

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Acceleration of Broadband Deployment by)	WT Docket No. 13-238
Improving Wireless Facilities Siting Policies)	
)	
Acceleration of Broadband Deployment:)	WC Docket No. 11-59
Expanding the Reach and Reducing the Cost of)	
Broadband Deployment by Improving Policies)	
Regarding Public Rights of Way and Wireless)	
Facilities Siting)	
)	
Amendment of Parts 1 and 17 of the)	RM-11688 (terminated)
Commission's Rules Regarding Public Notice)	
Procedures for Processing Antenna Structure)	
Registration Applications for Certain)	
Temporary Towers)	
)	
2012 Biennial Review of)	WT Docket No. 13-32
Telecommunications Regulations)	

REPLY COMMENTS OF THE CITY OF ALEXANDRIA, VIRGINIA; THE CITY OF ARLINGTON, TEXAS; THE CITY OF BELLEVUE, WASHINGTON; THE CITY OF BOSTON, MASSACHUSETTS; THE CITY OF DAVIS, CALIFORNIA; THE CITY OF LOS ANGELES, CALIFORNIA; LOS ANGELES COUNTY, CALIFORNIA; THE CITY OF MCALLEN, TEXAS; MONTGOMERY COUNTY, MARYLAND; THE CITY OF ONTARIO, CALIFORNIA; THE TOWN OF PALM BEACH, FLORIDA; THE CITY OF PORTLAND, OREGON; THE CITY OF REDWOOD CITY, CALIFORNIA; THE CITY OF SAN JOSE, CALIFORNIA; THE VILLAGE OF SCARSDALE, NEW YORK; THE CITY OF TALLAHASSEE, FLORIDA; THE TEXAS COALITION OF CITIES FOR UTILITY ISSUES; THE GEORGIA MUNICIPAL ASSOCIATION; THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION; AND THE AMERICAN PLANNING ASSOCIATION

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SUMMARY

The opening comments show no immediate need for the Commission to adopt binding rules implementing Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012.¹ Instead, the record supports our view that the Commission should clarify its guidance and encourage local governments and industry to address issues collaboratively.

If the Commission were to adopt Section 6409(a) rules immediately, the record would provide support only for the framework in our opening comments—a framework that other local governments and their associations also endorse. The Commission’s proposed rules are unreasonable for a fundamental reason: when it comes to wireless facilities, context matters. Many in the industry appear to recognize that, read literally, the Commission’s proposed rules would lead to serious problems. For example, they acknowledge that Section 6409(a) does not prevent states and local governments from addressing issues of public health and safety. They also effectively concede that whether a modification substantially changes an existing wireless tower or base station cannot be answered with absolute standards that do not start by evaluating the existing tower or base station. Many recognize that even relatively small changes to a facility are substantial if they defeat stealth conditions.

But the industry’s approach to Section 6409(a) remains problematic. For example, some commenters would allow local governments to protect against safety hazards recognized in particular ordinances (building codes) yet would mandate that local governments ignore safety hazards addressed elsewhere. They also would apply Section 6409(a) much more broadly than the statute permits, and call for a Section 6409(a) enforcement scheme that would present serious

¹ Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. 112-96, H.R. 3630, 126 Stat. 156 (enacted Feb. 22, 2012), codified at 47 U.S.C. § 1455(a).

constitutional problems. For policy, practical, and legal reasons, our approach—like that of other communities and local-government associations—remains the better, and in many respects, the required approach.

The record shows near unanimity that Section 6409(a) does not apply to a state or local government acting in a proprietary capacity, and no comment demonstrates a need for the Commission to attempt to define what is and is not proprietary. The Commission should simply confirm that Section 6409(a) does not apply. The comments further show no need for the Commission to adopt further rules under Section 332(c)(7). Offering little or no evidence to support new rules, the comments also fail to confront the significant legal barriers to adopting some of the industry’s proposed solutions, including a “deemed granted” rule.

Finally, while many industry commenters support streamlining the Commission’s environmental and historical review processes, the comments generally fail to grasp that the Commission may not make this change at the same time that it reads Section 6409(a) to severely limit states’ and local governments’ abilities to review historical and environmental issues. On the other hand, if the Commission were to endorse the sensible approach to Section 6409(a) that we have proposed, changing the Commission’s own review processes would raise many fewer issues.

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The opening comments confirm that there is no immediate need for the Commission to adopt binding rules implementing Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012.² Instead, as we suggested in our opening comments, the Commission

² Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. 112-96, H.R. 3630, 126 Stat. 156 (enacted Feb. 22, 2012), codified at 47 U.S.C. § 1455(a).

should clarify its guidance and encourage local governments and industry to address issues collaboratively.

If the Commission proceeds now to adopt Section 6409(a) rules, the comments provide support for our approach—one that other local governments and their associations also endorse.³ The Commission should recognize that its proposed rules are unreasonable for a fundamental reason: when it comes to wireless facilities, context matters. Many in the industry appear to acknowledge this. They recognize, for example, that Section 6409(a) does not prevent states and local governments from addressing issues of public health and safety. They also effectively acknowledge that whether a modification substantially changes an existing wireless tower or base station can only be answered in context and not by applying the absolute standards that the Commission has proposed. Many commenters recognize that even relatively minor changes to a stealth facility can be “substantial” if they defeat stealth conditions.

But the industry’s approach to Section 6409(a) remains problematic. For example, some commenters would allow local governments to protect against safety hazards recognized in particular ordinances (building codes) yet mandate that local governments ignore safety hazards addressed elsewhere. We describe these problems in more detail below. For both practical and legal reasons, our approach—like that of other communities and local-government associations—remains the better, and in many respects, the required approach.

³ See, e.g., Comments of the City of San Antonio, Texas, WT Docket No. 13-238 (Feb. 3, 2014) (“San Antonio Comments”); Comments of the National Association of Telecommunications Officers and Advisors, the National Association of Counties, the National League of Cities, and the United States Conference of Mayors, WT Docket No. 13-238 (Feb. 3, 2014) (“NATOA Comments”); Comments of the Colorado Communications and Utility Alliance *et al.*, WT Docket No. 13-238 (Feb. 3, 2014) (“CCUA Comments”); Joint Comments filed by the League of California Cities, the California State Association of Counties and SCAN NATOA, WT Docket No. 13-238 (Feb. 3, 2014) (“League of California Cities Comments”).

The record reflects near unanimity that Section 6409(a) does not apply to a state or local government acting in a proprietary capacity, and no comment demonstrates a need for the Commission to attempt to define what is and is not proprietary. The Commission should simply confirm that Section 6409(a) does not apply.

Despite the industry's best efforts, the comments also show no need for the Commission to adopt further rules under Section 332(c)(7). The comments provide little or no evidence to support new rules, and they fail to confront the significant legal barriers to adopting some of the industry's proposed solutions, including a "deemed granted" rule.

Finally, few commenters recognize that how the Commission approaches Section 6409(a) directly impacts whether it may streamline its own reviews under the National Historic Preservation Act and National Environmental Policy Act. Many local governments now review the environmental and historic-preservation implications of wireless-facility modifications. If the Commission were to read Section 6409(a) to broadly interfere with this important local safeguard, the Commission would need to narrow its exemptions, not broaden them.

I. THE COMMENTS DO NOT DEMONSTRATE A NEED FOR FORMAL RULES.

Most industry commenters urge the Commission to issue formal rules implementing Section 6409(a) immediately, often without explaining why. We again urge the Commission not to rush to regulate.

As we have shown, local governments want advanced wireless service for their communities, and are successfully working with the industry to encourage and streamline deployment.⁴ Instead of developing a framework for litigation or regulatory battles, the

⁴ Comments of the City of Alexandria, *et al.*, WT Docket No. 13-238 (Feb. 3, 2014) ("Alexandria Comments") at 5-13.

Commission should shine light on the most successful collaborative practices. By doing so, the Commission would both allow these practices to continue and considerably narrow the areas where federal rules might be needed.

To the extent that industry commenters address the need for immediate rules, they provide little support for their claims. For example, PCIA calls for rules simply because some jurisdictions, including the City of Davis, California, have “attempted to interpret” Section 6409(a).⁵ PCIA provides no evidence that these local efforts have led to problems. To the contrary, Davis adopted the ordinance that PCIA complains about when the City was considering applications for a distributed antenna system (“DAS”) that deployed antennas in new ways. The ordinance allowed DAS facilities to expand to a certain size, but necessarily limited what automatic increases would be permitted. This ensured that by allowing the DAS, the City would not inadvertently authorize additional facilities that would adversely affect public health, safety, or residential neighborhoods. In other words, because the applicant and the City could define upfront how the system could change later, the City was able to move forward and authorize new installations that might not otherwise have been approved. The City has not only approved the DAS but, since it adopted its new rules, it has approved over 20 wireless applications without denying a single application. What is true in Davis is also generally true. The industry does not point to any instance, much less a widespread pattern of activity, adversely affecting deployment that justifies formal rules.⁶

⁵ Comments of PCIA, WT 13-238 (Feb. 3, 2014) (“PCIA Comments”) at 26-27.

⁶ Verizon claims that a “number of Georgia cities and counties continue to require comprehensive public hearings for *any* increase in the height of an existing tower.” Verizon Comments at 27. Verizon does not name these communities, and the Georgia Municipal Association has found no evidence that the claim is accurate.

PCIA is effectively arguing that the Commission must act to prevent local governments from defining the federal-law term “substantially change” by local ordinance, and thereby undermining Section 6409(a) altogether. But this reflects a misunderstanding of what local governments are doing. It is certainly true that some communities have amended their codes to allow modifications that do not involve a substantial change in physical dimension, and in doing so have defined what would be a “substantial change” in particular circumstances. But as we pointed out in our initial comments, if the Commission recognizes that “substantially change” depends on circumstances, then the local ordinances are simply an effort to comply with the law. A local government that defines “substantially change” too broadly would not be insulated from a Section 6409(a) challenge; the question ultimately would turn on circumstances specific to the modified “tower” or “base station.” But we expect that through a cooperative and best-practices approach, local governments will adopt ordinances consistent with Section 6409(a). That local governments are developing workable approaches to Section 6409(a) therefore cuts against adopting immediate federal rules, and should be cause for applause, not for federal intervention.

