Commission reasonably interpreted the two provisions addressing conditions imposed by localities: the criterion for

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[11] *See* Reply Comments of T-Mobile at 7 (SER-101); *see also, e.g.*, CellSite, "Cabinets," https://cellsitesolutions.com/products/cabinets (last visited February 27, 2023) (offering cabinets that provide "storage and protection" for equipment housed inside); American Products, "Telecommunications Enclosures," https://amprod.us/telecommunications-enclosures/ (last visited February 27, 2023) (similar); Charles Industries LLC, "Outdoor Cabinets," https://www.charlesindustries.com/products/outdoor-cabinets/ (last visited February 27, 2023) (similar).

modifications that would "defeat the concealment elements of the eligible support structure," 47 C.F.R. § 1.6100(b)(7)(v), and the criterion for a modification that "does not comply with conditions associated with the siting approval of the construction or modification of the eligible support structure," unless the non-compliance would not exceed the Commission's thresholds in Sections 1.6100(b)(7)(i)-(iv), governing conditions such as height and width. The Commission explained that "concealment elements" are those "elements of a stealth-designed facility intended to make the facility look like something other than a wireless tower or base station," such as a tree or a clock tower, *Declaratory Ruling* ¶ 34 (1-ER-21), and that all other "conditions to minimize the visual impact of non-stealth facilities" are separately addressed as "conditions" under Section 1.6100(b)(7)(vi). *Declaratory Ruling* ¶¶ 35-36 (1-ER-21-22).

This interpretation is consistent with the Commission's explanation of "concealment elements of a stealth wireless facility" in the *2014 Order*. *2014 Order*, 29 FCC Rcd at 12950 ¶ 200. The Commission agreed with commenters that "a modification that undermines the concealment elements of a stealth wireless facility, such as painting to match the supporting facade or artificial tree

branches, should be considered substantial." *Id.* Thus, "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" is substantial. *Id.* The *Declaratory Ruling* is therefore consistent with the *2014 Order's* characterization of "concealment elements" as elements of a "stealth facility." *Id.*

The interpretation is also consistent with comments in the record that treated "concealed" and "stealth" as synonyms, and distinguished other aesthetic requirements such as "careful placement conditions." *See Declaratory Ruling* ¶ 35 (1-ER-22). For example, the *2014 Order* cited comments by one municipality regarding the criteria "as it relates to 'concealed' or 'stealth' designed facilities. In the context of these types of facilities, designed to NOT look like a wireless tower or base station," the municipality argued that a substantial change should include changes that thwart the "concealment or stealth nature of the facility." *See 2014 Order*, 29 FCC Rcd at 12950 n.545 (citing Comments of City of Coconut Creek ¶ 16 at 7) (SER-182).

Relying on the "last antecedent" rule, Petitioners contend that when the *2014 Order* referred to "concealed or 'stealth'-designed facilities" as "facilities designed to look like some feature other than a wireless tower or base station," it intended to describe only "stealth-designed" facilities, and not "concealed" facilities. LOCC 39. That reading makes little sense. Both "concealed" and "stealth-designed" modify a common noun: "facilities." The definition "facilities designed to look like some other feature other than a wireless or base station" is thus most naturally read to define "concealed or 'stealth'-designed facilities" as a "unified whole." *Facebook, Inc. v. Duguid*, 141 S. Ct 1163, 1169 (2021). Petitioners' interpretation is also inconsistent with the *2014 Order*, which characterized concealment elements as elements "of stealth facilities," and not as a distinct category from stealth, or a larger category containing stealth. *2014 Order*, 29 FCC Rcd at 12950 ¶ 200.[12]

The Commission's interpretation also gives a clear "independent meaning," *Amador*, 872 F.3d at 1026, to Section 1.6100(b)(7)(v) (dealing

[12] Thus, even if the "last antecedent" rule were in play, it would be overcome by "other indicia of meaning." *Hall v. USDA*, 984 F.3d 825, 838 (9th Cir. 2020).

with concealment elements) and Section 1.6100(b)(7)(vi) (dealing with conditions associated with siting approval) in a manner that is consistent with the *2014 Order*. The *2014 Order* explained that "conditions" under Section 1.6100(b)(7)(vi) include "conditions" that address a site's visual impact, such as "fencing" and "height or width increases." *2014 Order*, 29 FCC Rcd at 12950 ¶ 200. Thus, "concealment elements" cannot include *all* conditions that can obscure a facility from view, because the provisions would then be redundant at least as to fencing and size. *See United States v. Cabaccang*, 332 F.3d 622, 627 (9th Cir. 2003) (avoid reading that "renders other provisions . . . inconsistent, meaningless, or superfluous").

