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

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

REPLY COMMENTS OF FIBERTECH NETWORKS, LLC

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SUMMARY

The Commission's most recent broadband deployment report declared that "broadband deployment is not reasonable and timely."[1] Congress likewise recognizes this Nation's unacceptable rate of broadband deployment and took steps in 2012 to improve the process for siting wireless broadband infrastructure by adopting Section 6409(a) in the Middle Class Tax Relief Act.[2] Consistent with Congress' objective in speeding deployment of wireless broadband networks, the Commission instituted this rulemaking proceeding to reduce barriers to the deployment of wireless broadband networks.[3]

As Qualcomm explains, expanding the capacity of wireless broadband networks requires the 'placement of very low power …small cells into the larger macro-cellular networks."[4] Streamlining the deployment process for these small cells is "important to supporting America's growing 'demand for and reliance on wireless broadband services.'"[5] The goal is to make these

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[1] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 11-121, Eighth Broadband Progress Report 27 FCC Rcd 10342 (2012) (*Eighth Broadband Report*).

[2] See Title VI – Public Safety Communications and Electromagnetic Spectrum Auctions, Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6409(a), 126 Stat. 156 (2012) (codified at 47 U.S.C. § 1455(a)).

[3] *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies; Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting; 2012 Biennial Review of Telecommunications Regulations*, WT Docket No. 13-238, WC Docket No. 11-59, WT Docket No. 13-32, Notice of Proposed Rulemaking, FCC 13-122, 28 FCC Rcd 14238 (2013) ("NPRM").

[4] Comments of Qualcomm, Incorporated, WC Docket No. 11-59, at 2. ("Qualcomm Comments")

[5] *Id*. *quoting* NPRM ¶ 2.

small cells "plug and play" by operators or users.[6] But such devices cannot be plug and play if a user or network operator has to undergo layers of local review for every single small cell unit it deploys. The process must be streamlined if this nation is going to have the robust wireless broadband services needed to serve the burgeoning demand for bandwidth from mobile devices and applications.

The Commission's NPRM proposed adopting national rules implementing Section 6409(a) in a uniform manner to best promote broadband deployment. Comments filed in response to the NPRM are largely supportive. But local governments have populated the record with comments urging the Commission to adopt policies that will have the effect of impeding wireless broadband deployment. These same local government interests resisted the Commission's efforts to set reasonable time limits for their review of initial siting applications leading to the Commission's 2009 Declaratory Ruling adopting a "shot clock."[7] These same interests now seek to thwart further measures that Congress has enacted that limit their discretion in order to speed deployment of critical broadband infrastructure.

Despite the local governments' opposition, the Commission should adopt national rules interpreting Section 6409(a) to permit small cell installations that will help plug the gaps of today's wireless broadband networks. In doing so, the Commission should recognize that collocation on an existing utility pole in the traditional utility corridor should be treated equally to a collocation on an existing monopole. The Commission should clarify the meaning of terms

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[6] *Id*.

[7] *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165, Declaratory Ruling, 24 FCC Rcd 13994 (2009) ("*2009 Declaratory Ruling*") *aff'd City of Arlington, Texas v. FCC*, 133 S.Ct. 1863 (2013).

in Section 6409(a) to promote broadband deployment, particularly small cell deployment in existing utility corridors.

Similarly, Fibertech urges the Commission to clarify again that the *2009 Declaratory Ruling* applies to small cell wireless networks. A number of comments suggest that despite previous Commission guidance, small cell networks do not fit within the shot clock order framework. To speed deployment and reduce litigation the Commission must clarify that the shot clock order applies on a technology neutral basis and plainly includes small cell networks.

By adding clarity to Section 6409(a), the Commission will remove unnecessary delays for wireless broadband infrastructure in the public rights-of-way. This will speed deployment of wireless networks in the traditional utility corridor, thus providing consumers with access to improved services and helping the Commission fulfill its policy objectives.

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REPLY COMMENTS OF FIBERTECH NETWORKS, LLC

Fibertech Networks, LLC ("Fibertech") respectfully submits these reply comments in response to the above-captioned Notice of Proposed Rulemaking ("NPRM") released by the Federal Communications Commission ("Commission").[8]

I. Introduction

In 2011, the Commission sought comment on "specific steps that could be taken to identify and reduce unnecessary obstacles to obtaining access to rights-of-way and siting

[8] NPRM *supra* n. 3.

wireless facilities."[9] This NPRM represents the next step, and the Commission must press on despite comments from local governments urging the Commission to do nothing because they "are successfully working with industry to encourage and streamline deployment."[10] These claims are not accurate, and the comments themselves provide examples of local governments' contentious drawn out disputes over the deployment of wireless networks.[11] One local government even threatens to "thwart" wireless facility deployment if the Commission continues to promote deployment.[12]

The local governments' claim that there is no need for Commission action is undermined by their record of "federal court litigation.[13] The local governments' comments are sufficient evidence that the Commission must act.

