

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

COMMENTS OF TOWERSTREAM CORPORATION

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SUMMARY

Congress has tasked the Commission with encouraging the deployment of broadband services to all Americans on a reasonable and timely basis, and with ensuring such deployment if the Commission finds that broadband services are not being reasonably and timely deployed. Broadband services depend on the availability of a broadband network. Network providers build wireless broadband networks when the costs – investments of money and time – are not prohibitive. Yet, state and local facilities siting requirements can be unduly burdensome, both in terms of time and money, becoming barriers to investment in, and therefore construction of, wireless broadband infrastructure. Having found that wireless network providers are hindered in their access to key inputs for building such wireless network infrastructure and face obstacles in permitting sites for their wireless facilities, the Commission must take action to remove such hindrances and obstacles.

The Commission should act to broadly interpret and implement Section 6409(a) of the Spectrum Act. Notably, the Commission should find that: (1) Section 6409(a) applies to unlicensed and fixed wireless facilities and services; (2) the term “wireless tower or base station” encompasses structures that support or house wireless communications equipment, even if such structures were not built for the sole or primary purpose of providing such support; and (3) a modification to an existing tower or base station under Section 6409(a) encompasses “collocations” on buildings and other structures, even if those structures do not currently house wireless communications equipment. Towerstream further urges the Commission to establish limitations on acceptable state and local government application and approval processes and remedies for violations of the Section 6409(a) process.

In addition, new technologies allow deployments with smaller antennas and equipment that are unobtrusive and simply do not require the same kind of regulatory oversight that was required for the deployment of large macrocells. Imposing burdensome facilities siting regulation to these newer technologies is not only unwieldy, but also a deterrent to the deployment of broadband infrastructure. Accordingly, the Commission should streamline its environmental processes for review for newer and smaller wireless technologies.

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COMMENTS OF TOWERSTREAM CORPORATION

Towerstream Corporation (“Towerstream”), by its attorneys, hereby submits comments in response to the Federal Communications Commission (“Commission” or “FCC”) Notice of Proposed Rulemaking¹ in the above-captioned proceeding addressing wireless infrastructure deployment. While the NPRM seeks comment on several matters related to the Commission’s efforts to improve its wireless facilities siting policies,² Towerstream focuses these comments

¹ *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies; 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; 2012 Biennial Review of Telecommunications Regulations*, Notice of Proposed Rulemaking, 28 FCC Rcd 14238 (2012) (“NPRM”); *see also* Public Notice, “Comment Deadlines Announced for Notice of Proposed Rulemaking on Improving Wireless Facilities Siting Policies,” WT Docket No. 13-32, WT Docket No. 13-238, WC Docket No. 11-59, DA 13-2324 (WTB rel. Dec. 5, 2013) (“Public Notice DA 13-2324”).

² The Commission also seeks comment on its environmental review process, including review for effects on historic properties, for small cells, distributed antenna systems, and other small-scale wireless technologies; a proposed narrow exemption from the Commission’s pre-construction environmental notification requirements for certain temporary towers; and certain

primarily on questions related to the interpretation and implementation of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012³ and on policies to facilitate the deployment of distributed antenna systems (“DAS”) and small cells.

I. Introduction

Towerstream is a competitive provider of wireless broadband data services. Towerstream provides competitive high speed Internet access service to customers in many major metropolitan markets across the United States using both licensed and unlicensed fixed point-to-point systems. Using unlicensed spectrum, Towerstream also provides Wi-Fi services to end user customers and data offloading services for excess capacity to providers of mobile wireless services and other competitive providers. These wireless broadband Internet access services provide a competitive alternative for carriers and consumers, and they facilitate efficient use of licensed spectrum by relieving the increasing demands being placed on licensed spectrum capacity.

Despite the strong public interest in encouraging wireless broadband networks, deployment of such networks is often hindered by burdensome and antiquated permitting requirements imposed by certain state and local regulations. Many of these regulations are outdated in that they have not accounted for changes in wireless technology, particularly the deployment of small cells and very small Wi-Fi antennas, and the demand for newer and faster technologies. These burdensome and time-consuming regulations are not consistent with, and do not enable wireless broadband network providers to meet, the Commission’s sweeping broadband deployment goals.

narrow issues regarding the 2009 declaratory ruling that established presumptively reasonable time periods for local review of wireless facility siting applications under Section 332(c)(7) of the Communications Act of 1934, as amended (“Act”). *See* Public Notice DA 13-2324.

³ *See* Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6409(a), 126 Stat. 156 (2012) (codified as 47 U.S.C. § 1455(a)) (“Spectrum Act”).

Citing a statement made by current FCC Chairman Wheeler that was made over two years ago in a report urging the Commission to take steps that would foster competition in the wireless industry, the Competitive Carriers Association (“CCA”) exclaims that “[w]e are living through the historical transformation of the ‘fourth network revolution.’”⁴ Towerstream agrees. In addition to the important spectrum, roaming, interconnection, equipment, and support issues raised in the CCA report as essential for a competitive wireless marketplace, Towerstream stresses that access to competitive wireless infrastructure is also a critical factor for making competitive wireless services available. The network may respond to consumer demand or it may drive consumer demand, but without the network, consumers will not have access to wireless broadband services.

Americans have long depended on their wireless devices for voice communications, and notably they are increasingly relying on them as their sole method for voice communications.⁵ Now, American consumers are also demanding instant access to data over their wireless devices

⁴ “A Framework for Sustainable Competition in the Digital Age: Fostering Connectivity, Innovation and Consumer Choice,” Ex Parte Presentation of Competitive Carriers Association, *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268 (Dec. 4, 2013) (citing Tom Wheeler, “Making Our History,” *Mobile Musings* (2011), available at <http://www.mobilemusings.net/2011/12/making-our-history.html>).

⁵ CTIA cites December 2012 data showing that over 38% of U.S. households are wireless-only for their communications needs, and USTelecom predicts that by the end of 2013, 45% of U.S. households will use wireless-only for voice services. See CTIA: The Wireless Association, *Wireless Quick Facts*, available at <http://www.ctia.org/your-wireless-life/how-wireless-works/wireless-quick-facts> and Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from Jonathan Banks, Senior Vice President, Law & Policy, USTelecom, *Connect America Fund: A National Broadband Plan for Our Future*; WC Docket No. 10-90, GN Docket No. 13-5, *Technology Transition Task Force, USTelecom Petition for Non-Dominant Treatment of Switched Voice Services*, WC Docket No. 13-3 (Dec. 5, 2013).

at faster and faster speeds.⁶ Commissioner Rosenworcel is correct that “access to mobile broadband is becoming an essential part of everything we do.”⁷ Consumers use mobile broadband services for banking and health care needs, commercial transactions, education, social networking, access to public safety, and so many more daily transactions and interactions. Importantly too, “[t]he Spectrum Act also authorized the Commission to conduct an incentive auction of broadcast television spectrum in order to make additional spectrum available for commercial broadband service *and to help fund the deployment of ... [a nationwide public safety wireless broadband network (“PSBN”)]*.”⁸ Without a sufficient or competitive wireless infrastructure, however, Americans will not have access to what is now an essential service – wireless broadband service.

