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 EUGENE, OREGON

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SUMMARY

Eugene has long recognized the importance of promoting wireless and landline broadband infrastructure and service as a critical component of the City's economic growth and development. The City has approved hundreds of wireless siting applications since the enactment of Section 332(c)(7), and it has also long encouraged wireless facility collocation. Eugene has adopted and consistently applied its land use, zoning and right-of-way access ordinances, rules and policies in a manner designed to promote wireless and landline broadband infrastructure while, at the same time, preserving the City's historic and aesthetic integrity, public safety, and fair and adequate compensation for use of City rights-of-way and other property. This is a delicate balancing process, and one that is highly site-specific. It is simply not amenable to any "one-site-fits-all," federally-imposed formula of the type proposed in the *NPRM.*

Many of the *NPRM*'s proposals, if adopted, would undermine the ability of Eugene, as well as other local governments, to preserve the visual and aesthetic integrity of their neighborhoods, parklands and historic areas and to ensure that wireless infrastructure is installed safely, and yet provide no discernible offsetting benefits in terms of promoting wireless deployment. Some of the *NPRM*'s proposals also stray beyond not only the text of Sections 6409(a) and 332(c)(7), but also beyond the constitutionally permissible reach of those statutes.

Premature and overly rigid interpretation by the Commission of Section 6409(a) at this point would inherently be incapable of taking into account the immense variation of proposed wireless modifications and the surrounding historical, environmental and aesthetic contexts in which they occur. The Commission should largely refrain from adopting any rules concerning Section 6409(a) at this time, relying instead on the development of best practices by industry and local governments, and it should not adopt any of the *NPRM*'s proposals relating to Section 332(c)(7).

1. The NPRM's Section 6409(a) Proposals.

Constitutional Concerns. If Section 6409(a) were construed to apply to any eligible facilities request relating to municipal property (such as light and utility poles, water towers or rights-of-way), that would mean that the municipality "may not deny, and shall approve," such a request to locate facilities on its property. Such compelled access to municipal property would be a taking of property within the meaning of the Fifth Amendment and, providing no procedure for determining just compensation, would be facially invalid under the Fifth Amendment.

Section 6409(a)'s "may not deny, and shall approve" language also presents serious Tenth Amendment concerns. On its face, Section 6409(a) compels a state or local government to take specific affirmative action—it "shall approve" an eligible facilities request falling within Section 6409(a). Section 6409(a) therefore unquestionably, and improperly, compels a state or local government to enact or administer a federal regulatory program. It is no answer to claim that Congress could have chosen another approach less offensive to the Tenth Amendment—as it did in Section 332(c)(7) or 47 U.S.C. § 541(a)(1). Unlike those provisions, Section 6409(a) compels a state or local government to affirmatively bless a federal regulatory scheme.

The Commission could, however, lessen (although not eliminate) Section 6409(a)'s Tenth Amendment vulnerability by construing "may not deny, and shall approve," as

encompassing approvals of eligible facilities requests subject to conditions or alterations. Construing Section 6409(a) to include conditional approvals of eligible facilities requests also would serve other desirable objectives as well. Nothing in Section 6409(a)'s language or history suggests that Congress intended to immunize eligible facilities requests completely from all public safety, building code, historic preservation or land use requirements.

"Existing Towers and Base Stations." On its face, Section 6409(a)'s purpose is to give preference to collocations at or modifications of "existing wireless towers and base stations" over construction of new "wireless towers and base stations." But Section 6409(a)'s preference is limited to only one kind of existing support structure—a "wireless tower"—and its associated "base station." The statute cannot be read as encompassing other types of non-wireless tower potential support structures—such as buildings, light poles, utility poles or water towers—and their associated base stations.

Likewise, construing "base station" to include structures "that support or house an antenna, transceiver or other associated equipment . . . even if they were not built for the sole or primary purpose of providing such support" would improperly render Section 6409(a)'s reference to "wireless tower" meaningless, as "base station" would then swallow up "wireless tower." Indeed, such a reading would also largely swallow Section 332(c)(7) as well.

Section 6409(a)'s "existing wireless tower or base station" language means that, the Commission's desire to promote DAS and small cell technology deployment notwithstanding, the statute is unlikely to apply to most DAS and small cell facilities. DAS and small cell solutions rely primarily on access to rights-of-way, utility poles and light poles, not access to existing wireless towers. But rights-of-way, utility poles and light poles are not "existing wireless towers or base stations."

"Substantial Change." The Collocation Agreement's definition of a "substantial increase in the size of the tower" is not an appropriate definition to import into Section 6409(a). A "substantial change" is a broader and more flexible concept than a "substantial increase." Moreover, the Collocation Agreement phrase serves a very different purpose than Section 6409(a)'s phrase. The Collocation Agreement standard, unlike Section 6409(a), is not preemptive. Importing the Collocation Agreement's "substantial increase in size" test into Section 6409(a), in contrast, would be preemptive, shielding requests falling within its definition from *any* state or local review at all.

"Substantially change the physical dimensions" cannot be assessed or determined in a factual or locational vacuum. It depends on a variety of factors—for example, the location of the existing tower or base station to be modified, how substantially the proposed change would alter the facility's appearance and prominence, and whether the proposed change in size would move the facility beyond generally applicable size limitations, such as height limits, or setback or "fall zone" requirements.

"Wireless." The *NPRM* wrongly proposes to define "wireless" and "transmission facilities" in Section 6409(a) as including broadcast services and facilities. That is at odds both with the Commission's own longstanding use of the terms "wireless" and "broadcasting," and with the Spectrum Act's use of those terms. Reading "wireless" in Section 6409(a) not to include broadcasting also is consistent with the provision's purpose. There is simply no indication in Section 6409(a), or elsewhere in the Spectrum Act or its legislative history, that the provision was directed at promoting broadcast facility deployment.

2. *The NPRM's Section 332(c)(7) Proposals.*

DAS. DAS or small cell facilities should not be subject to the time frames or other requirements in the *Shot Clock Ruling*. Based on DAS providers' self-described status, Section 332(c)(7) does not apply to DAS, and accordingly, the *Shot Clock Ruling* should not apply to DAS siting applications. By their own admission DAS providers are most interested in locating their facilities on light or utility poles in municipal rights-of-way. But precedent is clear that Section 332(c)(7), and thus the *Shot Clock Ruling*, do not apply to requests for access to municipal property.

The "Deemed Granted" Remedy. The *NPRM* asks whether (a) to expand the *Shot Clock Ruling* remedy to provide that a wireless facilities application is "deemed granted" if a state or local government does not act within the presumptive time periods set forth in the *Shot Clock Ruling*, and (b) to impose a "deemed granted" remedy for Section 6409(a). Both proposals are misguided for multiple reasons, not the least of which is that they would be inconsistent with the Section 332(c)(7)(B)(v) court remedy, as both the *Shot Clock Ruling* and the Fifth Circuit decision affirming the *Shot Clock Ruling* found.

The *Shot Clock Ruling* specifically rejected the "deemed granted" remedy as contrary to the statute. Section 332(c)(7)(B)(v) provides for judicial review by a court of competent jurisdiction when the state or local government has failed to act within a reasonable period of time. The court, not the Commission, is tasked by statute both with making the ultimate determination as to whether the locality's decision was made within a reasonable period of time and with deciding what the appropriate remedy is if the locality failed to do so, and the court is to do so on a case-by-case basis. A Commission-imposed "deemed granted" remedy for *Shot Clock Ruling* violations would impermissibly permit the Commission to supplant the court-provided remedy in Section 332(c)(7)(B)(v).

