

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies)	WT Docket No. 13-238
)	
Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting)	WC Docket No. 11-59
)	
Amendment of Parts 1 and 17 of the Commission's Rules Regarding Public Notice Procedures for Processing Antenna Structure Registration Applications for Certain Temporary Towers)	RM-11688 (terminated)
)	
2012 Biennial Review of Telecommunications Regulations)	WT Docket No. 13-32
)	

**COMMENTS OF THE CITY OF WEST PALM BEACH, FLORIDA TO
NOTICE OF PROPOSED RULEMAKING**

I. INTRODUCTION

1. On September 26, 2013, the FCC released a Notice of Proposed Rulemaking¹, (“NPRM”) in which it expressed a desire to “explore opportunities to promote the deployment of infrastructure that is necessary to provide the public with advanced wireless broadband services, consistent with governing law and the public interest.” The NPRM addressed potential measures to expedite the environmental and historic preservation review of new wireless facilities, as well as proposed rules to implement statutory provisions governing State and local review of wireless siting proposals.

2. Specifically, the NPRM sought comment on four topics, including:

- Streamlining the environmental and historic preservation review processes for newer technologies, including small cells and distributed antenna systems;

¹ *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies (FCC 13-122)*

- Removing barriers to the deployment of temporary towers, that are used in cases of emergencies or to add capacity during short term events;
- The meaning of terms included in a provision of the Middle Class Tax Relief and Job Creation Act of 2012 which states “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;” and
- Clarification of issues addressed in the Commission’s “shot clock” order which set time periods for state and local governments to complete review of wireless siting applications.

3. As a local government representing our residents who are directly affected by the wireless and tower industries’ continued development of infrastructure for wireless services in the City of West Palm Beach, we offer the following comments to the NPRM for the Commission’s consideration in crafting rules associated with these four topic areas. While we generally agree with the NPRM’s desire to clarify matters that were left unclear by prior legislation (such as 47 USC §1455(a)), we have a number of issues with some of the NPRM’s proposals, particularly in light of real life experiences with applications submitted by the industry since enactment of 47 USC §1455(a) and similar state legislation, and in particular we are mindful of the Tenth Amendment’s provision regarding reservation of powers and that some of the proposals of the NPRM appear to conflict with same.

II. COMMENTS ON EXPEDITING ENVIRONMENTAL COMPLIANCE & HISTORICAL PRESERVATION COMPLIANCE FOR DISTRIBUTED ANTENNA SYSTEMS AND SMALL CELLS

4. The NPRM seeks comment on several alternate proposals submitted by the wireless infrastructure industry to adjust the scope of environmental compliance review and historical preservation compliance review for a DAS or small cell facilities. The industry proposals generally seek to exempt DAS and small cell facilities from any environmental processing apart from assuring RF exposure compliance. The industry argues that these types of facilities generally have no adverse environmental effects because of their small size/footprint and reducing this regulatory burden will expedite the development of these types of facilities.

5. One proposal, (advanced by Verizon) is to expand the current exclusion of collocations on an existing tower or building from environmental processing (other than RF exposure and effect on historic properties). Verizon’s proposal seeks to expand that exclusion to also apply to collocations on other structures, including structures such as utility poles, water tanks, light poles, and road signs. The NPRM proposes to adopt such an expanded exclusion and requested comment.

6. Generally, the rule change as proposed by the NPRM is not objectionable in concept, but should be subject to further refinement. In particular, it should not be applied to water tanks collocations for DAS/Small Cell facilities, which should still require the existing environmental processing rules. Attachment of facilities to water tanks can have adverse public safety effects (because of the potential for contamination during the construction/attachment process) and thus should not be subjected to further exclusion from existing rules. Existing requirements are sufficient to safeguard the public water supply from issues arising from

collocations on water tanks and thus should be retained for this particular subset of "structure", particularly since the NPRM indicated that such a change in exclusions would be applicable not only to a DAS/Small Cell facility but also a macrocell or other similar facility on a water tower.²

