

**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
)	

REPLY COMMENTS OF THE CITY OF MESA, ARIZONA

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SUMMARY OF REPLY COMMENTS OF THE CITY OF MESA, ARIZONA

The City of Mesa, Arizona (the "City" or "Mesa") is the third-largest city in Arizona with over 439,000 people. These reply comments set forth specific examples of harm that may result from the industry comments on the proposed rule ("Rule") and notice ("Notice").

For example, in the Southwest, streets are not just for vehicles and pedestrians: Many streets are water courses - - they intentionally become fast-flowing rivers after major rains to safely convey massive amounts of water, rocks, mud and debris away to area drainage facilities. Such "drainage" streets and highways are specifically designed for this, and to that end, structures and obstructions within them are carefully planned and minimized. The addition - - without the right of City review, modification or rejection - - of wireless equipment and other structures in and near the rights of way under the industry comments on the Rule will reduce the

runoff capacity of the City rights-of-way, causing flooding, property damage and injuries. And it will violate other Federal statutes, such as the Americans with Disabilities Act and those regarding FEMA floodplain management and the National Flood Insurance Program.

Also the Notice and Rule and industry proposals thereon will harm public safety communications systems. The City maps all zoning and building requests to see if they might interfere with the microwave portion of its public safety communications system, such as a new building blocking a microwave beam (which has occurred). If a request shows potential interference, the City conducts more analysis, and if there is a problem, either works with applicants to see if minor changes in the building or structure being applied for will remove the interference, or starts the process of relocating its microwave towers, antennas etc. The Rule and Notice as interpreted the way industry comments propose will harm this, by requiring applications to be approved in 45 days, thus harming the City's ability to require changes, and not affording it the time needed (usually around 18 months) to do Federally required studies and other work necessary if a microwave tower has to be changed. The problem is greatly exacerbated because under Paragraphs 108 and 111 of the Notice and industry comments thereon the Rule will apply to wireless modifications to any of the hundreds of thousands of existing structures in the City.

These examples show why overriding most or all state laws and local ordinances, including zoning rules and other rules with a safety oriented component - - as the Rule and Section 6409(a) under industry proposed interpretations will do - - will lead to harm.

Second, these examples show why the Act (and thus the Rule) is unconstitutional, despite industry claims to the contrary, because they exceed the power of Congress under the Commerce

Clause and the Tenth Amendment, and require Mesa and other cities to violate other Federal laws.

The Act and Rule are particularly unconstitutional because it is the City - - not this Commission or the Congress - - which will bear the brunt of the blame for harms that result from them. Such "blurring of the lines of political accountability" is barred by the Supreme Court, and is a prime reason why the Act and Rule are unconstitutional under the Tenth Amendment.

And the unconstitutionality is increased (if that is possible) by the Commission's proposals to further intrude on the affairs and political organization of local units of government by (1) imposing rigid time limits (with applications deemed approved if limits are exceeded), and (2) affecting municipalities forms of government by prohibiting applications from coming before elected bodies in public session (where at minimum, in public sessions the public would be informed that the City's actions were required by a Federal law or rule).

The broader the Commission's interpretation of Section 6409(a), and the broader the rule it adopts, the more certain it is that both the Act and the rule will be struck down as unconstitutional.

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REPLY COMMENTS OF THE CITY OF MESA, ARIZONA

I. INTRODUCTION AND BRIEF SUMMARY

The City of Mesa, Arizona (the "City" or "Mesa") submits these reply comments mainly in response to industry comments in the Commission's Notice of Proposed Rulemaking dated September 26, 2013, ("Notice") seeking comments on a proposed rule ("Rule") to clarify and implement the requirements of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 ("Section 6409(a)" or "the Act").

Mesa is the third-largest city in Arizona, and the 38th largest city in the United States. It is home to over 439,000 people, according to the 2010 U.S. Census, which makes it larger than more well-known cities, such as Atlanta, Miami, Minneapolis, Cincinnati, Pittsburgh, St. Louis, Tulsa and Cleveland. Given its extremely long east to west travel distance, in excess of 18 miles,

and large land area of 133.13 square miles (larger than Las Vegas, Philadelphia, Portland, and Atlanta) Mesa's geography gives rise to specific public safety communications needs and features.

