

**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 FIBERTECH NETWORKS, LLC

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SUMMARY

The record in this and other related proceedings before the Commission show that the deployment of wireless and wired infrastructure is critical to expanding the availability of mobile communications and broadband services throughout the United States. We live in an information age that demands constant connectivity, yet there are still too many barriers to the deployment of last-mile wireless infrastructure, particularly infrastructure that can be placed in the public rights-of-way in close proximity to existing fiber-based networks.

In these comments, Fibertech describes how the Commission can make common sense revisions to its environmental regulations so that antennas appurtenant to fiber-optic networks in existing aerial and underground utility corridors (e.g., the public rights-of-way) are not unnecessarily burdened because they happen to be “wireless.” This will allow wireless broadband networks to operate on a fair playing field in the traditional utility corridor and speed deployment of wireless broadband.

Additionally, Fibertech will offer suggestions about how the Commission may interpret Section 6409(a) in a way that allows small cell installations to fulfill their critical role in filling in the gaps of today’s wireless networks. Fibertech encourages the Commission to recognize that collocation on an existing utility pole in the traditional utility corridor should be treated equally to a collocation on an existing monopole.

Finally, Fibertech urges the Commission to clarify again that the *2009 Declaratory Order* (i.e., “Shot Clock Order”) applies to small cell wireless networks. To further aid in rapid deployment of wireless broadband, the Commission should adopt a “deemed granted” remedy to permits mired in local regulatory processes that exceed the “reasonable” time period set forth in the 2009 Declaratory Ruling. This will help wireless providers avoid litigation delays, which suffocate the use of new spectrum.

The Commission also has the obligation to correct a lack of parity in the process of attaching equipment to utility poles. Under current rules, wireline operators, electric utilities and cable operators are free to attach equipment to utility poles with minimal local regulation. Pursuant to the commission's competitively and technology neutral rules, wireline communications attachers follow the same process and pay virtually uniform rates for their attachments. But when providers seek to attach small cell network equipment to extend their fiber networks they face disproportionately burdensome local zoning regulation. The Commission must take steps to reduce this regulatory burden so that network operators can make deployment decisions based on business and engineering considerations rather than regulatory ones.

By adopting sensible changes to regulations and adding clarity to Section 6409(a), the Commission will remove unnecessary delays for wireless broadband infrastructure in the public rights-of-way. By making critical changes, the Commission can bring uniformity to local regulation of wired and wireless infrastructure in the public rights-of-way, which will speed deployment of wireless networks in the traditional utility corridor, thus providing consumers with access to improved services.

TABLE OF CONTENTS

Summary	i
TABLE OF CONTENTS.....	iii
I. Introduction.....	2
A. Background Regarding Fibertech.....	3
B. The Past, Present and Future of Small Cells in in the Public Rights-of-Way.....	5
II. FCC Legal Authority	7
A. The Commission Has Substantial Authority to Promote the Deployment of Broadband Without Encroaching on State Authority Preserved by the Tenth Amendment.....	7
III. Expediting Environmental Compliance for DAS/Small Cells.....	9
A. The Commission Should Modify the Exclusion in Section 1.1306 Note 1 of Its Rules to Exclude the Installation of Wireless Equipment in Existing Aerial and Underground Corridors from the Provisions of Section 1.1307(a).	10
1. The Commission Should Define the Exclusion by Limiting it to Wireless Equipment in the Existing Aerial and Underground Utility Corridors	10
2. The Commission Should Define the Exclusion by Limiting it to Wireless Equipment Collocated on Existing Structures in the Existing Aerial and Underground Utility Corridors	13
3. The Commission Has Authority to Amend Section 1.1306 Note 1	14
B. If the Commission Does Not Adopt a Categorical Exemption It Should Clarify That The Provision of the NPA/Collocation Agreement Requiring Review of Deployments on Structures Older than 45 Years Does Not Apply to Utility Poles.....	15
IV. The Commission Should Adopt Rules Interpreting the Statutory Language in Section 6409(a)	17
A. The Commission Should Clarify the Definitions for the Key Terms used in Section 6409(a)	18
1. Transmission Equipment and Wireless	18
2. Existing Wireless Tower or Base Station.....	19
3. Collocation, Removal, and Replacement	23
4. “Substantially Change the Physical Dimensions”	24
5. “May Not Deny and Shall Approve”.....	27
B. The Commission Should Adopt Regulations Regarding the Review and Processing of Applications	30
1. The Commission Should Require any State or Local Government Application Process to be Administrative and Non-Discretionary.....	30

2.	The Commission Should Establish 45 Days for Replacements and 90 Days for Collocations as the Default Maximum Time Period in which a State/Local Government has to Consider Before Approving an Application Under Section 6409(a).....	31
3.	The Commission Should Further Establish a Rule That if an Application Is Not Approved Within 90 Days for Collocations and 45 Days for Replacement It Should Be Deemed Granted	31
V.	The FCC Should Confirm that its 2009 Shot Clock Order Applies Equally to Small Cell and DAS deployments	33
A.	The Commission Should Confirm that Any Small Cell/DAS Collocation on an Existing Structure Includes Utility Poles/Streetlight/Traffic Signals and Is Subject to a 90 Day Timeline	34
B.	The Commission Should Adopt a Deemed Granted Remedy	34
VI.	Conclusion	36

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COMMENTS OF FIBERTECH NETWORKS, LLC

Fibertech Networks, LLC (“Fibertech”) respectfully submits these comments in response to the above-captioned Notice of Proposed Rulemaking (“NPRM”) released by the Federal Communications Commission (“Commission”).¹

¹ *In the Matter of 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*, WT Docket No. 13-238, WC Docket No. 11-59, WT Docket No. 13-32, Notice of Proposed Rulemaking, FCC 13-122 (rel. Sept. 26, 2013) (“NPRM”).

I. Introduction

In 2010 the National Broadband Plan recommended establishing “the fastest and most extensive wireless networks” in the world; however, the National Broadband Plan’s goal will never be achievable until the Commission takes the necessary action to ensure “network providers have easier access to poles, conduits, ducts and rights-of-way.”² In 2011, the Commission took a major step in advancing easier access to poles and conduits by expanding access and increasing the speed of deployment on utility poles in the twenty-nine states directly regulated by the Commission (“*Pole Attachment Order*”).³ By requiring that pole owners treat wireless pole attachments equal to other types of utility pole attachments, the *Pole Attachment Order* has improved access and speed of deployment of wireless facilities in states regulated by the Commission. These regulations opened up large geographic areas that had previously been hostile toward distributed antenna systems (“DAS”) and similar small cell-type deployments in the public rights-of-way.⁴

² Omnibus Broadband Initiative, Federal Communications Commission, Connecting America: The National Broadband Plan p. 109 (2010).

³ *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, *Report and Order and Order on Reconsideration*, 26 FCC Rcd 5240 (2011), *aff’d sub nom. American Elec. Power Service Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013), *cert. denied* 134 S. Ct. 118 (Oct. 7, 2013) (“*Pole Attachment Order*”)

⁴ Outdoor DAS and small cell wireless deployments are technologically different, but virtually indistinguishable in form and end user function. Both types of deployments consist of small antennas and equipment boxes and sometimes utility pole-sized power supplies. Both types are attached to existing wooden utility poles, streetlights, or traffic signals or integrated into new poles designed to be aesthetical similar to other structures in the public right of way. Because outdoor DAS nodes are essentially a subset of outdoor small cells, these comments will use the term “small cell” to also encompass all outdoor deployments in the public rights-of-way and will not discuss in-building deployments.