7. The NPRM also seeks comment on whether to create a new categorical exclusion from NEPA processing for DAS/Small Cell facilities. We believe this proposal is ill advised. Existing rules, subject to the certain adjustments to exclude certain collocations on certain types of structures, are adequate to address the industry's concerns. Contrary to industry assertions, DAS/Small Cell facilities do have the ability to create adverse environmental effects. In particular, we have seen instances where DAS proposals for new standalone facilities are as substantial as a traditional macrocell in terms of physical footprint and associated infrastructure deployment³. The wireless industry's proposal to create an exemption based on physical size (using cubic volume measurements) is laudable, but it does not address the potentially adverse environmental impacts of any infrastructure, irregardless of size⁴, and the exclusions from calculation of cubic volume, including "...Associated electric meter, concealment, telecom demarcation box, ground-based enclosures, battery back-up power systems, grounding equipment, power transfer switch, and cut-off switch..."⁵ effectively moot the cubic volume measurement standard.

8. Likewise, the NPRM's proposal to create a categorical exclusion from NEPA review for DAS/Small Cell facilities within rights-of-way is also problematic. There have been a number of issues with installation of new wireless infrastructure within rights-of-way, including additional hazards to pedestrian and vehicular traffic. Conditioning the exclusion from NEPA processing on the condition that the infrastructure not a "substantial increase in size" over nearby infrastructure does not solve the issue because it is not merely one installation, but rather multiple facilities (as are necessary for DAS) installed in a cluster that create an issue. Furthermore, DAS applications we have seen to date are designed to only accommodate one provider, thus multiple DAS installation for multiple providers are projected which will create an infrastructure cluster equal to or greater than a traditional macrocell.

9. The proposal for exclusions along existing aerial or underground corridors has some merit. Certainly along existing aerial corridors, where the infrastructure is being attached to existing equipment, exclusion from NEPA processing would be acceptable. However, installation of above ground infrastructure within underground corridors (where there is no above ground infrastructure) presents many of the same issues as that within rights-of-way.

10. The NPRM's consideration of exclusions from historic preservation review for DAS/Small Cells raises similar issues as exclusions from environmental review. The NPRM considers 3 option relative to historical review for DAS/Small Cell facilities: (1) a categorical exclusion; (2) a program "alternative; or (3) finding these type of facilities are not "undertakings" under the applicable statute and thus not subject to review. DAS/Small Cell facilities can very clearly adversely affect historic properties, and thus the only option that

² NPRM, Paragraph 42, at Page 17

³ For example, a carrier has sought approval for a purported DAS facility in West Palm Beach, Florida, which has no antenna or feedlines but involves significant expansion of the existing compound.

⁴ For example, the City of West Palm Beach, Florida has pending requests for sidewalk seating from restaurants, which would be located immediately around and adjacent to proposed DAS infrastructure, creating a sidewalk access impediment.

⁵ NPRM at footnote 99 (Page 19)

should be considered is a program “alternative” which will permit review of these facilities for impact on historical properties. For example, the City of Savannah, Georgia seeks to place DAS infrastructure in its alleyways off the main streets where other utilities like electric and phone are already located in order to preserve the historic nature of the City. With a categorical exclusion, Savannah would not have the ability to review the proposed infrastructure’s effect on its historical districts. The other two options would eliminate any type of review for impact on historical properties for DAS/Small Cells and would adversely impact many communities by allowing installation of traditional DAS/Small Cell infrastructure where it would be inappropriate and would not be harmonious with the surrounding properties. Retaining an appropriate level of review would allow for collaboration between providers and communities so that the infrastructure could be deployed in a fashion that does not adversely impact the historical districts or properties.

III. COMMENTS ON ENVIRONMENTAL NOTIFICATION EXEMPTION FOR REGISTRATION OF TEMPORARY TOWERS

11. We believe there is merit to the proposal to create a permanent exemption for environmental notice for temporary towers. Such facilities play an important role in times of emergencies, particularly weather emergencies, and the ability to deploy such systems quickly should be paramount. Codification of the standards contained in the current interim waiver provisions are appropriate. However, we believe that should these temporary facilities extend beyond the 60 day period contained in the current interim waiver (and proposed in the NPRM), then the existing rules should apply and the requisite environmental notifications and assessments should take place (post-construction, of course), as if the structure were to be permanent. There are several examples of “temporary” facilities in rural locations that have become de facto permanent facilities for various reasons⁶, and they should be subject to the same requirements as traditional permanent facilities. We express no opinion on whether the FCC should retain a case-specific waiver process as an alternative to environmental notification, except to note that retaining a waiver process injects uncertainty into siting issues whereas having a clear and fast rule lends itself to certainty of results for all affected parties.