Mesa supports the thoughtful, detailed comments filed by the many municipal commenters (such as the City of San Antonio, City of Alexandria, City of Eugene and those of the national municipal organizations) in this proceeding. Such comments address a wide range of issues and problems with Section 6409(a) and the Rule. Mesa opposes and responds to the comments filed by the industry, such as PCIA, CTIA, Verizon, AT&T, among others.

In support of the municipal commenters, and in opposition to industry comments, Mesa's reply comments will first set forth a few specific examples of problems - - serious problems - - with the Rule (especially as commented on by industry) that affect the public safety, creating the likelihood of serious harm to people and property. Many of these problems occur in the rights of way, which Mesa will emphasize. Although these examples are based on Mesa's experience, they are not unique to Mesa, and apply to many states and municipalities.

The more general point from these examples is that Mesa's ordinances - - and those of municipalities generally - - protect the public health and safety in a wide variety of ways. Although building and safety codes (fire codes, electrical codes, etc.) and zoning restrictions are the best known and are mentioned in the Notice, protecting the public safety goes well beyond that. Zoning restrictions have a significant public safety component, contrary to what industry would have this Commission believe.

That is why Mesa's examples focus on items not raised in the Notice or covered much (if at all) in comments filed to date - - specifically on drainage and microwave beams for public safety communications - - where the public harms being prevented are great. They illustrate why

overriding - - as the Rule and Section 6409(a) purport to do - - many or most state laws and local ordinances, including those such as zoning restrictions which have a public safety component will lead to harm.

Second, these examples show why the Act (and thus the Rule) is unconstitutional, particularly under industry comments, because it exceeds the power of Congress under the Commerce Clause and the Tenth Amendment. The Act not only infringes on rights reserved to the states, but (particularly as implemented by the Rule) is unconstitutional because it would give Mesa the Hobson's choice of either complying with the Act and Rule or complying with other Federal laws. That is because the Act and Rule violate other Federal laws, and the City cannot comply with both.

The Act and Rule are unconstitutional because it is the City - - not this Commission or the Congress - - which will bear the brunt of the blame for harms that result from them. This includes public outrage, opprobrium and lawsuits by property owners, individuals and estates of the deceased harmed by the Act and Rule. Such "blurring of the lines of political accountability" is barred by the Supreme Court, and is a prime reason why the Act and Rule are unconstitutional under the Tenth Amendment.

The unconstitutionality is increased (if that is possible) by industry's and the Commission's proposals to further intrude on the affairs and political organization of local units of government by (1) imposing rigid time limits (with applications deemed approved if limits are exceeded), and (2) affecting municipalities forms of government by prohibiting applications from coming before elected bodies in public session (where at minimum, in public sessions the public would be informed that the City's actions were required by a Federal law or rule).

The Commission cannot resolve these constitutional issues. That is for the courts. But it can affect the courts' resolution.

Specifically, the broader the Commission's interpretation of Section 6409(a), and the broader the rule it adopts, the more certain it is that both the Act and the rule will be struck down as unconstitutional. The Commission must keep this fact in mind.

II. EXAMPLES OF PROBLEMS WITH THE PROPOSED RULE

There are substantial problems with Rule, especially as industry would have it apply, which directly harm public safety. Some are as follows:

A. Streets, General: Mesa administers over 1500 miles of arterial and collector streets (in other words, major thoroughfares, many with five lanes of traffic) and over 1800 miles of residential streets. It has rules limiting (and in general, preventing) utilities or others from placing permanent obstructions on sidewalks and in the paved portions of the streets. The reason is obvious: Streets are mainly for cars and other vehicles. Sidewalks are for pedestrians. Streets and sidewalks should not be blocked or obstructed, as (among other things) that can cause serious injuries and property damage.

The Rule violates these rules and principles, for example by allowing large obstructions to be placed in the streets and sidewalks. The following examples illustrate this.

B. Street Problems, Specific Examples: The Rule would inhibit the City from regulating construction and other activity in its right-of-way. Arizona municipalities are the ultimate authority on regulation of the right-of-way, having been granted this power by the Arizona state legislature. *See, e.g.*, Arizona Revised Statutes (A.R.S.) §§ 40-283 (“within the confines of municipal corporations the use and occupancy of streets [by utility companies] shall be under

rights acquired by franchises . . . and subject to control and regulation by municipal authorities”); 9-506 (“[f]or the purpose of authorizing and regulating the construction, operation and maintenance of cable television systems the licensing authority of a city . . . may issue a license to any person to use public streets, roads, and alleys and shall impose conditions, restrictions and limitations upon [them]”); 9-583.A (“[n]othing in this section [dealing with provision of telecommunications services] affects the authority of a political subdivision to manage the public highways within its jurisdiction or to exercise its police powers”).