Unfortunately, reforms at the utility pole owner level have not been enough.⁵ Under the current framework, wireline telecommunications and cable networks can attach equipment to utility poles with little if any local government oversight. But if a wireline network operator seeks to incorporate small cell technology in its fiber-optic network, the local zoning authority asserts jurisdiction over such utility pole attachments. This conflicts with the Commission's long standing adherence to principles of technology neutral competition policy.⁶ This frequently deters network operators from incorporating small cell technology because of the time and costs involved with securing local zoning approvals. This impacts the ability of fiber optic network providers to bring the benefits of their network to customers and deprives consumers of state of the art broadband networks.

The Commission now has the opportunity to do more by removing counterproductive federal regulatory impediments, clarifying the scope of Section 6409(a), and insuring that State and local governments issue critical permits in a timely manner for telecommunications carriers and others utilizing antennas for a variety of radio communications purposes. Only with these reforms may network providers access the public rights-of-way to deploy the fastest and most extensive wireless networks in the world without unnecessary delay.

A. Background Regarding Fibertech

Fibertech is a competitive local exchange carrier ("CLEC") whose customers include other CLECs, wireless carriers, hospitals, educational institutions and financial institutions, among other industries. Since its founding, Fibertech has deployed over 9,700 miles of fiber optic cable in the public rights-of-way, benefiting from the absence of unnecessary federal

⁵ Unfortunately, pole owners in non-FCC states have not consistently treated wireless attachments equally since the *Pole Attachment Order* which continues to be an impediment to the rapid deployment broadband wireless networks.

⁶ See *Pole Attachment Order*, 26 FCC Rcd at 11913 ¶ 117.

regulations or protracted discretionary local government permitting processes.

Recently, Fibertech began incorporating wireless equipment attachments into its fiber optic networks in the public rights-of-way. These “small cell” installations typically consist of a single antenna about the size of a two-foot section of a standard utility pole and radio equipment that is a little larger than a standard power meter, and Fibertech hopes to add battery backup power in the future. This equipment is much smaller than equipment typically attached to utility poles, and is similar in form and function to other existing pole-mounted equipment, such as electricity smart-meters, and cable-TV power supply boxes.

Even though Fibertech’s small cell wireless equipment is similar to other utility infrastructure and deployed in the traditional utility corridor—the public right-of-way—it is burdened by additional federal regulatory requirements and vulnerable to highly burdensome and discretionary local government processes. For example, Fibertech has invested in an extensive fiber optic network in a mid-sized Midwestern city. Initially, the city welcomed Fibertech and the economic benefits associated with state-of-the-art fiber optic communications networks. It issued all of the necessary permits for the fiber optic cable infrastructure, including placing a new pole in the public right-of-way. Unfortunately, when Fibertech wanted to increase utilization of the network by attaching small cell equipment—which was less than four-cubic feet per pole in total size—the city took the position that wireless attachments are prohibited despite state and federal laws allowing access. But the city regularly allows attachments of fiber and other types of utility infrastructure without issue.

This example illustrates the hostility wireless facilities face from some local governments no matter the limited size of the equipment or whether it is surrounded by similar utility infrastructure. The Commission should act here to fulfill Congress’ intent to streamline “the

process for siting of wireless facilities by preempting the ability of State and local authorities to delay collocation of, removal of and replacement of wireless transmission equipment.”⁷

B. The Past, Present and Future of Small Cells in in the Public Rights-of-Way

In 2011 the Commission requested comments on “specific steps that could be taken to identify and reduce unnecessary obstacles to obtaining access to rights-of-way and siting wireless facilities.”⁸ While Fibertech’s experience may be somewhat limited by its recent entry into this market, small cell wireless facilities across the country have faced numerous obstacles for years, which will certainly increase given the burgeoning demand for wireless broadband services.

Many small cells deployments have languished for years due to lengthy and unproductive bureaucratic administrative tasks and hearings. For example, a four small cell deployment on an existing utility pole line along a rural “dead-zone” stretch of Santa Cruz County which was applied for in June 2011, still has not been released for final construction. In Burlingame, California, the local government ultimately denied applications submitted in September 2010 to attach small cells to existing utility poles—that case is now in its second year of litigation. The Second Circuit recently ordered Greenburgh, New York to allow a handful of small cell installations, which were originally applied for in November 2009.⁹

⁷ See 158 CONG. REC. E237-239 (Daily Ed. Feb. 24, 2012) (statement of Rep. Upton), available at <http://www.gpo.gov/fdsys/pkg/CREC-2012-02-24/pdf/CREC-2012-02-24-pt1-PgE237-5.pdf>.

⁸ *Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, WC Docket No. 11-59, *Notice of Inquiry*, 26 FCC Rcd 5384, 5389 ¶ 10 (2011) (“*NOI*”).

⁹ *Crown Castle NG East Inc. v. Town of Greenburgh* No. 12-cv-6157, 2013 WL 3357169 (S.D.N.Y. July 3, 2013) ; *aff’d* by No. 13-cv-2921, 2014 WL 185012 (2nd Cir., Jan. 17, 2014)

These are all examples of where small cell providers have tried to use the traditional utility corridors (e.g., the public rights-of-way) and existing structures (e.g., utility poles) in order to improve the reach and capacity of wireless networks to support broadband service. It appears that the mere fact that the deployment involves “wireless,” technology motivates local jurisdictions to aggressively resist deployment even though electric, cable, and wired telecommunications providers are welcomed into the public rights-of-way. Additionally, the numerous and unfortunate delays that network builders face in vindicating their rights in court proceedings benefit no one, and hurt the consumers who would otherwise have better, faster, and more access to wireless networks for business, personal, and public safety uses.

Finally, the demand for additional wireless facilities in the public rights-of-way are likely to increase as the “internet of things” grows. First, CLECs with extensive fiber optic networks, like Fibertech, are adding small cells to harness the backhaul capabilities of existing fiber networks. Second, utility companies are only beginning to realize the full potential of adding wireless “smart grid” facilities to their utility poles, and public safety entities regularly attach Wi-Fi and other communications facilities to streetlights and traffic signals. Finally, it is widely anticipated that cable and internet service providers will continue to add small wireless facilities such as Wi-Fi, to their existing fiber backbones as well. Because the Commission recognizes that “wireless” encompasses more than traditional “cell phone” infrastructure for voice, it is critical that federal and state regulations reflect this broad understanding.¹⁰

Small cells in the public rights-of-way make efficient use of existing utility and fiber infrastructure. In these comments, Fibertech will explain why the Commission should remove

¹⁰ NPRM at ¶ 104 (broadening “wireless” to encompass any Commission-licensed or authorized services will be particularly critical to the definition of “Wireless Tower” under Section 6409(a)).

unnecessary federal and local regulatory impediments. The Commission can further the objectives of the National Broadband Plan by allowing wireless broadband infrastructure to be deployed in a similarly timely manner. Doing so fulfills the Commission’s goals of lowering costs and providing faster access to the public rights-of-way that will ultimately meet “America’s demand for and reliance on wireless broadband services.”¹¹

II. FCC Legal Authority

A. The Commission Has Substantial Authority to Promote the Deployment of Broadband Without Encroaching on State Authority Preserved by the Tenth Amendment

The Commission plainly has the statutory authority to take the actions contemplated in the NPRM. The Intergovernmental Advisory Committee (“IAC”), however, suggests that the “the Tenth Amendment and principles of federalism dictate that the Commission should not be involved in adopting rules that govern the local zoning process.”¹² IAC’s concerns are baseless and reek of the “faux-federalism” arguments the Supreme Court rejected in *City of Arlington*,¹³ and *Iowa Utilities Board*.¹⁴ As the Supreme Court found in *City of Arlington*, Congress has spoken to the issue by “explicitly supplant[ing] state authority by *requiring* zoning authorities to render ... decision[s]” consistent with federal law.¹⁵

The IAC appears to suggest that zoning requirements for the deployment of wireless networks are a matter of purely local concern. But Congress has spoken on this issue through both Section 332(c)(7)(B)(ii) of the Communications Act and Section 6409(a). And the Supreme

¹¹ *Id.* ¶ 2.