Otherwise, the industry’s arguments often boil down to asserting a need for some Commission guidance as to Section 6409(a)’s critical terms. Some guidance *is* helpful. The question, however, is whether that guidance can be informal and non-binding (as we proposed) or must be in formal rules immediately. The comments show that all that is needed now is for the Commission to clarify its earlier guidance, and to protect a cooperative approach. This would boost efforts to develop best practices, and avoid the harms that the record shows would flow from the Commission’s proposed rules.

II. THE COMMENTS SHOW WHY ANY COMMISSION RULES MUST BE NARROWLY AND CAREFULLY TAILORED.

Our opening comments showed that adopting the Commission’s proposed rules in their current form would have major adverse consequences for public safety, the environment, historical structures, and local communities—consequences that Congress could not have intended. Although the industry’s comments seem to recognize that the proposed rules, read literally, would go too far, the industry’s solutions still result in many of the same problems. For example, local governments are now approving many facilities with minimal review because the facilities are small, have a predictable and limited form factor, and do not require specialized and potentially large equipment like backup-power supplies. Under the industry’s proposed approach, however, these facilities could substantially change. If granting a “small cell” application effectively always grants the right to place a larger cell regardless of its impact, a simple initial-facility approval process necessarily must become more complex. As we suggested, any rules immediately implementing Section 6409(a) must be reasonable and narrowly crafted to comply with the law, to avoid constitutional issues, and to prevent unintended negative consequences. The industry’s approach falls short.

A. “Wireless”

The industry broadly supports the Commission’s view that the word “wireless” in Section 6409(a) makes the statute apply to collocation, removal, or replacement of equipment used in connection with—and to wireless towers or base stations used for—“any Commission-authorized wireless transmission, licensed or unlicensed, terrestrial or satellite, including commercial mobile, private mobile, broadcast, and public safety services, as well as fixed wireless services

such as microwave backhaul or fixed broadband.”⁷ But as we have cautioned, Congress likely did not intend Section 6409(a) to apply to “broadcast” towers, which have traditionally been viewed as distinct from “wireless” towers.⁸ The reference to “base station” further suggests that Congress was thinking of a particular type of wireless facility—a facility designed for mobile wireless services. A broader definition would go beyond what Congress intended and have negative consequences. Extending Section 6409(a) to small structures often placed in tight spots—like Wi-Fi nodes—would also significantly impact Section 6409(a)’s operation.⁹ Among other things, applying the statute so broadly requires a sensible approach to determine what it means to “substantially change the physical dimensions” of such a small device, and may trigger reviews that do not now apply.

B. “Transmission Equipment”

The industry widely supports the Commission’s broad definition of “transmission equipment” to include “antennas and other equipment associated with and necessary to their operation, including, for example, power supply cables and a backup power generator,”¹⁰ while

⁷ Notice of Proposed Rulemaking, WT 13-238, WC 11-59, RM 11688 (terminated), WT 13-32, FCC 13-122 (Sept. 26, 2013) (“NPRM”) ¶ 104.

⁸ Alexandria Comments at 26.

⁹ *See, e.g.*, Comments of the Riverside County Office of Education, WT Docket No. 13-238, at 6 (Feb. 3, 2014).

¹⁰ Comments of the Utilities Telecom Council, WT Docket No. 13-238 (Feb. 3, 2014) (“UTC Comments”) at 12; Comments of the Telecommunications Industry Association, WT Docket No. 13-238 (Feb. 3, 2014) (“TIA Comments”) at 5; *see also* PCIA Comments at 29; Comments of Towerstream Corporation, WT Docket No. 13-238 (Feb. 3, 2014) (“Towerstream Comments”) at 11; Comments of Fibertech Networks, WT Docket No. 13-238 (Feb. 3, 2014) (“Fibertech Comments”) at 18; NPRM ¶ 105.

local governments and others argue that the term should be limited to equipment directly involved in transmission, which excludes power supplies.¹¹

Taking the industry’s approach would lead to unreasonable results. In Bellevue, Washington, for example, a company has proposed to swap out three antennas, *and* to replace this current power equipment



with power facilities that would be placed in a new and much larger 6’ by 25’ vault. The company proposes to site this vault in the City’s right-of-way and on City park land. Of course, in some settings, such a change could be appropriate. But context matters. When Congress limited an eligible facilities request under Section 6409(a) to those requests involving the collocation, removal, or replacement of “transmission equipment,”¹² it did not mean to mandate

¹¹ Comments of the California Coastal Commission, WT Docket No. 13-238 (Feb. 3, 2014) (“Coastal Commission”) at 3; CCUA Comments at 9; Comments of the League of California Cities Comments at 2; Comments of Fairfax County, Virginia, WT Docket No. 13-238 (“Fairfax County Comments”) (Feb. 3, 2014) at 7.

¹² This also underscores that the Commission must define “that involves” narrowly. 47 U.S.C. § 1455(a)(2) (“For purposes of this subsection, the term ‘eligible facilities request’ means any request for modification of an existing wireless tower or base station *that involves-- . . .*”)

that the City also accept a 6' by 25' vault to host backup power supplies. In addition, as Fairfax County, Virginia, explains, backup generators are “necessarily accompanied by fuel tanks containing flammable materials,” “produce[] noxious fumes,” and “are loud.”¹³ Allowing Section 6409(a) to govern the placement of back-up generators could lead to facilities at “schools, parks, and other public lands” and “in close proximity to students, stadium seating, and crowds.”¹⁴ “Transmission equipment” in its common meaning, and read in the context of other terms in Section 6409(a), cannot and should not be read to reach these facilities.

C. “Wireless Tower” or “Base Station”

1. Section 6409(a) does not apply to buildings, street lights, utility poles, and other non-tower structures.

The industry insists that the phrase “wireless tower or base station” includes not only cell towers, but also buildings, streetlights, utility poles, and other non-tower support structures. Not so. Because these non-tower structures are neither a “tower” nor “base station,” Section 6409(a) does not affect the local review of modifications to these facilities.

(a) Structures Not Built To Support Antennas Are Not “Wireless Towers.”

To confirm that other support structures such as buildings, street lights, and utility poles are not “wireless towers,” one need look no further than the industry’s comments. AT&T states that “buildings, street poles, utility poles, traffic poles, [and] water tanks” are “non-tower”

(emphasis added). A provider may not bundle a request to collocate “transmission equipment” with other problematic equipment and maintain that Section 6409(a) mandates approval of the entire package.

¹³ Fairfax County Comments at 7.

¹⁴ *Id.*

structures.¹⁵ Verizon admits that extending Section 6409(a) to these other facilities would require the Commission to define “tower” as “structures *similar* to wireless antenna towers.”¹⁶ PCIA likewise states that “utilities poles” are “non-tower structures.”¹⁷

Although this understanding of “tower” reflects both the term’s common meaning and the Commission’s definition in the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (“Collocation Agreement”),¹⁸ the industry now urges the Commission to stretch Section 6409(a) to reach other support structures. CTIA openly ignores the statute’s plain language, arguing that Congress “certainly” did not intend to preempt state and local actions delaying collocations “only on towers . . . [but not] . . . on existing structures.”¹⁹ PCIA similarly asks the Commission to extend Section 6409(a) to “[a]ny request to modify an existing tower *or other structure*.”²⁰ The Commission may not do this. Section 6409(a) concerns only a request to modify a “wireless tower,” not other support structures.

Nor may the Commission extend Section 6409(a) to these other support structures by defining “tower” in a novel way. Some argue that the Commission should alter the standard

¹⁵ Comments of AT&T, WT Docket No. 13-238 (Feb. 3, 2014) (“AT&T Comments”) at 11; *id.* at 24 (referring to “non-tower structures, such as utility and municipal poles”).

¹⁶ Comments of Verizon and Verizon Wireless, WT Docket No. 13-238 (Feb. 3, 2014) (“Verizon Comments”) at 28 (emphasis added). In fact, they are often not similar at all.

¹⁷ PCIA Comments at 21.

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

¹⁹ Comments of CTIA-The Wireless Association, WT Docket No. 13-238 (Feb. 3, 2014) (“CTIA Comments”) at 12.

²⁰ PCIA Comments at 36 (emphasis added); *see also id.* at 32 (arguing that “wireless tower or base station” should include “structures that have historically been a focus for state and local governments as capable of supporting wireless facilities, including water towers, light stanchions and utility poles.”).

understanding that the structure must be built “for the sole or primary purpose of supporting” antennas.²¹ This would conflict with the conference report, which confirms that Section 6409(a) applies to requests to modify “cell towers.”²² It would also radically expand Section 6409(a)’s scope. Because Congress does not “hide elephants in mouseholes,”²³ the word “tower” cannot be understood to eliminate local-zoning authority over a wide range of facilities in so cryptic a fashion. When Congress intended to address wireless “infrastructure” beyond a “wireless tower,” it did so.²⁴

Buildings, streetlights, utility poles, and other non-tower structures are also not “base stations.” The industry’s comments present no serious defense for the Commission’s proposal to define “base station” circularly as “a structure that currently supports or houses . . . part of a base station.”²⁵ This interpretation is untenable on its face: a “base station” is a “network element in radio access network responsible for radio transmission and reception in one or more cells to or from the user equipment;”²⁶ it is not a structure that supports that network element.²⁷ Instead, as

²¹ PCIA Comments at 31-32; Comments of the Wireless Internet Service Providers Association, WT Docket No. 13-238 (Feb 3, 2014) (“WISPA Comments”) at 7-8, Exhibit A; Fibertech Comments at 19.

²² H.R. Rep. No. 112-399, at 133 (2012) (Conf. Rep.).

²³ *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

²⁴ See CUA Comments at 8; League of California Cities Comments at 5.