The line the Commission drew between "concealment elements" and "conditions" is also consistent with the examples of "concealment elements of a stealth facility" the Commission gave in the *2014 Order*—disguising a facility to look like a tree, or disguising it to look like part of the façade. *2014 Order*, 29 FCC Rcd at 12950 ¶ 200. Both examples address techniques that makes the facility "look like some feature other than a wireless [facility]" (i.e., a tree or a façade). Although Petitioners contend (LOCC 72-73, Boston 34-35) that other visual mitigation conditions should have been included as concealment elements

governed by Section 1.6100(b)(7)(v), their interpretation does not draw a coherent distinction between the matters encompassed by that section and the "conditions" covered by Sections 1.6100(b)(7)(vi).

B. The Localities' Interpretation Is Inconsistent With The Rules And The Statute

The Localities contend that the "plain meaning" of the term "concealment elements" includes any condition that hides facilities from view. *See* Intervenors 12-14; LOCC 67-68. That is not the case.

First, Section 1.6100(b)(7)(v) does not cover concealment elements in general; it covers "concealment elements *of the eligible support structure*." 47 C.F.R. § 1.6100(b)(7)(v) (emphasis added). Techniques such as setbacks, which address placement of the facility on a support structure such as a building, *see* Intervenors 9, are not naturally referred to as elements "of the eligible support structure." By contrast, Section 1.6100(b)(7)(vi) refers expansively to "conditions associated with the siting approval of the construction or modification of the eligible support structure," a phrase that readily encompasses placement requirements associated with approval and other conditions that do not govern "elements" of the support structure, such as fences or landscaping.

Second, the Localities' preferred reading is inconsistent with the structure of the rules. As we have explained, *see supra* at 58, to interpret "concealment" to mean anything that hides a facility from view would mean many local requirements would fall under both (v) and (vi). It is implausible that the Commission intended this result, because the rules define different circumstances under which "concealment elements" under (v) and "conditions" under (vi) are enforceable: "conditions" do not preempt modifications within the thresholds of Sections 1.6100(b)(7)(i)-(iv), but "concealment elements" do. For example, a local government may desire to limit the visibility of a facility by prohibiting height increases within the thresholds of Section 1.6100(b)(7)(i). If that proviso is both a "concealment element" and a "condition," it would be enforceable under the Localities' interpretation of Section 1.6100(b)(7)(v), but unenforceable under Section 1.6100(b)(7)(vi).

It is also difficult to see, under the Localities' view, what work remains for Section 1.6100(b)(7)(vi)'s exclusion of modifications that are "non-compliant only in a manner that would not exceed the thresholds identified in [Sections 1.6100(b)(7)(i)-(iv)]." That is, if conditions that help hide a facility from view fall under Section 1.6100(b)(7)(v)—

including conditions implicating size, *see* Intervenors 14-15—it is unclear what "conditions" would fall under Section 1.6100(b)(7)(vi) that might implicate height, width, or the other features governed by Sections 1.6100(b)(7)(i)-(iv). A proviso devoid of meaningful effect "cannot be what the [Commission] intended and is not required by the statute." *Bassiri v. Xerox Corp.*, 463 F.3d 927, 932 (9th Cir. 2006). The Localities argue that the Commission's interpretation is inconsistent with the statute. Boston 30, 36, Intervenors 15. But the Section 6409(a) standard is not any change that localities consider "substantial," but only those that "substantially change the physical dimensions of [the] tower or base station." 47 U.S.C. § 1455(a)(1). It was reasonable to interpret that standard in a way that excludes conditions preventing changes the Commission has determined are not "substantial" under the size-related criteria. The Localities' interpretation, on the other hand, would allow localities to use conditions to exempt from Section 6409(a) modifications that are not "substantial[] change[s] in the physical dimensions." *Id.*