¹² Intergovernmental Advisory Committee Recommendation Number 2013-13 in Response to the Notice of Proposed Rulemaking Adopted and Released September 26, 2013 at p. 9 (filed Dec. 2, 2013). (“IAC Recommendation”)

¹³ *See* 133 S. Ct. 1863, 1873 (2013).

¹⁴ 525 U.S. 366, 379 (1999).

¹⁵ 133 S. Ct. at 1863.

court recognizes that as “interstate commerce ...become[s] ubiquitous, activities once considered purely local have come to have effects on the national economy and have accordingly come within the scope of Congress’ commerce power.”¹⁶

IAC’s invocation of the Tenth Amendment does not have any merit either. As the Commission observed in the NPRM, where Congress has acted pursuant to its powers under Article I, the Supreme Court’s Tenth Amendment analysis examines whether a federal regulatory scheme “compels the States to enact or administer a Federal regulatory program.”¹⁷

The Tenth Amendment provides that the “powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people.”¹⁸ As discussed above, there can be no serious challenge to the federal regulatory scheme over wireless communications infrastructure as this is clearly an exercise of Congress commerce clause power.¹⁹ Instead, it appears that IAC suggests that the Commission’s promulgation of rules interpreting Section 6409(a) somehow “commandeer’ local zoning authorities to directly... enact and enforce a federal regulatory program.”²⁰

Federal courts, however, have already ruled that preemption under Section 332(c)(7) does not compel local or state governments to enforce a federal regulatory program.²¹ Consistent with Supreme Court guidance, local zoning boards may either abide by the procedural requirement placed on a board's decision-making process by Section 332(c)(7) and the Commission’s

¹⁶ *New York v. U.S.*, 505 U.S. 144, 158 (1992).

¹⁷ NPRM ¶ 138 citing *Printz v. United States*, 521, U.S. 989, 933 (1997).

¹⁸ U.S. Const. Amendment X.

¹⁹ See e.g. *New York*, 505 U.S. at 158.

²⁰ *Id.* at 161. (internal citations omitted).

²¹ *New Cingular Wireless PCS, LLC v. City of Cambridge*, 834 F. Supp. 2d 46 (D.Mass. 2011).

regulations or relinquish authority over the construction and placement of personal wireless service facilities.²²

III. Expediting Environmental Compliance for DAS/Small Cells

In 2011, the Commission sought comment on “specific steps that could be taken to identify and reduce unnecessary obstacles to obtaining access to rights-of-way and siting wireless facilities.”²³ The NPRM more specifically requests “comment on whether to expedite or tailor our environmental review process for technologies such as DAS and small cells.”²⁴

The Commission’s current environmental regulatory structure covers proposed “major Federal actions significantly affecting the quality of the human environment...”²⁵ Because of technological advancement, however, small cell wireless infrastructure has more in common with everyday utility infrastructure than with its larger wireless “macrocell” cousins installed on private property. Because of the anticipated demand for broadband wireless networks, carriers will increasingly seek to locate small cell infrastructure used in existing utility corridors. In order to promote wider availability of robust wireless broadband the environmental regulatory structure should be sensibly adjusted to account for the limited environmental impact associated with small cell wireless infrastructure.

Fibertech suggests that the Commission can apply reduced environmental regulation only in existing aerial and underground utility corridors, which are overwhelmingly public rights-of-way with a small number of utility easement corridors. Fibertech also recommends that the

²² *See id.*

²³ *Supra* n. 6.

²⁴ NPRM at ¶ 43.

²⁵ *Id.* at ¶ 18 (quoting 42 U.S.C. § 4332(2)(C)).

Commission avoid grouping small cells together as “a single undertaking” because they are often widely dispersed throughout a geographic market.²⁶

Fibertech applauds the Commission for recognizing that expedited and streamlined small cell deployments are critical to future wireless growth and encourage the Commission to modify the current federal environmental review process to remove this unnecessary delay for small cells in the public rights-of-way.

A. The Commission Should Modify the Exclusion in Section 1.1306 Note 1 of Its Rules to Exclude the Installation of Wireless Equipment in Existing Aerial and Underground Corridors from the Provisions of Section 1.1307(a).

In the NPRM the Commission asks whether “small cell deployments are unlikely to have significant environmental effects and whether we should adopt a categorical exclusion for some or all of the components involved in DAS and small cell deployments from NEPA review other than for compliance with RF exposure limits.”²⁷ The Commission further asks “how to define the structures that are eligible, the locations where the exclusion should apply, and any other conditions or criteria for eligibility that are necessary to ensure that such deployments do not have a significant effect on the environment.”²⁸

1. The Commission Should Define the Exclusion by Limiting it to Wireless Equipment in the Existing Aerial and Underground Utility Corridors

Fibertech proposes that the Commission modify the environmental regulatory structure so that small cells installations are excluded from the requirements of Section 1.13079(a) and that the parameter for exclusion be based on the location of the installations—specifically in existing

²⁶ *Id.* ¶ 64.

²⁷ *Id.* ¶ 43.

²⁸ *Id.* ¶ 47.

aerial and underground corridors (e.g., public rights-of-way and utility easements).²⁹

Under today's regulatory structure, small cells in the public rights-of-way largely fall under existing exclusions, however, every small cell installation must be reviewed under Section 1.1307(a)(4), which creates unnecessary burden and delay. These delays are not justified considering that the aerial wire and cable on the same poles are excluded from environmental review. Because the small cell infrastructure does not add to the environmental impact any more than the wires and cables on the same poles, there is no justification for the disparate environmental processes. This delay could be entirely eliminated if the Commission were to fashion an exclusion similar to the current language of Section 1.1306 note 1, which provides a full exclusion from Section 1.1307(a) and (b) for "aerial wire or cable" in existing aerial and underground corridors where such use is permitted.³⁰

The Commission should carve out a similar exception to Section 1.1307(a) for small cell wireless equipment placed in existing aerial and underground corridors. Fibertech proposes that the Commission adopt the following language:

The provisions of §1.1307(a) do not encompass the installation of antenna(s) and associated equipment where it is deployed within existing aerial or underground corridors.

This exclusion may seem broad, but it is narrow considering the nature of existing aerial or underground corridors.

First, small cell wireless equipment is similar to other utility infrastructure in the existing aerial and underground corridors. The overwhelming majority of these corridors are public

²⁹ "Existing aerial and underground corridors" will be used interchangeably with "public rights-of-way" and "utility corridors."

³⁰ 47 U.S.C. § 1.1306 note 1 states, in part, "The provisions of § 1.1307 (a) and (b) of this part do not encompass the installation of aerial wire or cable over existing aerial corridors of prior or permitted use or the underground installation of wire or cable along existing underground corridors of prior or permitted use, established by the applicant or others."

rights-of-way, which have roads, traffic lights, traffic signs, streetlights, and a panoply of various ground furniture (e.g., trashcans, bus stops, phone booths, newspaper dispensers, utility and traffic signal cabinets, etc.). In aerial corridors, there are also lines of utility poles with wires, power transformers, and various types of equipment boxes.