Even if the FCC were inclined to reconsider its rationale in the *Shot Clock Ruling*, the Fifth Circuit's decision affirming the *Shot Clock Ruling* leaves no room for a "deemed granted" remedy. The Fifth Circuit construed the *Shot Clock Ruling* deadlines as creating only a "bursting-bubble" presumption in Section 332(c)(7)(B)(v) court proceedings. Once a local government produces evidence, the presumption disappears, leaving the court—*not* the Commission—to judge the competing evidence. The Fifth Circuit's upholding of the *Shot Clock Ruling* rested on its conclusions that (1) the Commission's "shot clock" was only a presumption, and (2) courts, not the Commission, would remain the ultimate arbiters of Section 332(c)(7)(B)(v) disputes. Applying a "deemed granted" remedy to the *Shot Clock Ruling* would therefore be flatly inconsistent with the Fifth Circuit's decision upholding that ruling.

The "deemed granted" remedy would also be inappropriate for Section 6409(a) violations. Virtually all, if not all, Section 6409(a) "eligible facilities" requests will also be Section 332(c)(7) requests. A Section 6409(a) request is therefore also covered by Section 332(c)(7) to the extent that the two statutory provisions are not inconsistent, and in terms of the available remedies, there is no conflict between the two. In fashioning a remedy, Section 332(c)(7) provides for judicial review, while Section 6409(a) has no remedy at all. The remedy for Section 6409(a) violations is a judicial one pursuant to Section 332(c)(7)(B)(v), regardless of whether an application is made to a local government under Section 6409(a) or the broader Section 332(c)(7).

A Section 6409(a) "deemed granted" remedy would improperly, and conclusively, presume that there could never be any reasonable justification for a locality's failure to act, even if, for example, the applicant failed to provide needed information, provided inaccurate or misleading information, or refused to cooperate in the application process. Fundamental principles of due process require that the state or local government have an opportunity to present evidence and be heard before a "deemed granted" remedy can be imposed. The appropriate remedy for a disappointed applicant would be to seek relief in a court under Section 332(c)(7)(B)(v) to enforce Section 6409(a). The types of fact-specific and context-specific issues presented in a Section 6409(a) disputes are best-suited to a judicial forum rather than the Commission.

Municipal Property Preferences Do Not Violate Section 332(c)(7). The *NPRM* asks whether local ordinances that establish "preferences" for the placement of wireless facilities on municipal property are unreasonably discriminatory in violation of section 332(c)(7). It is unclear from the *NPRM*, however, what is meant by "preferences for placing wireless facilities on municipal property." To the extent that the *NPRM* is referring to ordinances that establish preferences for siting on municipal property based on the non-application, or limited application, of local land use and zoning regulations to municipal property, such preferences do not, and cannot, constitute unreasonable discrimination under Section 332(c)(7), for at least two reasons.

First, a municipality, like any other landowner, controls the use of its own property. Section 332(c)(7) is directed at a city's land use regulation of private property and only applies in that regulatory context. It does not apply to a city's decisions about access to its own municipal property.

Second, construing differential treatment of wireless siting on municipal property and private property as "discrimination" under Section 332(c)(7) ignores fundamental distinctions between governmental and private property and the purposes they serve. It also would lead to absurd and counterproductive results. Industry's "discrimination" argument is a *sub rosa* effort by industry to eliminate all wireless facility siting restrictions in residential or other sensitive areas. But Section 332(c)(7) has not been, and cannot be, construed to require that Draconian result.

3. The NPRM's NEPA and NHPA Proposals.

The *NPRM* proposes to broaden the NEPA exclusion for collocations to include DAS. The *NPRM* also proposes to adopt an exclusion from NHPA Section 106 review in the context of DAS, small cells, and similar facilities. These proposals are problematic.

First, Section 6409(a) specifically states Congress' intent that the Commission's NEPA and NHPA review processes not be changed. Second, as a matter of public policy, preservation of the Commission's NEPA and NHPA review process is a necessary element for ensuring that environmental and historic preservation concerns are acknowledged and adequately addressed. If the Commission were to construe Section 6409(a) broadly and/or expand Section 332(c)(7)'s preemptive reach, the Commission's NEPA and NHPA review processes might become the only available mechanism for addressing environmental, historic preservation, and public safety concerns associated with many wireless installations.

Industry proponents of the *NPRM*'s proposed expansion of the NEPA and NHPA exemptions claim that siting DAS and other small cell facilities typically cause only minor disturbances. While that may be true in many cases, the City cannot support a blanket exemption of DAS facilities on the blanket assumption that those facilities will never cause anything more than *de minimus* intrusions.

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COMMENTS OF THE CITY OF EUGENE, OREGON

The City of Eugene, Oregon ("City" or "Eugene"), files these comments in response to Notice of Proposed Rulemaking, 28 FCC Rcd. 14238 (released September 26, 2013) ("*NPRM*"), in the above-captioned proceeding.

Eugene supports the comments of other local government interests filed in this proceeding. The City supplements those comments as follows.

INTRODUCTION

Eugene has long recognized the importance of promoting wireless and landline broadband infrastructure and service as a critical component of the City's economic growth and development. To that end, Eugene has adopted and consistently applied its land use, zoning and right-of-way access ordinances, rules and policies in a manner designed to promote wireless and landline broadband infrastructure while, at the same time, preserving the City's historic and aesthetic integrity, public safety, and fair and adequate compensation for use of City rights-of-way and other property.

This is a delicate balancing process, and one that is highly site-specific. It is simply not amenable to any "one-site-fits-all," federally-imposed formula of the type proposed in the *NPRM*. Eugene's approach has proven quite successful, with wireless and wireline broadband infrastructure widely deployed in the City,[1] and the City continues to approve the installation and deployment of new wireless technologies that will improve broadband availability to its residents, businesses and visitors.

Many of the *NPRM*'s proposals, if adopted, would undermine the ability of Eugene, as well as other local governments, to preserve the visual and aesthetic integrity of their neighborhoods, parklands and historic areas and to ensure that wireless infrastructure is installed safely, without providing any discernible offsetting benefits in terms of promoting wireless deployment. Some of the *NPRM*'s proposals also stray beyond not only the text of Sections 6409(a) and 332(c)(7), but also beyond the constitutionally permissible reach of those statutes. The Commission should therefore proceed with caution. That means that the Commission should largely refrain from adopting any rules concerning Section 6409(a) at this time, relying

[1] *See, e.g.*, Comments of the City of Eugene, WC Docket No. 11-59, at 6 (filed July 18, 2011).

instead on the development of best practices by industry and local governments, and it should not adopt any of the *NPRM*'s proposals relating to Section 332(c)(7).

I. EUGENE'S REGULATION OF WIRELESS FACILITIES INSTALLATION AND PLACEMENT HAS PROVEN SUCCESSFUL BOTH FOR WIRELESS PROVIDERS AND THE PUBLIC.

The City's land use and zoning laws are designed to protect several important interests. They are designed to ensure the structural integrity of facilities to protect public safety, to preserve the community and aesthetic integrity of the neighborhoods and City districts where facilities are located, to protect view-sheds and historic areas, and to protect the environment.

At the same time, the City's land use and zoning laws are also designed to facilitate the installation of wireless facilities in the City. Since the late 1990s, the City's land use code has contained provisions specifically encouraging collocation on existing towers, buildings, light or utility poles, and water towers.[2] Collocation applications of this nature are given streamlined treatment, and permitted as of right in certain zones in the City. As a result, the City has granted hundreds of collocation and other wireless siting requests.

The City recognizes the importance to its residents and businesses of having widely deployed and available wireless services, and the City's land use and zoning policies are specifically designed to facilitate that deployment while, at the same time, preserving the other vital interests its land use and zoning laws are designed to serve. This balancing is a very fact-intensive and fact-specific process. The City believes this balancing process has worked quite well for both its residents and for wireless providers. Industry has agreed, as exemplified by AT&T's December 2012 letter to the City thanking the City's Planning and Development

[2] *See* Eugene, OR, Code § 9.5750.

Department for its contribution to the successful launch of AT&T's 4G LTE upgrade in Eugene.[3] Since adopting its wireless zoning ordinance in 1997, the City has granted over 240 wireless siting applications. The Commission would do well to leave that process undisturbed.