Finally, the Localities' policy arguments against the Commission's reading rest on a mistaken premise. "[C]oncealment elements" under Section 1.6100(b)(7)(v) are not the "only means of concealing facilities

that Subsection 1.6100(b)(7) preserves." Intervenors 9. On the contrary, Section 1.6100(b)(7)(vi) allows for enforcement of reasonable conditions, including those relating to mitigation of visual impact that are not stealth elements, so long as they do not prevent modifications within the thresholds for substantial changes in Sections 1.6100(b)(7)(i)-(iv). And even though localities cannot use "conditions" to bar modifications of a size the Commission has determined is not "substantial," they can enforce reasonable requirements that minimize the visual impact of wireless facilities, such as shrouding, fencing, and visual protection for equipment in setbacks. *See Declaratory Ruling* ¶ 44 (1-ER-27).

C. The Statement In The Commission's Brief In *Montgomery County* Does Not Undermine Its Interpretation

Petitioners contend (LOCC 65, Boston 30-33) that the Commission's reading of the concealment elements rule is inconsistent with a statement in the Commission's brief in *Montgomery County v. FCC*. *See* Brief of Respondents at 40-41, *Montgomery Cty.*, 811 F.3d 121 (4th Cir. 2015), 2015 WL 4456506 (filed June 9, 2015). The portion of the brief on which Petitioners rely consists of a single sentence stating that if a hypothetical modification extends a previously hidden wireless

structure above a tree line, the locality "could impose conditions designed to conceal the modified facility." *Id.* The sentence did not address the interpretive question of what kinds of conditions are "concealment elements" and what are "conditions" under Sections 1.6100(b)(7)(v) and (vi).[13]

This statement in the brief is generally consistent with the *Declaratory Ruling*, which explains that Section 1.6100(b)(7)(vi) allows localities to enforce reasonable siting conditions such as a larger fence to hide a modification within the thresholds of Section 1.6100(b)(7)(i)-(iv). *Declaratory Ruling* ¶ 44 (1-ER-26). In the *Declaratory Ruling*, the Commission went on to clarify that if the "original siting approval specified that a tower must remain hidden between a tree line," a "proposed modification within the thresholds of section 1.6100(b)(7)(i)-(iv) . . . would be permitted under section 1.6100(b)(7)(vi)." *Id.* This is because, the Commission explained, "the provider cannot reasonably

[13] The Fourth Circuit also did not address the distinction between the two provisions. Rather, it listed the rule governing "concealment elements" among other "examples" of ways the rules "incorporate considerations of context," including different height limits for towers outside the right-of-way and other structures, preservation of environmental and historic review, and preservation of health and safety laws. 811 F.3d at 131.

replace a grove of mature trees with a grove of taller mature trees to maintain the absolute hiding of the tower." *Id.*

Any inconsistency between the Commission's discussion in the *Declaratory Ruling* and the statement in its Montgomery County brief does not undermine the Commission's reading or render it arbitrary or capricious. The Commission expressly acknowledged the brief's statement in the *Declaratory Ruling*, and explained that the brief had not addressed the interpretive issue of the line between Sections 1.6100(b)(7)(v) and (vi).[14] *Declaratory Ruling* n.130 (1-ER-27). It also explained that "in light of extensive subsequent experience as documented in the record," it determined that it should construe the rule governing stealth facilities "to depend upon whether the design would be viewed as no longer effective in view of the modified facilities." *Id.* In any event, it is well settled, as the Commission noted, that "staff level actions do not bind" the agency's subsequent determinations. *Id.* (citing, *e.g.*, *SNR Wireless LicenseCo, LLC v. FCC*, 868 F.3d 1021, 1037 (D.C. Cir. 2017)). The Commission therefore provided the "minimal

[14] For that reason, the Localities have no basis for claiming "unfair surprise" (Boston 47-48). *Cf. Qwest Servs. Corp.*, 509 F.3d at 540.

explanation" required to justify any change in interpretation. *Rancheria*, 776 F.3d at 714.