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

[10] 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, WC Docket No. 11-56, 5 (filed Feb. 3, 2014) ("Alexandria Comments").

[11] Comments of Fairfax County, Virginia, WC Docket No. 11-59, at 6 (filed Feb. 3, 2014) ("Fairfax"); Alexandria Comments at 17.

[12] Fairfax Comments at 15.

[13] *See* Fairfax Comments at 6 (*citing T-Mobile Northeast LLC v. Fairfax Cnty. Bd. of Supervisors*, 672 F.3d 259 (4th Cir. 2012) and *New Cingular Wireless v. Fairfax Cnty. Bd. of Supervisors*, 674 F.3d 270 (4th Cir. 2012). *See also* Comments of The City of Mount Vernon, New York,WC Docket No. 11-59 (filed Feb. 3, 2014) ("Mt. Vernon Comments"). (which was also sued by a wireless carrier in *MetroPCS New York, LLC v The City of Mount Vernon and The City of Mount Vernon Planning Board*, 739 F. Supp. 2d 409 (S.D.N.Y. 2010); *Crown Castle NG*

Thus, it is imperative for the Commission to move forward with its rulemaking because it is the only way to promote the upgrade to our nation's wireless infrastructure. These improvements drive innovation and ideally allow all citizens—from Fairfax County, Virginia to San Jose, California—to participate in the new information age.

II. The Commission Should Clarify that the Rulemaking will not Interfere with Nondiscretionary Laws Governing Issues of Public Safety or Environmental/Historical Compliance.

Many of the comments from local governments suggest that adopting the sensible rules proposed in the NPRM will allow wireless providers to ignore applicable safety codes and other nondiscretionary requirements. There is simply no basis for this concern other than to gin up opposition to the Commission's efforts to reduce barriers to deployment of wireless broadband infrastructure. Fibertech and other companies deploying small cell technology agree that nothing in the Commission's proposed rules would impede the continued enforcement of such non-discretionary rules and regulations pertaining to wireless facilities.[14] This is consistent with Section 6409(a)(3) specifying that environmental and historical regulations will not be impacted at all by other subsections of Section 6409(a).[15]

A. The Commission Should Disregard Unsupported Scare Tactics Regarding Public Safety of Small Cells in the Public Rights-of-Way.

Multiple comments employ unsupported scare tactics to suggest that reducing barriers to

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

[14] *See* Comments of AT&T, WC Docket No. 11-59, 26 (filed Feb. 3, 2014) ("AT&T Comments") (local jurisdictions may ensure compliance with nondiscretionary building and safety codes.).

[15] 47 C.F.R. § 1455(a)(3) (stating, "APPLICABILITY OF ENVIRONMENTAL LAWS Nothing in paragraph (1) shall be construed to relieve the Commission from the requirements of the National Historic Preservation Act or the National Environmental Policy Act of 1969.").

small cell[16] deployment will compromise public safety. For example, Alexandria et al ask, "Will the work be performed properly?"[17] The answer is resoundingly "yes." Local governments will still retain the ability to "ensure that any work performed will be consistent with safe and sound engineering practices including, for example, whether the applicant has a plan for properly guarding against harms to utilities, or (where work is in the right-of-way) addressing traffic diversion."[18] Fibertech agrees.

Unfortunately, the "safety" issue that many local communities are concerned about — but are unwilling to admit — is radio frequency. For example, Alexandria's comments refer to a news story from Lafayette, California as evidence of a DAS system creating "a significant hazard for children."[19] This news report, however, mentions "health effects," "radio frequency," and "microwave" radiation eight times; while only once referencing a single unsupported claim about children "hitting their heads" on what appears to be a base station.[20] The same news story also reports that Lafayette and two other nearby communities adopted moratoria; that Albany, California completely bans antenna replacement; and then asks whether there should be "antenna

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

[17] Alexandria Comments at 9.

[18] *Id*.