²⁵ NPRM Appendix A, Proposed Rule 47 C.F.R. § 1.30001(b)(1)

²⁶ European Telecommunications Standards Institute, “Digital cellular telecommunications system (Phase 2+); Universal Mobile Telecommunications System (UMTS); LTE; Vocabulary for 3GPP Specifications,” 3GPP TR 21.905. http://www.etsi.org/deliver/etsi_tr/121900_121999/121905/11.03.00_60/tr_121905v110300p.pdf; CTC Technology & Energy, Engineering Analysis of Technical Issues Raised in the FCC’s Proceeding on Wireless Facilities Siting, Alexandria Comments, Exhibit B (“CTC Report”) at 20.

²⁷ Alexandria Comments at 27.

the Commission has made clear previously, a “base station” is “generally *placed atop* a purpose-built communications tower, or on a tall building, water tower, or other structure providing sufficient height above the surrounding area.”²⁸ AT&T is alone in directly supporting the Commission’s reading of “base station,”²⁹ but it does so only based on “policy considerations.”³⁰ Other commenters combine “wireless tower or base station” without showing how either term, standing alone or read together, reaches these support structures.³¹

2. Section 6409(a) does not apply to most DAS facilities.

PCIA argues that a “base station” “should cover DAS, small cells and other Communications Facility Installations.”³² The term cannot be stretched so far, as the DAS industry itself has explained. For example, DAS providers have stated that their facilities do not include a “wireless . . . base station” at all, but that the only wireless “base station” is the carrier’s—which is found at a central “hub” location.³³ At most, Section 6409(a) would permit

²⁸ *In re Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, 26 FCC Rcd. 9664 ¶ 308 (2011) (emphasis added).

²⁹ AT&T Comments at 22 (“While ‘tower’ is defined in the Collocation NPA and the Section 106 NPA to include only those structures built for the sole or primary purpose of supporting wireless communications equipment, the term ‘base station’ is not so limited”).

³⁰ AT&T lone justification based on statutory interpretation, not policy, is that any other reading would “render the term ‘base station’ superfluous.” AT&T Comments at 22. AT&T does not explain how it would do so. If a “base station” does not include a support structure, Section 6409(a) would apply to modifications of only one support structure, a “wireless tower,” but it would also apply beyond this: to modifications of the “base station” located at the wireless tower. There is nothing superfluous about this.

³¹ Sprint Corporation at 8; Towerstream Corporation at 15.

³² PCIA Comments at 33; *see also* Sprint Comments at 9.

³³ *See, e.g.,* NextG Networks of California, Inc., *In re Petition of NextG Networks of California, Inc. for a Declaratory Ruling that its Service is Not Commercial Mobile Radio Service*, Petition for Declaratory Ruling, WT Docket No. 12-37 at 3-4 (Dec. 21, 2011).

only this facility to be modified, not anything that connects to it.³⁴ PCIA, perhaps inadvertently, confirms the distinction. It suggests that it is necessary to change the proposed categorical-exclusion test from applying to a “*wireless* facility installation” to a “*communications* facility installation” to ensure that the exclusion will apply to DAS facilities.³⁵ The implication is that most DAS facilities cannot be considered “wireless facilities,” much less wireless “base stations” or “towers.” As used in connection with collocation, “base station” is commonly understood to apply to the facilities at a wireless tower site³⁶—not to vast swaths of the communications network that may be involved in making wireless and wireline systems work. Section 6409(a) applies only to a modification of a “wireless” tower or base station. It does not reach most DAS facilities.

D. “Existing”

The industry would have the Commission tie itself in legal knots with the word “existing.” As Verizon attempts to explain its position, because Section 6409(a) applies to a modification of an “*existing* wireless tower or base station,” the statute must somehow extend to modifications of facilities that do not house any current wireless facilities:

The Commission could interpret the term “existing wireless tower or base station” in conjunction with the accepted (and proposed) definition of

³⁴ CTC Report at 20 (“In a DAS, to the extent that any portion of the system may be considered a ‘base station,’ the base station is limited to the radio transmission and reception equipment in the headend building.”). The fiber connecting nodes through the right-of-way certainly would not qualify as a “base station.”

³⁵ PCIA Comments at 8.

³⁶ While the term “base station” is not defined in the Nationwide Programmatic Agreement, the definition closest to that the Commission proposes for “base station” is the term “antenna.” 47 C.F.R. Part 1, App. C, Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process (“NPA”) at § II.A.1. The term includes only “on-site” equipment, switches, wiring, cabling, power sources, shelters, or cabinets installed as part of the original installation of the antenna.

collocation, which includes “the mounting or installation of an antenna on existing tower, building, or structure.” Since the drafters of the provision clearly intended to include collocations, the term “existing wireless tower or base station” should be interpreted to include all collocations, not just those on structures that already hold wireless facilities.³⁷

Verizon’s argument is a distraction. The question is not about the word “existing,” which is widely understood. It is about *what* must exist: a “wireless tower” or “base station.” Unlike the Nationwide Programmatic Collocation Agreement, which by its terms applies to structures other than wireless towers (and which distinguishes between towers and non-towers), Section 6409(a) addresses only modifications to a “wireless tower or base station.” As a result, if a provider seeks to modify a building or non-tower structure, it is not proposing to modify a “wireless tower” or “base station”—and Section 6409(a) does not apply. Policy arguments about the word “existing” do not broaden these statutory terms.³⁸ Nor may the Commission adopt overly broad readings of “tower” or “base station”—for example, expanding them to reach the non-tower support structures discussed above—and then use fictions about the word “existing” to try to reduce the harmful effects.³⁹ A building does not fall outside Section 6409(a) because it is a “wireless tower or base station” that does not “exist”; it falls outside Section 6409(a) because it is not a “wireless tower” or “base station” at all.⁴⁰

³⁷ Verizon Comments at 28; *see also* Comments of Sprint, WT Docket No. 13-238 (Feb. 3, 2014) (“Sprint Comments”) at 9.

³⁸ Towerstream Comments at 18-19.

³⁹ *See, e.g.*, PCIA Comments at 34-35.

⁴⁰ Indeed, under the Verizon model, the term “wireless” becomes superfluous. Any structure that could support a Wi-Fi device—almost anything—would be an “existing wireless tower.”

E. “Collocation,” “Removal,” and “Replacement.”

The industry makes two primary arguments about how the Commission should define “collocation,” “removal,” and “replacement.” First, they argue that the terms should apply to a request to replace or harden a tower.⁴¹ Second, they argue that the terms extend to the placement of facilities “associated” with the supporting structure, “even if the equipment is not physically located upon it.”⁴² The Commission should not adopt either approach.

Contrary to industry commenters, replacing or hardening a tower falls outside of Section 6409(a). The statute does not make the hardening or replacement of a tower an “eligible facilities request.”⁴³ An eligible facilities request must be for “modification” of an “existing” tower or base station, and it must involve the “collocation,” “removal” or “replacement” of transmission equipment. Those terms do not imply that an eligible facilities request can be for “replacement” of the tower itself. Just the reverse: Congress’s use of “replacement” indicates that when Congress meant to allow “replacement,” it said so. Indeed, “modification” of an “existing” tower indicates that the tower will remain in place. The Supreme Court has confirmed that the Commission must read the word “modify” to mean to “change moderately or in minor fashion.”⁴⁴ Changing a tower *completely* does not qualify.

Section 6409(a) also does not permit “collocation,” “removal,” or “replacement” of transmission equipment that is not physically located upon the “wireless tower” or “base station” in question. Because Section 6409(a)’s principal limitation concerns whether a modification

⁴¹ AT&T Comments at 24; UTC Comments at 15.

⁴² PCIA Comments at 36; Sprint Comments at 10; UTC Comments at 15.

⁴³ Alexandria Comments at 31.

⁴⁴ *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 225 (1994).

“substantially changes the physical dimensions” of a tower or base station, allowing providers to place facilities not physically located upon the “tower” or “base station” could give providers an unlimited pass to place such facilities, regardless of their impact. Congress could not have intended this. An eligible facilities request is subject to Section 6409(a) only to the extent that it involves the modification of an existing tower or base station. Requests to place facilities in locations other than on the existing “tower” or “base station” would therefore fall outside of Section 6409(a).

F. “Substantially Change the Physical Dimensions.”

1. The Commission must not expand, but abandon, the Collocation Agreement’s 4-part “substantial increase in the size of the tower” test.

Our comments showed that the Commission’s proposal to rely on the Collocation Agreement’s “substantial increase in the size of the tower” test to define Section 6409(a)’s “substantially change the physical dimensions” test is arbitrary, dangerous, and counterproductive.⁴⁵ While acknowledging the test’s problems, the industry generally either supports the flawed standard in slightly modified form,⁴⁶ or calls for the Commission to make it *more* preemptive of local authority.⁴⁷ For example, PCIA argues that the Commission should alter the test’s fourth element so that expanding an existing site up to 30 feet and excavating within those expanded boundaries would not qualify as a “substantial change.” This would make a bad test worse. If a tower were placed near a road or sidewalk, the test would arguably allow a provider to excavate in that space—with no local oversight.

⁴⁵ Alexandria Comments at 32-40.

⁴⁶ Verizon Comments at 30; CTIA Comments at 13; Towerstream Comments at 19-20.

⁴⁷ PCIA Comments at 38; Sprint Comments at 10; UTC Comments at 13.

Contrary to CTIA's and PCIA's view, considering context would not defeat Section 6409(a)'s purpose.⁴⁸ Any other approach would jeopardize public safety, disrupt environmentally and historically sensitive areas, and undermine the essential planning and land-use measures that define and distinguish our communities.⁴⁹ This would put considerable pressure on local governments not to approve a "tower" or "base station" because the facility could change later in problematic ways. This would not further Congress's goals or benefit anyone. CTIA and PCIA effectively recognize the problems by, for example, suggesting that "stealth" facilities should be protected, or that *some* public-safety, environmental, and historical-preservation concerns may be addressed. But an absolute rule inevitably cannot address the problems in any but a fairly random way, and requires layers of exceptions that simply cannot anticipate the myriad technical developments that may occur in the years ahead.