II. THE *NPRM*'S SECTION 6409(a) PROPOSALS.

The *NPRM* (¶¶ 9, 90-143) offers a number of proposals to "clarify and implement" Section 6409(a) of the Middle Class Tax Relief and Jobs Creation Act of 2012.[4] Those proposals are animated by the Commission's "concern[ ] that disputes over [Section 6409(a)'s] interpretation may significantly delay [the] benefits [of collocation]," which the *NPRM* describes as promoting "wireless coverage and capacity" while "reduc[ing] the environmental and other impacts of new wireless facilities deployment" (*NPRM* ¶ 9).

Eugene agrees that collocation can, if implemented appropriately, provide these benefits, and for that reason the City has long encouraged wireless facility collocation. But Eugene does not share the *NPRM*'s view that premature and preemptive "clarification" of Section 6409(a), particularly the "one-site-fits-all" nature of many of the *NPRM*'s proposals, would further the Commission's goals. To the contrary, premature and overly rigid interpretation by the Commission of Section 6409(a) at this point would inherently be incapable of taking into account the immense variation of proposed wireless modifications and the surrounding historical, environmental and aesthetic contexts in which they occur. As a result, premature and rigid "one-site-fits-all" interpretation of Section 6409(a) would more likely result in degradation of local governments' ability to protect historical sites, public safety and community integrity and aesthetics without providing any discernible benefit in increased wireless deployment.

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[3] *See* Letter from Adam Grzybicki, President, Oregon, External Affairs, AT&T to Eugene Planning and Development Department (December 20, 2012), attached as Exhibit A.

[4] Pub. L. No. 112-96, § 6409(a), 126 Stat. 156 (2012) ("Spectrum Act") (to be codified at 47 U.S.C. § 1455(a)).

For that reason, the City strongly agrees with the Commission's suggestion (*NPRM* ¶ 98) that the wiser course would be to give local governments "additional opportunity to implement some or all of the provisions of Section 6409(a) before adopting prescriptive rules." That would provide both localities and the wireless industry "more opportunity and flexibility to develop solutions that best meet the needs of their communities consistent with the requirements of the provision," and it would "also help [] distinguish those issues that require [Commission] clarification . . . from those on which there is general consensus" (*id.*).

To the extent that the Commission nevertheless decides to proceed with clarifying some or all of Section 6409(a)'s terms at this time, Eugene supports the comments of other local government interests on those issues and adds the following.

A. Section 6409(a) Cannot Plausibly, or Constitutionally, Be Read to Apply to Access to Municipally-Owned or Controlled Rights-of-Way, Light Poles, Utility Poles, Water Towers or Other Municipal Property.

The *NPRM* suggests (¶ 108) that Section 6409(a)'s phrase "existing wireless tower or base station" includes "other types of structures, from buildings and water towers to streetlights and utility poles," noting that "new technologies, such as DAS or small cells, are often deployed on utility poles and other structures that were not built for the primary purpose of supporting antennas" (*id.* ¶ 108 n.235). As noted in Part II (C)(1) below, this proposal goes too far and cannot be squared with the plain, common sense meaning of "existing wireless tower or base station." But the *NPRM*'s proposal also raises additional fundamental constitutional problems that must be addressed at the outset.

Many, if not most, of the kinds of property the *NPRM* lists—streetlights, utility poles, the rights-of-way on which those utility or light poles are located, and water towers—are municipal property. In Eugene, for example, the City owns streetlights and light poles, and its municipal utility, EWEB, owns the majority of the utility poles in the City. And the City, of course, also

owns or controls the underlying rights-of-way on which both light poles and utility poles are located.

If Section 6409(a) were construed to apply to "any eligible facilities request" relating to such municipal property, that would mean that the municipality "may not deny, and shall approve," such a request to locate facilities on municipal property. But compelled access to municipal property would be a taking of property within the meaning of the Fifth Amendment.[5] Such compelled access to municipal property, when coupled with Section 6409(a)'s "may not deny, and shall approve" language, and with no mechanism provided for determining or awarding just compensation, would be facially invalid under the Fifth Amendment.[6]

Perhaps for this reason, the *NPRM* (¶¶ 124, 129) properly recognizes that Section 6409(a) should not be construed to reach eligible facilities requests for access to municipal property. Like Section 332(c)(7), Section 6409(a) "applies only to local zoning and land use decisions and does not address a municipality's property rights as a landowner."[7] Section 6409(a) simply cannot be plausibly, or constitutionally, read to apply to what otherwise might be an "eligible facilities" request for access to utility poles, light poles, rights-of-way, water towers or other municipal property.

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[5] *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Gulf Power Co. v. United States*, 187 F.3d 1324, 1328-29 (11th Cir. 1999).

[6] *See Gulf Power Co.*, 187 F.3d at 1331 ("a reasonable, certain, and adequate provision for obtaining compensation [must] exist at the time of the taking" (quoting *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985))).

[7] *Omnipoint Commc'ns, Inc. v. City of Huntington Beach*,738 F.3d 192, 201 (9th Cir. 2013). *Accord Sprint Spectrum, L.P. v. Mills*, 283 F.3d 404, 417-21 (2d Cir. 2002); *Omnipoint Commc'ns Enters., L.P. v. Township of Nether Providence*, 232 F. Supp. 2d 430, 433-435 (E.D. Pa. 2002); *Omnipoint Holdings, Inc. v. City of Southfield*, 203 F. Supp. 2d 804, 814-18 (E.D. Mich. 2002); *Sprint Spectrum, L.P. v. City of Woburn*, 8 F. Supp. 2d 118, 120 (D. Mass. 1998) (§ 332(c)(7)(B) does not apply to requests to locate wireless facilities on municipal property).

B. Section 6409(a)'s "May Not Deny, and Shall Approve" Language Presents Serious Tenth Amendment Problems, Which Would Be Lessened, But Not Eliminated, By Construing "Shall Approve" to Encompass Approval Subject to Reasonable Conditions.

The *NPRM* (¶ 138) properly recognizes that adoption of a "deemed granted" remedy would present Tenth Amendment concerns (*see* Part III (B)(2) below), but it fails to recognize that Section 6409(a)'s "may not deny, and shall approve" language presents those same concerns. On its face, Section 6409(a) compels a state or local government to take specific affirmative action—it "shall approve" an "eligible facilities request" falling within Section 6409(a). Section 6409(a) therefore unquestionably "compel[s] [a state or local government] to enact or administer a federal regulatory program."[8] In other words, by ordering state and local governments to affirmatively approve eligible facilities requests, Section 6409(a) "commandeers [state and local] legislative or administrative apparatus for federal purposes."[9]

It is no answer to claim that Congress could have chosen another approach less offensive to the Tenth Amendment—as it did in Section 332(c)(7) or 47 U.S.C. § 541(a)(1)—by requiring state and local governments to regulate subject to federal limitations or face preemption,[10] or by simply preempting all state or local authority over eligible facilities requests. That is not what Section 6409(a) does. It instead orders state and local governments to affirmatively act on and approve eligible facilities requests. If that is not "commandeer[ing]" state and local "administrative apparatus for federal purposes,"[11] then nothing is.

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[8] *Printz v. United States*, 521 U.S. 898, 933 (1997).

[9] *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012).

[10] *NPRM* ¶ 138 n.277 (quoting *New York v. United States*, 505 U.S. 144, 167 (1992), and *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 5101 ¶ 136 (2007)).

[11] *Sebelius*, 132 S. Ct. at 2602.

The Commission could, however, lessen (although not eliminate) Section 6409(a)'s Tenth Amendment vulnerability by construing "may not deny, and shall approve," as encompassing approvals "subject to conditions on or alterations to the request" (*NPRM* ¶ 124). That would make Section 6409(a) more akin to Section 332(c)(7) and the competitive cable franchise provision in 47 U.S.C. § 541(a)(1), rather than a federal command that a state or local government take specific action to affirmatively bless what the federal government, rather than the state or local government, has decided to do.

