

**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 EUGENE, OREGON

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March 5, 2014

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

The positions taken in the City’s opening comments¹ received ample support from other commenters.² The City endorses and supports the opening comments of other local government interests and replies to the other opening comments as follows.

¹ Comments of the City of Eugene, Oregon, WT Docket No. 13-238 (filed Feb. 3, 2014) (“Eugene Comments”).

² *See, e.g.*, Comments of the City of San Antonio, Texas, WT Docket No. 13-238 (filed Feb. 3, 2014) (“San Antonio Comments”); Comments of the National Association of Telecommunications Officers and Advisers *et al.*, WT (Footnote continued . . .)

INTRODUCTION AND SUMMARY

The overwhelming majority of commenters cautioned against Commission adoption of binding rules implementing Section 6409(a)³ and against any further Commission action relating to Section 332(c)(7)⁴ or the *Shot Clock Ruling*.⁵ Indeed, even excluding comments from individual members of the public (which themselves overwhelmingly opposed any Commission preemption), over 58 local government and state agency commenters opposed Commission preemption, while approximately 18 industry commenters supported varying degrees of Commission preemptive action.

There is good reason for the opening comments' decided tilt against preemptive Commission action. The record reveals some consensus among industry and local governments on a few issues. First, there was an acknowledgement by industry that a uniform, "one-size-fits-all" process would not be appropriate for all facilities applications. Second, there was some recognition by industry that there is a role for local review of siting requests to ensure public safety and structural integrity. Third, some in industry agreed that localities have the right to ensure that any eligible facilities request does not undermine the stealth or camouflage elements of an existing tower or base station. And fourth, at least some in industry conceded what should

Docket No. 13-238 (filed Feb. 3, 2014) ("Comments of the National League of Cities"); Comments of the City of Alexandria, Virginia *et al.*, WT Docket No. 13-238 (filed Feb. 3, 2014) ("Alexandria Comments"); Joint Comments of the California League of Cities *et al.*, WT Docket No. 13-238 (filed Feb. 3, 2014) ("CA Comments"); Comments of the Colorado Communications and Utility Alliance *et al.*, WT Docket No. 13-238 (filed Feb. 3, 2014) ("CO/WA Comments").

³ Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6409(a), 126 Stat. 156 (2012) ("Spectrum Act") (codified at 47 U.S.C. § 1445(a)).

⁴ 47 U.S.C. § 332(c)(7).

⁵ Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, WT Docket No. 08-165, Declaratory Ruling, 24 FCC Rcd 13994 (2009) ("*Shot Clock Ruling*"), *recon. denied*, 25 FCC Rcd 11157, *aff'd sub nom.*, *City of Arlington, Tex. v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013).

be obvious: Section 6409(a) does not apply where state and local governments are acting as property owners—e.g., where wireless providers seek access to utility or light poles, or to rights-of-way or other public property.

The record also demonstrates the need for the Commission to proceed with caution. Section 6409(a) is less than two years old, and the process of applying its provisions to the widely varying factual circumstances that each proposed wireless facility placement inherently presents is in its early stages. The Commission would do well to refrain from adopting any binding interpretations of Section 6409(a) at this early juncture and to instead allow localities and industry, based on their still-growing experience, the time to develop best practices.

To the extent that the Commission nevertheless decides to construe Section 6409(a)'s provisions, some conclusions are clear. First, “existing wireless tower or base station” means just that; the phrase does not encompass any structure, such as a building, utility or light pole, or water tower, that does not already have an existing tower or base station installed on it. Second, “substantially change the physical dimensions” is a phrase that cannot be construed in a factual vacuum or reduced to a single, purely quantitative formula, divorced from the factual context of a specific proposed wireless facility. Rather, “substantial change” must be construed in a factual context that includes the historical or environmental surroundings, structural and public safety considerations, and generally applicable zoning requirements. Third, “transmission equipment” means equipment used to transmit and receive wireless signals and does not include other associated fixtures or equipment that do not transmit or receive such signals.

With respect to remedies, the answers are clear. The *Shot Clock Ruling*, and the Fifth Circuit decision upholding it,⁶ preclude adoption of a “deemed granted” remedy under Section

⁶ *City of Arlington, Tex. v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013).

332(c)(7). And since almost all Section 6409(a) applications will also be Section 332(c)(7) applications, the same applies to them. Because both Section 6409(a) and Section 332(c)(7) disputes are by their nature highly fact-specific, courts are far better-equipped to resolve them.

The record reflects no reasoned basis for finding that so-called preferences for siting on municipal property are contrary to the anti-discrimination provision of Section 332(c)(7)(B)(i)(I).

The record also makes clear that it would be unwise for the Commission to adopt the *NPRM*'s proposals to broaden the National Environmental Policy Act ("NEPA") exclusion to include Distributed Antenna Systems ("DAS")/small cells or to adopt a National Historic Preservation Act ("NHPA") exclusion for DAS/small cells.

I. THE OPENING COMMENTS REFLECT SEVERAL AREAS OF CONSENSUS.

The opening comments reveal general agreement on certain issues presented by the *NPRM*. Many industry and local government commenters discussed the current implementation of Section 6409(a) and the status of various wireless siting processes. Overall, commenters valued the collaborative relationship between carriers and local governments. Multiple local government commenters expressed the same support that the City noted in its initial comments for the expansion of wireless communications coverage. Fibertech discussed conditions, such as painting equipment a certain color, that a local government might impose and to which telecommunications carriers "often agree in order to preserve a positive working relationship with the local government," and added that Section 6409(a) "will not change that."⁷ Several local governments also described the collaborative processes through which they developed wireless siting ordinances and the creative solutions that have emerged as a result of these

⁷ Comments of Fibertech Networks, LLC at 28, WT Docket No. 13-238 (filed Feb. 3, 2014) ("Fibertech Comments").

cooperative efforts between local governments and industry.⁸ That collaborative process would be upended by premature preemptive action by the Commission.