[19] *Id*., at 17 citing KTVU, "SPECIAL REPORT: New cell towers, improved reception comes with a price" available at http://www.ktvu.com/videos/news/special-report-new-cell-towers-improved-reception/vF3Mq/ (last visited Feb. 23, 2014).

[20] *Id*.

free neighborhoods."[21]

The sad reality regarding communities like Lafayette is their failure to comprehend that public safety *is* compromised when citizens lack wireless coverage. Parents want to stay in contact with their children, even if it means having infrastructure in front of a school.[22]

The Commission should not base its decisions in this rulemaking on unique but nonetheless calamitous events involving utility poles or small cell equipment. These incidents are isolated and provide no data from which the Commission can or should draw conclusions regarding the appropriate role for local government in siting small cell wireless infrastructure. Wireless facilities, including those deployed in the public right of way must still comply with the same public safety standards applicable to other types of telecommunications facilities placed in the right-of-way. The Commission's proposed rules streamlining the approval process for small cell networks will not change this fact.

B. Infrastructure in the Public Right-of-Way is Already Heavily Regulated and Should be Treated Equally

Fibertech's initial comments explained that infrastructure deployed in the right-of-way is already subject to safety codes and reviews such as the National Electric Safety Code ("NESC")

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[21] *Id*.

[22] A number of the comments make wildly inaccurate claims regarding the role of DAS in the Malibu Canyon Fire in 2007. *See* Alexandria et al, at. 18-19. But the California Public Utilities Commission ("CPUC") investigation contradicts these claims. *See Investigation on the Commission's Own Motion into the Operations and Practices of Southern California Edison Company, Cellco Partnership LLP d/b/a/ Verizon Wireless, Sprint Communications Company LP, NextG Networks of California, Inc. and Pacific Bell Telephone Company d/b/a/ AT&T California and AT&T Mobility LLC, Regarding the Utility Facilities and the Canyon Fire in Malibu of October 2007*, Proposed Decision I. 09-01-018 (Sept. 19, 2013), available at: http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M077/K059/77059441.PDF (last visited Feb 23, 2014). The CPUC concluded that the poles were overloaded because of fiber cable attachments. *Id*. at 9. The CPUC found that NextG did not have antennas attached to any of the

that is enforced by electric utilities.[23] Contrary to the claims of some local governments, nothing in the Commission's proposed rules under Section 6409(a) will alter the existing governance of wireless network infrastructure on utility poles.

As mentioned above, local control regarding public safety—traffic control permits, electrical inspections, and even building permits (if required)—will not be impacted by Section 6409(a) to the extent they involve nondiscretionary permits equally applied to all utilities in the public rights-of-way.[24] In addition to local control, which implements the National Electric Code ("NEC") through the electrical inspections required before any power connection, there is also the NESC, which governs all utility infrastructure in the public rights-of-way, including wireless infrastructure.

Each state, except California, has adopted regulations based on the NESC.[25] The NESC sets a safety standard for wireless infrastructure in the public rights-of-way, but pole owners regularly have their own specific standards of construction with which all wireless attachments must comply. Alexandria's scenario with an existing utility pole surrounded by other utility poles is far-fetched. Such a deployment is unlikely to occur because the pole owner would not permit such construction that plainly violates the NESC because it would interfere with other pole attachments.[26] Alexandria implies that all utility poles are dangerous by "presenting fall-zone

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poles, *id*. at 14-15, and allocated primary responsibility to the electric utility while also imposing lesser sanctions on four different telecommunications carriers that had pole attachments. *Id*. at 9.

[23] Comments of Fibertech Networks, LLC WC Docket No. 11-59, 28 (filed Feb. 3, 2014) ("Fibertech Comments").

[24] See Comments of Sprint, WC Docket No. 11-59, 11 (filed Feb. 3, 2014) ("Sprint Comments").

[25] The CPUC adopted General Order 95, which is substantively similar to the NESC.

[26] Alexandria Comments at Ex. C, p. 13. (attaching to all four quadrants of a pole interferes with NESC Rules 236 and 237 regarding climbing and working space respectively).

safety hazards" when they are tall.[27] However, utility poles are designed and constructed safely for all different heights and purposes.