Construing Section 6409(a) to include conditional approvals of eligible facilities requests also would serve other desirable objectives as well. As the *NPRM* notes, local approvals of not only wireless facilities, but most land use applications generally, are conditioned on the applicant's compliance with general building code, height limit, setback of "fall zone," and other public safety requirements. *NPRM* ¶¶ 125-127, n.258. Similarly, in sensitive view-shed, residential, or historic areas, wireless facilities are often subject to camouflage requirements. Nothing in Section 6409(a)'s language or history suggests that Congress intended to immunize eligible facilities requests completely from all public safety, building code, historic preservation or land use requirements. We doubt, for instance, that Congress intended Section 6409(a) to permit the expansion of a tower regardless of whether the expansion was inadequately supported and thus constituted a public danger. We likewise doubt that Congress intended Section 6409(a) to permit the uncamouflaged expansion of an existing camouflaged facility.

C. Other Section 6409(a) Definitional Issues.

1. "Existing Wireless Tower or Base Station."

On its face, Section 6409(a)'s purpose is to give preference to collocations at or modifications of "existing wireless towers and base stations" over construction of new "wireless towers and base stations." This preference for collocation is one that Eugene, and most municipalities, share. But Section 6409(a)'s preference is limited to only one kind of existing support structure—a "wireless tower"—and its associated "base station." The statute cannot be read as encompassing other types of non-wireless tower potential support structures—such as buildings, light poles, utility poles or water towers—and their associated base stations.

Likewise, construing "base station" to include structures "that support or house an antenna, transceiver or other associated equipment . . . even if they were not built for the sole or primary purpose of providing such support" (*NPRM* ¶ 108) would improperly render Section 6409(a)'s reference to "wireless tower" meaningless, as "base station" would then swallow up "wireless tower."[12] Indeed, such a reading would also largely swallow Section 332(c)(7) as well.[13]

Any common sense and plain meaning-reading of Section 6409(a) is that poles, water towers and buildings are neither "existing wireless towers" nor "existing base stations." To be sure, an existing tower or base station might be located on top of a building, and if they were, an

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[12] *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statue ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (internal quotation marks and citation omitted)).

[13] Even assuming that the *NPRM* (¶ 143) is correct in concluding that the more specific Section 6409(a) controls over the more general Section 332(c)(7), Section 6409(a) cannot plausibly be read to repeal Section 332(c)(7). Yet if "base station" were construed to include all sorts of support structures that are not "existing towers," that would mean that Section 332(c)(7) would become largely superfluous. *See Morton v. Mancari*, 417 U.S. 535, 549-50 (1974) ("In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.").

eligible facilities request might be made with respect to that existing tower or base station. But absent an existing tower or base station already being located on a building or other non-wireless tower support structure, that building or other support structure is simply not an "existing wireless tower or base station." Verizon's suggestion to the contrary (*NPRM* ¶ 111) defies any plain reading of "existing wireless tower or base station."

It may well be that reading Section 6409(a) to extend beyond "existing wireless towers or base stations" to include wireless-unadorned buildings, light poles, utility poles, or water towers might further the wireless industry's deployment desires. But that is beside the point. Congress intended Section 6409(a) to facilitate wireless deployment, but only in the way, and only to the extent, that the statutory language states: on "existing wireless tower[s] or base station[s]."

Moreover, Section 6409(a)'s "existing wireless tower or base station" language means that, the Commission's desire to promote DAS and small cell technology deployment notwithstanding, the statute is unlikely to apply to most DAS and small cell facilities. The reason is that, as the DAS industry itself has stated, DAS and small cell solutions rely primarily on access to rights-of-way, utility poles and light poles, not access to existing wireless towers.[14] But rights-of-way, utility poles and light poles are not "existing wireless towers or base stations." In addition, as noted in Part II (A) above, utility and light poles are, or are typically located on, municipal property, and Section 6409(a) does not grant, and could not constitutionally be read to grant, access to municipally-owned property.

Further, at least one DAS provider has already argued before the Commission that DAS nodes are not "base stations," and that its DAS system "does not transmit or receive RF

[14] Comments of PCIA, WC Docket No. 11-59, at 27 (filed July 18, 2011); Comments of NextG Networks, Inc., WC Docket No. 11-59, at 2, 19 (filed July 18, 2011).

transmission over the air, and . . . does not have any radios in its services or facilities."[15] DAS is instead, by the industry's own description, essentially a landline backhaul service.[16] Section 6409(a) applies only to wireless facilities, not landline service facilities.

2. "Substantially Change the Physical Dimensions."

The Collocation Agreement's[17] definition of a "substantial increase in the size of the tower" is not an appropriate definition to import into Section 6409(a). As an initial matter, the Collocation Agreement phraseology—"substantial increase in the size of the tower"—is not the same as Section 6409(a)'s phrase, "substantially change the physical dimension" of an existing tower or base station. A "substantial change" is a broader and more flexible concept than a "substantial increase."

More fundamentally, the Collocation Agreement phrase serves a very different purpose than Section 6409(a)'s phrase. The Collocation Agreement standard, unlike Section 6409(a), is not preemptive. That is, the Collocation Agreement definition only draws a line between what is subject to more thorough FCC national historic preservation review and what is not. *NPRM* ¶ 28. If a given wireless siting proposal does not constitute a "substantial increase in the size of the tower" under the Collocation Agreement, that in no way affects, or preempts, separate and independent local land use review of that proposal. The same is true of the Commission's adoption in the *Shot Clock Ruling*[18] of the Collocation Agreement test for defining a collocation

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[15] Declaration of David Cutrer at 2-3 ¶ 8, Exhibit 3 to *Petition of NextG Networks of California, Inc. for a Declaratory Ruling that its Service is Not Commercial Mobile Radio Service*, WT Docket No. 12-37 (filed Dec. 26, 2011) ("NextG Petition"). *Accord* NextG Petition, at 2-4, 8-9.

[16] NextG Petition, at 2-4, 8-9. *Accord* Comments of PCIA, at 27.

[17] 47 C.F.R. Part 1, App. B, Nationwide Programmatic Agreement for the Collocation of Wireless Antennas ("Collocation Agreement").

[18] Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, WT Docket No. 08-165, Declaratory Ruling, 24 FCC Rcd. 13994 (2009) ("*Shot Clock Ruling*"), *petition*

(Footnote continued . . .)

for purposes of the Section 332(c)(7) "shot clock" rule: The "shot clock" rule only sets a presumptive time limit within which a locality should act on collocation requests; it does not in any way limit or preempt the substantive scope of a locality's review of such collocation requests. Importing the Collocation Agreement's "substantial increase in size" test into Section 6409(a), in contrast, would be preemptive, shielding requests falling within its definition from *any* state or local review at all.

The City strongly agrees with the IAC that "the question of substantiality [under Section 6409(a)] cannot be resolved by the adoption of mechanical percentages or numerical rules applicable anywhere and everywhere in the United States, but rather must be evaluated in the context of specific installations and a particular community's land use requirements and decisions." *NPRM* ¶ 122.

Put simply, factual context matters. Increasing the height of a 40-foot tower by 20 feet is a far more substantial change in the tower's physical dimensions than increasing the height of a 120-foot tower by 20 feet. Successive 10% or 20-foot increases in the height of a tower would yield a substantial change of the tower's physical dimensions. A proposed tower height increase that would exceed the height limit permitted of a given land use zone would be a substantial change because the generally applicable height limit itself establishes what kind of change is substantial. For the same reason, as well as physical safety reasons, a proposed tower height increase that would violate a setback requirement, or a change that is unaccompanied by implementation of loading, grounding, or other safety requirements, would be a "substantial change." Likewise, making an uncamouflaged addition to a camouflaged facility would

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for review denied in part and dismissed in part, City of Arlington, Tex. v. FCC, 668 F.3d 229 (5th Cir. 2012), *aff'd* 133 S. Ct. 1863 (2013).

constitute a "substantial change," because "substantial change in physical dimensions" means nothing if it does not include changes that, from a visual standpoint, are substantial.