The availability and expansion of wireless broadband services depend on the availability and expansion of wireless broadband infrastructure. As the Commission so aptly stated in the National Broadband Plan, “[b]roadband is the great infrastructure challenge of the early 21st century,”⁹ while also noting that “*permitting requirements and procedures for rights of way,*

⁶ CTIA reports that “[m]ore than 89 percent of U.S. inhabitants have mobile broadband subscriptions.” CTIA: The Wireless Association, *Wireless Quick Facts*, available at <http://www.ctia.org/your-wireless-life/how-wireless-works/wireless-quick-facts>.

⁷ Statement from FCC Commissioner Jessica Rosenworcel Regarding Presentation on Measuring Broadband America FCC Speed Test App (Nov. 14, 2013) available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-324153A1.pdf.

⁸ NPRM, ¶ 91 (emphasis added).

⁹ FEDERAL COMMUNICATIONS COMMISSION, *CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN*, Executive Summary at XI (2010), available at <http://download.broadband.gov/plan/national-broadband-plan.pdf> (“National Broadband Plan” or “NBP”). The Commission explained that “[l]ike electricity a century ago, broadband is a foundation for economic growth, job creation, global competitiveness and a better way of life. It is enabling entire new industries and unlocking vast new possibilities for existing ones. It is changing how we educate children, deliver health care, manage energy, ensure public safety, engage government, and access, organize and disseminate knowledge.” *Id.*

poles, conduits and towers ‘are key to the efficient and streamlined deployment of broadband,’ and that difficulties in such access ‘often prove to be the greatest impediment to the efficient, cost-effective, and timely deployment of broadband.’¹⁰ Wireless broadband infrastructure is comprised of antennas and associated equipment, and it is through the siting, and therefore permitting, of antennas and equipment that a wireless broadband network is built. Accordingly, the policies, rules, and guidance that the Commission develops in this proceeding are crucial for accelerating the country’s wireless broadband future.

Today, wireless voice and data traffic is carried over licensed and unlicensed spectrum with varied technologies that require significantly smaller antennas and equipment than ever before. Wireless facilities siting policies must reflect the current state of technology and equipment, but these policies must also anticipate and be flexible enough to accommodate evolving technologies and equipment.

In light of the difficulties of deploying wireless broadband networks in some areas of the country, but also with forethought about the competitive and expansive opportunities that wireless broadband services can bring to consumers across the country, Towerstream supports the Commission’s efforts to implement Section 6409(a) of the Spectrum Act and to tailor the Commission’s environmental rules for DAS and small cells. Towerstream urges the Commission to find that:

- Section 6409(a) applies to unlicensed wireless facilities and fixed wireless services, including fixed broadband;¹¹

¹⁰ National Broadband Plan at p. 116, n. 2 (*citing* Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from Judith A. Dumont, Director, Massachusetts Broadband Initiative, GN Docket Nos. 09-47, 09-51, 09-137 (Jan. 8, 2010) (emphasis added).

¹¹ See NPRM, ¶ 104.

- the term “‘wireless tower or base station’ should be interpreted to encompass structures that support or house an antenna, transceiver, or other associated equipment that constitutes part of a base station, even if they were not built for the sole or primary purpose of providing such support;”¹²
- a modification to an existing tower or base station under Section 6409(a) encompasses “‘collocations on buildings and other structures, even if those structures do not currently house wireless communications equipment;”¹³ and
- states and local governments must implement streamlined application processes¹⁴ that are tailored to the characteristics of the antennas and other related equipment that is necessary for the service being provided.

Towerstream also urges the Commission to establish:

- reasonable timeframes for action on and approval of wireless facilities permitting applications, and reasonable limitations on the information required in such applications and review thereof;¹⁵ and
- “‘deemed granted” remedies, and other remedies that provide the entity requesting a permit with a clear path to resolution of disputes about the approval process for Section 6409(a) eligible facilities requests;¹⁶

Finally, Towerstream urges the Commission to modify its environmental compliance rules applicable to the deployment of distributed antenna systems and small cell technologies.¹⁷

¹² NPRM, ¶ 108.

¹³ NPRM, ¶ 111; *see also* NPRM, ¶ 104.

¹⁴ *See generally* NPRM, ¶¶ 130-136.

¹⁵ *See* NPRM, ¶ 134.

¹⁶ *See generally* NPRM, ¶¶ 137-143.

II. The Commission Must Define the Terms in Section 6409(a) Broadly To Facilitate Rapid Broadband Deployment

Section 6409(a) of the Spectrum Act requires that “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.”¹⁸ Subsection (a)(2) defines an “eligible facilities request” as “any request for modification of an existing wireless tower or base station that involves (A) collocation of new transmission equipment; (B) removal of transmission equipment; or (C) replacement of transmission equipment.”¹⁹

The Commission proposes to define the undefined terms in Section 6409(a), filling in other interstices that may delay the intended benefits of the statutory provision, but seeks comment on whether the Commission should take such proactive action or instead allow issues of interpretation to be resolved through local interpretations, judicial decisions, and voluntary agreement.²⁰ Towerstream urges the Commission to proceed with its proposed efforts to define the otherwise undefined terms in Section 6409(a) and to establish federal standards implementing Section 6409(a). Absent proactive FCC action, deployments pursuant to Section 6049(a) will be bogged down in a quagmire of conflicting local, state, and judicial proceedings and litigation. Such a “wait and see” approach will not realize the twin goals of Section 6409(a) to promote “commercial and public safety wireless broadband deployment through several

¹⁷ See generally NPRM, ¶¶ 11-67.

¹⁸ 47 U.S.C. § 1455(a).

¹⁹ 47 U.S.C. § 1455(a)(2).

²⁰ See NPRM, ¶ 96.

measures that promote rapid deployment of the network facilities needed for the provision of broadband wireless services.”²¹

Indeed, the Commission’s proactive implementation of Section 6409(a) (by defining its terms) is supported by the Commission’s continuing obligations under Section 706 of the Telecommunications Act of 1996,²² to encourage the deployment of advanced telecommunications capability and bolstered by the broader authority conferred by Section 706. The Commission’s own understanding that Section 706 “constitutes an affirmative grant of regulatory authority” has been affirmed recently by the Court of Appeals in *Verizon v. FCC*,²³ stating that “section 706 of the Telecommunications Act of 1996 vests [the FCC] with affirmative authority to enact measures encouraging the deployment of broadband infrastructure.”²⁴ Importantly, Section 706(b) states that if the Commission has found that advanced telecommunications capability is not being deployed to all Americans in a reasonable and timely fashion, the Commission is required to “take immediate action to accelerate

²¹ NPRM, ¶ 91.