Under its authority to regulate the right-of-way, the City has required changes in proposed wireless communications installations to ensure the safe and orderly operation and maintenance of the City’s right-of-way, and reserved the right to deny applications where (for example) this could not be accomplished. Several examples of requested permits and/or licenses to establish are as follows. Although some relate to new sites, in those cases the particular issue could also occur with proposed modifications to existing sites covered by the Rule.

- 4320 E. Brown Road Antenna – The City rejected the proposed antenna because the construction would have filled in a private retention basin, which would cause the property owner to be out of compliance with the City’s drainage requirements. For the Commission's edification, as set forth in more detail below, the City and much of the southwestern United States has to be extremely concerned about drainage, as sudden violent storms can lead to major flooding, injuries and property damage. This example is particularly relevant because the Rule mandates City approval unless there is "excavation outside . . . the current boundaries of the leased or owned property", and here drainage facilities were being filled in, the opposite of excavation.

- The Brown Road location was also rejected due to a proposed equipment compound which would have been located directly over an underground electric power line, thus preventing access to the line for repairs (the electric utility needs to be able to dig from the surface to make repairs if the line should fail at that location). The City has to retain the right to reject applications where the modification of an existing facility would extend over buried power lines or otherwise prevent access to underground utility lines. But the Rule may prevent this due its wording that only "excavations" outside a site and utility easements allow City modification or rejection.
- 55 S. Horne Street Antenna – The proposed site was located within an electrical substation, and the City required changes to the application to comply with the National Electrical Safety Code.
- US 60 and Higley Road Cell Tower – The City required design modifications to prevent a cell site from damaging water and sewer lines. Specifically, the cell site was to be connected to certain utilities by "directionally boring" a tunnel or path for such line. The City required the bore to be further away from water and sewer lines so as to assure that they would not be harmed. The Rule may prevent such modifications due its wording that only "excavations" outside a site and utility easements allow City approval. The Commission should be aware that in many cases utility lines to/from cell sites are installed by underground directional boring specifically because that does not require excavation (a trench) that will harm roads, sidewalks and other items on the surface. City approval for such bores is needed to help assure that they do not drill into other buried lines, such as those for natural gas, electricity, water, sewer or telecommunications.

- Main and McDonald Streets Equipment System – A provider applied to place a communications equipment cabinet in a public sidewalk. The City rejected the application as it would have violated the American's with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213 (1994), regarding access by persons with disabilities to the City's Main Street. The cabinet would also have significantly impeded foot traffic on the public sidewalk. Under industry proposals, such as those of the PCIA, placing base station equipment located on the ground, or adding equipment to an existing installation, would force the City to violate either Section 6409(a) or the ADA - - it would not be able to comply with both.

The examples above illustrate some of the legal and practical difficulties that the City will face if the Rule is adopted. The City would not have been able to prevent these types of requested equipment or facility sitings.

C. Storm Drainage Systems Breached or Harmed: The Rule would detrimentally affect City access for the operation and maintenance of City drainage facilities located on or near public rights of way. Drainage is a major issue in the arid southwestern United States. For example, in Mesa and much of Arizona the average annual rainfall is around 9.5 inches, but a quarter of more of this rainfall precipitation can come in just one intense storm, and it does not percolate quickly into the compacted ground. Instead it flows along the surface as flash floods, carrying rocks, boulders, mud and other debris. Think of many fast, small Mississippi's laden with rocks.

So the land and streets are carefully developed and engineered to convey surface waters away safely, reduce peak flows via retention areas, and remove obstacles that can effectively

"dam" flood waters such that they cause undue harm by flooding larger areas or forming unplanned routes.