D. The Commission Reasonably Concluded That "Conditions" Under Section 1.6100(b)(7)(vi) Are Subject To The Size-Based Criteria

Section 1.6100(b)(7)(vi) preserves permit conditions only so far as they are not inconsistent with Sections 1.6100(b)(7)(i)-(iv) (dealing with height, width, cabinets and excavation), and does not refer to Section 1.1600(b)(7)(v) (governing "concealment elements"). *See Declaratory Ruling* ¶¶ 41-42 (1-ER-25-26). Petitioners contend that by negative implication, any so-called "concealment conditions" should be preserved "even if their enforcement would frustrate modifications that fit within the other thresholds for a substantial change." LOCC 41-43, 62-64. But any negative implication is limited, because the Commission reasonably read the "concealment elements" covered by Section 1.16100(b)(7)(v) as confined to those used in "stealth facilities." *Declaratory Ruling* ¶¶ 34-35 (1-ER-21-22); *see also 2014 Order*, 29 FCC Rcd at 12950 ¶ 200 (discussing separate treatment of "concealment elements" and "conditions").[15] Thus, as the Commission explained, conditions intended

[15] Footnote 543 of the *2014 Order* does not demonstrate that "non-compliance with a concealment condition would always amount to a

to "minimize the visual impact of non-stealth facilities" are subject to the limitations in Sections 1.6100(b)(7)(i)-(iv) as "conditions associated with siting approval" under Section 1.1600(b)(7)(vi). *Declaratory Ruling* ¶ 35 (1-ER-22).

VI. THE EXPRESS EVIDENCE REQUIREMENT IS A REASONABLE INTERPRETATION AND NOT A RETROACTIVE RULE

To ensure the protection of those conditions that localities had imposed—not features that played no role in the localities' consideration—the *Declaratory Ruling* clarified that to count as "conditions" under Sections 1.6100(b)(7)(vi), there must be "express evidence that at the time of approval the locality required the feature and conditioned approval upon its continuing existence." *Declaratory Ruling* ¶ 42 (1-ER-25). The Commission based its reading on "the basic principle that applicants should have clear notice of what is required by a condition and how long the requirement lasts." *Declaratory Ruling* n.123 (1-ER-25).

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substantial change," as Petitioners assert (LOCC 41-42). Rather, the footnote explains why the criteria address "concealment elements" and other "conditions" that may not involve a change in "physical dimensions." *2014 Order*, 29 FCC Rcd at 12949 n.543.

Similarly, the Commission explained that Section 1.6100(b)(7)(v) applies to only "identifiable, pre-existing [concealment] elements" and not to "new restrictions that the locality did not previously identify." *Declaratory Ruling* ¶¶ 36-37 (1-ER-22). To identify such conditions, there must be "express evidence in the record to demonstrate that a locality considered in its approval that a stealth design . . . would look like something else," although "specific words or formulations are not needed." *Declaratory Ruling* ¶ 38 (1-ER-23).

1. Petitioners contend that the Commission's reading is unlawfully retroactive. LOCC 68-69; Boston 52; Intervenors 15-23. But it is well settled that interpretations of existing law "do[] not present retroactivity concerns." *AT&T Commc'ns Sys. v. Pac. Bell*, 203 F.3d 1183, 1187 (9th Cir. 2000); *see Farmers Tel. Co. v. FCC*, 184 F.3d 1241, 1250 (10th Cir. 1999)) (the "question of retroactivity does not arise" where Commission order "clarifies and explains existing law or regulations"). Sections 1.6100(b)(7)(v) and (vi) define "concealment elements" and "conditions" that are exempt from Section 6409(a). By specifying how to identify those requirements, the *Declaratory Ruling* "explain[s] . . . the substantive law that already exists." *Hemp Indus. Ass'n*, 333 F.3d at 1087. It did so consistently with Sections

1.6100(b)(7)(v) and (vi) because nothing suggests those provisions originally covered conditions that were not supported by express evidence. *See Gunderson*, 268 F.3d at 1154 (interpretation upheld where rule was not "so clear as to render the [interpretation] inconsistent"); *cf. Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 97, 99-100 (1995) (resolution of issue left "unaddressed" by regulation did not "effect[t] a substantive change in the regulations").

