

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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
)	

To: The Commission

**COMMENTS OF PCIA – THE WIRELESS INFRASTRUCTURE ASSOCIATION
AND THE HETNET FORUM**

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EXECUTIVE SUMMARY

This proceeding affords the FCC the opportunity to take meaningful, impactful steps to speed broadband deployment and investment. Mobile broadband drives innovation, creates jobs, and improves the quality of our lives—but these benefits cannot be achieved without the deployment of robust wireless infrastructure. By removing barriers to the deployment of newer technologies like DAS and small cells, and refining its rules for collocations, the FCC can facilitate greater coverage and capacity of wireless broadband networks. Taking these and other steps to improve wireless facility siting policies will further accelerate broadband deployment for the benefit of all Americans.

First, the FCC should streamline its environmental review process for DAS and small cells. The FCC should amend its rules to categorically exclude DAS and small cell deployments from environmental and historic review. DAS and small cell installations have limited visual impacts, involve minimal ground disturbance, and generally occur in existing public rights-of-way where some ground disturbance is to be expected. Because the environmental and historic preservation effects of such construction will be nonexistent or *de minimis*, a categorical exclusion is warranted. Such a rule change will help streamline the deployment of infrastructure that is needed to provide the public with advanced wireless broadband services and provide new opportunities for commerce and connectivity in hard-to-target areas.

Alternatively, the FCC could ask the ACHP to invoke the “exempted category” provision of its rules, or determine that deployment of DAS and small cells meeting specified criteria is neither a “major federal action” nor a “federal undertaking.” At a minimum, the FCC should adopt several rule changes that will provide targeted relief. These include: updating its collocation categorical exclusion to include collocation on all structures; clarifying that the corridor categorical exclusion includes DAS and small cell components; and adopting new

exclusions for (i) certain DAS and small cell components located outside of existing corridors, (ii) collocations on utility poles and other non-tower structures over forty-five years old, (iii) collocations and new poles in utility or communications rights-of-way, and (iv) replacement utility poles or non-tower structures.

Second, the FCC should adopt rules implementing and enforcing Section 6409(a) of the Spectrum Act. As the expert agency charged with implementing the Communications Act, the FCC is uniquely positioned to interpret and define the terms of Section 6409(a). Failing to act here and provide needed certainty would allow Section 6409(a) to be interpreted case-by-case through the courts and local jurisdictions—a lengthy, arduous process that would inevitably lead to patchwork implementation and undermine the streamlining purpose of the legislation. Definitive regulation from the FCC can prevent the statutory language from being misconstrued by localities or courts, as has been the case with Section 332(c)(7).

Accordingly, it is essential that the FCC establish consistent rules and avoid uncertainty by defining key terms in Section 6409(a). Those terms include: “Wireless,” “Transmission Equipment,” “Wireless Tower or Base Station,” “Existing,” “Collocation,” “Removal,” “Replacement,” and “Substantially Change the Physical Dimensions.” The FCC should make clear that the statute’s “may not deny, and shall approve” mandate requires approval of all eligible facilities requests without exception and without discretionary review. The FCC should also set baseline limits on applications processes, time for review, and unreasonable fees to ensure this mandate is carried out. In particular, the FCC should require the approval of these requests within forty-five days, and adopt a deemed granted rule and other remedies for Section 6409(a) non-compliance. Lastly, the FCC should also make clear that that legal, non-conforming structures are available for modifications under Section 6409(a), and that fall zones and setbacks cannot be used to deny an otherwise qualified application.

These actions are fully within the FCC’s authority under Section 6003(a) of the Spectrum Act, which calls for Section 6409(a) to be implemented and enforced as part of the Communications Act.

Third, the FCC should take further steps to implement Section 332(c)(7). Specifically, the FCC should apply the test for substantial increase in size under the Shot Clock and Section 332(c)(7) in the same way it interprets the test under Section 6409(a); establish a specifically enumerated floor for when a new siting application is considered complete for the purpose of triggering the Shot Clock’s established time frame; make clear that DAS and small cell facilities should be subject to the same presumptively reasonable time frame; state that the presumptively reasonable period for state or local government action on an application under the Shot Clock should run regardless of any local moratoria; and recognize that municipal property siting preferences can effectively prohibit the provision of wireless services. The FCC should also revise its Shot Clock to adopt a deemed granted remedy that applies to all facilities—including new tower requests—in addition to those covered by Section 6409(a).

Finally, the FCC should make permanent its environmental notification waiver for temporary towers. Since the waiver was enacted, significant public interest benefits have accrued without significantly impacting the environment, migratory birds, or air safety. Comments have been uniformly positive, and the Commission should solidify the positive results of its waiver by creating a permanent exemption for temporary towers meeting its measured criteria. The FCC should also adopt its proposed guidelines for temporary towers. Temporary towers that meet these guidelines do not have the potential for significant environmental effects, but will benefit the public by addressing important short term coverage and capacity needs.