Some of the City of Mesa's drainage facilities are either located within the right-of-way or just outside of the right-of-way. These facility types include retention basins, channels, debris basins, storm pipes, culverts, and storm drain facilities. For those facilities located outside of the right-of-way, operation and maintenance is facilitated via easements from the rights-of-way, which provide the city access for cleaning, operating, and maintaining drainage facilities. Section 6409(a) poses a hazard and hinders local authorities from necessary access during both emergency and regular operation and maintenance work. For example, allowing new or additional cell phone equipment cabinets (including those for antennas on utility poles or light standards) to be placed in areas that front on or otherwise obstruct these easements - - without the ability of the City, where appropriate, to reject or condition such placements - - creates a threat to public safety, particularly in emergency response situations.

Section 6409(a) makes the unwarranted assumption that communication companies clearly understand and respect how city drainage facilities are accessed, operated and maintained. That is not the case.¹ It is the City of Mesa's experience that almost all design and

¹ In some areas, floodplains have been delineated and are located with the City's right-of-way. If wireless equipment is allowed to be placed within an effective floodplain, it may require fill to establish a foundation at adequate height. Any infill areas or reduced storage volume located within a floodplain or drainage basin or channel require the hydraulic analysis of both existing and proposed improvements to show that the improvements being proposed will not create an adverse or negative impact to surrounding development that might be affected by the floodplain or improvements within the floodplain. This analysis is prepared as a FEMA Letter of Map Revision (LOMR) submittal to FEMA with supporting hydraulic analysis and documentation. The City staff has the knowledge necessary to coordinate this activity in a safe manner and process; the subcontractors used by telecommunications carriers generally lack this expertise in following federal guidelines. Further, it is the City's responsibility as a participant in the National Flood Insurance Program ("NFIP") to make sure this is done correctly; for the telecommunications companies it is a side issue. Should the requirements of NFIP not be met, it

construction of wireless facilities is subcontracted to entities which are low bidders and promise the quickest speed to market. Drainage is not always on their radar, or a major consideration. By contrast, it is one of the specific and principal items which the City addresses to protect the public safety.

If telecommunications companies are given rights to dictate where cell tower facilities in and near the right of way can be located - - as industry and the Rule propose - - they will undermine the City's ability to manage these drainage facilities in the right-of-way and easements for the benefit of the public.

In addition, the Commission needs to be aware that in the Southwest, streets are not just for vehicles and pedestrians: Many streets are water course conveyance paths - - they intentionally become fast-flowing rivers after major rains to safely convey away massive amounts of water, rocks, mud and debris, ultimately to area drainage facilities, such as rivers and streams or storage facilities like retention basins.

Specifically, like many other southwestern municipalities, Mesa uses some of its right-of-way to safely convey storm runoff into drainage facilities. The right-of-way thus serves a critical purpose as part of the overall drainage infrastructure needed to preserve the public safety during intense rainfall events. City standards call for runoff from a 10-year storm event to be conveyed within the tops of the curbs of the street; while conveying runoff from a 100-year storm event within the City's right-of-way (the right-of-way typically extends well beyond the curb).

Such drainage streets and highways are specifically designed to act as watercourses, and to that end, structures and obstructions within them are carefully planned and minimized. The addition - - without the right of City review, modification or rejection - - of wireless equipment

could put citizens who carry flood insurance at risk of higher rates, or even jeopardize the City's membership in NFIP.

and other structures in the rights of way under the Rule will reduce the runoff capacity of the City rights-of-way, causing additional unnecessary flooding.

In addition, wireless equipment will collect trash, debris and mud during a flood, which will act as a dam, resulting in faster flows (and risks to public safety) around the structure and damage to adjacent private property by increasing already high water levels. This can easily occur if a tree floating down the street is trapped between an equipment structure and nearby sign or pole, quickly causing a dam.

To reiterate: Minimizing structures and facilities within the City rights-of-way maximizes the flood carrying capacity of local drainage facilities and allows flood waters to flow unhindered down the streets. Using the right-of-way as a means of safe conveyance of runoff flows to local and regional flood infrastructure is vital to reduce the risk of flooding and promote safety for the public during intense rainfall events.

The Rule runs directly counter to these principles, and will increase the property damage, deaths and injuries resulting from flood waters.

D. Federal Floodplain Management Laws Violated: The Rule will require the City to violate other federal laws, such as those relating to floodplain management. For example, the rules of the National Flood Insurance Program (NFIP) state in 44 CFR 60.3(d)(3) that “communities are responsible for prohibiting encroachments, including fill, new construction, substantial improvements, and other development within the adopted regulatory floodways” (emphasis supplied).