There was also some consensus that a “one-size-fits-all” approach would not be appropriate across all local governments, although one industry commenter added that any process must be transparent and nondiscriminatory.⁹ Long being subject to state and local open records, open meeting, public notice and public hearing laws, local governments are familiar with the benefits of, and are obligated to employ, transparent processes. It is industry, not local governments, that effectively opposes transparency by arguing for Commission rules that would preempt state and local public notice and hearing requirements.¹⁰ As for nondiscrimination, we note that Section 332(c)(7)(B)(i)(I) already prohibits unreasonable discrimination among providers of functionally equivalent services.

Industry commenters acknowledged that in at least some circumstances, local governments may impose structural limitations on changes to an existing tower or other safety-related conditions.¹¹ PCIA-The Wireless Infrastructure Association (“PCIA”) conceded that “substantiality” involves review of the height, width, and depth of the equipment to be added.¹² PCIA also acknowledged that local governments may look at weight in conjunction with

⁸ See Comments of the Town of Hillsborough, California at 3, WT Docket No. 13-238 (filed Feb. 3, 2014) (“Hillsborough Comments”); Comments of the City of Chicago, Illinois at 3, WT Docket No. 13-238 (filed Feb. 3, 2014).

⁹ Comments of the Wireless Internet Service Providers Association at 10, WT Docket No. 13-238 (filed Feb. 3, 2014) (“WISPA Comments”).

¹⁰ See, e.g., CA Comments at 19.

¹¹ Comments of Verizon and Verizon Wireless at 29, WT Docket No. 13-238 (filed Feb. 3, 2014) (“Verizon Comments”); Comments of AT&T at 8, WT Docket No. 13-238 (filed Feb. 3, 2014) (“AT&T Comments”).

¹² Comments of PCIA-The Wireless Infrastructure Association and the HetNet Forum at 39, WT Docket No. 13-238 (filed Feb. 3, 2014) (“PCIA Comments”).

building permits and construction standards.¹³ PCIA further stated that “a modification that undermines the concealment elements of a ‘stealth’ wireless facility . . . should not be considered insubstantial for the purpose of Section 6409(a).”¹⁴ Multiple local government commenters submitted examples of situations where a modification would defeat the purpose of camouflage techniques, illustrating this point.¹⁵

No industry commenter seriously disputed the City’s position that Section 6409(a) does not apply where state and local governments are acting as property owners. Fibertech stated that it agreed with the Intergovernmental Advisory Committee on this issue.¹⁶ Several municipal entities endorsed the *NPRM*’s tentative conclusion that Section 6409(a) does not apply in these situations, emphasizing the importance of this issue and the absurdity of applying Section 6409(a) to access to municipally-owned or controlled property.¹⁷

II. THE WEIGHT OF THE COMMENTS DOES NOT SUPPORT A FINDING THAT THERE IS A SYSTEMIC PROBLEM WITH LOCAL GOVERNMENT SITING PROCESSES.

Although industry commenters pointed to anecdotal instances of alleged problems with local siting processes, none of these examples was substantiated. Apparently sensing the lack of evidence supporting their position, some industry commenters sought to bootstrap the record by incorporating by reference supposed examples of local zoning problems contained in their

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *See, e.g.*, Comments of Fairfax County, Virginia at 11, WT Docket No. 13-238 (filed Feb. 3, 2014) (“Fairfax County Comments”) (illustration comparing tree-poles at different heights); Comments of Missouri Municipal League at 3-4, WT Docket No. 13-238 (filed Feb. 3, 2014) (illustrations showing potential modifications to flagpole tower and pencil tower).

¹⁶ Fibertech Comments at 29.

¹⁷ Comments of the Padre Dam Municipal Water District at 2-3, WT Docket No. 13-238 (filed Feb. 3, 2014); Comments of Sweetwater Authority at 2-5, WT Docket No. 13-238 (filed Feb. 3, 2014); Comments of Valley Center Municipal Water District at 2-5, WT Docket No. 13-238 (filed Feb. 3, 2014).

comments filed in earlier proceedings, such as in WT Docket No. 08-165, the *Shot Clock Ruling*.¹⁸ Industry’s attempted bootstrap is misguided. With regard to Section 332(c)(7), the Commission concluded in the *Shot Clock Ruling* that the evidence which industry now seeks to recycle was insufficient, both legally and factually, to justify a “deemed granted” remedy.¹⁹ With regard to Section 6409(a), it would be the epitome of irrational, arbitrary and capricious decisionmaking for the Commission to rely on alleged local conduct that occurred long before Section 6409(a) became law to conclude that local governments have not complied, or would not comply, with Section 6409(a).

Local governments, on the other hand, described wireless application processes that generally work well to balance a wide range of varied interests, including those of homeowners concerned about property values and those of wireless carriers concerned about multiple applications for the same area.²⁰ Several local governments noted that not all delays in processing an application are unreasonable or unwarranted, or even caused by the municipal government at all.²¹ The weight of the comments submitted in this proceeding does not support a conclusion that there is any systemic problem with local siting processes that warrants significant Commission intrusion.

¹⁸ Comments of Crown Castle at 19, WT Docket No. 13-238 (filed Feb. 3, 2014) (“Crown Castle Comments”); AT&T Comments at 29 (citing comments filed July 18, 2011 in WT Docket No. 11-59); Comments of CTIA-The Wireless Association at 20, WT Docket No. 13-238 (filed Feb. 3, 2014) (“CTIA Comments”).

¹⁹ *Shot Clock Ruling* ¶ 34.

²⁰ See Comments of Portland Design Commission at 4, WT Docket No. 13-238 (filed Jan 31, 2014); Comments of the National League of Cities at 6.