The Commission must not be swayed by such misinformation and should rely on its own expertise regarding the well-established rules governing utility infrastructure in the public right-of-way.[28] Wireless facilities on utility poles in the public rights-of-way will remain subject to the same rules as other facilities placed on utility poles in the right-of-way. For this reason, small cell deployments *are* easier—not more complicated—and need less local governance because they are already so heavily regulated. Fairfax County states that it needs to apply a zoning process based on nearby homeowners; but undermines its claim because the County lacks the same process for other utility infrastructure.[29] The fact is that wireless technology, including small cells, is targeted for particularly burdensome process, not based on safety, but on irrational and unjustified, "not in my back yard" fears. There is thus no public safety concern that should prevent the Commission, in fashioning its rules to promote small cell wireless deployment, from ensuring that wireless and wireline facilities in existing utility corridors receive similar treatment.

III. The Commission Should Clarify the Meaning of Undefined Terms in Section 6409(a)

Numerous comments support the Commission's proposal to clarify a number of the key

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[27] *Id*. at 16.

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

[29] Fairfax Comments at 27.

terms in Section 6409(a).[30] There are, however, local governments that continue to urge the Commission to refrain from defining the statutory terms, claiming that "one-size" does not fit all.[31] Fibertech agrees with those comments urging the Commission to reject this suggestion because only the Commission can provide the necessary clarity and predictability[32] The Commission should reject the local government's recommendation that the Commission do nothing. Congress plainly states that the statute clearly grants the Commission the authority to construe the ambiguous terms of Section 6409(a).[33] Further, because wireless networks are by their nature interstate networks and carriers build networks on a regional or nationwide basis it is counterproductive to structure the implementing rules to allow for wide disparity in how local government treat small cell deployment.[34] As Verizon observes, the Commission should interpret the ambiguous terms of Section 6409(a) so that those terms are applied consistently across the United States and to avoid protracted litigation.[35] This helps ensure that Section 6409(a) is given

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[30] Verizon Comments at 27.

[31] 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, WC Docket No. 11-59, 7 (filed Feb. 3, 2014) ("NATOA Comments"); Fairfax Comments at 4; Alexandria Comments at 34.

[32] *Id.*

[33] 47 U.S.C. § 1403(a) ("—The Commission shall implement and enforce this title as if this title is a part of the Communications Act of 1934 …. A violation of this title, or a regulation promulgated under this title, shall be considered to be a violation of the Communications Act of 1934….").

[34] Fibertech agrees that Section 6409(a) will not waive state and local government authority over their property. The Commission, however, must make it clear that the public right-of-way is not "proprietary property," but rather an already heavily regulated, existing utility corridor. *See* NATOA Comments, at 10, n.19 (implying that the public rights-of-way should be used for revenue generation).

[35] Verizon Comments at 27.

the full effect intended by Congress."[36] Uniformity in the application of Section 6409(a) encourages speedier deployment of more advanced infrastructure and should remain the Commission's policy goal.[37]

Commission action here is also justified under Section 706 of the Telecommunications Act of 1996.[38] As Towerstream observes, since the Commission has determined that broadband is not available to all Americans on a reasonable and timely basis, the Commission has the obligation under Section 706(b) to take actions to speed the deployment of broadband.[39] There can be no dispute that Section 706 "affirmative[ly] grant[s]" the Commission expansive authority to speed broadband deployment.[40] This authority should inform the Commission's analysis of the terms of Section 6409(a) and guide its decision to adopt broad national rules rather than rely on local government "best practices."

A. Existing Wireless Tower or Base Station

Fibertech agrees with NATOA that the word "existing" means "[i]t must *exist*!"[41] The meanings of "wireless tower" and "base station," however, need firm definition from the Commission because they are not clear under Section 6409(a).

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[36] *Id*.

[37] Comments of Towerstream, WC Docket No. 11-59, 10 (filed Feb. 3, 2014) ("Towerstream Comments").

[38] § 706, Pub. L. 104-104, Title VII, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157 (Feb. 8, 1996). Section 706 is not part of the Communications Act and is codified in Chapter 12 of Title 47, at 47 U.S.C. § 1302.

[39] Towerstream Comments at 9.

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

[41] NATOA Comments at 12.

While the term "Wireless tower" is defined in the Collocation Agreement, that definition applies in a specific context and does not now control the Commission's interpretation of the term under Section 6409(a). Fairfax County states, without support, "[a] 'wireless tower' is not a utility pole." Utility poles, however, frequently support wireless antennas.[42] In some cases, utility poles are deployed for the sole purpose of supporting a wireless antenna.[43] Alexandria, for example, includes a photograph of a pole that the utility replaced in order to allow third parties to attach wireless antennas at the appropriate height.[44]

Common sense dictates that the term "wireless tower" under Section 6409(a) includes utility poles.[45] Section 6409(a) encourages collocation wireless networks using existing infrastructure. Moreover, the impact of collocating a small cell antenna on an existing utility pole is significantly less than collocating on a wireless monopole because the size of a small cell allows it to blend in with the surrounding existing cables and equipment, which are often much larger. Thus, it simply makes sense that under the statute, a "utility pole" qualifies as a "wireless tower."