Second, there is no need to put size limits on the equipment that can go into these corridors because the nature of existing aerial and underground corridors limit the size of any additional infrastructure. The size of wireless equipment is inherently limited by the physics of what size and weight equipment can be attached to a wooden utility pole or streetlight or, in some underground areas, deployed as a new “stealth” pole or in an underground vault.³¹ Macrocell installations, in contrast, with multiple antennas and large equipment cabinets, are simply too big to place in these utility corridors. Any wireless equipment deployed in the utility corridor will, by necessity, already have a size and form factor to blend in with the surrounding environment.

Third, a categorical exemption will level the playing field for wireless broadband infrastructure in these utility corridors. Wireless providers face additional federal environmental regulatory hurdles that providers deploying other types of infrastructure in the utility corridors do not face. This artificially raises the cost of deploying wireless broadband, and puts wireless broadband at a disadvantage when compared to its wired counterpart.

Fourth, absent a categorical exemption for small cell infrastructure; upgrading structures, (such as poles) in the utility corridors will be subject to less environmental review than small cell deployments which plainly have less environmental impact. For example, in order to

³¹ “Stealth” poles are specifically designed to mimic existing streetlights or decorative lamp posts. Associated equipment may be placed in the structure, in a small cabinet, or in an underground vault.

accommodate pole top antennas, some utility poles in Florida must always be replaced. The pole owner, consistent with pole attachment and NESC rules, fully reviews and approves the pole replacement. The Commission should not place arbitrary federal limits on size or the types of materials.³² Nor should these improvements to utility infrastructure trigger Section 106 review.

For these reasons, the Commission should adopt an exclusion covering small cell wireless infrastructure in existing aerial and underground corridors.

2. The Commission Should Define the Exclusion by Limiting it to Wireless Equipment Collocated on Existing Structures in the Existing Aerial and Underground Utility Corridors

If the proposed exception to Section 1.1307(a) in the utility corridor is too broad, then Fibertech, as an alternative, proposes that the Commission adopt a limited exclusion for small cell equipment collocated on existing structures in existing utility corridors.

Fibertech proposes that the Commission amend Section 1.1306 note 1 by inserting the following:

The provisions of §1.1307(a) do not encompass the installation of antenna(s) and associated equipment where deployed on structures or in underground vaults within existing aerial or underground corridors. This current framework could lead to absurd results. For example, if a utility pole owner refused to allow a small cell attachment to their wooden poles, thereby requiring the provider to place a new mid-span pole in a pole line, that single new pole in the pole line could trigger a full Section 106 review because it is not an “existing” structure. Absurd results also could arise where the wireless equipment has to be placed in ground-mounted cabinets,—a full Section 106 review could be triggered, but only for the non-collocated equipment cabinet. This burden and delay unjustifiably applies only to equipment associated

³² NPRM at ¶ 63.

with wireless broadband even though there is no federal regulatory burden for facilities associated with wired broadband networks, such as those used in fiber-to-the-home deployments.

Wireless infrastructure in existing aerial and underground corridors has no greater impact on human environment than other utility infrastructure. Thus, if the Commission is going to adopt a categorical exclusion, it is more logical and efficient to limit the exclusion by applying it in “existing aerial and underground corridors,” rather than establishing a collocation exclusion that leads to arbitrary rules.

**3. The Commission Has Authority to Amend Section 1.1306
Note 1**

The NPRM asks if there is a basis to conclude whether “small cell deployments (whether on new or existing structures) do not individually or cumulatively have a significant effect on the quality of the human environment so as to qualify for a categorical exclusion from NEPA review under 40 C.F.R. § 1508.4?”³³ So long as the exemption is limited to placement “in” aerial and underground utility corridors, there will be no disruption to the current human environment because the small cell wireless facilities will be in already disturbed areas (e.g., existing public rights-of-way and utility easements) and located along side all the other types of communications and utility infrastructure that humans need in modern life.

Additionally, a categorical exclusion is consistent with Section 800.3(a)(1) of the Advisory Council on Historic Preservation’s (“ACHP”) rules, which allow the Commission to fully exclude an undertaking from Section 106 when it “is a type of activity that does not have the potential to cause effects on historic properties.”³⁴ When small cell installations occur in existing aerial and underground corridors there will be no impact on historic properties because

³³ *Id.* ¶ 51.

³⁴ 36 C.F.R. § 800.3(a)(1).

(1) the installation will not be attached to a building or other type of historic structure and (2) they will be located along side similar types of infrastructure (e.g., traffic signals, streetlights, utility poles, equipment cabinets, bus stops, trash cans, etc.) so that any potential adverse effect would be *de minimis*.

As long as the Commission limits any categorical location to these existing aerial and underground corridors, it will avoid concerns that small cell antennas and equipment would impact historic properties or disrupt the environment. By placing small cell installations in the public rights-of-way and utility easements, providers simply make more efficient use of previously disturbed areas.

B. If the Commission Does Not Adopt a Categorical Exemption It Should Clarify That The Provision of the NPA/Collocation Agreement Requiring Review of Deployments on Structures Older than 45 Years Does Not Apply to Utility Poles

As discussed above, Fibertech urges the Commission to exempt small cell installations, including new placement of new utility poles, in existing aerial and underground corridors. Should the Commission, however, prefer a more narrowly limited modification to current environmental regulations for small cells, Fibertech encourages the Commission to at least remove the Section 106 trigger for utility poles over 45 years old.

As the Commission notes, the “Collocation Agreement excludes collocations on a building or other non-tower structure from routine Section 106 review unless, among other things, the building or structure is over 45 years old.”³⁵ This regulatory requirement leads to substantial and unnecessary delays because, while utility poles are sometimes over 45 years old, they are in no way historic and nothing suggests anyone thinks they ever will be. As such, whether a utility pole is less than or greater than 45 years old, an attachment to it will have no

³⁵ NPRM at ¶ 28.

impact on the environment or historic preservation. It is fair to assume that utility poles were simply not considered when the word “structure” was included in the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (“Collocation Agreement”).³⁶

The NPRM asked if this exclusion should be expanded to other “non-tower structures, such as street lamps or water towers.”³⁷ Fibertech proposes that the Commission expand the exclusion to “structures in aerial and underground corridors (e.g., public rights-of-way),” which will cover utility poles, streetlights, decorative lamp posts, street signs, and traffic signals. Typically, streetlights, decorative lamp posts and street signs are not strong enough to support a small cell wireless facility, and would have to be strengthened before attachment. For example, none of the historic streetlights in Alameda, California, as referenced in footnote 122 of the NPRM, currently would be structurally appropriate for a small cell installation.

Traffic signal poles, in contrast, are often sturdy enough to support small cell antenna placement without reconstruction. Eliminating the requirement that utilities and attachers record the age of traffic signal poles would help streamline the regulatory burden on small cell installations.

As discussed herein, the Commission has a number of ways it can streamline the regulatory process for small cell installations in existing aerial and underground corridors without impacting the ability to preserve historic properties or the environment, and there should never be concern that attachment to a utility pole or traffic signal over 45 years old will ever negatively impact their “historic nature” because they have none. For simplicity’s sake, however, Fibertech encourages the Commission to adopt a full exclusion for small cell located in the

³⁶ 7 C.F.R. Part 1, App. B, Nationwide Programmatic Agreement for the Collocation of Wireless Antennas § V.A.1. (“Collocation Agreement”).