²² 47 U.S.C. § 1302 (“Section 706”).

²³ *See Verizon v. FCC*, No. 11-1355, 2014 U.S. App. LEXIS 680, at 21 (D.C. Cir. 2014) (“*Verizon*”).

²⁴ *Verizon* at 4. *See also Verizon* at 22. Citing the legislative history for Section 706, the Court of Appeals references the Senate Report describing Section 706 as a “‘necessary fail-safe’ ‘intended to ensure that one of the primary objectives of the [Act] – to accelerate deployment of advanced telecommunications capability – is achieved.’” *See id.*, citing S. Rep. No. 104-23 at 50-51 (1995). Moreover, the Court of Appeals emphasized, as the Commission itself has observed, that “it would be ‘odd . . . to characterize Section 706(a) as a “fail-safe” that “ensures” the Commission’s ability to promote advanced services if it conferred no actual authority.’” *Verizon* at 25, citing *Open Internet Order*, 25 F.C.C.R. 17905 at 17970, ¶ 120 (2010). The Commission’s authority to regulate under Section 706 does not only lie in subsection (a), but also in subsection (b). The Court of Appeals states that in “[e]mphasizing the provision’s ‘shall take immediate action’ directive, the Commission concluded that section 706(b) ‘provides express authority’ for the rules it adopted.” *Verizon* at 29, citing *Open Internet Order*, 25 F.C.C.R. at 17972, ¶ 123.

deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”²⁵

In the Commission’s most recent broadband progress report, the Commission found that “broadband deployment is not reasonable and timely,” reporting that there are continuing barriers to broadband infrastructure investment.²⁶ Notably, the Commission reported the difficulties that broadband providers continue to experience “in accessing key inputs for broadband infrastructure, such as ... rooftops,” but also cited permitting obstacles on cell towers for wireless broadband.²⁷ With this finding, the Commission in fact must take action as directed by Section 706(b). Defining the terms of Section 6409(a) and ensuring that state and local governments implement Section 6409(a) according to the federal standards that the Commission adopts in this rulemaking is critical to achieving rapid deployment of broadband networks consistent with the mandates of Section 6409(a) of the Spectrum Act and Section 706 of the Telecommunications Act of 1996.

State and local governments should be required to comply with the federal standards that the Commission develops in this proceeding as a precondition to their continued regulatory authority.²⁸ Not only has Congress stated that broadband access is an important federal goal, but the broadband industry by its very nature is already national in scope. Therefore, having a common understanding of the rights and obligations under Section 6409(a) at a federal level will

²⁵ 47 U.S.C. § 1302(b).

²⁶ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, Eighth Broadband Progress Report, 27 FCC Rcd 10342 (2012) (“Eighth Broadband Progress Report”), *referencing* 47 U.S.C. § 1302(b).

²⁷ *See* Eighth Broadband Progress Report, ¶ 142.

²⁸ *See* NPRM, ¶ 99.

not only facilitate, but will also encourage, business investment in broadband infrastructure because the costs associated with complying with regional variations on the essential terms for facilities siting will be eliminated. It is appropriate for states and local governments to retain their traditional land use responsibilities, but on matters of national importance where a level of consistency and uniformity is necessary to accomplish a federal goal – specifically, the availability and expansion of broadband – the Commission must define the relevant terms in Section 6409(a) in order to implement it accordingly.

Towerstream supports the Commission’s efforts to define the key terms of Section 6409(a), and urges the Commission to define the terms broadly in order to achieve the goals of the statute. The Commission seeks to define or interpret the terms “*transmission equipment*,” “*existing wireless tower or base station*,” “*substantially change the physical dimensions*,” and “*collocation*” as they apply to an “*eligible facilities request*.” Towerstream offers the following comments on these terms.

Transmission Equipment

The Commission proposes to define “transmission equipment” with broad application to “encompass antennas and other equipment associated with and necessary to their operation, including ... power supply cables and a backup power generator.”²⁹ The Commission also asks whether it should include or exclude any equipment from the term “transmission equipment.”³⁰ Towerstream supports the Commission’s proposal to define “transmission equipment” broadly, without excluding any equipment, because a broad definition will facilitate the rapid deployment of wireless broadband networks and will also minimize the need to continually redefine the term

²⁹ NPRM, ¶ 105.

³⁰ NPRM, ¶ 105.

as technology and applications evolve. Defining the term broadly is consistent with Congress' intent to speed the deployment of public safety and commercial broadband networks.

Towerstream strongly supports the Commission's proposal to include backup power equipment within the definition of transmission equipment in light of the public interest in continued service during emergencies. There are no "transmissions" without a power supply. It would be meaningless to require states and localities to approve broadband facilities only to have those governmental entities deny permitting for the power necessary for transmissions during emergencies. It is critical that the Commission interpret Section 6409(a) in a manner that enhances the ability of providers like Towerstream to deploy broadband facilities that continue to function during emergencies.

With one important change, Towerstream supports defining an "antenna" for purposes of Section 6409(a) as antenna is defined in the Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process ("NPA").³¹ As defined in the NPA, "the term Antenna does not include unintentional radiators, mobile stations, or devices authorized under Part 15 of the Commission's rules."³² Accordingly, unlicensed devices are not "antennas" for purposes of the NPA. The Commission should not adopt this limitation for purposes of Section 6409(a). Applying this limitation would be inconsistent with the broad use of the term "wireless" in Section 6409(a) and the Commission's recognition that it applies to

³¹ 47 C.F.R. Part 1, App. C § II.A.I. The NPA defines antenna as "[a]n apparatus designed for the purpose of emitting radio frequency ('RF') radiation, to be operated or operating from a fixed location pursuant to Commission authorization, for the transmission of writing, signs, signals, data, images, pictures, and sounds of all kinds, including the transmitting device and any on-site equipment, switches, wiring, cabling, power sources, shelters or cabinets associated with that antenna and added to a Tower, structure, or building as part of the original installation of the antenna." *Id.* See also NPRM, ¶ 106.

³² NPA at § II.A.1.

both licensed and unlicensed facilities. Accordingly, the Commission should not exclude devices authorized under Part 15 from the definition of “antenna” for purposes of Section 6409(a).

Existing Wireless Tower or Base Station

In the NPRM, the Commission considers the individual words or sub terms of the statutory term “existing wireless tower or base station.” The Commission seeks comment on the meaning of each word or smaller group of words, but also the meaning of these words as they relate to the application of the entire phrase. Towerstream comments accordingly.