Regarding the definition of "base station," Fibertech strongly supports the Commission's proposed definition because it properly captures that, once installed, transmission equipment is part and parcel of a "base station" with all of its other necessary components. Fairfax County's contention that "base station" is only a "discrete set of components that directly support the

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[42] *See* Verizon Comments at 28.

[43] Numerous utility and streetlight pole owners across the nation require pole replacement in order to support pole top antennas.

[44] Alexandria Comments at Ex C, p. 13.

[45] *See* AT&T Comments at 22 (limiting term to structures built specifically for wireless equipment is inconsistent with the language of the statute and congressional intent and would arbitrarily exclude small cell equipment.).

telecommunications of a wireless tower—at its 'base'" confuses base transceiver cabinets with the broader industry meaning of a "base station" in a wireless network.[46] Base stations are most definitely small cell installations because these are the exact points of presence where the "land" communicates with the "mobile" surroundings and vice versa. Fibertech agrees with AT&T that the term base station here includes support structures.[47]

B. "Collocation"

Collocation is another term where the Commission needs to fill in the gaps left by the statute. First, the Commission is free to adopt different definitions of "collocation" under Section 6409(a) and Section 332(c)(7), because these are two entirely different statutes in different sections of the United States Code and serve entirely different purposes.[48] It may make sense, however, to be consistent with the most common usage, adopted generally from the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, 47 C.F.R. Part 1, App. B.

Fairfax County argues that collocation" "in ordinary parlance, means the installation of additional antennas on an existing wireless facility with one or more existing antennas, with no substantial change in the existing facility's physical dimensions."[49] That contention, however, conflicts with zoning codes around the country that use the term "collocation" to encourage attachment to existing structures—buildings, water towers, utility poles, streetlights, etc. —

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[46] Fairfax Comments at 8.

[47] AT&T Comments at 23.

[48] *See American Council on Educ. v. F.C.C.*, 451 F.3d 226, 231 (D.C. Cir. 2006) (FCC could apply different meaning to same term used in different statutes). *See also* 47 USC § 6409(a)(1) (stating, "Notwithstanding section 704 of the Telecommunications Act of 1996…").

[49] Fairfax Comments at 23; 47 C.F.R. Part 1, App. B, p. 2 (definition of collocation).

consistent with the broader definition under the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas ("Collocation Agreement").[50]

Fairfax County provides an example that illustrates how a broader definition of collocation will speed broadband deployment.[51] That case involved a proposed collocation of an antenna array atop an existing electric transmission tower in the public right-of-way that would have resulted in a pole height increase from 100 to 110 feet.[52] Fairfax County had previously permitted Verizon and AT&T to collocate on the transmission tower and approved an expansion of the pole from 90 to 100 feet.[53] Fairfax County nevertheless rejected T-Mobile's application—despite the Planning Commission's finding that the "facility satisfied the criteria of location, character, and extent"—because of community allegations regarding the effect the collocation "would have on the residents' use and enjoyment of their properties."[54] It is exactly this type of "not in my backyard" approach to critical wireless infrastructure deployment that Congress enacted Section 6409(a) to prevent. Under Section 6409(a) this type of application would plainly be handled differently, consistent with Congress' intent to supersede discretionary review of placement of wireless infrastructure on facilities that have already been subject to local land use processes.

C. "Substantial Change in Physical Dimensions"

Consistent with their overall preference for no Commission action here, local

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[50] *See* AT&T Comments at 24 (urging use of collocation definition in Collocation Agreement).

[51] Fairfax Comments at 6 (citing *T-Mobile Northeast*, 672 F.3d at 269).

[52] *T-Mobile Northeast*, 672 F.3d at 263.

[53] *Id*.

[54] *Id*. at 264.

governments urge the Commission to construe the term "Substantial Change in Physical Dimensions" to afford them broad discretion to decide when a change is "substantial."[55] These comments ignore the fact that these discretionary local government standards created the need for Congress to adopt Section 6409(a).[56]

Fibertech agrees with NATOA that a numeric standard should "consider underlying engineering and other technical standards."[57] This is consistent with Fibertech's suggestion that a determination of whether a proposed increase is "substantial" be based on the technical and engineering requirements of a wireless facility.[58] A numeric standard should capture the most likely technical and engineering situations regarding collocation of small cell equipment on existing infrastructure.[59] Unfortunately, others urge the Commission to adopt an unreasonable approach.