As shown above, telecommunications facilities placed within a regulatory floodway are likely to obstruct flood flows, causing the water to slow down and back up, resulting in higher flood elevations and greater risk to public safety.

And again, the Rule and Section 6409(a) would require the City to violate other Federal laws.

E. Public Safety Communications Disrupted: The Rule will disrupt public safety communications in Mesa, and in other communities with microwave public safety communications systems. That is because due in part to its large land area - - over 133 square miles, with parts of it somewhat rural - - Mesa uses a microwave system to connect public safety (police, fire, EMS) communications points in different areas of the City.

In order to prevent new construction from disrupting the public safety microwave system, such as a new structure blocking transmissions between Point A and Point B, the City requires a review of zoning, building permit and similar applications to see if any proposed structure may interfere with the system. Serious harm to the public can occur if police, fire and similar communications are disrupted, and the City adopted the new requirements after the following incident:

In 2008 the City's Communications Department (which, among other things, oversees and operates the City's public safety communications facilities) discovered that a new industrial steel recycling plant (CMC Steel) was being constructed near one of the City's communications tower sites located at 7144 S. Meridian in Mesa. Upon further investigation, the City learned that the height of the recycling plant's tallest building would block the path of a critical microwave radio path - - specifically it was so tall it would (and did)² block a microwave path vital to the operation of the City's Public Safety radio system.

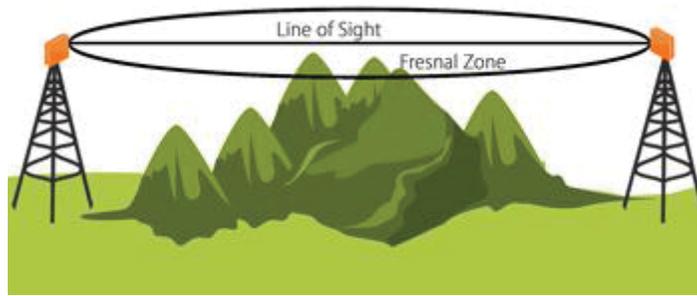
² The City had wisely designed its public safety communications system with redundant microwave paths, so when the blockage occurred, communications were not interrupted. But until the new tower/replacement microwave path became operational, the City had only one circuit to the location in question, such that the failure of any component on that circuit would have taken down one ninth of the City's public safety communications system.

By the time the Communications Department learned of this, building permits for the plant had already been issued and construction was moving forward. The City's only choice at that point (if the Department had known earlier, possibly a slight change in the building or its location would have removed the problem) was to build a new, taller tower and relocate (and relicense) the microwave dish and path to a higher elevation on the new tower so the microwave beam would clear the new building. See the City's Microwave Safety Pool license WPQW572, where the interference was between sites TRW (a one hundred fifty foot (150') tower) and SWP, necessitating the City's building a new, two hundred foot (200') tower, TRW2, to replace TRW.

In order to help lessen the possibility of a similar occurrence in the future all of the City's current microwave path Fresnel zones have now been identified and included in a GIS mapping layer.

As the Commission may be aware, Fresnel zone clearances are used to analyze potential interference by obstacles near the path of a radio beam, in this case microwave beams or paths. There are multiple such Fresnel zones, strong "out of phase" interferences can make microwave transmissions unusable, and some zones must be kept largely free from obstructions to avoid interference. Although some obstruction of Fresnel zones can be tolerated, for vital services such as public safety the recommended obstruction is 20% or less.

Not all public safety systems have such redundancy.



The Fresnel zones for City public safety microwave paths are entered in the City's master GIS computer systems as "parcel tags" for each parcel of land in or near Fresnel zones. The same GIS system is used for zoning matters, building permits and the like. The result is that Communications Department personnel are notified of activity (such as zoning or building permits applications, etc.) for any "Fresnel zone" tagged parcel, so that they can immediately investigate and ameliorate possible microwave communications path interference issues.

Because Fresnel calculations can predict whether interference will be helpful (such as in-phase) or harmful (out of phase) for the microwave path in question, the City then can work with applicants to see if minor changes in the building or structure being applied for will remove or sufficiently reduce the interference. Depending on the situation, such changes may be requested or required by the City.

At minimum, the City is made aware of potential disruptions to its public safety communications system before they occur, and if necessary, can change its microwave system to prevent the problem.