As the Commission made clear, interpreting "conditions" and "concealment elements" to cover only those requirements for which there is express evidence serves to ensure that "the locality required the feature and conditioned approval upon its continued existence." *Declaratory Ruling* ¶ 42 (1-ER-25). Although Intervenors claim (at 22) that the *Declaratory Ruling* "dictat[es] . . . specifically how a locality must have demonstrated" conditions, the Commission stated that no "specific words or formulations" are required. *Declaratory Ruling* ¶ 38 (1-ER-23) ("Our 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."). The locality must simply "show that the condition existed at the time of the original approval" so that "the applicant was on notice that noncompliance with the condition could

result in disqualification." *Declaratory Ruling* n.123 (1-ER-25). And it would make little sense to read the rules as permitting localities to "merely assert," *Declaratory Ruling* ¶ 42 (1-ER-25), that approval of a facility was conditioned on an unidentified feature in existence at the time of the approval.

2. There is also no retroactivity in the *Declaratory Ruling*. Sections 1.6100(b)(7)(v) and (vi) are prospective: they establish whether a locality "shall approve" a new modification or not, and do not undo any past Section 6409(a) determinations. To be sure, the *Declaratory Ruling* affects which requirements count as "concealment elements" or "conditions" that can prevent automatic approval of future modifications. But a rule is not retroactive "merely because it draws upon antecedent facts for its operation." *Landgraf v. USI Film Prod.*, 511 U.S. 244, 270 n.24 (1994); *see Am. Min. Cong.*, 965 F.2d at 769-770 ("[a] rule with exclusively future effect, such as a change in the tax laws taxing future income from existing trusts, is not made retroactive by the fact that it will unquestionably affect past transactions").

Thus, courts regularly hold that new regulatory treatment of completed acts is not retroactive. *See US W. Commc'ns, Inc. v. Jennings*, 304 F.3d 950, 958 (9th Cir. 2002) (application of new

regulation to contracts that predate the regulations not retroactive); *Bell Atlantic Tel. Cos. v. FCC*, 79 F.3d 1195, 1207 (D.C. Cir. 1996) (rule that changed the way past earnings were treated for purposes of calculating future tariffs held prospective); *id.* at 1207 (citing cases); *W. Langley Civic Ass'n v. Fed. Highway Admin.*, 11 F. App'x 72, 76 (4th Cir. 2001) (regulation that determines eligibility for new funding based on past determinations held prospective).[16]

3. Contrary to the Localities' suggestions (Intervenors 24, LOCC 70), a regulation is not retroactive "merely because it . . . upsets expectations based in prior law." *Landgraf*, 511 U.S. at 269; *see also id.* at 270 n.24 (observing that zoning regulations are prospective requirements that "upset the reasonable expectations that prompted those affected to acquire property").

Here, the express evidence requirement does not upset any legitimate reliance interests. To the extent the meaning of "condition"

[16] Because the regulation governs the new modification, this case is unlike the cases on which Intervenors rely (at 18-20), in which the retroactivity "targeted" past conduct. *Vartelas v. Holder*, 566 U.S. 257, 270 (2012). Here, the "targeted" conduct is the new modification, which is assessed based on the "antecedent fact[]," *Landgraf*, 511 U.S. at 269 n.24, of whether a documented condition exists.

and "concealment elements" were unclear, localities had no legitimate reliance interests in their "own (rather convenient) assumption that unclear law would ultimately be resolved in [their] favor." *Qwest Servs. Corp.*, 509 F.3d at 540; *see also Acosta-Olivarria v. Lynch*, 799 F.3d 1271, 1275 (9th Cir. 2015) (reliance on a prior rule "less likely to be reasonable" where new rule "merely attempts to fill a void in an unsettled area of law"). None of the cases Intervenors cite (at 23-24) involves a clarification of an unclear law.