²¹ For example, there have been cases where a wireless provider “self-certifies” Section 6409 eligibility without providing documentation to verify such eligibility. Comments of the City of West Palm Beach, Florida at 7 & n.18, WT Docket No. 13-238 (filed Feb. 3, 2014) (“West Palm Beach Comments”). See also Comments of the National League of Cities at 6.

In addition to being unsupported by the record, any Commission action on Section 6409(a) at this early juncture would have detrimental effects on the collaborative efforts that both industry and local government commenters endorsed in their comments. Preemption would remove the incentives that providers have to work with local governments, and the creative solutions that this cooperation has developed would largely cease.²² If industry were to believe itself immune from any Section 6409(a) local oversight or approval process, it would have no motivation to work with local governments to develop ways to promote widespread deployment of wireless in a way that respects the interests of historical preservation, the environment, and public safety.

Similarly, a Commission ruling that defined Section 6409(a)'s reach too broadly would disincentivize local governments from granting initial approvals of new towers or base stations for fear of what those towers or base stations might subsequently be allowed to morph into without further local input or oversight.²³ Alternatively, local governments might be forced to perform much more thorough and time-consuming reviews of requests for new wireless facilities, considering the impacts of potential future collocations at the time of the initial application for a new facility, since future review opportunities would be curtailed.²⁴ Federal preemption of local authority in this area would force local governments to adapt by becoming more circumspect in evaluating *all* new wireless tower or base station siting applications. Such additional circumspection would hardly seem to serve industry's interests.

²² See Comments of Portland Design Commission at 2, 4 (describing Portland's work to develop design solutions to better integrate wireless facilities into design and historic districts, including working with industry to explore acceptable screening materials); Comments of the City of Salem, Oregon at 9, WT Docket No. 13-238 (filed Feb. 3, 2014) ("Salem Comments"); Hillsborough Comments at 2.

²³ See Comments of the District of Columbia at 15, WT Docket No. 13-238 (filed Feb. 3, 2014) ("D.C. Comments").

²⁴ See Comments of the City of Huntsville, Alabama at 3, WT Docket No. 13-238 ("filed Feb. 3, 2014).

Some commenters highlighted not only the preemption of local laws, but also the difficult interactions that some of the proposed regulations would have with state, local, and other federal laws and legal requirements. The City of San Antonio, for instance, noted City and state law requirements to protect the Edwards Aquifer that apply to wireless facilities.²⁵ Several other local governments cited their responsibilities under the Americans with Disabilities Act; if facilities can be sited or modified without the meaningful involvement of local authorities, the local authority may not be able to ensure compliance with accessibility and safety requirements.²⁶ In another example, the California Coastal Commission discusses the California Coastal Act of 1976, under which the Coastal Commission and some local governments in California must balance the Coastal Act's requirements in permitting new development, including the siting and installation of new wireless facilities.²⁷ If the FCC were to preempt local authority to require project modifications, conditions, or, if necessary, re-siting, then the California Coastal Commission and local governments might not be able to fulfill their statutory responsibilities.²⁸ In the District of Columbia, the Height of Buildings Act of 1910 effectively limits the heights of any buildings or structure in the District.²⁹ Construction activities are governed not only by D.C. zoning and land use authority, but also federal agencies and federally chartered historical commissions.³⁰

²⁵ San Antonio Comments at 5.

²⁶ Salem Comments at 11; Comments of the City of Des Moines, Iowa at 3-4, WT Docket No. 13-238 (filed Feb. 3, 2014).

²⁷ Comments of the California Coastal Commission at 2, WT Docket No. 13-238 (filed Jan. 31, 2014).

²⁸ *Id.* at 3.

²⁹ D.C. Comments at 4 (citing D.C. Code § 6-601).

³⁰ *Id.*

What the record reveals is that the *NPRM* often overlooked the unique legal and regulatory environments in which each local government operates and the unintended consequences that could result from preemptive Commission action. Wireless deployment at the expense of every other consideration or interest—including those expressly recognized by other federal laws, such as the environment, historical and aesthetic preservation, and public safety—was not the intent of Congress in enacting Section 6409(a).³¹

III. THE WIRELESS INDUSTRY’S POSITIONS ARE UNSOUND.

Not surprisingly, wireless industry commenters urge the Commission to construe Section 6409(a) so aggressively as to transform the Commission into a national zoning board, to extend the *Shot Clock Ruling* and further construe Section 332(c)(7), and to sweep away all NEPA and NHPA review of DAS/small cell facilities. The Commission should reject the invitation. Industry’s positions rest on untenable distortions of the statutory language and would lead to common sense-defying results.

A. Industry’s Proposed Interpretations of Section 6409(a)’s Language are Untenable.

1. “Existing Wireless Tower or Base Station.”

Industry commenters rather uniformly, but counter-textually, argue that the term “wireless tower” is not limited to structures solely or primarily designed to support wireless facilities, but instead encompasses structures, such as light and utility poles, buildings and water towers, that are not at all designed solely or primarily for that purpose.³² This is so, according to

³¹ See Eugene Comments at 26-27.

³² See, e.g., CTIA Comments at 12; PCIA Comments at 22; Comments of Sprint Corporation at 8-9, WT Docket No. 13-238 (filed Feb. 3, 2014) (“Sprint Comments”); Verizon Comments at 28.

industry, because these other kinds of structures can and do support wireless facilities and expanding the term “wireless tower” to include them would promote wireless deployment.³³

But as we and other commenters pointed out, such a reading of the term “tower” is untenable.³⁴ As an initial matter, industry’s argument that its reading of “wireless tower” would promote wireless deployment proves too much. Construing “wireless tower” to include each and every man-made structure in the nation might promote wireless deployment, but that is not what Section 6409(a) says; Congress intended Section 6409(a) to facilitate wireless deployment only in the way that Section 6409(a) states: on “existing wireless towers and base stations.”³⁵ And no amount of linguistic gymnastics can transform structures that are not existing towers or base stations into “existing towers or base stations.”