³⁷ NPRM at ¶ 61.

existing aerial and underground corridors, as discussed above in section III.A.1.

IV. The Commission Should Adopt Rules Interpreting the Statutory Language in Section 6409(a)

When Congress passed Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 (“Spectrum Act”),³⁸ it took a significant step towards enhancing the ability that wireless network providers will be able to construct the necessary infrastructure to support the burgeoning network capacity demands of today and tomorrow. The current problem many providers face is “frozen infrastructure” where existing wireless towers and base stations are essentially frozen in a 3G world because changes in local government codes will not allow providers to make the necessary improvements to upgrade and expand facilities to 4G+ and other future technologies and to increase capacity to accommodate growing demand. Even in the traditional utility corridors, small cell wireless providers regularly encounter fierce local government opposition, delays, and denials.

Unfortunately, Section 6409(a) does not go far enough to guarantee that local governments will regulate small cell wireless infrastructure deployed in utility corridors the same way they regulate similar types of wired communications and utility infrastructure, such as smart meters and power supply boxes.³⁹ Fibertech is concerned about the growing trend of jurisdictions discriminating against small cell wireless attachments—in the public rights-of-way and typically attached to existing wooden utility poles—by imposing extremely burdensome and discretionary regulatory burdens, which sometimes leads to outright denial of access and costly and protracted

³⁸ See Title VI – Public Safety Communications and Electromagnetic Spectrum Auctions, Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6409(a), 126 Stat. 156 (2012) (codified at 47 U.S.C. § 1455(a)). We refer hereinafter to the Middle Class Tax Relief and Job Creation Act of 2012 as the “Spectrum Act.”

³⁹ Section I.A *supra*.

litigation.⁴⁰ The Commission should interpret the ambiguous provisions in Section 6409(a) to clearly prohibit local governments from impeding the deployment of small cell wireless infrastructure in existing utility corridors.

A. The Commission Should Clarify the Definitions for the Key Terms used in Section 6409(a)

There are a number of terms in Sections 6409(a)(1) and (a)(2) that the Commission should clarify to provide additional certainty, consistent with Congressional intent. Section 6409(a)(1) states in part: “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.” Section 6409(a)(2) defines “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.” The following are comments on how these terms may be better defined to forestall disputes and litigation.

1. Transmission Equipment and Wireless

Fibertech supports the Commission’s broad interpretation of the term ‘transmission equipment’ to encompass antennas and other equipment associated with and necessary to their operation, including, for example, power supply cables and a backup power generator.⁴¹ Fibertech also supports having the same definition for “base station” because a base station is (and incorporates) “transmission equipment” that has already been installed and, hence, is now

⁴⁰ See above § I.B. for examples of delays, denials, and litigation lasting years.

⁴¹ NPRM at ¶ 105.

an existing base station.⁴²

With respect to the definition of “wireless,” Fibertech supports the interpretation that encompasses all transmission equipment that supports any type of Commission-authorized “wireless,” rather than restricting the term to certain types of wireless services.⁴³

2. Existing Wireless Tower or Base Station

Fibertech supports the Commission adopting a broad definition of “existing wireless tower” so that it encompasses “structures” used regularly for the collocation of transmission equipment, such as utility poles, streetlights/traffic signals. As discussed in Section I.B, placement of small cell infrastructure in the public rights-of-way is similar to placement of facilities used for public safety, smart grid, and wireless internet service antennas. The NPRM notes that the current definitions of “tower” in the Collocation Agreement and NPA both include language limiting the definition of tower to “any structure built for the sole or primary purpose of supporting” antennas.⁴⁴ This definition must be expanded so that the definition of an “existing wireless tower” under Section 6409(a) includes poles that were constructed to support utility infrastructure, even if not for the “sole or primary purpose” of placing wireless antennas.

This interpretation is also consistent with the broad definition of “collocation” in the Collocation Agreement, which broadly encompasses collocations on “structures.”⁴⁵ Fibertech agrees with Verizon that Section 6409(a) applies to collocations on existing structures that may be used to support transmission equipment, and, as discussed above, recommends a broader

⁴² *Id.* ¶ 105 n.227.

⁴³ *Id.* ¶ 104.

⁴⁴ *Id.* ¶ 104 n.226.

⁴⁵ *Supra* n. 35.

definition of “wireless towers” to include other poles used for utility infrastructure, regardless of whether they currently support a wireless attachment.⁴⁶

For example, Fibertech suggests adopting a definition broader than that used in the Collocation Agreement so that for purposes of Section 6409(a) “tower” means: “any structure built for the sole or primary purpose of supporting *transmission equipment or other utility infrastructure*.”⁴⁷ By broadening the definition of “wireless tower” to include “other utility infrastructure,” small cell providers will be able to obtain streamlined access to existing utility poles and streetlights/traffic signals, which are located in existing aerial and underground corridors, regardless of whether such poles currently contain wireless attachments. By contrast, without a broader definition, providers could face the paradoxical situation where wireless providers have a more streamlined process for adding multiple large antennas to an existing tower, but would undergo a more burdensome approval process for placing a single small antenna on an existing wooden utility pole.

Additionally, broadening the definition of “wireless tower” to include existing utility infrastructure would carry out “the clear intent of Congress to facilitate collocation.”⁴⁸ This provides the benefits of attaching transmission equipment to the exact type of structures that were built for the purpose of network infrastructure—e.g., utility poles. This broader definition of tower is also consistent with Commission policy, which “has taken several significant steps to facilitate collocations.”⁴⁹ The ability to obtain streamlined processing for collocating small cell

⁴⁶ NPRM at ¶ 111.

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

⁴⁸ NPRM at ¶ 104.

⁴⁹ *Id.* ¶ 95.

infrastructure on utility poles is critical to the deployment of small cells necessary for expanded and more robust wireless broadband as contemplated in the National Broadband Plan and the 2011 Pole Attachment Order.⁵⁰

Further, Fibertech's proposal is consistent with the Commission's policy of technological neutrality.⁵¹ Under the current regulatory framework, a fiber optic network provider seeking to expand services to new customers and thereby maximize the use of its investment has multiple options for extending its network. But instead of making its decision based on economics or engineering the overriding factor in deployment is the impact of local zoning review. In some cases, where small cell wireless is the only viable economic option for extending the network to a customer, the impact of lengthy, costly and arbitrary local zoning reviews can deter investment. There is no sound basis for treating attachments of small cell infrastructure to utility poles any different than attaching telecommunications equipment, cable TV equipment or electric utility equipment and doing so distorts the marketplace.

When there are no available utility poles, network providers installing small cells and other wireless devices, such as public safety antennas, may seek to attach to other existing vertical structures in the public rights-of-way, such as streetlights and traffic signals. These structures, however, are typically owned by the local government which has control, as the structure owner, on whether or not to allow the attachment.

The proposed definition of "wireless tower" in Section 1.30001(b)(6) would be harmful to all providers using small wireless devices that seek to attach to existing structures in the public rights of way. For example, an electric company seeking to place a smart grid, automatic meter

⁵⁰ See generally, *Pole Attachment Order*.