Alexandria, for instance, encourages the Commission to construe "'substantially change' [as] a relative term that will vary with circumstances."[60] This is plainly an invitation to unfettered municipal discretion that will not foster deployment of the additional broadband infrastructure that the nation's economy requires. Fibertech disagrees with Alexandria's comments and submits that the term "substantial change" does "lend itself to a mechanical, numerical formula" the numerical formula in the *Collocation Agreement* for "substantial increase" has worked quite well

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[55] Alexandria Comments at 32 (arguing that "Substantial Change in Physical Dimensions" is "a relative term that will vary with circumstances.")

[56] *See* Towerstream Comments at 21 (discretionary reviews would be subject to abuse and disagreements undermining purpose of Section 6409(a)).

[57] NATOA Comments at 10.

[58] Fibertech Comments at 25.

[59] *Id*. at 26.

[60] Alexandria Comments at 32.

for many years.[61] If the Commission adopted regulations where "substantial" meant "'important' or 'essential,'" as Alexandria recommends, it would undermine Congress' intent to provide predictability for critical wireless improvements.[62]

Fairfax County states the term should be construed to cover "'undue impact' and incompatibility," which would mean whatever a State or local government wants it to mean.[63] Fairfax County mentions some statistics regarding its acceptance of wireless infrastructure.[64] Yet, it also cites two federal circuit court of appeals cases where it has aggressively fought against wireless infrastructure that would have made significant improvements to wireless service.[65] It claims that its denials are justified to thwart the deployment of telecommunications facilities that are "wholly incongruous with a community."[66]

Again, in *T-Mobile*, it would have been an additional antenna area on top of existing antenna arrays on an electrical transmission tower in the public right-of-way that would have extended it from 100 to 110 feet—fitting firmly within what is acceptable under the National Collocation Agreement regarding "substantial increase in size."[67] This is exactly the type of problem Congress meant to solve—allowing wireless infrastructure in locations with existing wireless and electric infrastructure in a previously disturbed public right-of-way.

Fibertech is encouraged that Fairfax County provides fair and accurate examples of what

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[61] *Id*.

[62] *Id*.

[63] Fairfax Comments at 3.

[64] *Id*. at 6. And even where it does refer to statistics it admits it conveniently selected a five-year window that excludes additional denials. *Id*. n.4.

[65] *Id*. at 6.

[66] *Id*.

[67] *T-Mobile Northeast*, 672 F.3d at 263.

a "substantial change in physical dimensions" could look like. Its example of an additional array on a monopine reflected industry reality and blends so well with the existing monopine that it is difficult to see the difference between the two photographs without closer inspection, despite Fairfax County's contention otherwise.[68] The potential extension of a base station also reflects industry reality and, as the photo shows, would result in a large, but no less incongruent brick wall.[69] It has the additional benefit of screening an existing parking lot, again, despite Fairfax County's perspective that this is an "unacceptable result."[70]

Other examples in the comments are practically farcical and appear motivated more by scare tactics than advancing a dialogue between local governments and telecommunications carriers.[71] The supposed small cell expansion is an absurd "flying buttress" construction, the likes of which has not been seen since the middle ages.[72] Thanks to modern construction practices and the NESC, wooden poles will never need to look like that.

Mt. Vernon claims that "local governments are best suited to determine what constitutes a substantial change in a site."[73] It is no surprise then that Mt. Vernon has been notoriously hostile towards wireless infrastructure and has lost federal court litigation relating to its failure to comply with existing law.[74] While Mt. Vernon has an existing DAS network, its comments indicate that with the unfettered discretion it seeks, Mt. Vernon intends to bar expansion of the

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[68] Fairfax Comments at 11.

[69] *Id*. at 12.

[70] *Id*.

[71] *See* Alexandria Comments at Ex. C, pp. 13-17.

[72] *Id*. at 13.

[73] Mt. Vernon Comments at 1.

[74] *MetroPCS New York, LLC v. The City of Mount Vernon*, 739 F. Supp. 2d 409 (S.D.N.Y. 2010).