Lest there is any doubt on this point, the balance of the Spectrum Act dispels it. As the CO/WA Comments point out,³⁶ elsewhere in that Act Congress used the much broader terms, “commercial or other communications infrastructure” and “Federal, State, tribal or local infrastructure.” Those terms make no sense if “existing wireless tower or base station” were as broad as industry contends.

2. *“Existing” and “Collocation.”*

The Alexandria Comments³⁷ correctly reveal the many fallacies of Verizon’s claim that Section 6409(a) applies to “collocations on buildings and other structures, even if those

³³ *See id.*

³⁴ *See, e.g.,* Eugene Comments at 9-10; San Antonio Comments at 11-12; Alexandria Comments at 22-26; CA Comments at 4-6; CO/WA Comments at 7-8.

³⁵ Eugene Comments at 9.

³⁶ CO/WA Comments at 8 & n.7.

³⁷ Alexandria Comments at 30-31.

structures do not currently house wireless communications equipment.”³⁸ An “existing” tower or base station is just that—an existing one, not a location where none exists but could exist. Moreover, Verizon’s position is flatly contradicted by Section 6409(a)’s “eligible facilities request” definition, which presumes the presence of pre-existing transmission equipment at the site.³⁹

3. *“Substantially Change the Physical Dimensions.”*

Industry commenters argue that Section 6409(a)’s phrase, “substantially change the physical dimensions,”⁴⁰ should be equated with the Collocation Agreement’s “substantial increase in the size of a tower” definition.⁴¹ But they also go even further. Most industry commenters assert that “substantially change” should be strictly limited to a single set of uniform, empirically measured increases in volume, regardless of visual, historic, safety or environmental impact, and should not include other factors such as color or weight.⁴² Some industry commenters venture still further, claiming that wireless providers should be permitted under Section 6409(a) to expand and excavate up to 30 feet outside of the existing premises.⁴³

³⁸ *NPRM* ¶ 111.

³⁹ Alexandria Comments at 31.

⁴⁰ *See, e.g.*, PCIA Comments at 37-38; AT&T Comments at 24; Sprint Comments at 10; Verizon Comments at 29.

⁴¹ 47 C.F.R. Part 1, App. B, § I.C, Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (“Collocation Agreement”).

⁴² *See, e.g.*, CTIA Comments at 14; PCIA Comments at 39, 46.

⁴³ PCIA Comments at 38; Sprint Comments at 10. Verizon also argues that there is no need for the Commission to adopt a cumulative limit on serial eligible facilities requests at the same site because (according to Verizon) (1) most collocators install equipment below the anchor tenant on a tower, and (2) the number of eligible facilities requests will be limited because there are only a limited number of potential collocators. Verizon Comments at 29. Verizon’s first excuse falls short, because even it concedes not *all* requests will be below the anchor tenant and, in any event, Verizon ignores (a) width, depth, wind loading and camouflaging, and (b) the fact that Section 6409(a)’s existence might itself change wireless providers’ collocation practices. Verizon’s second excuse—essentially, that there are relatively few potential competitive collocators in any market—is curious, because it is flatly at odds with Verizon’s position elsewhere that the wireless market is intensely competitive. *See, e.g.*, Comments of Verizon Wireless at 7-72, WT Docket No. 11-186 (filed Dec. 5, 2011).

Other commenters, however, lay bare the fallacies of industry’s arguments. Industry’s effort to equate the Collocation Agreement language with Section 6409(a)’s language ignores that the two do not use the same language.⁴⁴ Perhaps more fundamentally, industry overlooks that the Collocation Agreement serves a very different purpose than Section 6409(a): The Collocation Agreement is not preemptive and does not limit local review, while Section 6409(a) is and would preclude *all* review of requests falling within its meaning.⁴⁵

Industry’s other overly narrow readings of what constitutes a “substantial change” are equally misguided. The notion that what is a “substantial change” can be established in a vacuum as a single, limited empirical measurement, divorced from any of the actual facts concerning a particular facilities request and the surroundings where it would be located, would truly transform the Commission into “a national zoning board,” which the *NPRM* (§ 99) quite properly disavows any intent to do.

Industry’s “one-size-fits-all” approach to defining “substantial change” also defies common sense. As the City of Alexandria correctly observed, “towers and base stations vary dramatically in size and design,”⁴⁶ and “the location [of a proposed eligible facilities request] may affect a change’s impact significantly.” Likewise, “[t]he term ‘physical dimension’ captures important factors such as the antenna’s shape and location,” not just its size.⁴⁷ An addition in size to an existing camouflaged wireless facility that is on or adjacent to a historical building or scenic view shed is not the same as a similarly sized addition to an existing wireless facility on an ordinary building in an industrial or commercial zone. Likewise, a change to an existing

⁴⁴ Eugene Comments at 11.

⁴⁵ *See, e.g.*, Eugene Comments at 11-12; San Antonio Comments at 13-14; Alexandria Comments at 37-39.

⁴⁶ Alexandria Comments at 32.

⁴⁷ *Id.* at 35.

wireless facility that affects weight, stability or wind loading is not the same as a similarly, or even identically sized, change to another existing wireless facility that weighs considerably less or does not affect the overall facility's stability or wind loading characteristics. And a change in the size of a tower that takes it above a fall-zone or set-back limit—and thus would mean the facility would reach a residence if it fell—is not the same as an identical increase in the size of a tower that would not exceed a fall-zone or set-back requirement and thus would not pose this public danger.