The point should be evident: "substantially change the physical dimensions" cannot be assessed or determined in a vacuum. It depends on a variety of factors—for example, the location of the existing tower or base station to be modified, how substantially the proposed change would alter the facility's appearance and prominence, and whether the proposed change in size would move the facility beyond generally applicable size limitations, such as height limits, or setback or "fall zone" requirements.

3. "Wireless."

The *NPRM* (¶ 104) proposes to define "wireless" and "transmission facilities" in Section 6409(a) as going far beyond Section 332(c)(7)'s "personal wireless service" definition to include "any Commission-authorized wireless transmission," including broadcast services. That is too broad. It may be that Section 6409(a)'s reference to "wireless" extends beyond Section 332(c)(7)'s "personal wireless service" to include traditional wireless services such as public safety services. Construing "wireless" to include broadcast service and facilities, however, is at odds both with the Commission's own longstanding use of the terms "wireless" and "broadcasting," and with the Spectrum Act's use of those terms.

The Commission has for years, and in a variety of contexts, used the terms "wireless" and "broadcast" to refer to two different categories of service; it has not treated broadcast services as a subspecies of "wireless" service.[19] Indeed, in its organizational structure, the Commission has

[19] *See, e.g.*, *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules*, WT Docket No. 99-168, Notice of Proposed Rulemaking 14 FCC Rcd. 11006 ¶ 46 (released June 3, 1999) (referring to "the potential for sharing this spectrum *between broadcast and wireless services, and the differences between their regulatory requirements*"), *further proceedings*, First Report and Order, 15 FCC Rcd. 476 ¶ 2 (2000) (referring to "wireless services and technologies" and "broadcast-type services"); *Reallocation and Service Rules for 698-746 MHz Spectrum Band (Television Channels 52-59)*, GN Docket No. 01-74, Notice of Proposed

(Footnote continued . . .)

long distinguished between "broadcast" and "wireless" service, with the former falling under the auspices of the Media Bureau and the latter under the auspices of the Wireless Telecommunications Bureau.

Furthermore, the Spectrum Act itself distinguishes between "broadcast" and "wireless." The Act has several references to "broadcast," all related to the reverse auction of broadcast spectrum.[20] It also has several separate references to "wireless," none of which, when read in context, could plausibly be read to include broadcasting.[21] To cite just one example, the Spectrum Act establishes the membership requirements of the FirstNet board, four members of which "shall be representatives of wireless providers."[22] Yet no one would seriously argue that Congress intended that broadcast industry representatives could or would fill those FirstNet board membership slots, as opposed to representatives of what we all know as the "wireless" industry—*i.e.*, the industry that owns the "existing commercial wireless infrastructure" that the Act encourages FirstNet to use "to the maximum extent economically desirable."[23]

Reading "wireless" in Section 6409(a) not to include broadcasting also is consistent with the provision's purpose. There is no indication in the statute's language or history that it was intended to promote broadcast—as opposed to wireless broadband, telecommunications and public safety—facility deployment. Nor is there any indication that local land use or zoning laws

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Rulemaking, 16 FCC Rcd. 7278 ¶ 43 (released March 28, 2001) (referring to spectrum sharing by "broadcasting" and "wireless services"), *further proceedings*, Report and Order, 17 FCC Rcd. 1022 ¶ 2 (2002) (referring to "wireless services and certain new broadcast operations" in a shared band); *Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization*, GC Docket No. 10-44, Notice of Proposed Rulemaking, 25 FCC Rcd. 2430 ¶ 15 (released Feb. 22, 2010) (referring to "broadcast and wireless services"), *further proccedings*, Report and Order, 26 FCC Rcd. 1594 (2011).

[20] Spectrum Act, §§ 6001(6)-(7), 6402, 6403 (to be codified at 47 U.S.C. §§ 1401(6)-(7), 309, 1452).

[21] *Id.* §§ 6201, 6202(b)(2)(A), 6203(b)(1)(A), 6206(b)(1), 6206(b)(1)(C), 6302(a), 6303(a), 6303(b)(1), 6303(b)(3) 6409.

[22] *Id.* § 6203 (b)(1)(A).

[23] *Id.* § 6206 (b)(1)(C).

have in any way delayed or impeded the collocation of wireless facilities at existing broadcast towers, which by their nature are already quite large and the modification of which is unlikely to significantly affect the facility's aesthetic, view-shed or historic preservation impact.[24]

On the other hand, reading "wireless" in Section 6409(a) to include broadcast would mean that it would apply to collocation of broadcast facilities at existing non-broadcast, wireless towers and base stations. That type of collocation would present wholly different and significant issues that Section 6409(a) was never intended to reach. Broadcast facilities, both in terms of tower and antenna height and in terms of the size of their associated transmission facilities, are typically much larger than wireless facilities. They also are subject to very different and less flexible transmitter and tower height requirements both by the FCC and by local land use, zoning and building code authorities. There is simply no indication in Section 6409(a), or elsewhere in the Spectrum Act or its legislative history, that the provision was directed at promoting broadcast facility deployment.

III. THE *NPRM'S* SECTION 332(c)(7) PROPOSALS.

In response to a petition from CTIA in 2009, the Commission established what presumptively constitutes a "reasonable period of time" for the purpose of Section 332(c)(7)(B)(ii).[25] The Commission set these presumptions at 90 days for state and local governments to process collocation applications and 150 days to process other applications.[26] The *Shot Clock Ruling* made clear that a state or local government would have the opportunity to

[24] That is not to say that wireless collocations on broadcast facilities would not present issues requiring local review or the imposition of conditions. Such collocation could necessitate conditions to ensure the continued structural integrity or strength of the tower and/or to prevent leakage into groundwater from new transmission or battery backup power facilities installed at the site. But as noted above (at Part II (B)), conditions of this nature should be allowed under Section 6409(a) in any event.

[25] *Shot Clock Ruling* ¶ 32.

[26] *Id.* ¶¶ 19, 32.

rebut this presumption of reasonableness in court. The Commission set the shot clocks in large part to clarify when a wireless provider could seek relief under the judicial review provision, Section 332(c)(7)(B)(v).

A. **The Commission Should Not Extend the *Shot Clock Ruling* to Include DAS.**

The Commission seeks comment (*NPRM* ¶¶ 158-59) on whether DAS or small cell facilities should be subject to the time frames or other requirements in the *Shot Clock Ruling*. The answer is no. Based on DAS providers' self-described status, Section 332(c)(7) does not apply to DAS, and accordingly, the *Shot Clock Ruling* should not apply to DAS siting applications.

Section 332(c)(7) concerns "personal wireless service facilities." The Commission proposes to find that to the extent DAS or small cell facilities "are or will be used for the provision of personal wireless services," these facilities are subject to the *Shot Clock Ruling* (NPRM ¶ 158). Yet DAS provider NextG has specifically argued to the Commission that its service is "no different from, and indeed competes directly with, the fiber-based backhaul/private line service provided by Incumbent Local Exchange Carriers."[27] NextG explained that all wireless networks are supported somehow by wireline transport services, but concluding that the act of providing service to a wireless equipment location converted a wired provider into a wireless provider would produce results nearing absurdity.[28] NextG pointed to 35 states that had granted NextG a certificate of public convenience and necessity, which required a finding that NextG was within the jurisdiction of the state commission and not providing Commercial Mobile Radio Services ("CMRS"), or else state jurisdiction would be preempted by Section

[27] NextG Petition, at 8.

[28] *Id.* at 8-9.