PCIA applauds the FCC’s initiation of this rulemaking as another important step in removing barriers to the deployment of critical broadband infrastructure. By acting now to

remove these barriers, consumers will continue to realize the benefits of better, more reliable, more advanced wireless services.

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**COMMENTS OF PCIA – THE WIRELESS INFRASTRUCTURE ASSOCIATION
AND THE HETNET FORUM**

PCIA—The Wireless Infrastructure Association and the HetNet Forum (“PCIA”)¹ hereby submit these comments on behalf of their members in response to the Commission’s Notice of

¹ PCIA is the national trade association representing the wireless infrastructure industry. PCIA’s members develop, own, manage, and operate towers, rooftop wireless sites, and other facilities for the provision of all types of wireless, telecommunications, and broadcasting services. PCIA and its members partner with communities across the nation to affect solutions for wireless infrastructure deployment that are responsive to the unique sensitivities and concerns of each community. The HetNet Forum, formerly The DAS Forum, is a membership section of PCIA dedicated to the advancement of heterogeneous wireless networks. “Heterogeneous networks” combine “macro,” or large, infrastructure such as monopoles with small cells and distributed antenna systems (“DAS”). By integrating the two types of infrastructure together, carriers are able to target geographic areas to increase network capacity.

Proposed Rulemaking (“NPRM”) considering adoption of measures to further accelerate broadband deployment by improving wireless facility siting policies.²

INTRODUCTION

As demand for broadband continues to explode, PCIA applauds the FCC’s initiation of a rulemaking to address infrastructure siting barriers that continue to impede broadband buildout. Through this proceeding, the FCC is positioned to encourage greater deployment of DAS and small cells—newer technologies that can address capacity and coverage needs and possess low profiles that make them desirable in historic areas. The FCC can also better define its rules for collocations, which can be used to expand coverage or increase capacity while reducing the need for new towers. By taking these and other steps, the FCC can further speed broadband deployment and investment for the benefit of all Americans.

The National Broadband Plan emphasized the need to remove obstacles to broadband buildout,³ recognizing that mobile broadband in particular is “driving innovation and playing an increasingly important role in our lives and our economy.”⁴ Likewise, President Obama has stressed the ability of wireless high-speed Internet access to “enhance America’s economic competitiveness, create jobs, and improve the quality of our lives.”⁵ And Chairman Tom

² *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Notice of Proposed Rulemaking, 28 FCC Rcd 14238 (2013), *summarized*, 78 Fed. Reg. 73144 (Dec. 5, 2013).

³ FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN, Chapter 6, 107-118 (2010) (“National Broadband Plan”), <http://download.broadband.gov/plan/national-broadband-plan.pdf> (visited Jan. 16, 2014)

⁴ *Id.* at 9-10.

⁵ The White House, *Presidential Memorandum: Unleashing the Wireless Broadband Revolution*, at 1 (Jun. 28, 2010) (“Presidential Memorandum”), <http://www.whitehouse.gov/the-press-office/presidential-memorandum-unleashing-wireless-broadband-revolution> (visited Jan. 16, 2014); *see also* The White House Office of the Press Secretary, Fact Sheet, *President Obama*

(continued on next page)

Wheeler has acknowledged that “wireless voice and data services are increasingly prevalent, empowering consumers to connect at the place and time of their choosing.”⁶

These benefits cannot be achieved without the deployment of robust wireless infrastructure. DAS and small cells play an increasingly important role, as network operators seek to target broadband capacity to the locations where customers use it most and to improve in-building coverage.⁷ For example, by 2015, AT&T alone plans to deploy over 40,000 small cells and over 1,000 DAS networks, in addition to 10,000 macrocells.⁸ In the NPRM, the Commission noted the important role of DAS and small cells, which “supplement the capacity of the ‘macrocell’ network, filling in gaps or providing additional capacity in a localized outdoor or indoor area where adding a traditional macrocell would be impractical or inefficient.”⁹

The deployment of these new technologies is occurring against the backdrop of more than fifteen years of efforts to streamline wireless broadband facility siting. Congress’s enactment of Section 332(c)(7) of the Telecommunications Act of 1996 was an important first step that provided direction to local zoning authorities about siting decisions and required

(footnote continued)

Details Plan to Win the Future through Expanded Wireless Access (Feb. 10, 2011) (setting goal of providing access to high-speed wireless services to at least 98 percent of Americans within five years), <http://www.whitehouse.gov/the-press-office/2011/02/10/president-obama-details-plan-win-future-through-expanded-wireless-access> (visited Jan. 16, 2014); President Barack Obama, *State of the Union Address* (Jan. 25, 2011), <http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address> (visited Jan. 16, 2014).