But those are just a sample of the myriad of different, and very fact-specific, scenarios that wireless facilities requests inherently and inevitably will present. After all, “substantial” is by its nature a relative, not an absolute, term. The same change made in two different locations may have negligible effects in one location, but cause the facility to fall out of compliance with historic preservation, environmental, or public safety laws, regulations, or requirements in the second location. This latter scenario is particularly concerning to the City. There is no indication in Section 6409(a) that Congress intended identical treatment of such dissimilar circumstances.⁴⁸

Even if “substantial change” were defined as a single, “one-size-fits-all” formula (which it should not be), PCIA’s and Sprint’s proposal⁴⁹ to sweep in expansions and excavations within 30 feet of an existing tower or base station would, under any common sense reading, constitute a “substantial change.” Additional construction or excavation over such a large area cannot in any sense be viewed as “insubstantial” under any circumstances. When coupled with industry’s claim that utility or light poles and existing buildings should be viewed as “existing towers and

⁴⁸ See Section II, *supra* (discussing local government comments regarding conflicts with generally applicable laws).

⁴⁹ PCIA Comments at 8; Sprint Comments at 10.

base stations,⁵⁰ PCIA's and Sprint's position becomes absurd. It would give providers unfettered license to construct on or excavate entire sections of sidewalks and streets.

Industry's "one-size-fits-all" approach to "substantial change" would also undermine what, in the City's experience, has proven to be the most successful approach to wireless siting. In the vast majority of cases, the City and the wireless provider are able to work out a "win-win" solution that results in approval of the wireless provider's facilities siting request subject to agreed-upon and site-tailored requirements to protect aesthetic, historic and other concerns. But that "win-win" solution requires flexibility on both the City's and the wireless provider's part, something that a "one-size-fits-all" standard would eliminate.

4. *"May Not Deny, and Shall Approve."*

Some industry commenters argue that Section 6409(a) does not permit localities to impose conditions on their approval of eligible facilities requests.⁵¹ As we and other commenters pointed out,⁵² construing Section 6409(a) to require unconditional approvals would render it unconstitutional. Construing Section 6409(a) to permit approvals subject to reasonable conditions, in contrast, would make it less constitutionally suspect.⁵³ Industry commenters do not seriously claim otherwise.

Moreover, as the *NPRM* (¶¶ 124-127) itself recognizes, Section 6409(a) need not be read in the absolutist fashion industry urges. Land use approvals of all kinds, not just those for

⁵⁰ CTIA Comments at 12; PCIA Comments at 31-32; AT&T Comments at 22; Sprint Comments at 8-9; Verizon Comments at 28.

⁵¹ *See, e.g.*, PCIA Comments at 42. PCIA (at 43) also makes the self-serving claim that wireless providers do not want their towers to collapse and thus can be trusted to ensure their facilities are safe. As an initial matter, the record suggests otherwise. *See, e.g.*, Alexandria Comments at 14-16. Moreover, PCIA's claim proves too much, as it suggests there is no need at all for building code or public safety requirements because no business wants its facilities to fail and therefore will always build safe facilities.

⁵² Eugene Comments at 7-8; San Antonio Comments at 9-10; Fairfax County Comments at 19; CA Comments at 17-18.

⁵³ *Id.*

wireless facilities, are routinely conditioned on compliance with building code, height limit and setback requirements. In historic or scenic areas, they are routinely subject to conditions such as camouflage, and in environmentally sensitive areas, they are subject to conditions designed to prevent contamination, pollution, or degradation. There is nothing in Section 6409(a) that suggests that Congress intended to give the wireless industry wholesale immunity from such important, and generally applicable, public safety, historical preservation, and environmental requirements. And industry offers no reasoned justification for its reading of the statute, other than its apparent, and misguided, view that Section 6409(a) is intended to promote wireless deployment at whatever cost, including costs to public safety and to historic and environmental preservation. But again, nothing on the face of Section 6409(a) suggests that result, and the Commission should reject industry's almost infinitely expandable reading of the statute.

B. Industry's Argument that Local Review under Section 6409(a) is Purely "Ministerial" Rests on a False Premise and, if Accepted, Would Succeed Only in Underscoring the Statute's Constitutional Infirmity.

Industry commenters claim that Section 6409(a) limits all local discretion and reduces local review to a purely ministerial function.⁵⁴ The claim is doubly flawed.

First, local review under Section 6409(a) would be ministerial and without discretion only if the application of every single term in Section 6409(a) can be completely divorced from the particular facts on the ground relating to every single wireless application to which Section 6409(a) potentially applies. As we and other commenters noted,⁵⁵ that is simply not true.

Whether Section 6409(a) applies, and if so, how it applies, will depend heavily on the specific

⁵⁴ See, e.g., AT&T Comments at 25-26; PCIA Comments at 41; Crown Castle Comments at 10-11; Comments of Towerstream Corporation at 22-24, WT Docket No. 13-238 (filed Feb. 3, 2014) ("Towerstream Comments").

⁵⁵ Eugene Comments at 12-13; San Antonio Comments at 14-15; Comments of Springfield, Oregon at 13, WT Docket No. 13-238 (filed Feb. 3, 2014); CO/WA Comments at 14; Alexandria Comments at 40. See also Section III(A), *supra*.

facts relating to the peculiar nature and characteristics of the particular facility proposed, the unique nature, characteristics and location of the structure on which the facilities are proposed to be installed, and the nature, characteristics and location of the surrounding area.

Second, if industry were correct that the local Section 6409(a) review process is purely ministerial, that would render the statute clearly unconstitutional. If Section 6409(a) is a Congressional command to local governments to take a ministerial act to fulfill a federally-dictated outcome (ministerial “approval” of all “eligible facilities requests”), then Section 6409(a) clearly violates the Tenth Amendment. It would be nothing more than a bald and unqualified federal command that a local government “administer or enforce a federal regulatory program, . . . commands [that would be] fundamentally incompatible with our constitutional system of dual sovereignty.”⁵⁶

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

Industry commenters urged the Commission to adopt the *NPRM*'s proposal (¶¶ 158-59) to apply the *Shot Clock Ruling* to DAS and small cells.⁵⁷ PCIA argued that Section 332(c)(7) contains technology-neutral terms that would accommodate technologies not necessarily contemplated in 1996, such as DAS.⁵⁸ Industry's interpretation, however, would stretch Section 332(c)(7) beyond its plain meaning.