DAS network.[75]

These comments highlight exactly why the Commission must set objective standards for "substantial change in physical dimensions" so that providers can deploy small cell network equipment without having to meet impossible discretionary standards such as showing no "undue impact," "incompatibility," or "wholly incongruous" effect.[76] The Commission should set objective nationwide standards because that is the purpose of regulations—providing predictability and clarity so that telecommunications carriers will be able to accommodate all customers –regardless of where they live — with the broadband network coverage they need.

D. "May Not Deny and Shall Approve"

Local governments also want to undermine Section 6409(a) by weakening the meaning of "may not deny and shall approve" so that eligible facilities requests may be effectively denied.[77] The Commission should decline to adopt the proposals that would effectively gut Section 6409(a).

The primary way local governments want to circumvent Section 6409(a) is by gaining the ability to deny collocation applications involving a nonconforming use. Fairfax County states that even when an otherwise eligible request to a lawful nonconforming use "does not substantially change the physical dimension of a tower or base station [it] must nonetheless be

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[75] Mt. Vernon Comments at 2 (stating that all the existing equipment is being used by a DAS customer). DAS networks are typically constructed so that all the initial equipment is used by one customer, however, under section 6409(a), a telecommunications carrier should be able to collocate additional equipment at those locations in order to accommodate another customer.

[76] *See e.g.*, Towerstream Comments at 5 (standards should take into consideration the evolving technology).

[77] Alexandria Comments at 41.

denied."[78]

This is an invitation to abuse. First, local governments could immediately change existing code so that all wireless facilities would be considered nonconforming uses—thus completely undermining Section 6409(a) in its entirety. Second, even if local government did not turn everything into a nonconforming use, allowing them to deny changes to all the nonconforming uses that exist today could trap countless numbers of wireless facilities in a 3G world despite technology advancing into 4G and beyond. It was exactly these types of old and outdated installations that Congress intended to "unfreeze" by mandating that States and local governments allow replacements and collocations of critical infrastructure.

Alexandria and Fairfax County also seek to weaken the mandate to "approve" eligible requests through conditions.[79] Allowing local governments to impose conditions will promote imposition of unreasonable and impossible conditions to circumvent the statute. Vague phrases such as "maintain the integrity of the original approval" are open-ended and do nothing to limit the discretion of local governments consistent with Congressional intent.[80] If a local government wants the condition to involve public safety, as Fairfax County implies, then that is acceptable.[81] The more common experience, however, is for local government to use discretionary phrases like "architecturally integrated into the structure" to effectively freeze any changes to existing deployments.[82]

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[78] Fairfax Comments at 14.

[79] Alexandria Comments at 41; Fairfax Comments at 14.

[80] Fairfax Comments at 14.

[81] *Id*. at 14.

[82] City of San Jose, Land Use Policy For Wireless Communication Facilities, Policy Number 6-20, 3 (Sept. 16, 2003).

Fibertech agrees that a State or local government may request an application, but that process should be administrative only and approved in a reasonable time period, otherwise it should be "deemed granted," which is a viable remedy under Section 6409(a). Only Commission rules to that effect will fulfill Congress's intent.

IV. A Deemed Grant Under Section 6409(a) is Constitutional

Despite the clear holding in *City of Arlington*,[83] local governments continue to argue that the Commission lacks the authority to preempt local zoning review of wireless infrastructure deployment.[84] Having failed to prevail at the Supreme Court, the local governments now challenge the Commission's authority to adopt a deemed grant remedy under Section 6409(a), claiming such a remedy would violate the 10th Amendment.[85] Fibertech fully addressed this specious claim of faux federalism in its initial comments.[86] Nothing in Section 6409(a) requires a local government to adopt a program or process it does not already have in place. As Crown Castle observes, the right to collocate only applies where the existing structure or tower has already "passed a jurisdiction's health, safety and welfare review."[87] If the local government exercises its local zoning authority to require parties deploying wireless telecommunications infrastructure to submit to local review, both the Communications Act (Section 332(c)(7)) and Section 6409(a) are clear that such local reviews must submit to a higher authority – the lawful exercise of federal power under the commerce clause over interstate commerce. There is no

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[83] *City of Arlington, Texas v. FCC*, 133 S.Ct. 1863 (2013).

[84] Fairfax Comments at 18-23.

[85] *Id.* at 18-19.

[86] Fibertech Comments at 7-8.