⁵¹ See *id.* ¶ 132 (discussing basis for adjusting pole attachment rates so all broadband providers pay a relatively uniform rate).

reading antenna on its own utility pole could be subjected to a highly discretionary, conditional use permit zoning process that could take years or even result in denial. An internet service provider that wants to attach a small proprietary spectrum Wi-Fi picocell to an existing utility pole with existing fiber optic cable to offer its customers greater wireless services could also be tied up in years of local government permitting processes simply because a wooden utility pole was not “built for the sole or primary purpose of supporting” antennas. Accordingly, the Commission should modify its proposed definition of “Wireless Tower” to include these structures that work extremely well to support FCC-licensed antennas, even if they were not originally constructed solely for that purpose. It should be just as easy to attach to a utility pole as a tower, and utility poles are the future.

Fibertech also supports the Commission’s broad definition of “base station” that was originally explained in the Section 6409(a) public notice, which defines a base station broadly as “radio transceivers, antennas, coaxial cable, a regular and backup power supply, and other associated electronics.”⁵² As mentioned above, under Section 6409(a) an “existing base station” is essentially transmission equipment that has already been installed, and this broad definition will make it clear that providers can easily replace outdated small cell equipment as new spectrum becomes available.

Finally, Fibertech supports the Commission interpreting “wireless tower or base station” 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

⁵² NPRM at ¶ 107 (*citing* Wireless Telecommunications Bureau Offers Guidance on Interpretation of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, *Public Notice*, 28 FCC Rcd 1 (WTB 2013) (“*Section 6409(a) PN*”).

primary purpose of providing such support.”⁵³ The IAC’s contention that “part of a base station” is not a “base station,” and thus by implication should not be covered by Section 6409(a) undercuts Congress’ intent to streamline the application process.⁵⁴ For example, sometimes the network provider only needs to replace an equipment box or the antenna. According to the IAC’s argument, the mandatory collocation approval would not apply unless the entire “base station” was being replaced, which makes no sense. Thus, the Commission should consider part of a wireless tower or base station the same as the whole.

3. Collocation, Removal, and Replacement

Critically, Section 6409(a) will increase the efficient use of existing wireless infrastructure by encouraging “collocation” on existing wireless towers and base stations.

Fibertech also supports a broad understanding of “base station” so that existing transmission equipment, whether attached to a pole or the ground, may have equipment collocated next to it or be replaced itself. While there is some, but limited, potential to collocate on small cell base stations because of the restricted space in the public rights-of-way, small cell transmission equipment often needs to be replaced as spectrum increases and technology is upgraded. Some jurisdictions do not allow by-right replacement of outdated equipment, which effectively freezes infrastructure in a 3G world. Frozen and out of date infrastructure benefits no one, and carefully clarifying the term “base station” in Section 6409(a) can alleviate this problem.

Occasionally, poles need to be replaced for structural reasons, and if the Commission broadens the definition of “wireless tower” to include utility poles and streetlights/traffic signals, then Fibertech requests that Section 6409(a) apply where “the replacement would not

⁵³ NPRM at ¶ 108.

⁵⁴ *Id.* ¶ 108–09.

substantially change the physical dimensions of the structure.”⁵⁵ Replacement of poles occur in a few circumstances: (1) a wood or metal pole is not structurally sound, so a slightly larger pole (usually of the same or similar material) is placed or (2) a wood pole is not tall enough to meet NESC clearances requiring the owner to place a slightly taller pole to allow for safe separation of the attachments on the pole.

4. “Substantially Change the Physical Dimensions”

The Commission requested comment “on whether to adopt the Collocation Agreement’s definition of ‘substantial increase in the size of the tower’ as the test for when a modification will ‘substantially change the physical dimensions.’”⁵⁶ Fibertech opposes use of this formulation and instead proposes a more sensible definition for “substantially change the physical dimensions” because “substantial increase in the size of the tower” is difficult to understand and not applicable to base stations. Additionally, by developing a workable definition of this phrase for different types of wireless towers, the Commission could resolve concerns that a monopine could grow a monopole top-hat.⁵⁷

For the purposes of small cells, the gating factor is whether the Commission defines “wireless towers” to include existing utility poles and streetlights/traffic signals. Assuming the Commission adopts this sensible definition, the most likely change to the “physical dimensions” of a pole is the replacement of an existing utility pole or streetlight with a newer and stronger pole when the existing structure cannot accommodate its current load.

The other likely change is installation of a pole extension or placement of a taller pole to

⁵⁵ *Id.* ¶ 115.

⁵⁶ *Id.* ¶ 119.

⁵⁷ “Top-hats” are the triangular metal structures attached at the top of monopoles to which the antennas are attached.

satisfy the NESC clearances. The benefit of these changes is that the antenna is located above the line of sight, which many local governments and pole owners prefer. In both of these situations, the impact is *de minimis* because these structures are already part of the built environment. Thus the Commission should specify that, for the purposes of wireless towers used for small cell attachments, (1) upgrading for structural improvement reasons and/or (2) increasing the height of a pole to comply with the NESC or pole owner standards not be considered to “substantially change the physical dimensions” of the pole.

In regards to small cell “base stations,” it is difficult to set limits on equipment size increases because such limits are inherently arbitrary and overlook the practical reality that small cells are the same size or smaller than other types of infrastructure deployed in the public rights-of-ways. Trying to regulate collocation by limiting equipment size increases also assumes that advances in wireless network technology will only require incremental adjustments to base stations. Arbitrary size limits thus could retard innovation in wireless networks.

The IAC’s proposal, to adopt a subjective standard that assesses whether the collocation would “adversely affect...esthetic or quality-of-life elements”⁵⁸ would be arbitrary. Such a standard is so subjective and discretionary it would effectively nullify Congress’ intent in enacting Section 6409(a)—streamlining applications for collocating wireless equipment— by making any increase in size possibly subject to denial.

Examples of similar subjective standards are present throughout the country. In the City and County of San Francisco, the law allowed for a replacement of equipment that was “of

⁵⁸ NPRM at ¶ 122.

substantially the same size, appearance, and power as the permitted equipment being replaced.”⁵⁹

Despite this apparently clear language, the City and County of San Francisco Department of Public Works staff interpreted the language to mean that *any* changes—even a reduction in equipment size—triggered a burdensome and discretionary six-to-twelve month application process with the risk of denial of the application.⁶⁰

Further, mechanical application of a percentage increase formula discriminates against small cell networks. Because Fibertech deploys small cells as small as four-cubic feet total, an equipment replacement could potentially double the equipment’s size, but that is only because the equipment it originally deployed is so small. For example, when the initial AWS band was deployed, one of the smallest base stations available was approximately 6” wide by 6” deep by 33” long, but when the 700 megahertz auction took place, much of this equipment needed to essentially double in size to support the additional frequency. Because the initial box was so small, however, these upgrades did not have a significant impact.

At a minimum, in order to allow providers to upgrade their networks on a regular basis to provide broad coverage and more robust speed, the Commission should carve out a definition of “substantially change the physical dimensions” specific to small cell base stations that will meet the requirements of industry without disrupting the surrounding environment. A rule of thumb for a small cell installation is roughly one to three antennas, two equipment boxes (sometimes combined in a shroud), a battery backup unit (which is also sometimes in a shroud with the equipment), and appurtenant electrical hookup/disconnect boxes. All combined, these base

⁵⁹ City and County of San Francisco Dept. of Public Works Order No. 180222, Regulations Implementing the Requirements of San Francisco Public Works Code Article 25 and Revising and Superseding Department of Public Works Order No. 179,406, § 25(A) (2012).

⁶⁰ San Francisco has approximately 110 pages of ordinance (Article 25) and regulations (DPW Order 180222) and 24 forms governing the attachment of small cells to existing wooden utility poles. There is litigation pending regarding many aspects of the law.

stations are typically no more than 12-15 cubic feet. Given the amount of similar infrastructure in the public rights-of-way, there would not be a significant impact if a small cell base station went up to 25 cubic feet, which, in many cases, would only be enough room for the addition of a battery backup unit.