IV. COMMENTS ON IMPLEMENTATION OF SECTION 6409(A) (47 USC §1455(A))

12. The NPRM also sought comment on recent legislation enacted by Congress regarding wireless siting and interpretation of such legislation. The commonly referenced “Section 6409”⁷ provisions established by Congress provided that local governments must approve and shall not deny certain types of collocation applications, but provided little guidance as to terms defined in Section 6409. The FCC’s Wireless Bureau attempted to fill in the gaps through informal guidance it issued addressing Section 6409⁸ but the Informal Guidance was not

⁶ For example, a lack of permanent power source in some locations in Wyoming mean that temporary “COW” (cellular on wheels) facilities with their own power source have become essentially permanent.

⁷ See Title VI – Public Safety Communications and Electromagnetic Spectrum Auctions, Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6409(a), 126 Stat. 156 (2012) (codified at 47 U.S.C. § 1455(a)).

⁸ Wireless Telecommunications Bureau Offers Guidance on Interpretation of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, *Public Notice*, 28 FCC Rcd 1 (WTB 2013) (hereafter “Informal Guidance”)

a rulemaking and did not solicit comments from all interested parties. Thus the NPRM seeks comments on whether the Commission should provide rules and definitions interpreting Section 6409 and if so, what those rules and interpretations should be.

13. We believe it is appropriate for the Commission to adopt rules and interpretations regarding Congress' intent regarding Section 6409 because of the divergent views already taken by industry and regulatory authorities in the absence of clarity.⁹ Indeed, some jurisdictions have already enacted legislation purporting to adopt standards consistent with congressional intent of Section 6409 but are inconsistent with the Informal Guidance as well as historical Commission interpretation.¹⁰ Uniform definitions will assist in achieving consistency of results and provide predictability to both local government and the wireless industry. It will also level the playing field between industry and local government as to what the appropriate "rules of the road" are, as the current status of matters has lent itself to misstatements of fact as to the appropriate standards by applicants and disregard for existing local land use regulations on the pretext that they are preempted by Section 6409.¹¹

14. We do not mean to suggest that the FCC preempt all local land use regulation as it relates to wireless infrastructure. To the contrary, we believe local land regulation, as codified as "preserved" in 47 USC §332(c)(7), should be the primary factor in regulating wireless infrastructure deployment because each community is unique in factors such as size, demographics, terrain, and population, which preclude a "one size fits all" type of regulation or model ordinance (which the wireless industry has suggested is appropriate but which can be problematic given the variances of the factors listed above). However, in the context of such local land regulation, establishing certain defined standards and technical terms will facilitate the processing applications for wireless services by local governments and achieve consistency of results and fewer administrative delays, both of which are expressed goals of the wireless industry. Nor do we believe establishing consistent defined terms creates a potential Tenth Amendment constitutional issue, as certain later proposed matters in the NPRM appear to do.

15. We offer comments on the following proposed definitions for terms used in Section 6409: (A) "transmission equipment" – The proposal in the NPRM to define transmission equipment to include antennas and other equipment associated with their operation is generally acceptable¹², except for the inclusion of backup generators as part of that equipment. Such generators generally operate on fuel sources such as liquid propane gas or diesel or kerosene or other flammable liquids which present significant public safety and environmental concerns and which must be addressed by local zoning regulations. Including such backup generators within these definitions covering Section 6409 would preclude local government from raising objections to such equipment in the context of an "eligible facilities request" and require approval of its installation regardless of compliance with public safety regulations. Thus, we

⁹ The wireless industry has been especially creative in interpreting the Congressional intent of Section 6409, expressing widely divergent opinions as to what "must be approved" to local communities.

¹⁰ See North Carolina S.L. 2013-185 (defining "substantial change" as, inter alia, increasing ground compound space more than 2500 square feet, which is inconsistent with the Informal Guidance and the provisions of 47 C.F.R. Part 1, App. B, Nationwide Programmatic Agreement for the Collocation of Wireless Antennas.)