Section 332(c)(7) covers “personal wireless service facilities.” In its initial comments, the City noted that DAS providers have previously argued that they are not wireless providers (much less personal wireless service providers), but are instead primarily landline-based

⁵⁶ *Printz v. U.S.*, 521 U.S. 898, 935 (1997).

⁵⁷ Comments of the California Wireless Association at 4, WT Docket No. 13-238 (filed Feb. 3, 2014); Fibertech Comments at 34; PCIA Comments at 55-56.

⁵⁸ PCIA Comments at 55-56.

backhaul providers.⁵⁹ Confirming this point, a DAS provider characterized itself as a “carrier’s carrier,” and stated that it “does not itself provide wireless services.”⁶⁰

DAS providers seek to avail themselves of Section 332(c)(7) where convenient—i.e., the time constraints of the *Shot Clock Ruling*—but otherwise seek to avail themselves of the perceived advantages of being a landline service provider. But neither Section 332(c)(7) nor Section 6409(a) applies to landline facilities or landline service. The Commission should not adopt a rule that would allow DAS providers to selectively, and inconsistently, be “wireless” providers. If landline-based backhaul facilities were construed to fall within Section 332(c)(7), or Section 6409(a), those provisions would be impermissibly, and counter-textually, stretched to include landline, rather than wireless, facilities and networks.

D. No Further Definition of a Remedy for Sections 332(c)(7) or 6409(a) is Warranted.

1. A “Deemed Granted” Remedy for Section 332(c)(7) “Shot Clock” Violations is Both Inconsistent with the Statute and Unnecessary.

Industry commenters generally support the *NPRM*’s proposal (¶ 162) to apply a “deemed granted” remedy if a state or local government does not act within the presumptive time periods of the *Shot Clock Ruling*.⁶¹ But that proposal is unlawful, unwarranted and misguided.

As the City explained in its opening comments, the Commission, the Fifth Circuit, and the Supreme Court have endorsed the understanding that Section 332(c)(7)(B)(v) provides for

⁵⁹ Eugene Comments at 16-17.

⁶⁰ Crown Castle Comments at 5 (“[A] description of the facilities Crown Castle deploys as a part of its fiber-fed DAS and Small Cell networks as ‘wireless’ inaccurately describes the equipment that is designed for the sole purpose of converting our wireless carrier customers’ traffic from RF to light signals that can be transported over Crown Castle’s fiber network to a designated interconnection point, and causes confusion regarding the status and service offering of neutral host DAS and Small Cell service providers.”).

⁶¹ PCIA Comments at 56; CTIA Comments at 20; Fibertech Comments at 32; AT&T Comments at 30; Crown Castle Comments at 17-18. *But see* Verizon Comments at 32-33.

expedited review in a court of competent jurisdiction.⁶² A Commission-imposed “deemed granted” remedy for failure to act within the time provided by the *Shot Clock Ruling* would run directly counter to that statutory remedy.

Industry arguments to the contrary are unavailing. As discussed above,⁶³ the unsubstantiated complaints of industry about the implementation of the *Shot Clock Ruling* do not weigh in favor of revisiting this issue. Further, the claim that Section 332(c)(7)’s court remedy is too slow and expensive⁶⁴ is an argument at war with Section 332(c)(7)(B)(v) itself; industry’s remedy, if any, lies with Congress, not the Commission. Under the *Shot Clock Ruling* and in accordance with Section 332(c)(7)(B)(v), the court may fashion remedies on a case-by-case basis, considering the facts of individual applications and the evidence presented by the local government regarding its compliance with Section 332(c)(7)’s requirements.⁶⁵ This court remedy is the only one prescribed by Section 332(c)(7), and other than industry’s self-serving and misplaced desire to rewrite the statute, there is no evidence that this remedy is inadequate.

2. *A Short “Shot Clock” and a “Deemed Granted” Remedy are Inappropriate for the Enforcement of Section 6409(a).*

Industry commenters support the *NPRM*’s proposal (¶ 134) to establish a time limit for the processing of requests under Section 6409(a). Industry commenters proposed several different time limits—including 30 days,⁶⁶ 45 days,⁶⁷ and 60 days⁶⁸—all shorter than the 90 days provided for collocations in the *Shot Clock Ruling*. There is no factual record to support a

⁶² Eugene Comments at 18-20.

⁶³ See Section II, *supra*.

⁶⁴ See, e.g., AT&T Comments at 8.

⁶⁵ *Shot Clock Ruling* ¶ 39.

⁶⁶ Towerstream Comments at 25.

⁶⁷ PCIA Comments at 50; Verizon Comments at 31.

⁶⁸ WISPA Comments at 10.

shorter presumptively reasonable time for review of Section 6409(a) applications.⁶⁹ In fact, a shorter time period would not allow local governments a reasonable amount of time to make the requisite findings under Section 6409(a).

As an initial matter, most, if not all, Section 6409(a) requests will also be Section 332(c)(7) requests.⁷⁰ Industry offers no reason why the 90-day period for collocation requests established in the *Shot Clock Ruling* needs to be shortened. To the contrary, Section 6409(a) review includes determining whether an application constitutes an “eligible facilities request” and whether the request would “substantially change the physical dimensions” of an “existing wireless tower or base station.”⁷¹ Local governments are entitled to adequate time to review such requests; even the most well-intentioned applicant might overlook a requirement, which the local government should be afforded the time to address with the applicant by seeking more information or conditioning approval on compliance.⁷² Further, wireless providers’ filing of a large number of applications in a short time period—something over which a local government has no control—could slow the review process. The excessively short time limits proposed by industry commenters are therefore unwarranted. The current *Shot Clock Ruling* time periods are sufficient for Section 6409(a) applications.