Wireless

In defining the term “wireless,” the Commission proposes “to find Section 6409(a) applies to the collocation, removal, or replacement of equipment used in connection with any Commission-authorized wireless transmission, licensed or unlicensed, terrestrial or satellite, including commercial mobile, private mobile, broadcast, and public safety services, as well as fixed wireless services such as microwave backhaul or fixed broadband.”³³ The Commission also proposes “to define a ‘wireless’ tower or base station to include one used for any such purpose.”³⁴

Towerstream agrees that in using the terms “wireless” and “transmission equipment,” Congress did not intend to limit the application of Section 6409(a) only to the “personal wireless services” facilities covered by Section 332(c)(7) of the Communications Act of 1934, as

³³ NPRM, ¶ 104.

³⁴ NPRM, ¶ 104.

amended (the “Act”).³⁵ The personal wireless services covered in Section 332(c)(7) are a relatively narrow category of all possible wireless facilities,³⁶ and Towerstream urges the Commission to find that Section 6409(a) applies broadly to *all* wireless facilities. Towerstream also concurs that this interpretation is warranted, “given the clear intent of Congress to facilitate collocation, the substantial number of broadcast and public safety towers that are potentially available for wireless collocation and that are, in many cases, already being used for collocation.”³⁷

It also seems reasonable that in not qualifying Section 6409(a) by the terms of Section 332(c)(7), Section 332(c)(7) itself has been limited such that the local zoning authority preserved for local governments under that provision are no longer preserved with regard to modifications of existing wireless towers or base stations.³⁸ Specifically, modifications to towers and base stations used for personal wireless services subject to Section 332(c)(7) are also subject to the requirements of Section 6409(a) that now apply to all wireless facilities that the Commission determines to be covered by Section 6409(a).

³⁵ See 47 U.S.C. § 332(c)(7) (added by Section 704 of the Telecommunications Act of 1996 (Public Law 104-104)). As noted in the NPRM, that provision preserves, but places limits on state and local authority to regulate wireless facilities siting used for “personal wireless services.”

³⁶ See 47 U.S.C. § 332(c)(7)(B)(i). Personal wireless services are defined as “commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services.” 47 U.S.C. § 332(c)(7)(C)(i).

³⁷ NPRM, ¶ 104.

³⁸ Section 6409(a) begins with “[n]otwithstanding section 704 of the Telecommunications Act of 1996 (Public Law 104-104) or any other provision of law” 47 U.S.C. § 1455(a)(1). Section 6409(a) has effectively removed the discretion of state and local governments when permitting covered modifications for existing wireless facilities because states and local governments “may not deny, and shall approve, any eligible facilities request.” 47 U.S.C. § 1455(a)(1).

Towerstream supports the Commission’s proposed broad definition of “wireless” and sees no reason to exclude any wireless services from the definition of the term, particularly in light of the evolving nature and uses of wireless communications, as well as the goal of rapidly deploying broadband networks. In particular, however, Towerstream urges the Commission to find that the term “wireless” includes unlicensed facilities and the services provided over such facilities, including Wi-Fi.³⁹

Tower or Base Station

While the Commission considers defining the words “tower” and “base station” individually, recognizing that each term has been previously defined by Commission rules and documents, Towerstream supports the Commission’s proposed approach of viewing these terms more holistically, incorporating concepts from previous definitions, but expanding the application of the entire phrase in order to better reflect the evolving wireless communications market.⁴⁰ Towerstream agrees with the Commission’s proposal for defining the entire phrase “wireless tower or base station,” as well as the Commission’s proposal for what equipment

³⁹ Pursuant to Part 15 of the FCC Rules, Towerstream is permitted to use unlicensed devices to provide fixed wireless broadband Internet access services to end user customers and data offloading services to providers of mobile services.

⁴⁰ The Commission notes that in the past a “tower” has been defined as “any structure built for the sole or primary purpose of supporting FCC-licensed antennas and their associated facilities.” NPRM, ¶ 107 (*citing* 47 C.F.R. Part 1, App. B, § I.B., Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (“Collocation Agreement”)); *Wireless Telecommunications Bureau Announces Execution of Programmatic Agreement with Respect to Collocating Wireless Antennas on Existing Structures*, Public Notice, 16 FCC Rcd 5574 (WTB 2001). The NPA definition of a “tower” is nearly identical. *See* 47 C.F.R. Part 1, App. C § II.A.14.

constitutes a base station. Functionally, there should be no difference in what is considered a tower and what is considered a base station for purposes of Section 6409(a).⁴¹

Historically, a tower was defined by the NPA as a structure built for the sole or primary purpose of supporting antennas used for wireless communications services.⁴² However, the Commission recognizes in the NPRM that many other types of structures that were not built for the sole or primary purpose of supporting antennas have been used to support antennas or base station equipment, and that expansive use has been encouraged to “enhance capacity for wireless networks.”⁴³ When antennas on these other types of structures have been used for wireless communications, they have been known as collocations, not towers. Importantly, one of the primary purposes of Section 6409(a) is to facilitate eligible facilities requests for *collocations* of *new* transmission equipment,⁴⁴ that is, specifically “placing wireless equipment on pre-existing structures rather than constructing new support structures.”⁴⁵ Congress and the Commission recognize that collocation “is often the most efficient, rapid, and economical means of expanding wireless coverage and capacity, and also ... [reducing] the environmental and other impacts of new wireless facilities deployment.”⁴⁶

Towerstream supports the melding of the concepts of “tower” and “collocation,” as well as eliminating any artificial distinction between what is a tower and what is a base station. In

⁴¹ The Commission has asked if it is material to the application of Section 6409(a) whether a structure is a tower or a base station, and if so, how the Commission should distinguish these terms. *See* NPRM, ¶ 108.

⁴² *See* NPRM, ¶ 108.

⁴³ NPRM, ¶ 108.

⁴⁴ Section 6409(a) applies to requests to *collocate new* transmission equipment; remove transmission equipment; or replace transmission equipment.

⁴⁵ NPRM, ¶ 9.

⁴⁶ NPRM, ¶ 9.

order to meet today's and tomorrow's wireless broadband needs, wireless broadband networks must be built. Building the networks that are needed requires that the Commission approach facilities siting with a view that is responsive to and anticipates innovations in wireless technologies. Specifically, today's wireless networks are made up of smaller antennas and equipment that provide better coverage and faster broadband speeds. In order for these facilities and networks to be rapidly deployed, or indeed to be economically deployed at all, they must be placed on structures that are not built solely for the purpose of supporting a wireless network.