¹¹ Counsel for an applicant in Mt. Vernon, New York alleging Section 6409 eligibility stated that the City was "prohibited from requiring {carrier} to submit information that is extraneous to this very limited review...The City is also precluded from applying state or local environmental, variance or other use regulations...."

¹² However, a number of items of comparable size need to be included in the definition, including but not limited to remote radio heads, tower mounted amplifiers and surge protection devices.

believe that backup electrical generators should not be included within the definition of “transmission equipment”; (B) “existing wireless tower or base station” – The NPRM proposes that the phrase “wireless” in this term be deemed to include all Commission licensed or unlicensed authorized spectrum, including commercial mobile, broadcast, private mobile, public safety, microwave, fixed broadband etc. We believe that this is appropriate with one exception, amateur radio. Amateur radio facilities are frequently located in residential parcels and are permitted pursuant to the PRB-1 limited federal exemption, but including them as potential location for collocation of commercial wireless services would be contrary to the intent of PRB-1 and would raise significant local zoning issues concerning structural stability and commercial utilization of property zoned for residential purposes. An “existing” wireless tower or base station should be defined as exactly that, a structure previously constructed for the purpose of transmitting or receiving wireless signals, consistent with existing FCC definitions of same.¹³ We concur with the IAC’s comments that a “base station” should be defined as “a set of equipment components that collectively provides a system for transmission and reception of personal wireless services.”¹⁴ We disagree with the proposed definition of “existing” put forth by Verizon that any structure already assembled is “existing” even if it does not contain any type of wireless equipment.¹⁵ Since the purpose of Section 6409 relates to collocation, it is inherently obvious that there must already be some type of wireless infrastructure already in place to make the facility an “existing” wireless tower or base station such that the addition of equipment would constitute a collocation. Expressed mathematically, $0+1 =$ a new wireless facility, $1+1 =$ a collocation; (C) “Collocation” – as expressed in the preceding text, a “collocation” must be defined as the *ADDITION* of wireless facilities to an existing wireless facility. A proposal to add antennas to a water tank with no existing wireless infrastructure is NOT a collocation but a new wireless facility. After approval and installation of such antennas, if a subsequent applicant desires to add additional equipment, that would be a collocation. The definition proposed in the NPRM is too broad and imprecise to define collocation and would permit applicants for new wireless facilities to claim Section 6409 status as a collocation, removing any discretionary authority from local government on the placement of new wireless facilities in their community; (D) “removal/replacement” – These terms should be defined as commonly understood using standard definitions.

16. (E) “substantially change the physical dimensions” – this definition is for the most complex of the terms in Section 6409. The proposed 4 prong definition, already used by the Commission in other contexts, should be adopted for use in connection with Section 6409 as it will lend uniformity and certainty to determining if an application is eligible for Section 6409 processing. However, the Commission should clarify some of the standards of such definition, including that the height increase (by percentage or actual footage) should be calculated from the original tower/structure height prior to any previous additions. Thus, an initial collocation could increase a tower by less than 10% without triggering a “substantial change” but any subsequent

¹³ 47 C.F.R. Part 1, App. B § I.B (“tower” is defined as “any structure built for the sole or primary purpose of supporting FCC-licensed antennas and their associated facilities.”)

¹⁴ See Intergovernmental Advisory Committee to the Federal Communications Commission: Advisory Recommendation Number 2013-9, “Response to Wireless Telecommunications Bureau’s Guidance on Interpretation of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012,” dated July 31, 2013, at Page 3. Available at: <http://www.fcc.gov/encyclopedia/intergovernmental-advisory-committee-comments>.

¹⁵ An existing flagpole or other structure could become a wireless tower by the addition of equipment but it would become a new facility and not a collocation. In addition, other types of structures that could also be utilized include church steeples, lightpoles, chimneys/smokestacks, sports lighting, billboards, etc.

addition that seeks even more height could trigger "substantial change" because of its calculation from the original height, and not the height after initial modification.¹⁶ We also believe that there should be a caveat to the "substantially change" 4 prong definition 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, we believe that a "substantial change" in the physical dimensions of such a facility would be any change that tends to diminish the concealment or stealth nature of the facility. For example, suppose there is an existing 80 foot grain silo "stealth" facility, designed to be consistent in height with actual surrounding silo structures, which is then proposed to be modified to be a 99 foot grain silo, which while inconsistent with the height of actual silo structures, would nominally be consistent with the proposed 4 prong test (in terms of height) to not be considered "substantial". Increasing the structure height would diminish its "concealment" effect because there are no similar 99 foot silos in the area. However, if there are other types of structures at 99 feet, a revision of the concealment to reflect consistency with surrounding structures could be permitted. The proposed collocation should maintain the appearance intended by the original facility, including, but not limited to, color, screening, landscaping, camouflage, concealment techniques, mounting configuration, and/or architectural treatment in order to be eligible for Section 6409 treatment.