The Localities base their claim of reliance on the fact that Section 6409(a) can only apply to collocations on "existing" support structures, and to be "existing" a structure must have been "reviewed and approved under the applicable zoning or siting process" by a locality. Intervenors 24-25 (citing 47 C.F.R. § 1.6100(b)(5)); *see also id.* § 1.6100(c). Localities contend that this definition of "existing" "gives every indication that a local government's 'applicable' process is all that is required to establish the baseline from which modifications may occur." Intervenors 24-25. But the prerequisite that a *structure* be "existing" in order for a modification to such structure to be eligible for Section 6409(a) treatment does not speak to the question of the evidence required to

demonstrate the existence of a condition *See* 47 C.F.R. § 1.6100(b)(5); *see also supra* at 50-51.

4. Even if the Commission's clarification were retroactive, "the agency may act through adjudication to clarify an uncertain area of the law, so long as the retroactive impact of the clarification is not excessive or unwarranted." *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 518 (9th Cir. 2012) (en banc) (internal quotation marks and citation omitted); *MPS Merch. Servs., Inc. v. Fed. Energy Regulatory Comm'n*, 836 F.3d 1155, 1166 (9th Cir. 2016) (retroactive interpretation permissible absent "manifest injustice"); *Qwest Servs. Corp.*, 509 F.3d at 539 ("retroactivity is the norm in agency adjudications"). And declaratory rulings issued under 47 C.F.R. § 1.2 are adjudications under the APA. *See Wilson*, 87 F.3d at 397.

A clarification with retroactive effect is not unjust or unwarranted when the interpretation "fill[s] a void in an unsettled area of law," and is not an "abrupt departure from well-established practice." *Garfias-Rodriguez*, 702 F.3d at 521; *see Qwest Servs. Corp.*, 509 F.3d at 540 ("[a] mere lack of clarity in the law does not make it manifestly unjust to apply a subsequent clarification of that law to past conduct"). Here, the Commission's interpretation serves the "statutory interest" of

preventing conditions that a locality simply asserts—but are otherwise wholly unsupported—from barring the application of Section 6409(a). *Garfias-Rodriguez*, 702 F.3d at 521.

5. The Localities contend (Intervenors 26, Boston 52) that the Commission was arbitrary and capricious in failing to consider that the requirement may "render unenforceable" conditions that lack express evidence. But the Commission responded to comments expressing concern that some localities may not have sufficiently documented the conditions they imposed, as Intervenors acknowledge (at 27). *See, e.g.*, *Declaratory Ruling* ¶¶ 33 & n.95, 38 n.111 (1-ER-21, 23). It rejected the argument that the rule required "specific words or formulations." *Declaratory Ruling* ¶ 38 (1-ER-23). Intervenors claim (at 27) this response is inadequate because the interpretation "affects all localities whose past siting approvals do not meet the Commission's new standard." But excluding purported conditions for which there was insufficient evidence was the point of the clarification. *Declaratory Ruling* ¶ 42 ("localities cannot merely assert" that a feature of a facility was a "condition") (1-ER-25).

CONCLUSION

The petitions for review should be denied.

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Respectfully submitted,

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STATUTORY ADDENDUM

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5 U.S.C. § 553
§ 553. Rule making

* * *

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

* * *

> **(3)** either the terms or substance of the proposed rule or a description of the subjects and issues involved.
>
> Except when notice or hearing is required by statute, this subsection does not apply--
>
> > **(A)** to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

* * *

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

* * *

> **(2)** interpretative rules and statements of policy; or

5 U.S.C. § 554

§ 554. Adjudications

* * *

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

47 U.S.C. § 1455
§ 1455. Wireless facilities deployment

(a) Facility modifications

(1) In general
Notwithstanding section 704 of the Telecommunications Act of 1996 (Public Law 104-104) or any other provision of law, a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.

(2) Eligible facilities request
For purposes of this subsection, the term "eligible facilities request" means any request for modification of an existing wireless tower or base station that involves--

(A) collocation of new transmission equipment;

(B) removal of transmission equipment; or

(C) replacement of transmission equipment.

(3) Applicability of environmental laws
Nothing in paragraph (1) shall be construed to relieve the Commission from the requirements of the National Historic Preservation Act or the National Environmental Policy Act of 1969.

47 C.F.R. § 1.2
§ 1.2 Declaratory rulings

(a) The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.