⁶ Chairman Tom Wheeler, FCC Blog, *The IP Transition: Starting Now* (Nov. 19, 2014), <http://www.fcc.gov/blog/ip-transition-starting-now> (visited Jan. 16, 2014).

⁷ HetNet Forum Seminar Presentation, *Small Cell Acceleration*, at 21 (Jul. 29, 2013), <http://www.thedasforum.org/wp-content/uploads/2013/07/HetNet-Forum-Small-Cell-Acceleration-Seminar-Presentations.pdf> (viewed Jan. 16, 2014).

⁸ *Id.* at 20.

⁹ NPRM ¶ 2, 28 FCC Rcd at 14240.

reasonable timelines for decisions.¹⁰ In 2000, the Commission entered into its landmark Collocation Agreement with historic preservation officials,¹¹ providing an exemption from the National Historic Preservation Act (“NHPA”) review process¹² for many antenna collocations. Four years later, the Commission entered into a National Programmatic Agreement (the “2004 NPA”) establishing review procedures for Commission undertakings subject to NHPA review.¹³ In 2009, the Commission interpreted provisions in Section 332(c)(7) to adopt the “Shot Clock,”¹⁴ establishing 90 days as a reasonable time for zoning decisions regarding collocations, and 150 days for other local siting decisions. And in 2011, the Commission adopted its *Pole Attachment Order* to help ensure timely and rationally priced access to poles, including the attachment of wireless antennas on pole tops.¹⁵

In 2012, Congress enacted the Spectrum Act,¹⁶ which provides in Section 6409(a) that “a State or local government may not deny, and shall approve,” certain “eligible facilities

¹⁰ 47 U.S.C. § 332(c)(7); Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (“1996 Act” or “Telecommunications Act”).

¹¹ Nationwide Programmatic Agreement for Collocation of Wireless Antennas, codified at 47 C.F.R. Part 1, Appendix B (“Collocation Agreement”).

¹² See 42 U.S.C. § 4321 *et seq.*; 16 U.S.C. § 470f.

¹³ Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, codified at 47 C.F.R. Part 1, Appendix C.

¹⁴ *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994 (2009) (“*Shot Clock Order*”), *recon. denied*, 25 FCC Rcd 11157 (2010), *aff’d sub nom. City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff’d*, 133 S. Ct. 1863 (2013).

¹⁵ *Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011), *aff’d sub nom. American Electric Power Service Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 118 (2013).

¹⁶ Middle Class Tax Relief and Job Creation Act of 2012, 112 Pub. L. 96, Title VI, 126 Stat. 156, 206 (2012) (“Spectrum Act”).

request[s]” for wireless siting.¹⁷ The Spectrum Act was designed to “advance wireless broadband service” by speeding deployment while making more spectrum available.¹⁸ More recently, in January 2013, the Wireless Telecommunications Bureau issued guidance on the meaning and application of Section 6409(a), and observed that the Commission has authority to implement and enforce that provision.¹⁹ Several months later, the Supreme Court confirmed the Commission’s authority to implement and enforce provisions of federal communications law in its *City of Arlington v. FCC* decision, which upheld the *Shot Clock Order*.²⁰

PCIA supports all the foregoing actions by Congress, the Commission, and the courts that assist with the wireless broadband facilities siting process. Nevertheless, barriers to infrastructure deployment remain. The NPRM and these comments propose numerous constructive refinements to the facilities siting process that, if adopted, will expedite the deployment of DAS and small cells and enable providers to collocate quickly. At the same time, states and localities should continue to facilitate the siting of new towers, which are also critical for broadband deployment. PCIA looks forward to working with localities to find ways to encourage new infrastructure construction in a manner consistent with the localities’ unique concerns and preferences.²¹

¹⁷ Spectrum Act, § 6409(a), 126 Stat. 232 (“Section 6409(a)”), *codified at* 47 U.S.C. § 1455(a).

¹⁸ See H.R. Rep. 112-399, at 136 (2012).

¹⁹ *Wireless Telecommunications Bureau Offers Guidance on Interpretation of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012*, Public Notice, 28 FCC Rcd 1 (WTB 2013) (“*Section 6409(a) Public Notice*”).

²⁰ *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013) (“*City of Arlington*”).

²¹ For example, localities should take steps to incent the placement of new facilities in preferred areas—such as industrial and commercial zones and on municipal or utility-owned property—by crafting policies to streamline new facility review and deployment in such areas. They should do so, however, without establishing restrictive preferences for the deployment on government-owned property, which can be a significant barrier to broadband deployment.