17. In connection with the review and processing of applications by local governments under Section 6409, and remedies relating to same, we have a number of comments to the proposals set forth in the NPRM. As it relates to the "must approve and shall not deny" language of Section 6409, we believe that it is appropriate to provide local government with the ability to deny such applications which would otherwise be qualified under Section 6409 if the applicant fails to provide sufficient information to show compliance with applicable local structural/building/electrical codes or fails to provide sufficient information in the application to confirm the applicability of Section 6409.¹⁷ Some jurisdictions have received recent applications purporting to self-certify applicability of Section 6409 and have failed to provide sufficient technical detail or information in order to verify same.¹⁸ Local government cannot just "take our word on it" from applicants that the proposal meets whatever terms the NPRM elects to define for Section 6409 but it must be capable of ascertaining information from an applicant to verify the assertion that the proposed collocation is Section 6409 eligible. This is a particular concern since many applications are prepared by subcontractors or consultants to the actual provider/infrastructure owner, who are in many instances less familiar with both the technical aspects of a wireless facility and the requirements of the local regulations than the local entity.

18. We concur with the NPRM's proposed finding that the provision of Section 6409 should not apply to local government in its capacity as a landlord. To the extent that local government elects to use public property for wireless infrastructure, its decision to permit or

¹⁶ In addition, there exists a real possibility that a 180 foot unlit tower with a 20 foot "non-substantial" increase in height which would have to be approved according to the proposal would also trigger an FAA lighting requirement and would in our opinion constitute a substantial change and thus should be subject to local approval.

¹⁷ It is also vital for the local community to obtain this information from all applicants in order to assure that the local community is properly complying with its equal treatment obligations under the 1996 Telecommunications Act as well as Section 6409.

¹⁸ For example, Harnett County, North Carolina received an application from a major wireless provider which alleged Section 6409 eligibility but failed to provide construction drawings to verify such eligibility and failed to provide documentation evidencing structural analysis and other required matters under the applicable County ordinance.

deny additional infrastructure as a landlord should not be encumbered in any way by the provisions of Section 6409.

19. We also endorse the position that applications under Section 6409 must still be compliant with applicable building, structural and electrical codes in order to be approved. In particular, the addition of equipment must not diminish the structural integrity of a tower and the applicant must be able to demonstrate continued compliance with ANSI/EIA/TIA-222, Revision G, as amended. We believe that any such application must continue to meet any applicable fall zone or setback distance required by the relevant local regulation, in order to ensure public health and safety, which is the duty of local government and one which the federal government may not preempt.

20. As noted in the NPRM, the Informal Guidance suggested that local government require an application to be submitted in order to determine, at a minimum, if the proposed facility is Section 6409 eligible. We concur with the NPRM that such a requirement be codified. In addition to requiring information necessary to determine if the application is Section 6409 eligible, the application should also provide all of the requisite information necessary for the jurisdiction to process and (if Section 6409 eligible) grant the application. Otherwise, it will be difficult for local government to meet the shot clock obligations imposed by the *2009 Declaratory Ruling* or by applicable state law, if it must undertake a two step application process wherein the primary application only contains information necessary to ascertain Section 6409 eligibility and the subsequent application revision or amendment contains the remaining information (i.e. compliance with TIA-222 Rev. G, etc.) necessary to process.¹⁹ Many communities utilize information from applications to analyze deployment of infrastructure and plan for future needs. Limiting the information to be collected in Section 6409 eligible applications would hinder this legitimate and necessary planning tool for local government and hinder the deployment of future infrastructure by forcing communities to react to applications as received rather than plan for future deployment objectives in the same fashion done for other utility infrastructure. Accordingly, we strongly oppose any limitation on information collection in applications for wireless infrastructure.