The Commission should adopt a rule that in order to qualify as an “eligible” request under Section 6409(a) modifications of existing small cell base stations in aerial and underground corridors may not exceed 25 cubic feet. Thus, any small cell base station in the existing aerial and underground corridors that exceeds 25 cubic feet would “substantially change the physical dimensions” of the base station, and thus not be an “eligible facilities request” under Section 6409(a). This objective standard will provide guidance to network providers as well as State and local governments and remove the uncertainty that Congress intended to correct by enacting Section 6409(a).

5. “May Not Deny and Shall Approve”

For all the areas of uncertainty in Section 6409(a), it is clear that Congress intended to preempt States and local governments and remove their discretion whether or not to approve an eligible facilities request. There are no circumstances that allow “a State or local government to deny an otherwise covered request.”⁶¹ Additionally, state and local governments should not be allowed to grant “a covered request subject to conditions on or alterations to the request” because that would undermine the core purpose of Section 6409(a) because if conditions were untenable, it would be a *de facto* denial of an otherwise eligible facilities request.

The Commission also requested comment on whether an eligible facilities request should

⁶¹ NPRM at ¶ 124.

“comply with State or local building codes and land use laws.”⁶² Eligible requests should always comply with building codes and any other governing law, such as TIA-22 Revision G and the NESC, because they are nondiscretionary safety standards that companies must always comply with. An eligible request, however, should not have to comply with local “land use law” because that is the precise area of state authority that Congress – by enacting Section 6409(a) and Section 332(c)(7) clearly preempted local zoning power. Local land use laws, subject to the limitations resulting from the preemptive effect of Section 332(c)(7), will remain applicable for non-eligible facilities requests.

There is nothing in Section 6409(a) that prevents network providers from complying with reasonable requests from local zoning jurisdictions. Every day, local governments make requests to telecommunications carriers that meet or exceed the requirements outlined in their municipal codes, and if the conditions are reasonable, telecommunications carriers often agree in order to preserve a positive working relationship with the local government. Section 6409(a) will not change that. For example, local governments regularly ask for equipment to be painted a certain color or placed in a shroud. Where complying with such requests is not impossible or cost prohibitive, telecommunications carriers are more often than not, likely to agree. Some conditions, however, such as building a shroud around the entire roof of a building before upgrading an antenna—are untenable for cost and construction reasons and cannot justify a denial of an otherwise eligible facilities request under Section 6409(a).

What must be preserved is the intent of Congress—the ability to upgrade and replace obsolete equipment and collocate new facilities at existing wireless towers and base stations. The

⁶² *Id.* ¶ 125.

Commission asked if there should be a full zoning review for “non-conforming uses.”⁶³ The answer should be no because it would be the exception that swallows the rule and undermine the intent of Congress because thousands of existing wireless towers and bases stations are currently non-conforming uses, frozen in time with outdated equipment that needs to be upgraded to current technologies. Additionally, local governments could change their laws tomorrow to make all existing wireless infrastructure “non-conforming,” effectively gutting Section 6409(a) leaving all existing wireless towers and base stations frozen in their current states.

Fibertech also supports the Commission’s proposal to preempt moratoria based on Section 6409(a).⁶⁴ Allowing moratoria creates the prevention and delay of upgrades and increases to critical wireless infrastructure, contrary to the intent of Section 6409(a).

Fibertech agrees with the IAC that Section 6409(a) does not apply when States and local governments are “acting in their capacities as property owners.”⁶⁵ Any time a small cell is attached to a municipally owned street light or traffic signal, the local government will control any changes made to the installations they have allowed as a property owner. The intent of Congress was only to preempt local governments’ discretionary permitting authority over existing wireless towers and base stations.⁶⁶ The Commission can fulfill the intent of Congress by limiting the preemption to those decisions involving permitting only.

Lastly, there are no Tenth Amendment issues concerning Commission implementation of

⁶³ *Id.* ¶ 126.

⁶⁴ *Id.* ¶ 135.

⁶⁵ *Id.* ¶ 129.

⁶⁶ See 158 CONG. REC. E237-239 (daily ed. Feb. 24, 2012) (statement of Rep. Upton), available at <http://www.gpo.gov/fdsys/pkg/CREC-2012-02-24/pdf/CREC-2012-02-24-pt1-PgE237-5.pdf>.

Section 6409(a) as IAC suggests.⁶⁷ As the NPRM notes, the Commission has the ability to implement regulations that will eliminate ambiguity and forestall potential disputes that may impede the deployment of broadband and result in costly piece-meal litigation. Promulgating reasonable rules, that “fill in the gaps” in Section 6409 does not compel state action that might contravene the Supreme Court’s Tenth Amendment jurisprudence. Rather, as the NPRM suggests, the state zoning authority — if it wants to regulate the deployment of wireless communications infrastructure — a subject in a field where state regulation is otherwise preempted — must choose either to comply with the standards set forth in federal law or it can elect not to regulate. Neither Section 6409(a) or the Commission’s decision in this proceeding compel state or local action.⁶⁸

B. The Commission Should Adopt Regulations Regarding the Review and Processing of Applications

The Commission should adopt regulations providing guidance to States and local governments regarding the proper review and processing of applications under Section 6409(a). While the better practice is for local governments to waive a formal application process in favor of simply providing notice, for those local governments that will have an application process, the following parameters should apply, which will prevent an application from being endlessly delayed by multiple hearings and appeals and effectively converted to a denial.

- 1. The Commission Should Require any State or Local Government Application Process to be Administrative and Non-Discretionary.**

The Commission requested “comment on whether Section 6409(a) warrants limiting the

⁶⁷ IAC Recommendation *supra* n. 12.

⁶⁸ See *New Cingular*, *supra* n. 21.

procedures for filing and reviewing an application” for an eligible facilities request.⁶⁹ Fibertech suggests that the Commission adopt regulations providing that any required application process be administrative only and non-discretionary because States and local governments are already required to approve the application. Any required application materials should be limited to those that will allow a local government to make a determination about whether it is an “eligible facility.”

2. The Commission Should Establish 45 Days for Replacements and 90 Days for Collocations as the Default Maximum Time Period in which a State/Local Government has to Consider Before Approving an Application Under Section 6409(a).

At a maximum, any required applications should be processed and approved within 90 days, which is currently the “shot clock” standard for collocations under Section 332(c)(7)(B)(ii).⁷⁰ Nothing, however, requires the Commission to adhere to the same timeline for eligible facilities requests under Section 6409(a). Fibertech encourages the Commission to adopt a 45-day deadline for a replacement eligible facility request, even if it retains the 90-day period for collocations. Forty-five days is also similar to what has been given to utility pole owners for new and replaced equipment, and should be adequate for the administrative review for transmission equipment replacement at an existing wireless tower or base station.⁷¹

3. The Commission Should Further Establish a Rule That if an Application Is Not Approved Within 90 Days for Collocations and 45 Days for Replacement It Should Be Deemed Granted

The Commission requested comment on whether an eligible request should be “deemed

⁶⁹ NPRM at ¶ 132.

⁷⁰ *Id.* ¶ 134 (stating “90 days as a presumptively reasonable period of time to process collocation applications under Section 332(c)(7).”).