A change such as the one described above (a taller tower) normally take around 18 months, as they require such things as

- RF and Fresnel analyses and interference studies
- A Federally required FAA tower study

- Compliance with Commission requirements for licensees under the National Environmental Policy Act, including
 - Consultation and coordination with the State Historical Preservation Officer
 - The same with the Tribal Historical Preservation Office
- Frequency coordination and relicensing of the modified microwave path
- Design
- Competitive bidding
- Construction, testing and switch-over

More time can be needed, such as if more land or a different site is needed and because the City operates on a lean budget, such that needed funds may not be readily available. In the example given above, the City by virtue of both luck and extra effort was able to collapse the 18 month process into around seven months. But such an expedited time frame is both (1) not assured, and (2) well beyond the 45 days proposed by industry and the 90 days set forth in the Rule.

So the Rule prevents measures by the City such as those described above, from both a timing perspective (changes are deemed approved in forty-five or ninety days, even if that time is insufficient for the analyses, licensing and changes described above) and substantively (by preventing the City from requesting or requiring changes which would prevent interference). The problem is greatly exacerbated because under Paragraphs 108 and 111 of the Notice the Rule will apply to wireless modifications not just to communications towers, but to any existing structure. Because there are literally hundreds of thousands of structures in Mesa the potential for harm is significant.

This harm from the Rule to public safety communications is ironic, given that several years ago disruptions to public safety communications lead to the Commission's Nextel rebanding orders, where Nextel was required to spend billions of dollars to change the frequencies it used (and pay others the cost of changing the frequencies they used) to prevent future disruptions.

In contrast to Nextel, the Rule ensures public safety disruptions.

F. Who Can Use Rule: The Rule is not confined to FCC licensees, or to any subset (e.g. - - cell phone companies). As worded, anyone with a device with a radio can use the Rule to avoid City rules and regulations, including zoning, building and safety codes, as well as state laws.

This is a prescription for harm.

The Rule would thus apply to thousands of people and entities within the City of Mesa. For example, the FCC's Universal Licensing System shows that there are over 2,500 FCC licensees in Mesa.³ The licensees include most of the more than one hundred (100) types of radio licenses which the FCC issues, and includes many individuals, small businesses and unsophisticated entities.

In addition, the Rule apparently applies to unlicensed entities, meaning anyone owning a device with a radio in it - - apparently to anyone with a radio-controlled garage door opener, Bluetooth device, baby monitor, Wi-Fi router or wireless indoor/outdoor thermometer. There are hundreds of thousands of these in Mesa.

³ This number is almost certainly too low, because as the FCC's web page states, it only shows the licensee's mailing address, not where their transmitters are located. It does not capture the high winter population of "snow birds" in Mesa and related seasonal businesses from out of state. And some licensee's (ham radio, for example) have multiple transmitters operating under one license.

The concern in part is that some relatively unsophisticated entities (individuals, small businesses) will use the Rule to wittingly or unwittingly violate City zoning, building and safety related ordinances in way that create risks of harm to themselves or others.

The related concern is that others will deliberately use the Rule to evade zoning, building and safety related ordinances, by grafting a "wireless facility" onto a project so as to exempt it from such ordinances.

And this is in addition to the risk that a licensee can increase a tower's height without regard to City zoning rules that require most towers - - especially "guyed towers" - - to be located far enough from rights-of-way, property boundaries and occupied structures so that when they fall, no one is injured. *See* Mesa City Code, Title 11, Chapter 35. So if a tower is 150' tall, it currently has to be set back at least 150' feet from the property boundary and occupied structures. But the Rule tosses this requirement out the window for modifications. And the electric equipment for a modified tower or structure need not be grounded, its generators can have gasoline stored in unapproved containers, and it can be built so close to lot lines and other structures that any fire will rapidly spread to adjacent buildings.

Section 6409(a) and the Rule thus purport to create a landscape pockmarked with "Wild West" government-free zones, where buildings and structures are out of compliance with the most basic zoning and safety regulations, all to the detriment of public safety.

III. SECTION 6409(a) AND THE RULE ARE UNCONSTITUTIONAL

A. Summary: Section 6409(a) and the Rule will be struck down by the courts as unconstitutional, for several reasons. As set forth in more detail below, these are:

1. The limitations on Congress' power under the Commerce Clause of the Constitution, including Congress' regulating "inactivity" in violation of the U.S. Supreme Court's decision two years ago generally upholding the Patient Protection and Affordable Care Act (commonly called Obamacare), National Federation of Independent Business et al. v. Sebelius, 567 U.S. ____, 132 S.Ct. 2566, 183 L.Ed.2d 450 (2012).