332(c)(3)(A).[29] PCIA has admitted that most DAS providers acquire state-level regulatory status that it believes exempts them from most land use processes, yet it claims that DAS faces local hurdles to DAS deployment.[30]

The DAS industry position seems to be that DAS facilities are not subject to local zoning requirements at all. They inconsistently seek to gain the advantages of the Section 332(c)(7) *Shot Clock Ruling* while, at the same time, maintaining that the local zoning authority preserved by Section 332(c)(7) does not apply to DAS deployments because they are landline, not wireless, providers. But DAS providers cannot have it both ways. The Commission should not grant DAS providers the opportunity to be "wireless" providers when it is convenient, but to be landline providers when it is not.

There is another, independent reason why the *Shot Clock Ruling* does not apply (or at least in most cases would not apply) to DAS providers. As noted above,[31] by its own admission DAS providers are most interested in locating their facilities on light or utility poles in municipal rights-of-way. But precedent is clear that Section 332(c)(7), and thus the *Shot Clock Ruling*, do not apply to requests for access to municipal property.[32]

B. The Commission May Not Add a "Deemed Granted" Remedy to the *Shot Clock Ruling*, Nor May It Otherwise Implement Such a Remedy for the Enforcement of Section 6409(a).

The *NPRM* (¶ 162) seeks comment on whether to expand the *Shot Clock Ruling* remedy to provide that a wireless facilities application is "deemed granted" if a state or local government does not act within the presumptive time periods set forth in the *Shot Clock Ruling*. The *NPRM*

[29] *Id.* at 13.

[30] Reply Comments of PCIA, WC Docket No. 11-59, at 24 (filed Sept. 30, 2011).

[31] Note 14, *supra* and accompanying text.

[32] Note 7, *supra* and accompanying text.

(¶ 137) also seeks comment on whether to impose a "deemed granted" remedy for Section 6409(a). Both proposals are misguided for multiple reasons, not the least of which is that they would be inconsistent with the Section 332(c)(7)(B)(v) court remedy, as both the *Shot Clock Ruling* and the Fifth Circuit decision affirming the *Shot Clock Ruling* found.

1. Section 332(c)(7)(B)(v) Bars a "Deemed Granted" Remedy for "Shot Clock" Violations.

As the *NPRM* notes (¶ 161), in the *Shot Clock Ruling* the Commission specifically rejected the "deemed granted" remedy.[33] Section 332(c)(7)(B)(v) provides for judicial review by a court of competent jurisdiction when the state or local government has failed to act within a reasonable period of time. The court, not the Commission, is tasked by statute both with making the ultimate determination as to whether the locality's decision was made within a reasonable period of time and with deciding what the appropriate remedy is if the locality failed to do so, and the court is to do so on a case-by-case basis.[34] The *Shot Clock Ruling* recognized that "deemed granted" would not always be the appropriate remedy and cited Section 332(c)(7) cases where courts have issued injunctions upon finding a failure to act within a reasonable time only after a comprehensive review of the facts specific to the case.[35]

On this score, the *Shot Clock Ruling* was unquestionably correct: A Commission-imposed "deemed granted" remedy for *Shot Clock Ruling* violations would impermissibly permit the

[33] *Shot Clock Ruling* ¶ 39 ("We reject the Petition's proposals that we go farther and either deem an application granted when a State or local government has failed to act within a defined timeframe or adopt a presumption that the court should issue an injunction granting the application.").

[34] *See id.* ("This provision indicates Congressional intent that courts should have the responsibility to fashion appropriate case-specific remedies.").

[35] *Id.* ("It is therefore important for courts to consider the specific facts of individual applications and adopt remedies based on those facts.").

Commission to supplant the court-provided remedy in Section 332(c)(7)(B)(v). Any other conclusion simply cannot be squared with the statute.

Even if the FCC were inclined to reconsider its rationale in the *Shot Clock Ruling*, the Fifth Circuit's decision affirming the *Shot Clock Ruling* leaves no room for a "deemed granted" remedy. The Fifth Circuit noted that, while a court considering a challenge to state or local government inaction under Section 332(c)(7)(B) will give deference to the FCC's "shot clock" presumption of what constitutes a reasonable period of time, the court in Section 332(c)(7)(B)(v) actions must also be allowed to consider any evidence speaking to the reasonableness of the state or local government's inaction.[36] In other words, the statute entitles the state or local government to the opportunity to rebut *in court* the *Shot Clock Ruling*'s presumption of unreasonableness by providing reasons for the delay, such as extenuating circumstances, the applicant's failure to submit requested information, or the complexity of the particular application.[37] A Commission-imposed "deemed granted" remedy, in contrast, would impermissibly usurp the court's jurisdiction under Section 332(c)(7)(B)(v).[38]

If there were any doubt on this score, the Fifth Circuit eliminated it. The Fifth Circuit construed the *Shot Clock Ruling* deadlines as creating only a "bursting-bubble" presumption in Section 332(c)(7)(B)(v) court proceedings: "the *only* effect of a presumption is to shift the burden of producing evidence with regard to the presumed fact."[39] The presumption does not operate to settle the case in a particular manner; rather, it determines which party in a Section

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[36] *City of Arlington, Tex. v. FCC*, 668 F.3d 229, 259 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013).

[37] *Id.* at 259-60.

[38] *Id.* at 260.

[39] *Id.* at 256 (citation omitted) (emphasis in original).

332(c)(7)(B)(v) court action must produce evidence challenging the presumed fact.[40] Once that party produces sufficient evidence to support a finding contrary to the presumption, the presumption disappears, leaving the court—*not* the Commission—to judge competing evidence. The burden of persuasion always remains with the party on whom it originally rested.[41] Applying this theory to the FCC's *Shot Clock Ruling*, the court stated:

> True, the wireless provider would likely be entitled to relief if it showed a state or local government's failure to comply with the time frames and the state or local government failed to introduce evidence demonstrating that its delay was reasonable despite its failure to comply. But, if the state or local government introduced evidence demonstrating that its delay was reasonable, a court would need to weigh that evidence against the length of the government's delay—as well as any other evidence of unreasonable delay that the wireless provider might submit—and determine whether the state or local government's actions were unreasonable under the circumstances.[42]

In other words, the Fifth Circuit's upholding of the *Shot Clock Ruling* rested on its conclusions that the Commission's "shot clock" was only a presumption, and that courts would remain the ultimate arbiters of Section 332(c)(7)(B)(v) disputes.[43] Applying a "deemed granted" remedy to the *Shot Clock Ruling* would therefore be flatly inconsistent with the Fifth Circuit's decision upholding that ruling. The Commission therefore cannot adopt a "deemed granted" remedy for the *Shot Clock Ruling*.

2. *Section 332(c)(7)(B)(v) Also Bars a "Deemed Granted" Remedy for Section 6409(a) Violations.*

The *NPRM* (¶ 137) also seeks comment on whether the Commission should impose a "deemed granted" remedy for Section 6409(a) violations. It cannot.

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[40] *Id.*

[41] *Id.*

[42] *Id.* at 257.

[43] *Id.* at 256.

The *NPRM* notes (¶ 137) that unlike Section 332(c)(7), Section 6409(a) does not contain an explicit judicial remedy as in Section 332(c)(7). But also unlike Section 332(c)(7), Section 6409(a) does not contain a "reasonable period of time" restriction—or any time limit—on a locality's decision to "not deny, and . . . approve" an "eligible facilities request." In fact, virtually all, if not all, Section 6409(a) "eligible facilities request[s]" will also be Section 332(c)(7) requests, because a locality's action on any request for modification of an existing wireless tower or base station will be a "decision[] regarding the placement, construction, and modification of personal wireless service facilities" within the meaning of Section 332(c)(7)(A).

Thus, a Section 6409(a) request is also covered by Section 332(c)(7) to the extent that the two statutory provisions are not inconsistent, and in terms of the available remedies, there is no conflict between the two.[44] In fashioning a remedy, Section 332(c)(7) provides for judicial review, while Section 6409(a) has no remedy at all. Thus, because virtually every Section 6409(a) request is also a Section 332(c)(7) request, the remedy for Section 6409(a) violations is supplied by Section 332(c)(7). Accordingly, the remedy for Section 6409(a) violations is a judicial one pursuant to Section 332(c)(7)(B)(v) regardless of whether an application is made to a local government under Section 6409(a) or the broader Section 332(c)(7).