Industry may be concerned that without a strict numerical standard, local governments would delay approvals. The reverse is true. In any community, there may be areas where modifications raise few issues and others where modifications raise significant issues. If local governments can adopt rules that address these locational differences, they can encourage initial installations in sensitive areas, and plan for modifications accordingly. That is, a flexible approach will lead to cooperation in both the initial installation and modification processes. Section 6409(a) provides a local government with a strong incentive to avoid later litigation about whether a proposed modification is a "substantial change"—by using an "approve once" approach that clarifies what later changes to a "tower" or "base station" will be "substantial."⁵⁰

⁴⁸ PCIA Comments at 40; CTIA Comments at 14 n.54.

⁴⁹ Alexandria Comments at 13-22.

⁵⁰ *Id.* at 12-13.

2. ***PCIA, Crown Castle, and AT&T properly recognize that aesthetic changes can be “substantial.”***

Both PCIA and Crown Castle recognize that if a modification would undermine the concealment elements of a stealth wireless facility, it would “substantially change” that facility.⁵¹ AT&T similarly notes that the “substantial change” standard “applies . . . to base station components with a visual effect.”⁵² We agree. If a proposed modification would defeat a “stealth” condition on a “tower” or “base station,” it would “substantially change the physical dimensions” of that facility. This view properly recognizes that the “substantially change” test does not measure a change only quantitatively, but qualitatively.⁵³ To be sure, there are significant problems with the industry approach—the issue is not (as AT&T appears to have it) whether the *facilities* remain hidden from view, but whether the stealth facility is properly configured so that it continues to blend in with its surroundings. A stealth “tree” that suddenly triples in size may hide facilities, but may no longer blend into its surroundings.

Moreover, while changes that defeat stealth conditions are an obvious “substantial change,” industry commenters fail to recognize that changes to non-stealth facilities that violate other approval conditions may be equally substantial. A change to a height-limited tower in an avian flyway that extended it above the 200-foot danger zone that the Commission has identified would be “substantial.” Likewise, a non-stealth tower may be approved on the condition that it not extend above a tree canopy in a scenic park. In short, the fact that a facility was not disguised does not mean that other limiting conditions can be ignored. Indeed, local governments often

⁵¹ PCIA Comments at 39; Comments of Crown Castle, WT Docket No. 13-238 (Feb. 3, 2014) (“Crown Castle Comments”) at 14.

⁵² AT&T Comments at 24. AT&T argues that Section 6409(a) should permit even “substantial” changes in towers or base stations if the facilities remain hidden from view. *Id.*

⁵³ Alexandria Comments at 12-13.

address visual effects and concerns in historic districts not through specific stealth conditions, but through careful placement.⁵⁴ A proposed modification that would defeat careful placement conditions or that would be a “substantial change” based on other site-specific circumstances is not insulated from review.

3. *The “substantially change” test must be measured against the facility’s original dimensions, not the dimensions as modified.*

Any “substantially change” test must measure the permitted changes from the original dimensions of the “tower” or “base station,” not the dimensions after they have been modified.⁵⁵ PCIA and Verizon agree.⁵⁶ Any other approach could—as PCIA puts it—allow “incremental and successive increases” “lead to a substantial increase in size.”⁵⁷ The debate in the comments appears to revolve around whether the change should be measured against the facility originally installed (as we suggested) or against the facility at a fixed later date, such as the date that the Commission adopts rules. The former approach does no harm to the industry (since the industry will either be able to take advantage of, or will already have enjoyed the benefits of the rule); the latter approach punishes communities that have worked to allow collocations.

4. *“Substantially change” must be tailored to the modified facility in question.*

Although the industry ignores the point, Section 6409(a)’s “substantially change the physical dimensions” test must consider the specific characteristics of the “wireless tower” or “base station” that would be modified. Indeed, the only way to measure whether a facility

⁵⁴ *Id.* at 19.

⁵⁵ *Id.* at 36.

⁵⁶ PCIA Comments at 38-39; Verizon Comments at 29.

⁵⁷ PCIA Comments at 38.

changes substantially is to start by evaluating the facility before it is modified. On the other hand, if the test would permit the same automatic modifications to a 200-foot facility and to a 2-foot one, or to a facility in a historic district and one outside of it, it does not evaluate a “change” at all.⁵⁸ Again, Section 6409(a) evaluates each change in context.

G. “May Not Deny and Shall Approve”

The industry is in broad agreement that despite Section 6409(a)’s “may not deny and shall approve” language, local governments can condition their Section 6409(a) approvals on compliance with nondiscretionary structural and safety codes.⁵⁹ This is a critical point that the Commission should embrace. At the same time, however, the commenters insist that local governments may not condition their approvals on more general land-use requirements that protect public safety,⁶⁰ including traditional zoning protections such as fall zones or set-back distances.⁶¹ This is wrong. Section 6409(a) is silent on local conditions, but as we explained, the statute cannot be read to preempt local authority to protect against unsafe conditions, whether the protections are reflected in building codes, zoning codes, or by other means. If the Commission were to adopt the narrow view of a local government’s right to condition approvals, it would

⁵⁸ Alexandria Comments at 34.

⁵⁹ AT&T Comments at 26; Sprint Comments at 11; PCIA Comments at 41; TIA Comments at 6-7; Crown Castle Comments at 10; Comments of Joint Venture: Silicon Valley, WT Docket No. 13-238 (Feb. 3, 2014) (“Joint Venture Comments”) at 6.

⁶⁰ AT&T Comments at 26; UTC at 15; Fibertech Networks Comments at 27; Joint Venture Comments at 6.

⁶¹ CTIA Comments at 15.

only underscore the need for a meaningful “substantially change the physical dimensions” test. Surely anything that changes a safe facility into an unsafe facility is “substantial.”⁶²

H. Legal, Non-Conforming Uses

CTIA, PCIA, Crown Castle, Fibertech Networks, and Joint Venture: Silicon Valley argue that Section 6409(a) must apply to requests to modify a “tower” or “base station” that has “legal, non-conforming” status.⁶³ We disagree. Such a modification is best understood to “substantially change the physical dimensions” of the tower or base station.

The industry speculates without any basis that local governments would “change their laws tomorrow to make all existing wireless infrastructure ‘non-conforming,’ effectively gutting Section 6409(a) leaving all existing wireless towers and base stations frozen in their current states.”⁶⁴ Local governments have no incentive to do so; they want wireless service for their communities, and they prefer collocation. Even if such a tactic were used, a reviewing court could easily determine that the requested modification is, in fact, *not* a “substantial change” under the circumstances. This is a virtue of a “substantial change” test that turns on context, not

⁶² See PCIA Comments at 42 (“As a result, states and localities must approve EFRs to an existing tower or base station, regardless of whether the modification conforms to initial conditions imposed by the locality on the size or purpose of the tower. An EFR is by definition minimally obtrusive. Any substantial modification to the structure’s height, width, or design elements would substantially change the physical dimensions of the structure and the streamlining provisions of Section 6409(a) would not apply.”); *id.* at 45 (“fall zones and setbacks, while appropriate when approving new wireless support structures, may not be used to deny an application for an otherwise qualified EFR on existing infrastructure.”).

⁶³ CTIA Comments at 15; PCIA Comments at 43-44; Crown Castle Comments at 14; Fibertech Comments at 29; Joint Venture Comments at 6.

⁶⁴ Fibertech Networks Comments at 28; PCIA Comments at 43-44.

absolutes. In reality, local governments typically have sound reasons for not permitting a nonconforming use to be modified⁶⁵:

Nonconforming uses are not favored because, by definition, they detract from the effectiveness of a comprehensive zoning plan. Accordingly, provisions for the continuation of nonconforming uses are strictly construed against continuation of the use, and, conversely, provisions for limiting nonconforming uses are liberally construed to prevent the continuation or expansion of nonconforming uses as much as possible. Rules that restrict the recognizability, continuation, and expansion of nonconforming uses are common. . . . A nonconforming use cannot be changed to a new and different use and continue to be protected.⁶⁶

As we explained in our initial comments, the law of non-conforming use permits a community to allow one landowner to use property in a way that other landowners may not to preserve the status quo. It avoids the costs that might otherwise occur if a new land-use law were applied to existing facilities—for example, if every home had to be re-wired to comply with any change in the electrical code. But the corresponding principle—that when a landowner changes the status

⁶⁵ Joint Venture: Silicon Valley claims that in the City of San Jose there are “many ‘frozen rooftop’ base stations that can essentially not be touched because of unreasonable conditions related to shrouding existing and unrelated equipment.” Joint Venture Comments at 6. This comment appears to address rooftops where facilities were installed without the screening required by the current code. Under the City Code, when any entity—whether a wireless provider or not—changes a rooftop configuration, the screening must be brought into conformity. This does not prevent anyone from modifying existing facilities; rather, it maintains the status quo until there is a change, and then the person making a change installs the sort of screening that would be required if similar facilities were installed today. This should not be troubling to anyone. However, the complaint does underline that the industry wants the Commission to read Section 6409(a)’s “may not deny and shall approve” to mean, *inter alia*, “may not deny and shall approve without conditions on screening of the sort imposed on other entities.” The Commission should decline the invitation to read Section 6409(a) that way. A rule that essentially required a local government to require screening at the time of initial installation or forego it as the facility expands would be counterproductive. Moreover, the City of San Jose has a demonstrated record of approving modification requests, and a streamlined procedure for doing so. *See, e.g.*, Reply Comments of the City of San Jose, California, *In re Acceleration of Broadband Deployment*, WC Docket No. 11-59 (Sept. 30, 2011).

⁶⁶ *Parks v. Bd. of Cnty. Comm'rs of Tillamook Cnty.*, 501 P.2d 85, 95 (1972) (internal citations omitted).

quo the rules that apply to others apply to that landowner—is equally important. What is or is not a “substantial change” to the status quo is not and could not be defined randomly, but is instead reflected in use conditions and applicable local laws. The Commission’s rules should respect the careful balance that permits continued uses of existing facilities. Because Congress provided no indication that it intended to allow providers to expand existing nonconforming uses, the “substantially change the physical dimensions” test must be read to consider these changes.