Towerstream agrees with the Commission's proposal to find that the term "wireless tower or base station" encompasses "structures that support or house an antenna, transceiver, or other associated equipment that constitutes part of a base station, even if they were not built for the sole or primary purpose of providing such support."⁴⁷ This definition also satisfies the Commission's goal of ensuring that the definition of a base station will be flexible enough to accommodate future technologies and technological configurations using licensed or unlicensed spectrum, including DAS or other wireless technologies where components are dispersed over a large area and may be owned or controlled by different parties.⁴⁸

Towerstream also agrees with the Commission's proposal to find that the equipment that constitutes a base station includes "antennas, transceivers, and other equipment associated with and necessary for their operation, including coaxial cable and regular and backup power equipment," similar to how transmission equipment has been defined already in the *Fifteenth Competition Report*.⁴⁹ Indeed, under this proposal the equipment that constitutes a base station is

⁴⁷ NPRM, ¶ 108.

⁴⁸ See NPRM, ¶ 110.

⁴⁹ NPRM, ¶ 110; see also *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with*

essentially the same as what the Commission has proposed to define “transmission equipment.” Towerstream supports the broadest definition of all terms in Section 6409(a), including both transmission equipment and what constitutes base station equipment.

Existing

The Commission also must define the term “existing” with regard to a wireless tower or base station. In asking whether the term "existing" requires only that the “structure” be previously constructed at the time of the collocation application or whether it requires a structure to be used at that time to support antennas or base station equipment, the Commission has already presumed the answer that facilitates deployments and remains consistent with the provisions of the statute. Specifically, the Commission has recognized that many types of “structures, from buildings and water towers to streetlights and utility poles, *may* support antennas or other base station equipment.”⁵⁰ The fact that such structures may support antennas or other base station equipment, inherently suggests that such structures need not already support antennas or base station equipment. Building on the Commission’s interpretation that a “wireless tower or base station” encompasses “structures” that support antennas and other base station equipment,⁵¹ Towerstream submits that any existing structure that could feasibly support antennas or base station equipment, whether or not it already supports antennas or base station equipment, should be considered “existing” for any eligible facilities request under Section 6409(a). Limiting the interpretation of the term “existing” to towers or base stations that already support antennas or base station equipment does very little to facilitate the ability of public safety

Respect to Commercial Mobile Services, Fifteenth Report, 26 FCC Rcd 9841, ¶ 308 (WTB 2011) (“*Fifteenth Competition Report*”).

⁵⁰ NPRM, ¶ 108 (emphasis added).

⁵¹ See NPRM, ¶ 108.

entities or wireless broadband network providers to rapidly deploy broadband wireless networks.⁵²

Towerstream urges the Commission to find that for purposes of Section 6409(a), an “existing” wireless tower or base station is any structure that is capable of supporting antennas or base station equipment and further that any such structure may be modified with a covered eligible facilities request for the collocation of new transmission equipment.⁵³ Towerstream agrees with Verizon’s position that “modifications of base stations, as that term is used in the statute, encompass collocations on buildings and other structures, even if those structures do not currently house wireless communications equipment.”⁵⁴ Towerstream also agrees with Verizon “that the term ‘modification’ is defined in the statute to include ‘collocation of new transmission equipment,’ and that the term ‘collocation,’ as defined by the Commission, includes mounting or installing an antenna ‘on an existing tower, building or structure.’”⁵⁵ Accordingly, collocations under Section 6409(a) should be given similar scope to those under the Collocation Agreement.

⁵² Towerstream disagrees with the initial Wireless Telecommunications Bureau guidance that an existing base station is only a “structure that ‘currently’ supports or houses base station equipment.” NPRM, ¶ 111 (*citing* Public Notice, “Wireless Telecommunications Bureau Offers Guidance on Interpretation of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012,” 28 FCC Rcd 1, 3 (WTB 2013) (“*Section 6409(a) PN*”).

⁵³ See NPRM, ¶ 92.

⁵⁴ Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from Tamara Preiss, Vice President, Federal Regulatory Affairs, Verizon, *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, at 2 (Feb. 28, 2013) (*citing* 47 C.F.R. Part 1, Appendix B, Section I.A.) (“Verizon Letter”); see also NPRM, ¶ 111.

⁵⁵ Verizon Letter at 2.

Should the Commission not define “existing” as Verizon has proposed, however, Towerstream urges the Commission to find at a minimum that any existing wireless tower or base station is any structure on which there is existing equipment that is “used in connection with any Commission-authorized wireless transmission, licensed or unlicensed, terrestrial or satellite, including commercial mobile, private mobile, broadcast, and public safety services, as well as fixed wireless services such as microwave backhaul or fixed broadband.”⁵⁶

Collocation

The Commission seeks comment on how to define “collocation.”⁵⁷ Consistent with Towerstream’s recommendation on the interpretation of the term “existing,” Towerstream urges the Commission to adopt the Collocation Agreement definition of “collocation,” specifically “the mounting or installation of an antenna on an existing tower, building or structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes,” but modified to include transmission equipment even if the equipment is not already physically located upon such tower, building or structure.⁵⁸ This definition is consistent with the definition that Towerstream advocates the Commission adopt for the term “existing,” and is necessary for Section 6409(a) to be useful in fulfilling the Commission’s broadband expansion goals.

Substantially Change the Physical Dimensions

The Commission seeks comment on whether and how it should define when a modification would “substantially change the physical dimensions” of a wireless tower or base

⁵⁶ NPRM, ¶ 104.

⁵⁷ See NPRM, ¶¶ 113-114. Towerstream is not commenting here on how the Commission should interpret the terms “removal” or “replacement.”

⁵⁸ See NPRM, ¶ 114.

station.⁵⁹ The Commission asks whether it should adopt or modify the four-prong test established in the Collocation Agreement⁶⁰ as the test for determining whether such a change has occurred for purposes of Section 6409(a), and if such a change has occurred thereby making the request for modification of the facilities ineligible for an application under Section 6409(a). In the alternative, the Commission asks whether the evaluating standard should be tailored to the type of structure, recognizing that structures other than towers that were built for the sole or primary purpose of supporting FCC-licensed antennas and associated facilities may be defined as towers or base stations for purposes of Section 6409(a).⁶¹

The four-prong test adopted under the Collocation Agreement certainly is appropriate for continued use when evaluating whether or not a substantial change in physical dimensions has

⁵⁹ See NPRM, ¶ 116.

⁶⁰ Under the four-prong test in the Collocation Agreement, a substantial increase in the size of a tower has occurred if:

“1) [t]he mounting of the proposed antenna on the tower would increase the existing height of the tower by more than 10%, or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to avoid interference with existing antennas; or

2) [t]he mounting of the proposed antenna would involve the installation of more than the standard number of new equipment cabinets for the technology involved, not to exceed four, or more than one new equipment shelter; or

3) [t]he mounting of the proposed antenna would involve adding an appurtenance to the body of the tower that would protrude from the edge of the tower more than twenty feet, or more than the width of the tower structure at the level of the appurtenance, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to shelter the antenna from inclement weather or to connect the antenna to the tower via cable; or

4) [t]he mounting of the proposed antenna would involve excavation outside the current tower site, defined as the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site.” NPRM, ¶ 118, *referencing* Collocation Agreement, § I.C.