[87] Comments of Crown Castle, WC Docket No. 11-59, 13 (filed Feb. 3, 2014) ("Crown Castle Comments").

debate that the Supremacy Clause of the Constitution means federal law supersedes local law.[88] There is no debate that Congress in Section 332(c)(7) and Section 6409(a) exercised its power over interstate telecommunications.[89] And there is no debate that the FCC may adopt rules pursuant to these statutes that have the effect of displacing conflicting local regulation.[90]

The Supreme Court's jurisprudence is clear that the Tenth Amendment only applies where the federal government compels state or local governments to administer a federal program.[91] But local review of wireless siting applications is not a "federal program." A local government process requires providers submit to local review — it is a local program, although plainly constrained by standards established by Congress pursuant to the commerce clause and the Supremacy Clause. There is no Tenth Amendment barrier to a deemed grant requirement under Section 6409(a).

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

Fibertech agrees with the Commission that Section 332(c)(7), including the "shot clock" adopted in the *2009 Declaratory Ruling*, already applies to small cell networks because there is no "distinction among personal wireless service facilities based on technology."[92] Because some local governments, however, contend that the *2009 Declaratory Ruling* does not or should not

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[88] U.S. Const. Art. VI, Cl. 2.

[89] *See City of Arlington*, 133 S.Ct at 1866 *citing Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115, (2005) ("Congress 'impose[d] specific limitations on the traditional authority of state and local governments to regulate the location, construction and modification of [wireless network] facilities.'").

[90] *Id*.

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

[92] *NPRM*, ¶ 158.

apply to small cell installations,[93] Fibertech requests the Commission formally clarify that section 332(c)(7) and the Commission's "Shot Clock Order" are "technology neutral, applying to any technology used for the provision of personal wireless service."[94]

The stance that small cells should not be covered by the *2009 Declaratory Ruling* because they "require particularized review" is unfounded.[95] Fairfax County inaccurately states that DAS nodes "typically involve a substantial height increase to a number of existing utility poles."[96] This is inaccurate and ignores the thousands of small cell base stations that are attached to poles below the power space. The county's concerns regarding small cells revolve around the same sort of "NIMBY" issues that tend to infect Fairfax County decisions regarding wireless facility installations.[97] Fibertech is concerned that Fairfax County applies a zoning process to these wireless pole attachments, even though the wireline facilities on existing utility poles were not subject to a similar zoning process.[98] The Commission should not allow local government to compound this type of disparate and burdensome processes by arbitrarily excluding small cells from the protections of the *2009 Declaratory Ruling*.

Similarly, the Commission must clarify that when small cells are attached to existing structures, they are "collocations" under the *2009 Declaratory Ruling*.[99] This interpretation is

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[93] Alexandria Comments at 60 (arguing that the 90 and 150 day shot clocks do not 'accurately reflect a reasonable time to process DAS applications") and Fairfax Comments at 27 (stating that "abbreviated timelines" for small cells is "misguided").

[94] Sprint Comments at 12.

[95] Fairfax Comments at 27.

[96] *Id*.

[97] *Id*. at 6 (citing two "macrosite" cases that went to litigation because of community opposition).

[98] *Id*. at 28.

[99] NPRM, ¶ 153.

consistent with the definition of collocation adopted in the Collocation Agreement.[100] Because these installations are in existing aerial utility corridors on existing infrastructure (utility poles), 90 days is an adequate amount of time—particularly considering similar and even more intrusive equipment installations typically have no local government process at all because they are not "wireless." This aptly illustrates why the Commission needs to protect wireless infrastructure deployment carriers in the public right-of-way so wireless broadband may compete on a level playing field with wired broadband services.

VI. Conclusion

Congress enacted Section 6409(a) in order to provide necessary balance for telecommunications carriers—who are told by local governments that they embrace wireless infrastructure and collocations, but then are blocked every step of the way necessitating litigation.[101] Additionally, the Commission should clarify the *2009 Declaratory Ruling* so that local governments cannot further burden small cells in the public rights-of-way. For these reasons, Fibertech respectfully requests the Commission affirm the importance of wireless infrastructure and enact rules that will allow telecommunications carriers to have predictable standards when making critical upgrades and improvements to wireless networks.

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[100] 47 C.F.R. Part 1, App. B, Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, p. 2.

[101] Fairfax County, the City of Mt. Vernon, and a number of cities joining the Alexandria Comment Coalition have either been sued or threatened to be sued regarding denials of wireless infrastructure improvements. *See supra* n. 54 (Fairfax County)*;* n.74 (Mt. Vernon).

Respectfully submitted,

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