I. Application Procedure

The industry argues that the Commission should impose a shorter shot clock for Section 6409(a) collocations than for Section 332(c)(7) collocations because, as Verizon puts it, Section 6409(a) requires only “a much more cursory review” by local zoning authorities.⁶⁷ That is wrong: the Commission certainly cannot make a rule by assuming that Section 6409(a) applications require only “cursory” review. Industry representatives often file applications that are incomplete and plagued with errors—in significant part because the industry relies on an oft-changing collection of third parties to file their applications.⁶⁸ There is no reason to expect this to change under Section 6409(a).

At the very least, imposing a shorter shot clock now is premature. Because the Commission lacks a record about how Section 6409(a) is operating, the Commission would only be guessing at what time period is reasonable.⁶⁹ For this reason, if the Commission imposes any

⁶⁷ Verizon Comments at 32.

⁶⁸ CTC Report at 24.

⁶⁹ Compare Shot Clock Order ¶45 (setting 90-day shot clock based on review of the record). Towerstream Corporation’s argument that “it is inherently unreasonable to require individual applications” for some deployments has no basis in Section 6409(a). Towerstream Comments at 26. Section 6409(a) addresses only how a local government must act on a “request”; it does not permit a provider to place facilities without making a request at all.

shot clock on Section 6409(a) applications, it should be the 90-day timeframe set forth in the 2009 Declaratory Ruling.

Contrary to industry claims, Section 6409(a) also does not dictate that a local government use a ministerial process to determine whether a modification request is an “eligible facilities request” or whether it would “substantially change the physical dimensions of such tower or base station.” Although a court might ultimately find that a local government reached the wrong conclusion on these issues, Section 6409(a) does not dictate what process a local government must use to reach its conclusion.⁷⁰ For example, if a local government sought to take public comment on whether a proposed modification in a residential neighborhood would change a tower’s physical dimensions substantially, Section 6409(a) would not prevent this. And with respect to application requirements generally, the Wireless Internet Service Providers Association (“WISPA”) gets it right: “local governments can establish their own applications or filing requirements based on administrative efficiency applicable to the community.”⁷¹

CTIA and PCIA also urge the Commission to preempt any moratoria on approving Section 6409(a) applications.⁷² The Commission should not make any *per se* rules in this area. As PCIA recognizes, moratoria can allow jurisdiction to update their codes to reflect legal changes. At the very least then, if the Commission were to choose to make rules under Section 6409(a), the Commission must allow a transition period for local governments to implement any revised standards.

⁷⁰ Alexandria Comments at 45 (“The federal government may not compel a State’s or local government’s leadership to rely on lower-level staff to make the sovereign entity’s decisions.”).

⁷¹ WISPA Comments at 5.

⁷² CTIA Comments at 18-19; PCIA Comments at 49.

J. Section 6409(a) Remedies

The industry urges the Commission to adopt a rule to “deem granted” any Section 6409(a) application that a local government fails to act upon or that the provider believes the local government denied improperly.⁷³ This would violate both the Due Process Clause and the Tenth Amendment.

The industry is adamant that it would benefit significantly if it need not *prove* that a local government has acted improperly: it would “avoid[] the need for applicants . . . to pursue judicial or administrative remedies to enforce the statutory requirement.”⁷⁴ In PCIA’s and Crown Castle’s view, a “deemed granted” remedy is necessary because going to court does not “guarantee[] a positive outcome.”⁷⁵ AT&T emphasizes that an applicant should be able to enforce Section 6409(a) itself by notifying the local government that it “considers” the application granted; the applicant’s belief would then entitle it to the remedy it seeks, unless the local government litigates in its own defense.⁷⁶ PCIA argues that 45 days after an applicant submits an application, a deemed-granted remedy should “take effect immediately.”⁷⁷

This deemed-granted approach would deprive a local government and its citizens of rights without due process. Due process generally entitles one deprived of a legal right to notice and an opportunity to be heard. “Where feasible, the opportunity (for obvious reasons) is

⁷³ AT&T Comments at 27; Verizon Comments at 32-33; CTIA Comments at 18; PCIA Comments at 50; Sprint Comments at 11; Towerstream Comments at 11; Fibertech Comments at 35; Joint Venture Comments at 7.

⁷⁴ Verizon Comments at 32.

⁷⁵ PCIA Comments at 57; Crown Castle Comments at 17.

⁷⁶ AT&T Comments at 26-27.

⁷⁷ PCIA Comments at 50.

expected to be pre-deprivation.”⁷⁸ A local government has a legal interest in reviewing wireless-facility applications and in denying those that do not qualify for approval under Section 6409(a), including applications that: (i) are incomplete; (ii) do not concern a modification to a “tower” or “base station”; (iii) do not involve collocation, removal, or replacement of transmission equipment; or (iv) would “substantially change the physical dimension” of the tower or base station. A local government also has a representational interest—a duty to act to protect local citizens. As importantly, citizens whose property, health, and safety may be affected may have a right to be heard before a permit affecting their own interests issues.⁷⁹

Granting an application is often not harmless or remediable. Pouring concrete into a wetland to create a pad for a larger tower is not something that can be easily remedied; destroying a grave site with careless expansion can never be remedied; causing a low-flying helicopter to crash is not remediable. The potential delays to industry—particularly given the actual record of deployment—is inconsequential compared to the risks.

The Commission may not require local governments and citizens to assume these risks or to forego rights without a hearing. Requiring a pre-deprivation hearing is especially critical since inaccurate applications are a major source of delay and increased cost in the current process.⁸⁰ The Commission certainly cannot build a remedial scheme around the false assumption that the applicant always has it right. The industry cites the Commission’s first cable franchising order to

⁷⁸ *Herwins v. City of Revere*, 163 F.3d 15, 18 (1st Cir. 1998) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985)).

⁷⁹ Stripping citizens of the opportunity to have input will not make them friendlier to wireless facilities. Indeed, it may serve to increase hostilities.

⁸⁰ CTC Report at 24.

justify this remedy.⁸¹ But the “deemed granted” remedy there addressed only a failure to act, not a denial alleged to be improper. Moreover, the remedy was for an “interim” franchise, valid only until the franchising authority takes “final action” on the application. And because the Sixth Circuit did not directly address the remedy’s legality, its lawfulness remains highly uncertain.⁸²

The “deemed granted” remedy would also run afoul of the Tenth Amendment. Without any explanation or reasoning, PCIA concludes that a federal rule “establishing the automatic grant” of requests by state and local governments “is not compelling a state to administer a Federal regulatory program.”⁸³ Of course it is. As the Supreme Court has explained, the Constitution’s Framers decided that “using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict.”⁸⁴ This led to the Framers’ “great innovation”:

[O]ur citizens would have two political capacities, one state and one federal, each protected from incursion by the other--a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it. The Constitution thus contemplates that a State’s government will represent and remain accountable to its own citizens.⁸⁵

A “deemed granted” remedy would blatantly reduce states and local governments to “instruments of federal governance.” By granting a permit that it has never, in fact, granted—and

⁸¹ *In re Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 5101 ¶¶ 77-78 (2007).

⁸² *Alliance for Cmty. Media v. FCC*, 529 F.3d 763 (6th Cir. 2008), *cert. denied*, 557 U.S. 904 (2009).

⁸³ PCIA Comments at 52.

⁸⁴ *Printz v. United States*, 521 U.S. 898, 919 (1997).

⁸⁵ *Id.* at 919-20 (internal citations omitted).

only because the federal government decrees that it has done so—a state or local government would not be responding to *its* citizens’ interests, but to federal interests. This is especially true where the Commission’s rule compelled a state or local government to grant a request that presents public safety and other problems that local citizens and their elected officials had sought to avoid. The federal government cannot make states and local governments responsible for the federal government’s decisions:

By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for “solving” problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects.⁸⁶

The federal government may not reduce state and local governments to “puppets of a ventriloquist Congress,”⁸⁷ but can only preempt conflicting state and local requirements within the proper scope of the Supremacy Clause. A “deemed granted” remedy is not consistent with this approach.⁸⁸

III. THE COMMISSION SHOULD NOT ADOPT ADDITIONAL RULES UNDER SECTION 332(c)(7).

The comments confirm that the Commission should not adopt additional rules under Section 332(c)(7). Any new rules would require local governments to adjust existing processes that are working. The burden is on those who seek additional rules to provide at least some evidence that they are needed. Industry commenters have failed to provide that evidence. Instead

⁸⁶ *Id.* at 930.

⁸⁷ *Id.* at 928 (quoting *Brown v. EPA*, 521 F.2d 827, 839 (9th Cir. 1975)).