2. The Federalism protections of the Tenth Amendment (all powers not given Congress are reserved to the states and people), exacerbated by the Commission's proposals to require local units of government to change their form of government to prevent matters under the Rule from coming before elected bodies in public session (where at minimum, the public would be told that City actions were required by a Federal law or rule).

3. And perhaps most importantly, cases based on the preceding principles which strike down Federal statutes which "blur the lines of political accountability" by requiring local officials to take actions (and the blame) for which Federal officials (in this case Congress and this Commission) are responsible.

4. The more broadly (and invasively on local powers) that Section 6409(a) is interpreted, the greater the likelihood of a successful Constitutional challenge. Courts are aware of this, and for that reason tend to interpret statutes narrowly so as to avoid Constitutional issues. The Commission must do the same if it wishes to preserve Section 6409(a) and the Rule.

B. Constitutional Analysis: Section 6409(a) and the Rule are unconstitutional under the Commerce Clause and Tenth Amendment of the U.S. Constitution. These provide in turn that "The Congress shall have the power: . . . (3) To regulate commerce with foreign nations, and

among the several states, and with the Indian tribes," U.S. Const. Art. I, Section 8, and 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." U.S. Const. Amend. X.

Recent U.S. Supreme Court cases have interpreted the 10th Amendment - - and the Commerce Clause - - in favor of states, municipalities and our "dual system of governance" so as to strike down Federal statutes which improperly intrude on state and local rights and authority. *See, e.g. Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U. S. 159, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001) ("SWANCC") (as discussed below, construing the Federal Clean Water Act so as not to preempt state and local authority because the statute would likely be unconstitutional if so construed); *Gregory v. Ashcroft*, 501 U.S. 452, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991); *New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992) ("New York") (invalidating the Low-Level Radioactive Waste Policy Act); *U.S. v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995) (invalidating the Federal Gun Free School Zones Act); and *Printz v. U.S.*, 521 U.S. 898, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997) ("Printz") (invalidating portions of the Brady Handgun Violence Prevention Act).

One of the most relevant principles is that "[T]he Federal Government may not compel the States to enact or administer a federal regulatory program," *New York*, 505 U.S. at 188, due to the blurring of lines of political accountability that result. Section 6409(a) and the Rule fall squarely afoul of this principle.

In language that could have been written with the Rule and Section 6409(a) specifically in mind, the U. S. Supreme Court has held that:

"[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished [W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the

regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation."

New York at 168-169 (citations omitted).

As is obvious, the direction in Section 6409(a) that "Notwithstanding . . . any other provision of law, a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower" falls squarely within the type of impermissibly "coercive" conduct prohibited by New York. The Rule is similarly coercive and invalid.

As is set forth in prior portions of these Comments, Section 6409(a) and the Rule squarely put Mesa and other cities and states in the position of taking the blame for actions for which this Commission and Congress are responsible.

This problem is exacerbated by the proposal in the Notice to prevent matters covered by the Rule coming before elected city councils (instead administrative approval by City staff would be required). Notice at ¶ 132. First, this is an impermissible Federal intrusion into the rights of states and local units of governments to determine and control their own forms of government. *See Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004) ("[F]ederal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power.").

Second, it exacerbates the "blurring of lines of political accountability" problem by prohibiting applications from coming before elected bodies which meet in public session - - and where the public would be told that the City actions in question were being forced on the City by the Federal government.

More generally in the Federalism context, and in determining the proper spheres of local and Federal authority, the courts resist attempts by the Federal government to usurp the general police powers traditionally reserved to the states. And the courts tend to recognize zoning (let alone building and safety codes) as a matter of particularly local concern, into which the Federal government is generally restricted from intruding. According to the Supreme Court:

"As Madison expressed it: '[T]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.'"

Printz, 117 S. Ct. at 2377.

Given the broad sweep of Section 6409(a) and the Rule, and their purported attempts to override "any" and "all" provisions of state and local law, including building and other safety codes and ordinances, such as those cited above, the courts will reject the Section and Rule on traditional Federalism grounds.