⁶¹ See NPRM, ¶ 121.

occurred for collocations on towers that were built for the sole or primary purpose of supporting FCC-licensed antennas and associated facilities. Towerstream, however, recognizes that additional standards may be necessary for determining whether a modification will “substantially change the physical dimensions” of other types of structures.

Towerstream notes that its Wi-Fi antennas and the majority of Towerstream’s other equipment placed on building rooftops are smaller than the size of a typical Network Interface Device (“NID”) that is located on most residential homes. External antennas are mounted at most a few feet above the existing building façade. Accordingly, Towerstream’s collocation of Wi-Fi antennas on rooftops would never substantially change the physical dimensions of the building on which they are located. Any new standards adopted in this proceeding must take into consideration the evolving nature of wireless infrastructure and the decreasing impact of smaller and smaller devices.

Towerstream disagrees with the Intergovernmental Advisory Committee (“IAC”) that “[t]he question of substantiality ... 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,”⁶² Towerstream believes that the community-based evaluations proposed by the IAC would be subject to disagreements and abuses by state and local governments that would undermine the intended purpose of Section 6409(a) to facilitate rapid deployment of public safety and commercial wireless broadband networks.

⁶² NPRM, ¶ 122 (*citing* 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” (July 31, 2013), <http://transition.fcc.gov/statelocal/recommendation2013-09.pdf> (“IAC Recommendation”)).

Towerstream supports the adoption of national standards and Commission oversight so as to facilitate investment in, and the rapid deployment of, broadband services throughout the country. Towerstream is continuing to evaluate this issue and looks forward to reviewing proposals in this proceeding, and to submitting specific proposals as needed.

III. The Commission Must Implement Processes To Ensure That the Benefits of Section 6409(a) Are Realized

May Not Deny and Shall Approve

It bears emphasizing that Section 6409(a) of the Spectrum Act commands that “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.”⁶³ In this statutory provision, Congress made clear that states and local governments may not impose obstacles on or delay the ability of wireless broadband network providers to meet the critical goal of ensuring that the nation has access to wireless broadband services.⁶⁴ Importantly, this provision helps ensure that the marketplace will be open so that wireless broadband networks can be built. With diverse, redundant, and state-of-the-art wireless broadband networks, American consumers and public safety entities will have access to the wireless broadband services they demand and require.

Despite the clear mandate that delays to deployment of wireless broadband networks will not be permitted, the statute apparently does not eliminate state and local government involvement entirely. In stating that states and local governments “shall approve” eligible facilities requests, it is presumed that states and local governments may implement an approval

⁶³ 47 U.S.C. § 1455(a) (emphasis added).

⁶⁴ See NPRM, ¶ 9.

process. The statute is clear, however, that the only basis for states and local governments to deny a modification would be if it does not meet the definition of an eligible facilities request.⁶⁵

While the Commission's efforts to define the terms of the statute will help delineate when a modification request is an eligible request covered by Section 6409(a), the Commission must also ensure that states and local governments do not engage in delaying tactics or thwart the purpose of Section 6409(a). Towerstream urges the Commission to establish limitations on acceptable state and local government application processes and timeframes, as well as to establish remedies for network providers when they believe that states or local governments are engaging in unreasonable behavior or are causing delay in building wireless broadband networks. Section 706 also provides the Commission with additional authority to impose measures that are necessary to ensure that states and local governments do not delay or thwart the requirements of Section 6409(a).

Application Procedures

The "shall approve" and "eligible facilities request" language of Section 6409(a) implies that states and local governments may require an application for a proposed modification to a tower or base station, and the Commission has proposed finding that "Section 6409(a) permits a State or local government at a minimum to require an application to be filed and to determine whether the application constitutes a covered request."⁶⁶ To the extent that the Commission determines that states and local governments are permitted to require applications, the "shall

⁶⁵ To the extent a state or local government believes that there are special circumstances that should allow it to deny a covered request, the Commission should require such state or local government to file a petition seeking a declaratory ruling, allowing for comments by interested parties, upon which the Commission should make an individualized determination about the alleged special circumstances. *See* NPRM, ¶ 124.

⁶⁶ NPRM, ¶ 131.

approve” and “may not deny” language in Section 6409(a) inherently limits what states and local governments may do or require during an application process.

Any application must be limited to requiring only the minimum information necessary for the permitting entity to determine that the request is an eligible facilities request. The application may not seek to collect additional information that is not directly relevant to this determination.

The application process must be streamlined, and must impose the least burden possible on applicants. The application requirements also must be reasonable in light of the characteristics of the antennas and base station equipment being used for the services being provided.

Moreover, Section 6409(a) applicants must have some form of redress with the Commission to seek review of fees, processes, and any other application matters if applicants believe those state or local application requirements are unreasonable or are inconsistent with Section 6409(a).

Towerstream is extremely concerned that even the most streamlined application process would remain an insurmountable impediment to the deployment of broadband networks using Wi-Fi, DAS, small cells, and other evolving technologies. Towerstream’s plans to provide broadband coverage to even to a medium-sized city require the deployment of tens of thousands of Wi-Fi antennas. Even if an application is “streamlined,” the mere scope of the undertaking renders the application process a huge impediment. Not only would the process be burdensome and expensive to the entity seeking to provide broadband, but it would be a huge drain on governmental resources. The pace of broadband deployment would be *at best*, the pace at which state and municipal workers could process tens of thousands of pages of applications.

Towerstream therefore urges the Commission to consider the nature of small facilities deployments as the Commission seeks to implement Section 6409(a). Certain deployments will *per se* never result in a substantial change in the dimensions of a tower or base station. In such

cases, Towerstream suggests that it is inherently unreasonable to require individual applications for such deployments. An application could cover all the Wi-Fi or small cell deployments by a specific provider in a given area. Alternatively, the “application” might be limited to filing a notification list of all the covered sites in a given area.

To the extent that applications are required, Towerstream urges the Commission to adopt uniform timeframes within which states and local governments must act on Section 6409(a) applications.⁶⁷ There is clear precedence for a Commission-established uniform, national standard. Notably, in the *2009 Declaratory Ruling*, the Commission “established 90 days as a presumptively reasonable period of time to process collocation applications under Section 332(c)(7).”⁶⁸ In light of the more narrow scope of review impliedly granted to states and local governments for Section 6409(a) applications, as compared to applications falling under Section 332(c)(7) of the Act, a shorter timeframe than the 90 days allowed for Section 332(c)(7) applications is reasonable for approving Section 6409(a) applications. Towerstream recommends that the Commission adopt a 30-day timeframe within which states or local governments must act on applications for modifications to towers or base stations that are eligible under Section 6409(a).