⁸⁸ There is, for the same reason, a substantial question as to whether Section 6409(a) can be squared with the Tenth Amendment. The more broadly Section 6409(a) is read, and the more draconian the remedies, the more significant the problem.

they have supported their demands for new rules—including ones which the Commission has no authority to implement—with vague and generalized claims and without documenting that the complained of practices are occurring let alone that they are widespread.⁸⁹ The allegations often

⁸⁹ In the Commission’s 2011 Notice of Inquiry proceeding, the industry made many allegations that specific local governments had engaged in practices that were hindering broadband deployment. The veracity of those allegations was vigorously and successfully disputed in reply comments filed both by a coalition of national local-government associations, and by numerous cities and counties. *In the Matter of Accelerating of Broadband Development Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, Reply Comments of the National League of Cities, et al. (Oct. 3, 2011) at 4-10; Reply Comment of the City of Maryland Heights, Missouri, WT 11-59 (Aug. 24, 2011) at 1-2; Reply Comments of the City of Medina (Sept. 14, 2011) at 3-4; Reply Comments of the City of Bothell WA (Sept. 20, 2011) at 1-3; Reply Comments of the City of Hopkinsville, KY (Sept. 26, 2011) at 2-4; Reply Comments of Spotsylvania County, VA (Sept. 28, 2011) at 2-3; Reply Comments of the Village of Wilmette, IL (Sep. 28, 2011) at 3-7; Reply Comments of Town of Morrisville, NC (Sep. 29, 2011) at 1-5; Reply Comments of the City of Concord, NC (Sept. 29, 2011) at 2-4; Reply Comments of the City of Monroe, OH (Sept. 29, 2011) at 1-2; Reply Comments of the National Association of State Utility Consumer Advocates and the New Jersey Division of Rate Counsel (Sept. 29, 2011) at 6-9; Reply Comments of the City of Fontana, CA (Sep. 29, 2011) at 2-3; Reply Comments of the City of Lake Forest, CA (Sept. 29, 2011) at 1-6; Reply Comments of City of Davis, CA (Sept. 30, 2011) at 2-7; Reply Comments of the City of Greensboro, NC (Sept. 30, 2011) at 2-7; Reply Comments of the City of Los Angeles, CA (Sept. 30, 2011) at 2-6; Reply Comments of the City of Mercer Island, WA (Sept. 30, 2011) at 1-6; Reply Comments of the City of Ontario, CA (Sept. 30, 2011) at 1-5; Reply Comments of the City of Yuma, AZ (Sept. 30, 2011) at 1-8; Reply Comments of the New America Foundation’s Open Technology Initiative, et al. (Sept. 30, 2011) at 3-7; Reply Comments of the City of Albuquerque, NM (Sept. 30, 2011) at 3-6; Reply Comments of the City of Lake Elmo, MN (Sept. 30, 2011) at 4-5; Reply Comments of the City of Mountain View, CA (Sept. 30, 2011) at 1-8; Reply Comments of the Coalition of Texas Cities (Sept. 30, 2011) at 9-13; Reply Comments of Montgomery County Maryland (Oct. 3, 2011) at 9-20; Reply Comments of Marin Telecommunications Agency (Oct. 3, 2011) at 1-4; Reply Comments of the City of Huntington Beach, CA (Oct. 3, 2011) at 2-8; Reply Comments of DC Office of Cable Television (Oct. 3, 2011) at 2-3; Reply Comments of the City of Torrance, CA (Oct. 3, 2011) at 2-6; Reply Comments of the City of San Jose, CA (Oct. 3, 2011) at 4-12; Reply Comments of the City of Richmond, CA (Oct. 3, 2011) at 2-3; Reply Comments of the City of Philadelphia, PA (Oct. 3, 2011) at 4-6; Reply Comments of the City of Overland Park, KS (Oct. 3, 2011) at 3-6; Reply Comments of the City of Goleta, CA (Oct. 3, 2011) at 2-3; Reply Comments of the City of Detroit, et al. (Sept. 30, 2011) at 8-17; Reply Comments of the City of Eugene, OR (Sept. 30, 2011) at 3-12; Reply Comments of the League of Oregon Cities (Sept. 30, 2011) at 2-3; Reply Comments of the New York State Thruway Authority (Sept. 30, 2011) at 41-46; Reply Comments of the City of Santa Clara, CA (Sept. 30, 2011) at 1-9; Reply Comments of Gwinnett County, GA (Sep. 30, 2011) at 1; Reply Comments of the Greater Metro Telecommunications

do not even name the jurisdiction, foreclosing any response. The Commission must make decisions based on the evidence before it, and with a rational connection between the facts found and the choice made.⁹⁰ Here, the dearth of evidence does not support further action because even if these few claims were true, they affect wireless siting in a miniscule portion of the tens of thousands of communities faced with wireless applications.

A. Application Completeness

We were pleased to see that at least one industry commenter recognizes that there is no need for one-size-fits-all rules. WISPA stated that it

does not support adoption of uniform processes that all State and local governments must use in processing and approving requests[.] . . . Thus, the process in New York City need not be the same process that a small town in Iowa must employ, but each process should be applied to all requesters in the same fashion and not favor one company or one technology over another. In each case, the approving body should request only such information as is necessary for compliance with applicable law and approval of the request.”⁹¹

Consortium, et al. (Sept. 30, 2011) at 3-15; Reply Comments of the City of West Palm Beach, FL (Sept. 30, 2011) at 1-3; Reply Comments of the City of Portland, OR (Sept. 30, 2011) at 1-19; Reply Comments of the City of North Plains, (Sept. 30, 2011) at 1-2; Reply Comments of the City of Duluth, GA (Sept. 30, 2011) at 1-3; Reply Comments of the Center of Municipal Solutions (Sept. 30, 2011) at 3-11; Reply Comments of the City of Oakland, CA (Sept. 30, 2011) at 2-4; Reply Comments of the City of Huntsville, AL (Sept. 30, 2011) at 2-6.

In this proceeding, the industry appears to have gone back to making unsupported statements. A classic example is found in the AT&T Comments at 29. AT&T claims “that some local jurisdictions have used [various measures] to delay and discourage wireless facility siting” but offers not a single example to support its claim. Rather, AT&T refers the Commission to its comments filed in 2011 which were cited by the Commission in this NPRM. As we pointed out at page 58 of our initial comments, AT&T did not support that 2011 claim with a single actual example. The company provides no examples now either. Instead, it simply states: “AT&T’s experience has not changed since that 2011 filing.”

⁹⁰ *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁹¹ WISPA Comments at 10. We do not agree with WISPA’s statement on the same page that “any processing fees should cover only the cost of processing the request, and should not include

We agree and believe that this approach is consistent with what local governments strive to do. However, numerous industry commenters seek rigid uniformity. These proposals and our responses follow.

1. *One-Time Incompleteness and Application Content Requirements.* CTIA seeks a rule that local governments have “one opportunity to deem an application incomplete and request information for purposes of triggering the Shot Clock.”⁹² PCIA seeks a rule with a “specifically enumerated floor” ensuring that the shot clock would begin running when the application is submitted “with all necessary documents as per the FCC requirements.”⁹³ Crown Castle states that the shot clock should continue running if a jurisdiction asks for further information not specifically outlined in the zoning application’s requirements.”⁹⁴

These and other industry suggestions are common in only two respects. First, the industry does not show a need for them. PCIA, for example, bases its request on an accusation that jurisdictions raise incompleteness issues “serially” and cites a single unnamed jurisdiction as an example. Second, the comments presume that it is possible to establish a federal rule defining what may be required in an application without running afoul of Section 332(c)(7). It is not. The Commission has no authority to determine what may be considered as part of the application process as a general matter, nor would it be wise or practical for the Commission to do so. ExteNet requests that the Commission “should provide guidance as to the categories of

payment of any bonds or extra fees[.]” or its statements elsewhere in its filing suggesting (contradictorily) that the Commission should adopt uniform processes and requirements on certain matters. These are addressed in other sections of our reply comments.

⁹² CTIA Comments at 16 n.59.

⁹³ PCIA Comments at 54.

⁹⁴ Crown Castle Comments at 17.

information that state and local governments may or may not require in order to deem an application complete and rule upon it.”⁹⁵ But the Commission is not a zoning board and cannot possibly create a complete or meaningful one-size-fits-all list of “FCC requirements” for an application. Any rules would lead to predictable disputes and delays as the courts or the Commission debate completeness. Consistent with the comments of Fairfax County⁹⁶ and West Palm Beach,⁹⁷ and with the Commission’s practice generally,⁹⁸ the Commission should not attempt to create such a list. Rather, it should reaffirm what is already implicit in the rule: that state and local requirements measure completeness.

Likewise, the Commission should not allow the shot clock to run while the application is incomplete. As both the California Coastal Commission (CCC) and Fairfax County recognize, by limiting the shot clock’s benefits to those who submit complete applications, the Commission

⁹⁵ Comments of Extenet Systems, Inc., WT Docket No. 13-238 (Feb. 3, 2014) (“ExteNet Comments”) at 6-7.

⁹⁶ Fairfax County Comments at 25 (“While the County encourages the FCC not to act in this regard, if it does act, the standard for completeness should be defined as the time when the carrier has provided to the zoning authority all information necessary for the state or local government to perform its zoning review of the application at issue, as set forth in the locality’s standard application for such facilities.”).

⁹⁷ Comments of the City of West Palm Beach, Florida, WT Docket No. 13-238 (Feb. 3, 2014) (“West Palm Beach Comments”) at ¶ 24.

⁹⁸ For example, when the Commission created a “shot clock” for cable franchise applications, it listed some submittal requirements but also stated: “We will calculate the deadline from the date that the applicant first files certain requisite information in writing with the LFA. *This filing must meet any applicable state or local requirements, including any state or local laws that specify the contents of a franchise application and payment of a reasonable application fee in jurisdictions where such fee is required.*” *In re Implementation of Section 621(a)(1) of the Cable Comms. Policy Act of 1984 As Amended by the Cable TV Consumer Prot. & Competition Act of 1992*, 22 FCC Rcd 5101, 5138 (2006) (emphasis added). Likewise, Section I.7 of the Commission’s Form 394 for cable-franchise transfers requires information that is identified in the franchise as required to be provided to the franchising authority.

effectively speeds deployment.⁹⁹ One of the central causes of delay in the zoning process is incomplete applications.¹⁰⁰ Allowing incomplete applications to trigger the shot clock would either result in more denials or more agreements on a case-by-case basis to extend the shot clock, but it would not speed deployment. Communities would need to devote limited staff time to correcting errors that the applicant should have corrected. And because staff time is limited, this would have a negative impact on those who submit complete applications: a local government would spend time on incomplete proposals instead of on those that are complete.¹⁰¹

When this incentive to shorten the substantive review period by withholding critical information is coupled with the industry’s request (discussed below) that the Commission “deem granted” its applications, the counterproductive and potentially dangerous consequences become obvious.¹⁰² Setting aside that such a result cannot be squared with Section 332(c)(7), it could free an applicant to build facilities without adequate public disclosure or consideration of risks.

2. *Single Application Requirement.* PCIA seeks clarification that the Shot Clock “applies only once and not, as has been the practice of some localities, twice—both first during any zoning or land use review process and again during the environmental review process,” citing a single jurisdiction in an example that is so brief that it does not appear to illustrate the alleged

⁹⁹ California Coastal Commission Comments at 6; Fairfax County Comments at 24-25.