⁶⁹ Although industry commenters cite their comments in prior FCC proceedings for the proposition that further Commission intervention is necessary, those prior comments do not justify such action. *See* Section II, *supra*. The *Shot Clock Ruling* was adopted long before the enactment of Section 6409(a). Thus, the comments in that proceeding cannot inform the record here about the status of local government implementation of Section 6409(a).

⁷⁰ Eugene Comments at 21.

⁷¹ *See* CA Comments at 21-22.

⁷² *See* Comments of National League of Cities at 13-14.

Industry commenters also advocate for a “deemed granted” remedy to enforce Section 6409(a).⁷³ Again, they do not provide support for their claims that such a remedy is necessary aside from the stale, and now irrelevant, record in the *Shot Clock Ruling* proceeding and a handful of other unsubstantiated accounts of delay.

The City reiterates that Section 6409(a) “eligible facilities request[s]” will almost always also be Section 332(c)(7) requests.⁷⁴ There is no conflict between the two statutory provisions regarding remedy: Section 6409(a) is silent, and Section 332(c)(7) provides for judicial review. Accordingly, judicial review is available for the enforcement of Section 6409(a) pursuant to Section 332(c)(7)(B)(v), and court review is the appropriate—and only—remedy for the reasons discussed by the Commission, and affirmed by the Fifth Circuit, in the *Shot Clock Ruling*.⁷⁵

A “deemed granted” remedy would also make Section 6409(a) still more vulnerable to Tenth Amendment challenge, because the threat of such a remedy would further force a state or local authority to take affirmative action on command of the federal government.⁷⁶ The statute should be construed to avoid the additional constitutional infirmity generated by a “deemed granted” remedy.⁷⁷

⁷³ PCIA Comments at 50; Sprint Comments at 11; Verizon Comments at 31; Towerstream Comments at 27; Comments of the New York State Wireless Association at 2, WC Docket No. 11-59 (filed Feb. 3, 2014); Fibertech Comments at 32; AT&T Comments at 26.

⁷⁴ Eugene Comments at 21.

⁷⁵ Eugene notes that Section 6409(a) does not incorporate any time limit. Without overlaying Section 332(c)(7) on Section 6409(a), there would be no basis for defining a presumptively reasonable period of time for local government review of an application made under Section 6409(a).

⁷⁶ *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012).

⁷⁷ *See, e.g., Clark v. Martinez*, 543 U.S. 371, 381-82 (2005).

Additionally, as the California Local Governments noted, a “deemed granted” remedy “blurs the lines of political accountability.”⁷⁸ It would place political responsibility for a wireless siting decision on the local government, when in fact that decision was dictated by the federal government.

In practice, a “deemed granted” remedy would burden local governments as well as the Commission. Towerstream encourages the Commission to require local governments to seek a declaratory ruling any time the local government believes there are circumstances that should allow it to deny a Section 6409(a) request.⁷⁹ This process would involve the filing of comments by interested parties and an individualized determination by the FCC.⁸⁰ Such a requirement would impose substantial new costs and burdens on local governments to file and defend petitions before the Commission and threaten fundamental principles of due process. The Commission would also become a national zoning board, entertaining comments from members of a community on local, fact-specific issues.⁸¹

Although the *NPRM* asks how a “deemed granted” remedy would operate if adopted (§ 141), industry commenters do not propose a workable implementation of such a remedy. Instead, industry’s proposals only serve to highlight the problems with a “deemed granted” remedy. There will inevitably be disagreement about whether a request is actually covered by Section 6409(a), what sorts of conditions constitute a denial or approval, and other individualized factual circumstances that would be impossible to address with a one-size-fits-all rule. Further, a “deemed granted” scheme would essentially allow a wireless provider to

⁷⁸ CA Comments at 26; Alexandria Comments at 46 (“[I]f the federal government wishes to authorize the placement of intrusive and harmful facilities, it must do so itself—and take responsibility for those actions.”).

⁷⁹ Towerstream Comments at 23 n.65.

⁸⁰ *Id.*

⁸¹ See *NPRM* ¶ 99; CA Comments at 27 (describing the slippery slope toward acting as a “national zoning board”).

unilaterally decide all Section 6409(a) issues for itself, leaving it to the local government to seek a ruling from the Commission or a court on any disagreement, however reasonable the local authority's position might be. A "deemed granted" remedy is unsupported by the record and the statute, and would be unworkable in practice.

E. Municipal Ordinances Establishing a "Preference" for Siting Wireless Facilities on Municipal Property Are Valuable for Widespread Wireless Deployment and Are Not Unreasonably Discriminatory.

Industry comments reflect a view of preferences for siting on municipal property that underscore the far-reaching and dangerous nature of industry's "deployment at all costs" approach. For example, PCIA asserts that it approves of "steps to incent the placement of new facilities in preferred areas," including municipal property, by streamlining review processes for such areas.⁸² Inconsistently, however, PCIA opposes what it describes as "restrictive preferences for the deployment on government-owned property, which can be a significant barrier to broadband deployment."⁸³ CTIA states that municipal preference ordinances, such as those that require the use of municipal property or a showing that no such property exists, should be deemed unreasonably discriminatory in violation of Section 332(c)(7)(B)(i)(I).⁸⁴

Aside from their ambiguity, industry's arguments ignore the facts. A wireless provider has no right to force any landowner—municipal or non-municipal—to allow the provider to site on the landowner's property.⁸⁵ A landowner may set conditions for the lease of its property, and the wireless provider seeking to site facilities may accept or decline to pursue the property as a siting option. A municipality controls the use of its own property, and Section 332(c)(7) does

⁸² PCIA Comments at 5 n.21.

⁸³ *Id.*

⁸⁴ CTIA Comments at 20-21.