21. As most local governments have adjusted their processes to conform to either state law or the *2009 Declaratory Ruling*, we believe it is appropriate to conform Section 6409 eligible applications to the same processing timeline as set forth in the *2009 Declaratory Ruling*, to wit, 90 days, and likewise subject to the same tolling provisions and extension provisions contained in the *2009 Declaratory Ruling*. As noted above, consistency in rules and outcomes should be the objective of the NPRM and harmonizing such applications with existing rules regarding timing is an appropriate exercise of Commission authority, inasmuch as the Supreme Court has already ruled on that issue.

22. We do express a view concerning moratoria enacted by local government and the NPRM's proposal to preempt such moratoria for Section 6409 eligible applications. Typically, the purpose of a moratorium is to facilitate adjustment of local government regulations to reflect changes to state or federal law and/or update the regulations to recognize advancements in technology. Although the industry has pointed to examples where moratoria have delayed the deployment of infrastructure, we are cognizant of several instances where a brief moratoria (consistent with prior Commission recommendations on that topic) have resulted in a

¹⁹ Among the determinations that a local entity must ascertain is whether a proposed collocation meets the existing zoning approval, including number of collocations, for the proposed site and is otherwise compliant with all other aspects of the original approved facility.

collaborative industry/local government effort to revise regulations to improve the local application process and provide greater certainty and consistency to the industry.²⁰ Thus, we are of the opinion that the NPRM's proposed rule to disregard moratoria in connection with Section 6409 eligible applications is misplaced and would discourage local government from updating their regulations, resulting in less consistency and certainty of results. We believe the alternative of requiring action on Section 6409 eligible applications within 90 days after expiration of a moratorium would be the better solution.

23. We express our strongest opinion as it relates to the proposals regarding remedy and enforcement for Section 6409 eligible applications. The NPRM's proposed "deemed granted" remedy for applications that are denied or not acted upon by local government would be inconsistent with traditional notions of federal/state jurisdiction. It raises Tenth Amendment issues and is also inconsistent with the remedies developed in the *2009 Declaratory Ruling*. The NPRM's proposal to have denials or inactions brought to the Commission as Petitions for Declaratory Ruling is misguided and would significantly burden local governments, who generally do not have Washington, DC based counsel available for representation before the FCC or the DC Circuit Court of Appeals (as the appellate court of review for Commission actions). There already exists a remedy and enforcement strategy that has demonstrated its functionality and efficiency and provided a trove of precedent to facilitate future decisions. The existing remedy under 47 USC §332(c)(7) permits an aggrieved applicant the ability to file suit in the local US District Court. We believe this remedy is appropriate for aggrieved Section 6409 applicants as it permits local government to use existing representation to advocate its position, and it provides an independent decisional authority cognizant of decisional precedent in that jurisdiction to adjudicate the subject matter, lending certainty to the proceedings.²¹ Local decisional authorities are also in a better position to grasp any unique circumstances associated with the proposal at issue, which may not be as recognizable by the Commission sitting in Washington DC. Furthermore, the proposed Petition for Declaratory Ruling would put the FCC in the position of being, in effect, a national zoning appeals board, which would appear to violate the provisions of the Tenth Amendment as well as create logistical issues. When a court decision is issued, it directs (where applicable) local government to issue the requisite permits necessary for actual construction to be commenced. Both a "deemed granted" remedy as well as a decision of the FCC would not have the imprimatur of a judicial decision and would cause additional delay in obtaining the required permits needed to actually construct a structure.

V. COMMENTS ON IMPLEMENTATION OF SECTION 332(C)(7) BY THE 2009 DECLARATORY RULING

24. The final portion of the NPRM sought comment on some of the findings made by the Commission in the *2009 Declaratory Ruling*, and in particular clarification as to some of the provisions interpreting Section 332(c)(7). First, the NPRM asks if the definition of "substantial

²⁰ See, Teton County, Wyoming Adopts New Cell Tower Rules, found at http://www.jhnewsandguide.com/news/town_county/county-adopts-new-cell-tower-rules/article_2987b6f4-b544-545f-8be4-2fc9f5d86373.html

²¹ In some jurisdictions where state law provides a "deemed granted" remedy, there is a potential for applicants to intentionally delay controversial applications in order to obtain the "deemed granted" remedy by running out the applicable state "shot clock".