¹⁰⁰ Alexandria Comments at 57. *See also In re 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, Reply Comments of Montgomery County, Maryland (Sept. 30, 2011).

¹⁰¹ Letter from the California Coastal Commission, WT Docket No. 13-238 (Jan. 31, 2014) (“California Coastal Commission Comments”) at 6.

¹⁰² Fairfax County Comments at 24-25.

behavior.¹⁰³ AT&T likewise suggests “the Commission should clarify ... that the shot clock applies to the overall municipal review from start to finish and does not restart with each subordinate local board or body.”¹⁰⁴ AT&T then goes on, in vague terms, to accuse “some local jurisdictions” of “applying a separate Section 332(c)(7) shot clock to each of many local proceedings”¹⁰⁵ It provides no illustration, and there is no indication that this is a significant problem. We are not aware of any case where a separate shot clock is applied to “each of many” local proceedings.

The industry may be attempting to modify the shot clock to address one of two issues that it was not designed to address, and which the factual record underlying the shot clock does not support. The first is a situation in which a local government denies an application, and rather than appeal, the applicant submits a new application. In that case, and consistent with the appeal limits the Commission has adopted, the shot clock necessarily restarts for the new application.

The second situation is described in our initial comments. In some communities, the zoning process is distinct from the process of obtaining construction permits: that is, once an applicant receives approval to place a facility of a certain type at a certain location, it must then file for various permits to perform work on site. The shot clock does not address these issues because the permitting process is often unrelated to the zoning issues and depends on when the

¹⁰³ PCIA Comments at 54 n.79. The totality of the description of the example of applying the Shot Clock twice is as follows: “In San Luis Obispo County, California, a member was advised that failure to respond to requests for additional information would invalidate application of the Shot Clock. The County asserted that the FCC’s Shot Clock rule applied, ‘if at all, once an application is deemed complete pursuant to the California Permit Streamlining Act.’”

¹⁰⁴ AT&T Comments at 29.

¹⁰⁵ *Id.*

applicant is ready to build.¹⁰⁶ Federal agencies (such as the FAA) may also need to provide approvals before a construction permit can issue. To make the shot clock address these approvals would also imply that at the same time as it applies for zoning approvals, the applicant must be paying for and have in place all construction bonds, building permits, and federal and state approvals associated with a project. That is not what happens now, and it would represent a fairly dramatic change for the industry, local communities, and state and federal agencies whose review would be affected by the expanded shot clock.

3. *Minimum Content for Incompleteness Letter.* PCIA and Crown Castle both seek a rule to mandate the minimum content of any incompleteness letter issued by local authorities: “Any municipal request for additional information from an applicant for a new wireless telecommunications facility should: (1) be in writing, (2) clearly delineate any information alleged to be missing, and (3) specify the particular subsection of the applicable code that requires the service provider to submit this particular information.”¹⁰⁷ To support this request, PCIA cites the same example as in #2 above, and Crown Castle describes one city that it successfully sued over delays in the application process, but by its own admission the facts surrounding that case were “exceptional.”¹⁰⁸ It is unclear any rule is needed here. And the third requirement could be unduly limiting. Not all jurisdictions codify detailed application submittal requirements because doing so would require a code amendment for even the slightest change. Bureaucratizing the incompleteness process will not speed deployment.

¹⁰⁶ There can be significant lags between the time an applicant obtains an approval and when it is actually ready to build. These lags have little to do with government and much to do with things like the availability of work crews.

¹⁰⁷ Crown Castle Comments at 17; PCIA Comments at 54-55.

¹⁰⁸ Crown Castle Comments at 16; PCIA Comments at 55.

B. Moratoria

As we pointed out in our initial comments, moratoria do not significantly delay the process, but do ensure that it proceeds smoothly and without discrimination.¹⁰⁹ Other commenters agree. The California Local Governments point out that moratoria can serve a useful purpose in “preserving the status quo to allow for the development of and implementation of a comprehensive plan, or a revision to the existing plan” and “[t]hese needs often arise after an unexpected increase in wireless facility applications, or a change in applicable rules.”¹¹⁰ We also agree with their view that “new regulations can often serve to clarify the process for all carriers to obtain permits, through a thorough and open discussion among industry, government, and community members.”¹¹¹ West Palm Beach also expressed a similar view as to the need for occasional moratoria.¹¹²

The providers continue to complain that local governments adopt moratoria for improper reasons but they offer virtually no evidence to support their claims. For example, AT&T claims that “[n]o other single government activity impacts wireless deployment as significantly as a decision to impose a moratorium and do nothing.”¹¹³ Yet AT&T is unable to offer a single

¹⁰⁹ Alexandria Comments at 54-56.

¹¹⁰ League of California Cities Comments at 33.

¹¹¹ *Id.*

¹¹² West Palm Beach Comments at ¶ 22.

¹¹³ AT&T Comments at 30. AT&T also urges the Commission to “clarify that no State or local government can prevent or delay the filing, review, consideration, or grant of a wireless facility siting application by adopting a moratorium and that if a moratorium is imposed, the periods of time for approving an application under Section 332(c)(7) and Section 6409 are not suspended.”

example of a government that has imposed a moratorium *and then actually done nothing*.¹¹⁴ State laws specifically limit the circumstances under which a local government may adopt or extend a moratorium.¹¹⁵

Other industry commenters variously accuse local governments of adopting moratoria as a “delay tactic” and ask the Commission to prohibit moratoria lasting longer than six months, without providing substantial evidence to support any of these assertions.¹¹⁶ PCIA also claims that the 1998 community-industry agreement found that moratoria lasting longer than 6 months violate public policy.¹¹⁷ It did no such thing. It specifically acknowledged that moratoria lasting longer than 6 months can be appropriate: “In many cases, the issues that need to be addressed during a moratorium can be resolved within 180 days. All parties understand that cases may arise where the length of a moratorium may need to be longer than 180 days.”¹¹⁸ As we argued in our initial comments, existing law provides more than adequate protection for a wireless-facility provider that believes a particular moratorium is a delaying tactic. No federal rules are necessary or advisable.

¹¹⁴ Similarly AT&T’s 2011 comments made a claim that municipalities institute moratoria to avoid the Commission’s Shot Clock ruling and cited two moratoria, without offering any verifiable proof that they were instituted for that purpose. Comments of AT&T, *In re Acceleration of Broadband Deployment*, WC Docket No. 11-59 at 15 (July 19, 2011).

¹¹⁵ See, e.g., Or. Rev. Stat. §§ 197.350(2), 197. 520.

¹¹⁶ PCIA cites one example, but offers no verifiable proof that that the moratorium was instituted to avoid the ruling. PCIA Comments at 55. Utilities Telecom Council and Fibertech seek preemption of moratoria lasting longer than 6 months. UTC Comments at 16; Fibertech Comments at 31.

¹¹⁷ PCIA Comments at 55.

¹¹⁸ Community-industry agreement, Section I.B., available at <http://transition.fcc.gov/statelocal/agreement.html> (last accessed on March 3, 2014).

C. Application to DAS

In the opening round, we indicated that there was no need for special rules applicable to DAS because if a DAS system is used to provide “personal wireless services,” it fits within Section 332(c)(7); if it does not, it does not.¹¹⁹ The California Local Governments and the City of San Antonio, Texas, agree,¹²⁰ as do CTIA and Sprint—but the industry asks for the clarification anyway.¹²¹

Other industry commenters seek to have the Shot Clock apply to DAS and small cells without this important qualification.¹²² This would be an inadvisable expansion of the shot clocks with no legal basis. We also strongly oppose the suggestions by ExteNet and Fibertech that the definition of “collocation” should encompass all existing structures, including utility poles, streetlights, traffic signals and other types of existing structures in aerial and underground corridors.¹²³ These commenters want the expanded definition to ensure the shot clocks apply to their wireless installations in the rights-of-way. At the same time, they seek to have the Commission specify that local zoning authority should not apply to traditional utility corridors because they want to avoid any discretionary review and to be treated the same as other utility infrastructure that may be constructed by right.¹²⁴ In short, DAS providers are trying to “have it

¹¹⁹ Alexandria Comments at 58.

¹²⁰ League of California Cities Comments at 34; San Antonio Comments at 18-19.

¹²¹ CTIA Comments at 21-22; Sprint Comments at 12.

¹²² PCIA Comments at 55-56; Fibertech Comments at 33-34.

¹²³ ExteNet Comments at 6; Fibertech Comments at 34.

¹²⁴ Fibertech Comments at 33-34; ExteNet Comments at 5 and 7 suggest it does not believe that Section 332(c)(7) and the Shot Clock order should apply to its activities in the public rights-of-way.

both ways.”¹²⁵ As Eugene, Oregon observes: “The Commission should not grant DAS providers the opportunity to be wireless providers when it is convenient, but to be landline providers when it is not.”¹²⁶ To be clear: to the extent that a DAS provider is providing personal wireless service facilities within the meaning of Section 332(c)(7), the shot clock would apply. But many DAS providers obtain rights as a competitive local exchange carrier (CLEC) to install wireline facilities in the rights-of-way, and a different process may apply to the placement of those facilities because of the different activities involved. For example, to obtain access to the public rights-of-way to install a wireline facility, a company may need a certificate of public convenience and necessity (CPCN) issued by a state utility commission, or a telecommunications franchise issued at the local level. It would not be necessary or appropriate to sweep those facilities under the shot clock.

We also stated that DAS and small-cell installations have several unique characteristics that can make them more complicated than traditional wireless installations, which counsels against concluding that the Commission’s 90 and 150-day shot clocks accurately reflect a “reasonable period” to process DAS applications.¹²⁷ Fairfax County’s comments indicate that they have had a similar experience, and they agree that no rulemaking is needed in this area.¹²⁸

¹²⁵ San Antonio Comments at 19.

¹²⁶ Eugene, Oregon Comments, WT Docket No. 13-238 (Feb. 3, 2014) (“Eugene Comments”) at 17.