Finally, with regard to timing on approval of Section 6409(a) applications, Towerstream agrees with the Commission’s proposal “to preempt the application of any ... moratoria to covered requests under Section 6409(a), including with respect to running of any applicable time

⁶⁷ See NPRM, ¶ 134.

⁶⁸ NPRM, ¶ 134 (*citing 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*, Declaratory Ruling, 24 FCC Rcd 13994, ¶¶ 46-47 (2009) (“*2009 Declaratory Ruling*”).

period.”⁶⁹ To the extent that a state or local government believes that additional time is needed for processing Section 6409(a) applications due to any moratoria, it should seek approval from the Commission on an as needed basis. The Commission should make clear that this type of relief is an exception to the requirement that the state or local government act without delay on such applications because of the importance that Congress placed on expanding wireless broadband infrastructure.

Remedies

Towerstream applauds the Commission for initiating this rulemaking to implement Section 6409(a) in a way that will promote uniformity, eliminate doubt, and facilitate expedient deployment of wireless broadband networks. The Commission’s efforts will have little effect, however, if the Commission’s implementation of Section 6409(a) can be abused or ignored by states and local governments that are charged with approving applications for modifications to towers and base stations pursuant to the requirements of Section 6409(a). Therefore, Towerstream urges the Commission to adopt rules that will ensure that the promise of Section 6409(a) will be realized. The Commission must provide Section 6409(a) applicants with a path to resolution when applications are not acted upon in a required timeframe or are denied, and when the reviewing state or local government is acting inconsistently with the goals of Section 6409(a).

First, the clear language of the statute provides that a state or local government “may not deny” an eligible facilities request. To the extent that a modification application has been found to be an eligible facilities request, a state or local government may not deny the application.⁷⁰ If

⁶⁹ NPRM, ¶ 135.

⁷⁰ See NPRM, ¶ 123.

a state or local government has denied an application because it has determined that the application does not meet the requirements to be considered an eligible facilities request,⁷¹ Towerstream urges the Commission to issue rules that would provide the Section 6409(a) applicant with an immediate right to petition the Commission for review of that state or local government decision, allowing the applicant 30 days from the date of the denial to file its petition with the Commission and requiring the Commission to act on that petition within 30 days from receipt.

Second, if an applicant has submitted a Section 6409(a) application, but the state or local government having authority to review and approve has failed to act on the application within the time required for action established by the Commission in this proceeding,⁷² Towerstream urges the Commission to issue rules that would treat that application as “deemed granted” upon the expiration of the allotted time within which the state or local government must act. The Commission’s rules also should provide applicants with the authority to proceed with the modification 30 days after such applicants have notified the Commission of the “deemed granted” status.

Finally, to the extent that an applicant believes the state or local government’s processes in reviewing a Section 6409(a) application for the required approval are inconsistent with Section 6409(a),⁷³ the Commission should issue rules that provide applicants with the ability to seek immediate review of the matter by the Commission if the matter has not been addressed satisfactorily to the applicant’s determination after having provided the state or local government

⁷¹ See NPRM, ¶¶ 137 and 140.

⁷² See NPRM, ¶ 137.

⁷³ See NPRM, ¶ 140.

with ten (10) business days' notice of its intent to seek Commission review. This right to seek review by the Commission should be available to applicants whether for reasons based on environmental or historic preservation requirements; for issues related to state or local building codes or land use laws; or for delaying or burdensome application processes, including concerns about the application form, the amount or type of documents required, unclear or undocumented processes, or processes that are not appropriately tailored to the type of modification.

Towerstream supports the Commission's proposal to "permit the filing of complaints with the Commission alleging violations of Section 6409(a) along with any implementing rules ... [it chooses] to adopt, and ... that such complaints be filed as petitions for declaratory ruling."⁷⁴

To the extent that rules adopted by the Commission in this rulemaking, including rules that provide remedies for violations of Section 6409(a), have the effect of preempting any state or local zoning regulation or decision, the Commission has preemptive authority under both Section 6409 of the Spectrum Act and Section 706 of the Telecommunications Act of 1996. While both the Commission and state commissions were tasked with encouraging the deployment of advanced telecommunications capability to all Americans, using regulatory measures to promote competition in the local telecommunications market and remove barriers to infrastructure investment,⁷⁵ Congress directed only the Commission to "take immediate action" to accelerate deployment of such capability if the Commission found that such capability was not being deployed in a reasonable and timely fashion.⁷⁶ The Commission has made this finding,⁷⁷

⁷⁴ NPRM, ¶ 142.

⁷⁵ *See* 47 U.S.C. § 1302(a).

⁷⁶ *See* 47 U.S.C. § 1302(b).

giving it authority to take action to remove barriers to infrastructure investment and to promote competition in the telecommunications market. Once this finding was made, Section 706(b) gives the Commission full authority for ensuring the deployment of advanced telecommunications capability to all Americans. In defining the terms of Section 6409(a), the Commission is using its authority under Section 706(b) to remove barriers to infrastructure investment and in the process of doing so, it is also rightly making clear that state and local regulations, processes, and decisions may not hinder or have the effect of prohibiting wireless broadband services by limiting the ability of network providers to deploy wireless broadband networks.

IV. The Commission Should Revise Its Environmental Rules To Accommodate Broadband Deployment Through Distributed Antenna Systems, Small Cells and Similar Technologies

The Commission is correct that “increasing demand for advanced wireless services and greater wireless bandwidth is driving a need for additional infrastructure deployment and new infrastructure technologies,” and that DAS and small cell technologies are helping to meet this demand.⁷⁸ Importantly, the Commission acknowledges that these technologies “increase spectral efficiency and data capacity within [a] network footprint” and allow “greater reuse of scarce wireless frequencies,”⁷⁹ but also that the equipment used is smaller than macrocells, such that they are “less visible than macrocells on tower structures, [and] ... may be particularly desirable for addressing capacity or coverage needs in areas with stringent siting regulations, such as

⁷⁷ See *supra* n. 26.

⁷⁸ NPRM, ¶ 14.

⁷⁹ NPRM, ¶ 15.

historic districts.”⁸⁰ Towerstream agrees with the Commission’s assessment of DAS and small cells facilities. These technologies are critically important to the deployment of broadband networks. While Towerstream has primarily focused these comments on the implementation of Section 6409(a), Towerstream urges the Commission to modify its environmental rules to facilitate the deployment of DAS and small cell technologies.