⁷¹ 47 C.F.R. § 1.1403(b) (pole owners must grant or deny access within 45 days).

granted” by “operation of law if a State or local government fails to act within a specified period of time.”⁷² The Commission should establish a rule so that applications are “deemed granted” after 90 days for collocations and 45 days for replacement of transmission equipment at existing wireless towers and base stations.

The Commission has statutory authority to adopt a “deemed granted” rule under Section 6409(a) that does not run afoul of the Tenth Amendment. As the NPRM concludes,⁷³ a “deemed granted” rule, does not compel a state or local government to administer federal regulations. The “deemed granted” would not obligate the state to do anything in regards to an application; the local government would have the option of exercising its zoning authority or ignoring the application, — in either instance the federal regulation does not compel any state action.

Deeming an application granted is consistent with previous Commission decisions regarding pole attachments.⁷⁴ Approximately 80% of small cells are pole attachments on existing utility poles, but without parity for the local government’s approval also being “deemed granted,” then these deployments could be needlessly delayed or, worse, tied up in litigation, which benefits no one as both time and money are wasted in lengthy court processes.⁷⁵

Additionally, the remedy of “deemed complete” under Section 6409(a) does not interfere with remedies under Section 332(c)(7) because Congress made Section 6409(a) distinct by stating, “Notwithstanding section 704 of the Telecommunications Act of 1996 (Public Law 104–104) or any other provision of law . . .” at the beginning of the statute.⁷⁶ Additionally, the

⁷² NPRM at ¶ 137.

⁷³ *Id.* at ¶ 138.

⁷⁴ NPRM at ¶ 137 n. 275.

⁷⁵ *See* section I.B above for examples of lengthy litigation cases involving small cells.

⁷⁶ 47 U.S.C. § 1455(a)(1).

legislative of Section 6409(a) confirms that Section 6409(a) “streamlines the process for siting of wireless facilities by preempting the ability of State and local authorities to delay collocation of, removal of, and replacement of wireless transmission equipment.”⁷⁷

Once the time period has passed, a telecommunications carrier should be required only to provide notice that the eligible facilities request has been “deemed granted” in order to proceed with construction.⁷⁸ Fibertech also agrees that filing a petition for a declaratory ruling at the Commission should be the proper remedy for an alleged violation of Section 6409(a), whether it be a State or local jurisdiction who disagrees with a deemed grant or a telecommunications carrier who disagrees with a denial of an “eligible facilities request.”⁷⁹

Because Section 6409(a) is separate from Section 332(c)(7), it should not interfere with the Commission’s mandate to provide a remedy for the wireless facilities that are understood by all to be an “eligible facilities request.” Fibertech urges the Commission to adopt a deemed granted remedy to fulfill Congress’s intent to streamline the process for upgrading and improving existing wireless infrastructure without unnecessary delay.

V. The FCC Should Confirm that its 2009 Shot Clock Order Applies Equally to Small Cell and DAS deployments

Fibertech agrees that Section 332(c)(7), including the “shot clock” adopted in the 2009 *Declaratory Ruling*, already applies to small cell networks.⁸⁰ There is no basis in the statute or

⁷⁷ See 158 CONG. REC. E237-239 (daily ed. Feb. 24, 2012) (statement of Rep. Upton), available at <http://www.gpo.gov/fdsys/pkg/CREC-2012-02-24/pdf/CREC-2012-02-24-pt1-PgE237-5.pdf>.

⁷⁸ NPRM at ¶ 141 (asking if an applicant should be required to notify a State or local government when it believes that a deemed grant has occurred).

⁷⁹ *Id.* ¶ 142.

⁸⁰ *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*

the Commission's *Declaratory Ruling* to justify excluding small cell networks from the preemptive reach of Section 332(c)(7)(a) and the Commission's ruling. As discussed above, however, given the reluctance of certain local governments to comply with federal law, the Commission should not affirm that small cell deployments fall within the ambit of the Declaratory Ruling and further specify that local zoning authority should not be applied to traditional utility corridors because it discriminates against wireless networks in favor of wired networks by singling out small cell antennas for extensive, discretionary permitting processes, while other types of utility infrastructure may be constructed by right.

A. The Commission Should Confirm that Any Small Cell/DAS Collocation on an Existing Structure Includes Utility Poles/Streetlight/Traffic Signals and Is Subject to a 90 Day Timeline

Ninety days is a reasonable timeframe for processing applications to collocate on existing structures, but to prevent any possible confusion, the Commission should make it explicit that “existing structures” includes utility poles and other types of existing structures in aerial and underground corridors, such as streetlights and traffic signals.

Fibertech provided suggestions on a “substantial change in physical dimensions” for collocations on existing base stations under Section 6409(a) in Section IV.A.4 above. If the Commission expands the *2009 Declaratory Ruling* to collocations on existing base stations, which are also “eligible facilities requests” under Section 6409(a), then Fibertech encourages the Commission to use the same standard to order avoid confusion.

B. The Commission Should Adopt a Deemed Granted Remedy

To the extent that States and local governments apply their zoning code to the public

Classify All Wireless Siting Proposals as Requiring a Variance, WT Docket No. 08-165, *Declaratory Ruling*, 24 FCC Rcd 13994 (2009) (“*2009 Declaratory Ruling*”).

rights-of-way for collocations or to the placement new utility poles and similar structures in the public rights-of-way for small cell attachments, the Commission should adopt a “deemed granted” remedy when the time to process an application under the *2009 Declaratory Ruling* exceeds 90 or 150 days respectively. Again, Fibertech does not agree with local jurisdictions treating new utility poles, which are often smaller than existing surrounding utility poles, as “mini-cell towers.” However, in those situations, such as the situation described in Section I.A. above, Fibertech requests the Commission use its preemptive power under Section 332(c)(7) to deny local zoning boards the ability to frustrate federal policy regarding the deployment of broadband wireless networks.⁸¹

The Commission should establish a rule providing that when local government fails to act within the “shot clock” time frames, “the authority will be considered to have not acted within a reasonable period of time under Section 332(c)(7) and the application will be deemed granted.”⁸² This will avoid litigation such as *Crown Castle NG East v. Town of Greenburgh*. That case took over four years to reach a decision at the Second Circuit Court of Appeals ordering the granting of the permits.⁸³ In the meantime, the residents and businesses of the town suffered with sub-par wireless broadband than they otherwise would have had because of open hostility of a local government to small cell wireless facilities in the public rights-of-way.

The Commission’s goal should be to direct resources to supporting broadband deployment, not costly and time-consuming litigation.

⁸¹ The deemed granted remedy under section 332(c)(7) does not run afoul of the Tenth Amendment for the same reasons applicable to the deemed granted remedy under section 6409(a) discussed on page 31.

⁸² Comments of PCIA-The Wireless Infrastructure Association and the DAS Forum, WC Docket No. 11-59 at p. 43 (filed July 18, 2011) (“PCIA Comments”).

⁸³ *Crown Castle NG East Inc. v Town of Greenburgh*, No. 13-cv-2921, 2014 WL 185012 (2d Cir. 2014) *supra* n. 9.

VI. Conclusion

Based on the foregoing, Fibertech respectfully requests the Commission affirm the importance of wireless infrastructure by removing unproductive and burdensome federal regulatory requirements, create regulations for Section 6409(a) accounting for small cell wireless towers and base stations, and clarify the *2009 Declaratory Ruling* to explicitly include and be more effective for small cells. Without such protections, small cell wireless facilities will continue to suffer unnecessary regulations and discriminatory treatment by local governments, which will hinder the expansion of broadband services to the public contrary to the goals of Congress and the Commission.

Respectfully submitted,

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