¹²⁷ Alexandria Comments at 58-60. West Palm Beach also notes that multiple DAS applications are frequently submitted at the same time as part of a planned DAS network deployment, which can place a burden on the review process which should be recognized. West Palm Beach Comments at ¶ 26.

¹²⁸ Fairfax County Comments at 27-28.

D. Preferences for Siting on Municipal Property

The Commission asked whether ordinances that establish preferences for the placement of wireless facilities on municipal property unreasonably discriminate among providers of functionally equivalent services.¹²⁹ In the opening round, we stated that the Commission cannot reach such a *per se* conclusion for the reasons stated in the NPRM.¹³⁰ Utilities Telecom Council simply comments that municipal property preferences are unreasonably discriminatory without explaining why or how.¹³¹ Others either do not comment on the Commission’s question or effectively support our view.¹³²

PCIA acknowledges that “siting wireless facilities on municipal property can benefit both the community and the provider[.]”¹³³ They suggest certain jurisdictions have used a preference for siting on municipal property to “effectively prohibit the provision of wireless services,” though in support they cite just one example of a member who had “difficulty siting,” which is not further explained but certainly is not the same as an effective prohibition.¹³⁴ PCIA goes on to describe its view of the circumstances under which municipal “preferences” can become effective mandates (“when jurisdictions couple them with ordinances that make it extremely

¹²⁹ NPRM ¶ 160.

¹³⁰ Alexandria Comments at 56.

¹³¹ UTC Comments at 17.

¹³² ExteNet suggests that the Commission should interpret “functionally equivalent services” to effectively treat wireline and wireless services as functional equivalents. ExteNet Comments at 8. The Commission should not do so, as Section 332(c)(7) only deals with “personal wireless services.”

¹³³ PCIA Comments at 56.

¹³⁴ *Id.*

difficult to site facilities on non-municipal property.”¹³⁵). But it does not provide examples where this has occurred. Section 332(c)(7) can more than adequately address any legitimate problems.

As we and almost all the municipal commenters pointed out, “municipal preferences” can encourage wireless deployments by making municipal property available in areas where siting options may be otherwise limited.¹³⁶ Attempting to regulate in this area may therefore limit sites available for deployment, and turn what can be simple processes into more time-consuming ones. The Commission should reject any *per se* approach.

E. “Deemed granted”

In our opening comments, we pointed out that the Commission lacks authority to adopt a “deemed granted” remedy under Section 332(c)(7), that it had already determined in the *2009 Declaratory Ruling* that it should not and may not adopt a “deemed granted” remedy, and that it had declared in the current NPRM that it is not “revisiting” any of the matters decided by the *2009 Declaratory Ruling*.¹³⁷ Numerous local government commenters share our view that a “deemed granted” remedy is neither legal nor advisable.¹³⁸ Some in industry agree. Verizon does

¹³⁵ *Id.*

¹³⁶ Eugene Comments at 23-25; San Antonio Comments at 26-28; West Palm Beach Comments at ¶ 27; League of California Cities Comments at 34-35; Fairfax County Comments at 26-27; Comments of the District of Columbia, WT Docket No. 13-238 (Feb. 3, 2014) (“DC Comments”) at 23.

¹³⁷ Alexandria Comments at 52-53.

¹³⁸ Comments of the National Association of Telecommunications Officers and Advisors, the National Association of Counties, the National League of Cities, and the United States Conference Of Mayors, WT Docket No. 13-238, at 14-15 (Feb. 3, 2014); League of California Cities Comments at 35-36; Comments of Rural County Representatives of California, WT Docket No. 13-238, at 4; DC Comments at 22; Fairfax Comments at 21-23; Jefferson County Comments at 3; West Palm Beach Comments at ¶ 28; San Antonio Comments at 20-13; Comments of City of Cornelius, OR, WT Docket No. 13-238, at 6; Eugene Comments at 17-20; Comments of City of Happy Valley, OR, WT Docket No. 13-238, at 5-6; Comments of City of Oregon City, Oregon, at 5-6.

not ask the Commission to revisit its deemed-granted remedy under Section 332(c)(7)(B), as it recognizes that the Commission has already determined that it should not do so.¹³⁹

Most of the rest of the wireless industry urges the Commission to revisit the issue and adopt a deemed-granted remedy.¹⁴⁰ They offer no concrete evidence that this is necessary, however, and, for the most part, they do not address the Commission's authority to adopt such a remedy. AT&T suggests the remedy is necessary to protect the carriers who are often put in a "no-win situation" by jurisdictions "intent on blocking wireless facility deployments" and "frequently leverage their ability to force applicants to resort to judicial action for relief" to exact "tolling or other demands" from the wireless providers.¹⁴¹ Yet it cites no specific examples of these alleged practices. In reality, there can be a variety of reasons why an application takes longer to process than the shot clock's presumptively reasonable period, as the Fifth Circuit in *Arlington* discussed:

The more likely scenario, however, is that a state or local government that has failed to act within the time frames will attempt to rebut the presumption of unreasonableness by pointing to reasons why the delay was reasonable. It might do so by pointing to extenuating circumstances, or to the applicant's own failure to submit requested information. Or it might note that it was acting diligently in its consideration of an application, that the necessity of complying with applicable state or local environmental regulations occasioned the delay, or that the application was particularly complex in its nature or scope. All of these factors might justify the conclusion that a state or local government has acted reasonably notwithstanding its failure to comply with the FCC's time frames. We do not list these possibilities to establish a definitive list of the circumstances that might cause a state or local government to have acted reasonably, however, as adjudications of specific disputes under the statute will ultimately determine how specific circumstances relate to the FCC's time frames. Our point here is simply to

¹³⁹ Verizon Comments at 32. Verizon did request that the Commission adopt a "deemed granted" remedy under Section 6409(a) which we oppose for the reasons discussed above.

¹⁴⁰ AT&T Comments at 30-31; WISPA Comments at 11; UTC Comments at 17.

¹⁴¹ AT&T Comments at 30-31

note both that a variety of circumstances can affect the consideration and determination of a wireless facility zoning application, and that these circumstances remain relevant even after the FCC issued its time frames.¹⁴²

Indeed, the presumption is critical to the rules' validity, as the Commission explained to the Fifth Circuit. AT&T effectively admits that its objection is to judicial review: that it *could* appeal post-shot clock, but it does not want to. This is no complaint at all, and adopting a rule to allow AT&T to avoid judicial review would amount to rewriting the remedy that Section 332(c)(7) provides. PCIA and Crown Castle both argue that a deemed-granted remedy is necessary because going to court does not “guarantee[] a positive outcome” for the provider.¹⁴³ Joint Venture: Silicon Valley suggests the Commission should impose a “deemed granted” remedy simply because there is litigation in some San Francisco Bay Area cities and litigation is costly.¹⁴⁴ Similarly, PCIA, Sprint, and Fibertech suggest a “deemed granted” remedy is necessary to avoid costly litigation.¹⁴⁵

Again, the complaint in all these cases is that the Section 332(c)(7) remedy is not adequate. But it is the statute's exclusive remedy, and the Commission's role is not to insulate the industry from Section 332(c)(7) (much less to guarantee a positive outcome).

PCIA and Crown Castle suggest the Supreme Court's decision in *Arlington*¹⁴⁶ permits this,¹⁴⁷ but they misconstrue the decision. *Arlington* forecloses a deemed-granted remedy.¹⁴⁸

¹⁴² *City of Arlington v. FCC*, 668 F.3d 229, 259-260 (5th Cir. 2012) (internal citations omitted).

¹⁴³ PCIA Comments at 57; Crown Castle Comments at 17.

¹⁴⁴ Joint Venture Comments at 8.

¹⁴⁵ PCIA Comments at 57; Fibertech Comments at 34-35; Sprint Comments at 12.

¹⁴⁶ *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013).

¹⁴⁷ PCIA Comments at 58; Crown Castle Comments at 18.

¹⁴⁸ Alexandria Comments at 52-53.

Under Section 332(c)(7)'s plain language, the Commission lacks authority to determine the scope of available judicial remedies or to create an administrative remedy.

IV. THE COMMISSION'S APPROACH TO SECTION 6409(A) MUST SHAPE ANY STREAMLINING OF ITS HISTORIC AND ENVIRONMENTAL REVIEWS.

The industry widely supports the Commission's proposals to streamline its National Historic Preservation Act and National Environmental Policy Act reviews, while commenters concerned with historic preservation and environmental issues oppose the change.¹⁴⁹ But few commenters recognize that how the Commission approaches Section 6409(a) directly impacts whether it may streamline its own review.

The Commission has stressed that "in the absence of specific protected resources such as historic properties protected under the NHPA, the Commission defers to local authorities to consider visual effects in their exercise of land use jurisdiction."¹⁵⁰ If the Commission were to read Section 6409(a) to broadly preempt local land-use authority over modifications, however, only the Commission could make these determinations. Likewise, many local governments now review the environmental and historic-preservation implications of certain wireless-facility modifications. If the Commission were to read Section 6409(a) to preempt this authority, the Commission would need to narrow its exemptions, not broaden them.

¹⁴⁹ Comments of the National Conference of State Historic Preservation Offices, WT Docket No. 13-238 (Feb. 3, 2014); Comments of the American Cultural Resources Association, WT Docket No. 13-238, at 1-2 (Feb. 3, 2014); Comments of the Arkansas Historic Preservation Program, WT Docket No. 13-238 (Feb. 3, 2014); Comments of the Ohio Preservation Office, WT Docket No. 13-238 (Feb. 3, 2014).

¹⁵⁰ *In re Norvado Inc.*, ASR App. No. A081266, DA 14-164, at ¶ 15 (Feb. 7, 2014).

V. CONCLUSION

The Commission should adopt a sensible approach to modifications of wireless towers and base stations under Section 6409(a). Although the industry's comments improve upon the Commission's proposed rules in important respects, they still require critical changes. If the Commission chooses to make rules under Section 6409(a) immediately, we urge the Commission to craft its rules in light of these comments. We also urge the Commission not to adopt further rules implementing Section 332(c)(7).

Respectfully submitted,

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