change” for purposes of Section 332(c)(7) should be the same as those for Section 6409 applications. We believe that the same 4 elements should be used for such definition, again lending consistency to the rules, and making clear to all parties what the applicable standards are which constitute a “substantial change”. Next, the NPRM asks if there should be clarification as to when an application is deemed “complete” for purposes of triggering the “shot clock” under the *2009 Declaratory Ruling*. We respectfully suggest the FCC avoid wading into this procedural provision. Completeness can be determined by comparing the subject application to the requirements set forth in each jurisdiction’s zoning regulations. Adopting a “one size fits all” definition for completeness would in many instances run contrary to local zoning regulations and would appear to violate the preservation of local zoning authority provisions of Section 332 (c)(7).

25. With respect to the effect of local moratoria upon applications under the *2009 Declaratory Ruling*, we reiterate our comments in Paragraph 22 above which should be applicable in this context as well. The alternate proposal set forth in the NPRM to establish a maximum cumulative time (which could be 90/150 days beyond a maximum 180 day moratoria) recognizes the value of a moratorium to facilitate the collaborative effort of local government and industry to update regulations to reflect advancements in technology and achieve regulations that permit consistency of result and network deployment in a reasonable manner.

26. As to the applicability of the *2009 Declaratory Ruling* to DAS infrastructure, we believe the NPRM’s proposal to utilize the same timeframes, as traditional infrastructure is appropriate, with a caveat. To the extent that a community receives, as part of a planned DAS network deployment, multiple DAS applications (i.e. more than 10) at the same time, there should be consideration in the timeline for such multiple applications because of the burden that same place on local government administration to review and process same. We also believe that it would be appropriate for the FCC to define DAS in a manner consistent with its intended purpose. We have seen applicants proposing “DAS” installations, which are really microcell and designed only for one provider. True “DAS” means a network of small infrastructure designed to transmit multiple providers throughout a distinct area. DAS applications should not be for solely a single location but rather should be presented as a defined area solution containing multiple sites.

27. We strongly disagree with prior commenters who have suggested that local regulations expressing a preference for siting infrastructure on public property unreasonably discriminates amongst providers of functionally equivalent services.²² First, the provisions in question merely express a preference, not a compulsory provision. Obviously if a public property site is not available or is not as effective for purposes of network deployment as a private site, the applicant can overcome that preference in the application process and demonstrate why the public site is inadequate. Secondly, we concur with the National League of Cities’ comments that such siting determinations must be made on a case-by-case basis. Furthermore, a blanket prohibition for such preferences in local regulations would again, we believe, violate the preservation of local zoning authority provisions of Section 332 and implicate 10th Amendment issues as well.

28. Finally, with respect to the “deemed granted” remedy for violations of the *2009 Declaratory Ruling* shot clock, we reiterate our above comments that such a remedy has serious

²² Such preferences are similar in nature to those set forth in Section 704 of the 1996 Telecommunications Act which express a desire to locate infrastructure on federal lands.

constitutional defects and that the current remedy available through utilization of local federal courts that are cognizant of the applicable law and unique circumstances is the most appropriate approach and thus we endorse continuation of the remedies prescribed in the *2009 Declaratory Ruling*.

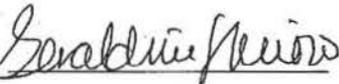
VI.

CONCLUSION

We appreciate the ability to comment on the topics contained in the NPRM and urge the FCC to consider our comments in connection with the proposals put forth therein. We believe that some of these provisions will, if enacted, remove any oversight from wireless infrastructure deployment to the serious detriment of public safety. By analogy, removing the speed limit from highways and eliminating traffic enforcement will invariably lead to accidents and injury. We urge the Commission to retain the existing provisions discussed in our comments as worthy of retention, while still streamlining some environmental and historical review processes where appropriate. Most importantly, the Commission should clarify the definition of terms utilized in Section 6409 so that the "rules of the road" are clear to all parties, but it should not impose "deemed granted" remedies (in light of constitutional issues with same) but rather approve continued use of existing remedies.

Sincerely,

City of West Palm Beach, Florida

By: 

Geraldine Muoio, Mayor

401 Clematis Street

West Palm Beach, Florida 33401

February 3, 2014