This is particularly the case where, as illustrated above, the Act and Rule would require states and municipalities to violate other Federal laws.

In these types of cases, the scope of Congress' powers under the Commerce Clause becomes an issue, as was well illustrated in the Supreme Court's health care decision in the summer of 2012. *See* National Federation of Independent Business et al. v. Sebelius, 567 U.S. ____, 132 S.Ct. 2566, 183 L.Ed.2d 450 (2012), discussed below.

But first, in its SWANCC decision, the U. S. Supreme Court affirmed that Congress' authority under the Commerce Clause is limited vis-a-vis traditional state and local land use laws. In SWANCC several municipalities proposed to build a landfill on property which included a wetland. Due to the presence of wetlands the Army Corps of Engineers refused to

issue a permit needed under the Clean Water Act for landfills that affect the "waters of the United States."

The U.S. Supreme Court upheld the municipalities' contention that the Corps was acting beyond the reach of Federal jurisdiction, stating that it feared that any other ruling would extend the Corps' jurisdiction far beyond "navigable waters" (a traditional test of Commerce Clause jurisdiction) to farmyard ponds and other isolated pools of water that were not adjacent to open water.

While the Court technically ruled against the government on the basis of rules of statutory construction, it clearly intimated that, were it compelled to do so, it would have significant constitutional concerns about the Corps' efforts to "push the limit of Congressional authority." 531 U.S. at 173. Its concern, said the Court, "is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id.*, citing United States v. Bass, 404 U.S. 336 at 349, 30 L Ed. 2d 488, 92 S. Ct. 515 (1971) ("Unless Congress conveys its purposes clearly, it will not be deemed to significantly change the federal-state balance"). The Court concluded that there was "nothing approaching a clear sign from Congress" that it intended federal power to reach so invasively into the area of land use regulation. To rule in favor of the Corps, said the Court, "would result in a significant impingement of the states' traditional and primary control over land and water use." *Id.* at 174.

Zoning laws such as those upheld in SWANCC have as one purpose protecting the public safety, as illustrated by Mesa's zoning ordinance requiring a "fall zone" around towers equal to the height of the tower, such that when the collapse they will not fall on occupied structures (or on the property of adjacent landholders). SWANCC will automatically extend to protect (and

prevent the preemption of) the many building and safety codes which Section 6409(a) and the Rule purport to abrogate. Not just replace with an arguably "better" Federal code, but abrogate, so that the public is unprotected.

In addition, the SWANCC decision is part of a trend to apply a much more restrictive construction to the Commerce Clause and thus restrict the powers of the Federal government. See, e.g. U.S. v. Lopez, *supra* (Federal Gun Free School Zones Act invalidated as exceeding Federal power under the Commerce Clause); Printz, *supra* (invalidating portions of Brady Handgun Violence Prevention Act); U.S. v. Morrison, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000) (portion of Federal Violence Against Women Act providing Federal civil remedy for certain gender-based assaults exceeded Federal authority under Commerce Clause and Fourteenth Amendment).

And, most recently and notably, Section 6409(a) is invalid under the Supreme Court's recent narrowing of the Commerce Clause in its 2012 decision upholding (on other grounds) the Patient Protection and Affordable Care Act, notably by striking Congress' attempt to use that clause to regulate "inactivity" (the failure to purchase health insurance).

"People, for reasons of their own, often fail to do things that would be good for them or good for society. Those failures—joined with the similar failures of others—can readily have a substantial effect on interstate commerce. Under the Government's logic, that authorizes Congress to use its commerce power to compel citizens to act as the Government would have them act.

"That is not the country the Framers of our Constitution envisioned."

National Federation of Independent Business et al. v. Sebelius, 132 S.Ct. 2566, 2589 (opinion of Chief Justice Roberts) (2012).

Section 6409(a) and the Rule fall within this prohibition because they compel activity (the approval of modifications to wireless facilities) which would not otherwise occur, *viz.* "a

State or local government may not deny, and shall approve" eligible facilities requests for modification.

IV. CONCLUSION

Section 6409(a) and the Rule will cause severe harm - - death, injuries and harm to property - - and are unconstitutional. The Commission should not adopt the Rule. The broader any rule the Commission adopts the greater the harm, and the greater the likelihood it and the Act will be held unconstitutional.

Respectfully submitted,



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