⁸⁵ *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 421 (2d Cir. 2002).

not limit a municipality's ability to permit, or limit, the siting of wireless facilities on municipal property.⁸⁶

This sort of preference is also not the sort of unreasonable discrimination contemplated by Section 332(c)(7). Discrimination for the purposes of Section 332(c)(7) occurs when a locality unreasonably prefers one functionally equivalent provider over another; in contrast, a requirement that providers must consider municipal sites first would apply equally to all providers.⁸⁷ ExteNet argues that non-discrimination means that states and local governments must allow wireless service providers of all sizes or types to compete.⁸⁸ That, however, is not what the statute says and could lead to the absurd result that local governments could draw no distinction between locating facilities on municipal property and locating facilities on private property. Section 332(c)(7) prohibits only *unreasonable* discrimination, and only prohibits unreasonable discrimination among providers, *not* discrimination among the different types of properties where providers' facilities may be located. Local governments have the flexibility to treat a proposed facility differently when there is a difference in visual impact or aesthetic character.⁸⁹ Such differential treatment "based on legitimate, traditional zoning principles" does not constitute unreasonable discrimination.⁹⁰

Additionally, construing differential treatment of wireless siting on municipal property and private property to be "unreasonable discrimination" ignores the differences between

⁸⁶ *Omnipoint Commc'ns, Inc. v. City of Huntington Beach*, 738 F.3d 192, 200 (9th Cir. 2013); *Sprint Spectrum*, 283 F.3d at 421 ("[W]e conclude that the Telecommunications Act does not preempt nonregulatory decisions of a local government entity or instrumentality acting in its proprietary capacity[.]"). See also *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 335-36 (2002). See also Section I, *supra*.

⁸⁷ See Fairfax Comments at 26.

⁸⁸ Comments of ExteNet Systems Inc. at 8, WT Docket No. 13-238 (filed Feb. 3, 2014).

⁸⁹ *T-Mobile Ne. v. Fairfax Cnty. Bd. of Supervisors*, 672 F.3d 259, 271 (4th Cir. 2012) (citing H.R. Rep. No. 104-458, 208 (1996) (Conf. Rep.)).

⁹⁰ *Id.* at 272.

government and private properties and the purposes they serve. PCIA acknowledges that siting on municipal property is often beneficial.⁹¹ As the City discussed in its initial comments, there are situations where, but for municipal property, there would be no locations open to siting (e.g., in residential neighborhoods).⁹² No broad conclusions about preferences for the placement of wireless facilities on municipal property can be reached because the facts of such preferences vary on a case-by-case basis.⁹³ There is no basis in the language of Section 332(c)(7) or in the record for imposing rules purporting to restrict municipal property wireless siting practices. Moreover, any such restriction would hinder, rather than promote, wireless deployment.⁹⁴

F. The Record Confirms that the NPRM's Proposed Expansions of NEPA and NHPA Exclusions Are Ill-Advised.

The Commission received submissions from commenters with expertise and experience in historic preservation and environmental issues on the NPRM's proposals to curtail the Commission's wireless facility siting review under the NHPA and the NEPA. Some cities were specifically concerned about collocations on water tanks, and potential effects on public water supply, as well as about the effects of installation of backup generator equipment on the environment and public safety.⁹⁵ Broad exemptions are not appropriate when impacts are likely to be *de minimis* in many, but not all, cases, particularly where there is the potential for

⁹¹ PCIA Comments at 5 n.21.

⁹² Eugene Comments at 24-25.

⁹³ See Alexandria Comments at 56-57. See also *T-Mobile*, 672 F.3d at 270.

⁹⁴ Eugene Comments at 26.

⁹⁵ West Palm Beach Comments at 2-3; Fairfax County Comments at 7-8; Comments of the City of Tempe, Arizona at 6, WT Docket No. 13-238 (filed Feb. 3, 2014).

cumulative effects.⁹⁶ The *NPRM*'s proposed broadening of the NHPA and NEPA exemptions fails to consider the full potential impacts of widespread DAS and small cell deployment.

While the City agrees that mounting antennas on existing towers and buildings may *often* be environmentally or aesthetically preferable to constructing new facilities, this will not always be the case, particularly depending on whether the Commission chooses to broadly define the scope of Section 6409(a) to cover applications for facilities on a variety of non-tower structures or to preempt local historic preservation or environmental review. These other structures, such as utility poles and water tanks, would also be exempted if the Commission adopts the *NPRM*'s proposal (§ 38) to expand the existing exclusion to the mounting of antennas on “other structures” in addition to “existing building[s] or antenna tower[s].” Some of these collocations may present significant historical preservation and environmental issues. Further, if the Commission broadly defines “collocation” or amends the categorical exclusion to include associated equipment, then many additional equipment deployments will be swept out of the reach of NEPA and NHPA under the proposed exemptions.

Local governments have demonstrated in their opening comments the reasonable concerns about associated equipment from both a historical preservation and an environmental perspective. The Commission should not ignore the potential environmental hazards presented by equipment—such as leaking fuel storage tanks associated with power supplies—when review processes can ensure safe, environmentally-responsible deployments of such equipment.

Additionally, if the Commission were to preempt significant amounts of local review and discretion in this rulemaking, which the City and many other commenters oppose (as discussed

⁹⁶ See, e.g., Comments of National Conference of State Historic Preservation Officers at 1, WT Docket No. 13-238 (filed Feb. 3, 2014).

in Sections III(A) and (B), *supra*), the NEPA and NHPA review processes would become increasingly important to ensure adequate historical preservation and environmental review of proposed projects in the absence of local historic preservation and environmental review. Such preemption would shift more, not less, responsibility for reviewing environmental and historical impacts onto the Commission.⁹⁷

CONCLUSION

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

Respectfully submitted,

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March 5, 2014

⁹⁷ See, e.g., Alexandria Comments at 61-62.