Towerstream agrees with PCIA that the “financial and regulatory costs involved in environmental and Section 106 processing are not warranted due to the minimal environmental effects of small cells and DAS facilities.”⁸¹ Further, Towerstream agrees with the various proposals submitted by PCIA and Verizon that would minimize the regulatory compliance process and costs associated with small cell and DAS deployment.⁸²

The compliance process required under the National Environmental Policy Act of 1969 (“NEPA”) should be expedited for DAS and small cells. Towerstream supports the Commission’s proposal to amend Note 1 to FCC Rule Section 1.1306 to accomplish this. Rule Section 1.1306 establishes actions that are categorically excluded from environmental processing and specifically, in part, the rule excludes actions unless they fall under the categories of environmental concern specified in Rule Sections 1.1307(a) *and* (b).⁸³ The proposed amendment of Note 1 to Rule Section 1.1306 would broaden the stated exclusion for environmental review from collocations on an existing building or antenna tower such that the exclusion would include

⁸⁰ NPRM, ¶ 17.

⁸¹ NPRM, ¶ 31.

⁸² *See* NPRM, ¶¶ 31-34.

⁸³ *See* 47 C.F.R. §§ 1.1306 and 1.1307. Notably, the Commission would still retain the right to require environmental processing under NEPA if the “Bureau responsible for reviewing the action determines, on its own motion or in response to public petition, that the action, although not falling within the categories of Sections 1.1307(a) or (b), may nevertheless have a significant environmental impact.” NPRM, ¶ 23. *See also* NPRM, n. 53.

other structures.⁸⁴ While Towerstream is particularly interested in minimizing the regulatory burdens associated with environmental compliance for DAS and small cells, Towerstream agrees with the Commission to the extent that further defining the scope of this exclusion based on reference to these specific technologies may be under-inclusive in that other technologies may involve “comparably unobtrusive wireless facilities” that may also warrant an exclusion.⁸⁵ Accordingly, Towerstream supports further framing of the scope of the exclusion “based on objective physical factors such as height, size, or location.”⁸⁶

Towerstream also supports expansion of the exclusion in Note 1 to Rule Section 1.1306 to make clear that it applies to equipment associated with the deployment of DAS and small cells beyond the antennas required for operation because application of stringent environmental compliance requirements to the other equipment necessary to operate these wireless technologies would not provide effective relief. Finally, Towerstream urges the Commission to make clear in its modification of Note 1 that the collocation exclusion applies to the interior and sides of buildings because without such clarification the intention of the amendment to exclude from NEPA requirements the technologies such as DAS and small cells that often operate based on placement of antennas and equipment inside buildings or on the sides of buildings could be rendered moot.⁸⁷

⁸⁴ See NPRM, ¶¶ 37-38.

⁸⁵ See NPRM, ¶ 46. The Commission cites as an example that “commercial uses of signal boosters (such as repeaters) may have characteristics similar to DAS and small cells such that they should be similarly eligible for any exclusion developed for DAS and small cell deployments.” *Id.*

⁸⁶ See NPRM, ¶ 46.

⁸⁷ See NPRM, ¶ 41.

The requirements for historic preservation review under Section 106 of the National Historic Preservation Act (“NHPA”) should also be tailored similarly to the proposals to limit environmental processing requirements for DAS and small cells. Towerstream agrees with PCIA’s reliance on Section 800.3(a)(1) of the Advisory Council on Historic Preservation (“ACHP”) rules, which “provides that an agency has no further Section 106 obligations ‘[i]f the undertaking is a type of activity that does not have the potential to cause effects on historic properties assuming such historic properties were present,’”⁸⁸ and further that the application of this rule “‘provides a ‘categorical exclusion from the consultation process’ where ‘there is no potential adverse effect’ or the environmental effects are ‘de minimis,’”⁸⁹

Due to the small size in general of antennas and related equipment needed for the deployment of DAS and small cell technologies, as well as the manner in which DAS and small cell sites are deployed, specifically inside buildings or on top of buildings, Towerstream urges the Commission to establish as a default that the environmental effect of deploying these types of wireless technologies is de minimis. In establishing such a default, the Commission can continue to rely upon Sections 1.1307(c) and (d) of the Commission’s Rules, which “direct the reviewing Bureau to require an [Environmental Assessment] for an otherwise categorically excluded deployment where, on its own motion or in response to public petition the Bureau finds that the deployment may have a significant environmental impact,”⁹⁰ as a means of ensuring that historic properties are protected from adverse effects of DAS and small cell facilities, or deployment of

⁸⁸ NPRM, ¶ 55, *citing* 36 C.F.R. § 800.3(a)(1).

⁸⁹ NPRM, ¶ 55, *quoting* Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from D. Zachary Champ, PCIA-The Wireless Infrastructure Association, WC Docket No. 11-59, GN Docket No. 12-354 at 5 (Mar. 19, 2013), *citing* *Save Our Heritage, Inc. v. FAA*, 269 F. 3d 49, 58, 62-63 (1st Cir. 2001).

⁹⁰ NPRM, ¶ 59. *See also* 47 C.F.R. §§ 1.1307(c) and (d).

other technologies that may be similarly eligible for such default regulatory treatment from Section 106 requirements.

If the Commission does not find that entities deploying DAS and small cells are relieved from the regulatory burdens of Section 106 reviews based upon a categorical exclusion, Towerstream urges the Commission to base relief from environmental compliance on other proposals made by PCIA.⁹¹ The Commission has recognized that DAS and small cell facilities are “critical to satisfying demand for ubiquitous mobile voice and broadband services”⁹² and the success of deploying these technologies will undoubtedly correlate to the regulatory burdens to which companies will be subject when installing new sites. Such relief should not be granted for the mere purpose of broadband expansion without concern for the environmental impact of the facilities deployment, but rather such relief should be granted because the nature of the facilities used for these types of technologies do not warrant the kind of NEPA and Section 106 reviews that have been required for other types of wireless facilities sitings.

V. Conclusion

For the foregoing reasons, Towerstream urges the Commission to define broadly the terms of Section 6409(a). Towerstream also urges the Commission to implement Section 6409(a) by establishing reasonable limits on the application and approval process, and remedy processes for facilities sitings falling under Section 6409(a). Finally, Towerstream urges the Commission to revise its environmental rules to accommodate the rapid deployment of newer and smaller wireless technologies. The Commission has authority under Section 6409(a) and Section 706 to take these actions to immediately accelerate the deployment of broadband

⁹¹ See NPRM, ¶ 55.

⁹² NPRM, ¶ 38.

infrastructure. All of these actions will help network providers like Towerstream invest in the wireless infrastructure that is critical for ensuring the availability of the wireless broadband services that consumers and public safety entities demand and need.

Respectfully submitted,



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