(b) The bureau or office to which a petition for declaratory ruling has been submitted or assigned by the Commission should docket such a petition within an existing or current proceeding, depending on whether the issues raised within the petition substantially relate to an existing proceeding. The bureau or office then should seek comment on the petition via public notice. Unless otherwise specified by the bureau or office, the filing deadline for responsive pleadings to a docketed petition for declaratory ruling will be 30 days from the release date of the public notice, and the default filing deadline for any replies will be 15 days thereafter.

47 C.F.R. § 1.925
§ 1.925 Waivers.

(a) Waiver requests generally. The Commission may waive specific requirements of the rules on its own motion or upon request. The fees for such waiver requests are set forth in § 1.1102 of this part.

(b) Procedure and format for filing waiver requests.

(1) Requests for waiver of rules associated with licenses or applications in the Wireless Radio Services must be filed on FCC Form 601, 603, or 605.

(2) Requests for waiver must contain a complete explanation as to why the waiver is desired. If the information necessary to support a waiver request is already on file, the applicant may cross-reference the specific filing where the information may be found.

(3) The Commission may grant a request for waiver if it is shown that:

(i) The underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or

(ii) In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.

(4) Applicants requiring expedited processing of their request for waiver shall clearly caption their request for waiver with the words "WAIVER—EXPEDITED ACTION REQUESTED."

(c) Action on Waiver Requests.

(i) The Commission, in its discretion, may give public notice of the filing of a waiver request and seek comment from the public or affected parties.

(ii) Denial of a rule waiver request associated with an application renders that application defective unless it contains an alternative proposal that fully complies with the rules, in which event, the application will be processed using the alternative proposal as if the waiver had not been requested. Applications rendered defective may be dismissed without prejudice.

47 C.F.R. § 1.6100
§ 1.6100 Wireless Facility Modifications.

(a) [Reserved by 83 FR 51886]

(b) Definitions. Terms used in this section have the following meanings.

(1) Base station. A structure or equipment at a fixed location that enables Commission-licensed or authorized wireless communications between user equipment and a communications network. The term does not encompass a tower as defined in this subpart or any equipment associated with a tower.

(i) The term includes, but is not limited to, equipment associated with wireless communications services such as private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul.

(ii) The term includes, but is not limited to, radio transceivers, antennas, coaxial or fiber-optic cable, regular and backup power supplies, and comparable equipment, regardless of technological configuration (including Distributed Antenna Systems and small-cell networks).

(iii) The term includes any structure other than a tower that, at the time the relevant application is filed with the State or local government under this section, supports or houses equipment described in paragraphs (b)(1)(i) through (ii) of this section that has been reviewed and approved under the applicable zoning or siting process, or under another State or local regulatory review process, even if the structure was not built for the sole or primary purpose of providing such support.

(iv) The term does not include any structure that, at the time the relevant application is filed with the State or local government under this section, does not support or house

equipment described in paragraphs (b)(1)(i)-(ii) of this section.

(2) Collocation. The mounting or installation of transmission equipment on an eligible support structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes.

(3) Eligible facilities request. 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, involving:

(i) Collocation of new transmission equipment;

(ii) Removal of transmission equipment; or

(iii) Replacement of transmission equipment.

(4) Eligible support structure. Any tower or base station as defined in this section, provided that it is existing at the time the relevant application is filed with the State or local government under this section.

(5) Existing. A constructed tower or base station is existing for purposes of this section if it has been reviewed and approved under the applicable zoning or siting process, or under another State or local regulatory review process, provided that a tower that has not been reviewed and approved because it was not in a zoned area when it was built, but was lawfully constructed, is existing for purposes of this definition.

(6) Site. For towers other than towers in the public rights-of-way, the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site, and, for other eligible support structures, further restricted to that area in proximity to the structure and to other transmission equipment already deployed on the ground. The current boundaries of a site are the boundaries

that existed as of the date that the original support structure or a modification to that structure was last reviewed and approved by a State or local government, if the approval of the modification occurred prior to the Spectrum Act or otherwise outside of the section 6409(a) process.