Further, the same rationale for rejecting a "deemed granted" remedy for Section 332(c)(7) applies to Section 6409(a).[45] A Section 6409(a) "deemed granted" remedy would

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[44] Section 6409(a) applies "[n]otwithstanding section 704 of the Telecommunications Act of 1996 ... or any other provision of law."

[45] The *NPRM* cites two examples of other contexts where the Commission has adopted a "deemed granted" or "deemed approved" remedy. *NPRM* ¶ 137 n.275. The City notes that in the context of pole attachments covered by 47 C.F.R. § 1.1403(b), the entity that has failed to act is a pole-owning utility, made subject to Commission regulatory jurisdiction by 47 U.S.C. § 224, not a state or local government acting as a regulatory authority. The pole attachment regulation therefore does not involve the preemption of state or local authority, but instead involves regulation of the pole attachment process and utility pole owners, over which Congress granted the Commission plenary rulemaking and remedy-fashioning authority. 47 U.S.C. § 224. The *NPRM*'s citation to the *Cable Franchise Report and Order*'s "interim franchise" remedy is also inapposite. The "interim franchise" that is "deemed granted"

(Footnote continued . . .)

improperly, and conclusively, presume that there could never be any reasonable justification for a locality's failure to act, even if, for example, the applicant failed to provide needed information, provided inaccurate or misleading information, or refused to cooperate in the application process. More generally, a particular application may be unusually complex or there may be a dispute about the completeness of the application, or whether Section 6409(a) even applies to it, that would render a "deemed granted" remedy inappropriate. Fundamental principles of due process require that the state or local government have an opportunity to present evidence and be heard before a "deemed granted" remedy can be imposed.

The *NPRM* also recognizes the possibility that a "deemed granted" remedy may run afoul of the Tenth Amendment to the U.S. Constitution (*NPRM* ¶ 138). As discussed in Part II (B) above, the "shall approve" mandate of Section 6409(a) presents potentially fatal constitutional issues, and enforcing this provision through a "deemed granted" remedy would only further exacerbate the Tenth Amendment infirmities of Section 6409(a).[46] The hand of a state or local authority is truly forced when its failure to act triggers such a severe remedy.[47]

The *NPRM* asks how a "deemed granted" remedy, if adopted, would operate (*NPRM* ¶ 141). The additional steps the Commission suggests might be required—possible notification to the state or local government when the applicant *believes* the "deemed granted" remedy has been triggered, a possible action by state or local government in the court or Commission—serve

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there is just that: interim. It vanishes once the local franchising authority acts on the franchise application. In neither the pole attachment nor cable franchise context would the justification for a "deemed granted" remedy translate to Section 6409(a) or the *Shot Clock Ruling*.

[46] A canon of statutory construction is that a statute should be read to avoid constitutional infirmities, "resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381-82 (2005).

[47] *See Printz*, 521 U.S. at 928 (when federal statute leaves no "policymaking" discretion to the state, it is difficult to see "how that improves rather than worsens the intrusion upon state sovereignty").

only to underscore the impracticality of such a remedy and the unnecessary burden it would put on state and local governments.

The City believes that the appropriate remedy for a disappointed applicant would be to seek relief in a court under Section 332(c)(7)(B)(v) to enforce Section 6409(a). The types of fact-specific and context-specific issues presented in a Section 6409(a) disputes are best-suited to a judicial forum rather than the Commission. Should the Commission nevertheless choose to develop a Commission-based administrative process to address Section 6409(a) disputes, that process must allow for full fact-finding that provides the affected local government with due process, including the right to present evidence and the right to a hearing if there are disputed issues of fact.

C. Municipal Ordinances Establishing a Preference for Siting Wireless Facilities on Municipal Property Do Not Violate the Section 332(c)(7) Antidiscrimination Requirement.

The *NPRM* asks for comment (*NPRM* ¶ 160) on whether local ordinances that establish preferences for the placement of wireless facilities on municipal property are unreasonably discriminatory in violation of Section 332(c)(7). It is unclear from the *NPRM*, however, what is meant by "preferences for placing wireless facilities on municipal property." The City assumes (but frankly does not know) that the *NPRM* may be referring to situations where local land use and zoning ordinances may not apply, or may apply in a more limited or different way, to municipal property. Alternatively, the *NPRM* may be referring to ordinances that in some form or fashion more directly favor siting facilities on municipal property.

To the extent that the *NPRM* is referring to ordinances that establish preferences for siting on municipal property based on the non-application, or limited application, of local land use and zoning regulations to municipal property, such preferences do not, and cannot, constitute unreasonable discrimination under Section 332(c)(7), for at least two reasons.

First, a municipality, like any other landowner, controls the use of its own property. A decision whether or not to allow construction on a municipality's own land "does not regulate or impose generally applicable rules on the placement, construction, and modification of personal wireless service facilities ... and so the substantive limitations imposed by [Sections 332(c)(7)(B)(i) and (iv)] are inapplicable."[48] Section 332(c)(7) is directed at a city's land use regulation and only applies in that regulatory context.[49] It does not apply to a city's decisions about access to its own municipal property. Understanding Section 332(c)(7) to limit a municipality's ability to permit the siting of wireless facilities on municipal property would render it an impermissible interference with and burden on the municipality's control of its own property.[50]

Second, construing differential treatment of wireless siting on municipal property and private property as "discrimination" under Section 332(c)(7) ignores fundamental distinctions between governmental and private property and the purposes they serve. It also would lead to absurd and counterproductive results.

A simple, and common, example will prove the point. In many municipalities, wireless towers are generally not permitted in an area zoned residential. There often are, however, fire or police stations located in residential areas, and those stations have tower facilities for the rather obvious reason of their use of public safety radio. A municipality may allow, even encourage,

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[48] *Omnipoint Commc'ns, Inc.*, 738 F.3d at 200. (quotation marks omitted); *see also Bldg. & Constr. Trades Council of the Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 226-27 (1993) ("When a State owns and manages property ... it must interact with private participants in the marketplace. In doing so, the State is not subject to pre-emption by the [federal statute], because pre-emption doctrines apply only to state *regulation*." (emphasis in original)).

[49] *Omnipoint Commc'ns, Inc.*, 738 F.3d at 200; *Sprint Spectrum, L.P. v. Mills*, 283 F.3d at 421 ("[W]e conclude that the Telecommunications Act does not preempt nonregulatory decisions of a local government entity or instrumentality acting in its proprietary capacity[.]").

[50] *See Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 335-36 (2002).

collocation of commercial wireless facilities at those police and fire stations. Such a practice actually promotes wireless deployment, as it would permit wireless facility siting in a residential area where wireless facilities may not otherwise be permitted. If such differential treatment of municipal and private property were "discrimination" under Section 332(c)(7), that would leave a municipality with only two choices: (1) to forbid wireless collocation at the police or fire stations, or (2) permit wireless facilities to be located throughout the residential area. The first choice certainly would not promote wireless facility deployment. The second choice reveals the industry's "discrimination" argument for what it really is: a *sub rosa* effort by industry to eliminate all wireless facility siting restrictions in residential or other sensitive areas. But Section 332(c)(7) has not been, and cannot be, construed to require that Draconian result. Put simply, it cannot be that a preference for siting on municipal property constitutes "unreasonable discrimination" under Section 332(c)(7).

IV. THE *NPRM*'S NEPA AND NHPA REVIEW PROPOSALS.

The *NPRM* proposes to broaden the National Environmental Policy Act ("NEPA") exclusion for collocations found in 47 C.F.R. § 1.1306 to apply to collocations on structures in addition to those on an "existing building or antenna tower" (*NPRM* ¶ 37) and/or to take other action to exclude DAS and small cell deployments from NEPA review (*NPRM* ¶¶ 42-43). The *NPRM* (¶ 53) also proposes to adopt an exclusion from National Historical Preservation Act ("NHPA") Section 106 review in the context of DAS, small cells, and similar facilities.

The City finds these proposals problematic. First, Section 6409(a) specifically states Congress' intent that the Commission's NEPA and NHPA review processes not be changed. Second, as a matter of public policy, preservation of the Commission's NEPA and NHPA review process is a necessary element for ensuring that environmental and historic preservation concerns are acknowledged and adequately addressed. Perhaps more importantly, if the Commission were

(improperly, in our view) to construe Section 6409(a) broadly and/or expand Section 332(c)(7)'s preemptive reach, the Commission's NEPA and NHPA review processes could become the only available mechanism for addressing environmental, historic preservation, and public safety concerns associated with many wireless installations.

A. An Exemption Would Be Contrary to Congress' Clearly Expressed Intent in Section 6409(a).

Section 6409(a) is unambiguous: it promotes collocation and modification of wireless facilities on existing towers or base stations, but *not* at the expense of NHPA or NEPA review. The *NPRM*'s goal of implementing Section 6409(a) while simultaneously expanding the NEPA and NHPA exemptions, all based on a desire to promote wireless deployment, cannot be squared with Section 6409(a)(3).

The first step in statutory analysis "always, is the question [of] whether Congress has directly spoken to the precise question at issue."[51] "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[52] Section 6409(a)(3) is clear on its face: "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." Using Section 6409(a) and its objectives as an opportunity to water down the NEPA and NHPA review processes is just what Congress did not want the Commission to do. Yet that is what the *NPRM* proposes to do.

[51] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

[52] *Id.* at 842-43.

B. The Commission Should Not Broaden Exemptions from NEPA and the NHPA, Particularly if It Simultaneously Preempts State and Local Historic Preservation, Environmental, Aesthetic, or Public Safety Oversight Under Section 6409(a).

NEPA is a procedural requirement that does not control the substantive outcome of an action, but it is crucial to promoting and facilitating public involvement.[53] The NHPA similarly has important procedural and public involvement components (*NPRM* ¶ 25). The local regulatory process works with the NHPA to ensure adequate public notice.[54] Further, the fact that interested parties can notify the Commission pursuant to the Nationwide Agreement upon discovery of previously unidentified historic properties is a "safeguard" to ensure that adverse impacts are considered.[55] The local land use process and the complaint process are significant components to fulfilling the historic preservation goals of the NHPA.

Should the Commission further preempt local land use and zoning authority under Section 6409(a) and/or Section 332(c)(7), as the *NPRM* proposes (but which as explained above, the City does not think the Commission should do), the Commission should recognize the heightened importance of federal NEPA and NHPA review as a safeguard mechanism.[56] Absent the FCC's NEPA and NHPA reviews, a broad swath of wireless facilities would be categorically insulated from historic preservation, environmental, aesthetic, or safety review at any level—

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[53] *NPRM* ¶ 79. *See also Am. Bird Conservancy v. FCC,* 516 F.3d 1027, 1035 (D.C. Cir. 2008).

[54] *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, WT Docket No. 03-128, Report and Order, 20 FCC Rcd. 1073 ¶ 108 (2004) ("use of the local zoning process, local newspaper publication, or an equivalent process constitutes sufficient notice of a proposed undertaking in the nature of a communications facility to the general public"), *petition for review denied by, CTIA-The Wireless Ass'n v. FCC*, 466 F.3d 105 (D.C. Cir. 2006).

[55] *Id.* ¶ 35.

[56] In one case in Georgia, the State Historic Preservation Officer decided not to comment on a proposed permit, but the County Commission, considering testimony of various citizens and other evidence not considered by the SHPO, denied the permit based on adverse visual impact to a historic district. *Southeast Towers, LLC v. Pickens County, Ga.,* 625 F.Supp. 2d 1293, 1302 (N.D. Ga. 2008). This illustrates the importance of having multiple layers of review to ensure the preservation of historic resources.

federal, state or local—if the FCC were to further preempt local authority under Section 6409(a) and/or Section 332(c)(7). Without meaningful state and local land use or zoning review, the FCC's NEPA and NHPA procedures would become increasingly necessary to take the requisite hard look at effects of an undertaking on the environment, historic properties and public safety.

Industry proponents of the *NPRM*'s proposed expansion of the NEPA and NHPA exemptions will no doubt claim that siting DAS and other small cell facilities typically causes only minor disturbances. While that may be true in many cases, the City cannot support a blanket exemption of DAS facilities on the blanket assumption that they will never cause anything more than *de minimus* intrusions. The City would therefore be concerned with any expanded exclusion that would remove some or all construction of new structures associated with DAS or small cell deployment from NEPA or NHPA review (*NPRM* ¶¶ 45, 56).

The Commission has suggested that DAS may be "particularly desirable in areas with stringent siting regulations, such as historic districts" due to their potential to be less visible.[57] That DAS may be more likely to be used in areas of historic significance or concern does not, however, counsel in favor of reducing historic preservation review. Rather, the Commission's procedures for historic preservation review and complaints should continue to ensure that the assumption that DAS will be less damaging to historic areas is correct, particularly if DAS is likely to be more prevalent in historic districts. Impacts of the deployment of DAS components, including antennas, power supplies, converters, transceivers, and other equipment, on historic structures, such as building facades and street lights, may be of particular concern.

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[57] *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 10-133, Fifteenth Competition Report, 26 FCC Rcd. 9664 ¶ 308 n.878 (2011); *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services,* WT Docket No. 11-186, Sixteenth Competition Report, 28 FCC Rcd. 3700 ¶ 321 (2013).

The FCC should not expand its current exemptions to NEPA and NHPA review. This is particularly important if the Commission decides (improperly, we believe) to construe Section 6409(a) to preempt state and local governments from reviewing applications pursuant to their own environmental protection and historic preservation laws and procedures.

CONCLUSION

The Commission should refrain from adopting preemptive rules construing Section 6409 at this time. It should instead give local governments the time and experience to flexibly address the fact-intensive and context-specific issues that Section 6409(a) necessarily raises, and also to give local governments and industry the time to develop best practices. The Commission should reject all of the *NPRM*'s proposals relating to Section 332(c)(7). And it should not broaden the NEPA and NHPA exemptions for wireless facilities.

Respectfully submitted,

/s/ Tillman. L. Lay

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February 3, 2014

Exhibit A

at&t

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December 20, 2012

City of Eugene
Planning and Development Department
Sarah Medary, Executive Director AIC
99 W 10th Ave.
Eugene, OR 97401

VIA EMAIL AND FIRST CLASS MAIL

RE: AT&T Broadband Data Network Launch (4G LTE)

Dear Sarah:

On November 16, 2012, AT&T launched a major upgrade to its wireless network, known as 4G Long Term Evolution ("LTE"), in the City of Eugene. We wanted to take a moment to thank you – the City's leadership, professional and administrative staff – for your important contribution towards a successful launch.

Over the past year, AT&T has worked closely with the Planning and Development Department to obtain permits and approvals to upgrade all of its cell sites spread throughout the City. This was quite an effort – the volume and complexity of the permitting program could not have been accomplished without the efforts of your staff, particularly Katharine Kappa, Charlotte Curtis, Gabe Flock, Mike McKerrow, and each member of the review team.

AT&T's investment in the 4G LTE network will provide substantial economic benefits to the City for years to come. Millions of dollars have been invested throughout the region in permitting fees, staff, design, construction and equipment, directly benefitting the City's economy. AT&T's 4G LTE network provides data speeds to customers up to ten times faster than 3G, allowing the city to be more competitive across the nation and the world.

Again, we appreciate your efforts and support. Please extend our thanks and congratulations to your entire staff.

Sincerely yours,

Adam Grzybicki
President, Oregon
External Affairs

cc: Hon. Kitty Piercy, Mayor
Jon Ruiz, City Manager
Mike Sullivan, Community Development Manager

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