(7) Substantial change. A modification substantially changes the physical dimensions of an eligible support structure if it meets any of the following criteria:

> (i) For towers other than towers in the public rights-of-way, 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; for other eligible support structures, it increases the height of the structure by more than 10% or more than ten feet, whichever is greater;
>
> > (A) Changes in height should be measured from the original support structure in cases where deployments are or will be separated horizontally, such as on buildings' rooftops; in other circumstances, changes in height should be measured from the dimensions of the tower or base station, inclusive of originally approved appurtenances and any modifications that were approved prior to the passage of the Spectrum Act.
>
> (ii) For towers other than towers in the public rights-of-way, it involves adding an appurtenance to the body of the tower that would protrude from the edge of the tower more than twenty feet, or more than the width of the tower structure at the level of the appurtenance, whichever is greater; for other eligible support structures, it involves adding an appurtenance to the body of the structure that would protrude from the edge of the structure by more than six feet;

(iii) For any eligible support structure, it involves installation of more than the standard number of new equipment cabinets for the technology involved, but not to exceed four cabinets; or, for towers in the public rights-of-way and base stations, it involves installation of any new equipment cabinets on the ground if there are no pre-existing ground cabinets associated with the structure, or else involves installation of ground cabinets that are more than 10% larger in height or overall volume than any other ground cabinets associated with the structure;

(iv) It entails any excavation or deployment outside of the current site, except that, for towers other than towers in the public rights-of-way, it entails any excavation or deployment of transmission equipment outside of the current site by more than 30 feet in any direction. The site boundary from which the 30 feet is measured excludes any access or utility easements currently related to the site;

(v) It would defeat the concealment elements of the eligible support structure; or

(vi) It 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 § 1.40001(b)(7)(i) through (iv).

(8) Transmission equipment. Equipment that facilitates transmission for any Commission-licensed or authorized wireless communication service, including, but not limited to, radio transceivers, antennas, coaxial or fiber-optic cable, and regular and backup power supply. The term includes equipment associated with wireless communications services including, but not limited to, private, broadcast, and public safety services, as

well as unlicensed wireless services and fixed wireless services such as microwave backhaul.

(9) Tower. Any structure built for the sole or primary purpose of supporting any Commission-licensed or authorized antennas and their associated facilities, including structures that are constructed for wireless communications services including, but not limited to, private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul, and the associated site.

(c) Review of applications. A State or local government may not deny and shall approve any eligible facilities request for modification of an eligible support structure that does not substantially change the physical dimensions of such structure.

(1) Documentation requirement for review. When an applicant asserts in writing that a request for modification is covered by this section, a State or local government may require the applicant to provide documentation or information only to the extent reasonably related to determining whether the request meets the requirements of this section. A State or local government may not require an applicant to submit any other documentation, including but not limited to documentation intended to illustrate the need for such wireless facilities or to justify the business decision to modify such wireless facilities.

(2) Timeframe for review. Within 60 days of the date on which an applicant submits a request seeking approval under this section, the State or local government shall approve the application unless it determines that the application is not covered by this section.

(3) Tolling of the timeframe for review. The 60–day period begins to run when the application is filed, and may be tolled only by mutual agreement or in cases where the reviewing State or local government determines that the application is incomplete. The timeframe for review is not tolled by a moratorium on the review of applications.

(i) To toll the timeframe for incompleteness, the reviewing State or local government must provide written notice to the applicant within 30 days of receipt of the application, clearly and specifically delineating all missing documents or information. Such delineated information is limited to documents or information meeting the standard under paragraph (c)(1) of this section.

(ii) The timeframe for review begins running again when the applicant makes a supplemental submission in response to the State or local government's notice of incompleteness.

(iii) Following a supplemental submission, the State or local government will have 10 days to notify the applicant that the supplemental submission did not provide the information identified in the original notice delineating missing information. The timeframe is tolled in the case of second or subsequent notices pursuant to the procedures identified in this paragraph (c)(3). Second or subsequent notices of incompleteness may not specify missing documents or information that were not delineated in the original notice of incompleteness.

(4) Failure to act. In the event the reviewing State or local government 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 deemed grant does not become effective until the applicant notifies the applicable reviewing authority in writing after the review period has expired (accounting for any tolling) that the application has been deemed granted.

(5) Remedies. Applicants and reviewing authorities may bring claims related to Section 6409(a) to any court of competent jurisdiction.