DISCUSSION

I. THE FCC SHOULD STREAMLINE ITS ENVIRONMENTAL REVIEW PROCESS FOR DAS AND SMALL CELLS TO SPEED DEPLOYMENT.

The FCC should adopt one overarching rule change that would create a specific categorical exclusion from both National Environmental Protection Act (“NEPA”) and NHPA review for DAS and small cells,²² given their at most minimal impact on the environment. This simple and comprehensive solution is preferable to making a series of piecemeal changes to the rules. Such a rule change will speed deployment, facilitate greater coverage and capacity of wireless broadband networks, and provide new opportunities for commerce and connectivity in hard-to-target areas.²³

Alternatively, the FCC could ask the Advisory Council for Historic Preservation (“ACHP”) to invoke the “exempted category” provision of its rules, or determine that deployment of DAS and small cells meeting specified criteria is neither a “major federal action” under NEPA nor a “federal undertaking” under the NHPA. At a minimum, however, the Commission should adopt several rule changes that will provide targeted and limited relief from NEPA and NHPA review.

A. DAS and Small Cell Installations Should Be Categorically Excluded from NEPA and NHPA Review.

Categorical exclusions serve the public interest by eliminating regulatory barriers and speeding deployment while protecting the environment.²⁴ An appropriately defined exclusion ensures that only minimally impactful installations that do not have an adverse effect on the environment or on historic properties qualify for the categorical exclusion. DAS and small cell

²² NPRM ¶¶ 43-49, 58-60, 28 FCC Rcd at 14254-56, 14259-61.

²³ *Id.* ¶ 53, 28 FCC Rcd at 14257.

²⁴ *Id.* ¶¶ 43, 56, 28 FCC Rcd at 14254-55, 14259.

installations clearly qualify—they have limited visual impacts, involve minimal ground disturbance, and generally occur in existing public rights-of-way where some ground disturbance is to be expected. Because the environmental and historic preservation effects of such construction will be nonexistent or *de minimis*, a categorical exclusion is warranted.

1. Section 1.1306 Note 1 Should Be Revised to Categorically Exclude “Communications Facility Installations.”

The Commission should amend Note 1 to Section 1.1306 of its rules²⁵ to categorically exclude from non-RF-related environmental processing the DAS and small cell deployments that fall within the following definition of “Communications Facility Installations:”

Proposed categorical exclusion for communications facility installations:

Communications facility installations that are categorically excluded from National Environmental Protection Act (“NEPA”) and National Historic Preservation Act (“NHPA”) review are the types of minimally impactful communications infrastructure designed to provide service in a limited geographic area. In general, these installations can include relatively inconspicuous, small form-factor installations consisting of one or more radio transceivers, antennas, interconnecting cables, power supply, hubs, and other associated components. The communications facilities referred to are generally made up of one or more equipment enclosure(s), antenna(s), and associated components.

If a communications facility installation conforms to the parameters below, the installation is categorically excluded from NEPA and NHPA review:

- (1) Equipment Volume. An equipment enclosure shall be no larger than seventeen (17) cubic feet in volume.
- (2) Antenna Volume. Each antenna associated with the installation shall be in an antenna enclosure of no more than three (3) cubic feet in volume. Each antenna that has exposed elements shall fit within an imaginary enclosure of no more than three (3) cubic feet.

²⁵ 47 C.F.R. § 1.1306 note 1.

- (3) Infrastructure Volume. Associated electric meter, concealment, telecom demarcation box, ground-based enclosures, battery back-up power systems, grounding equipment, power transfer switches, and cut-off switches may be located outside the primary equipment enclosure(s) and are not included in the calculation of Equipment Volume.

Volume is a measure of the exterior displacement, not the interior volume of the enclosures. Any equipment that is concealed from public view in or behind an otherwise approved structure or concealment, is not included in the volume calculations.²⁶

While this definition generally tracks the definition PCIA proposed last year,²⁷ the proposed exclusion has been revised to refer to “communications” facility installations instead of “wireless” facility installations. Because the central element of DAS installations is typically fiber or cable transport connecting wireless antennas, or nodes, with a central communications hub site,²⁸ the broader term is appropriate and is consistent with the goal of a flexible, technology-neutral definition. The proposed categorical exclusion should apply to all

²⁶ This definition is intended to limit equipment and antenna volumes solely for purposes of determining the communications facilities that should be excluded from environmental processing under the FCC’s rules. Some communications facilities, including certain DAS and small cell facilities, may exceed these volume limitations, and the definition is not meant to limit what can be installed on a pole or to otherwise define what constitutes a DAS network or a small cell.

²⁷ See NPRM at ¶ 49 & n.99, 28 FCC Rcd at 14256 (citing Letter from D. Zachary Champ, PCIA–The Wireless Infrastructure Association and The HetNet Forum, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 11-59, GN Docket No. 12-354 (filed July 22, 2013) (“PCIA July 22, 2013 *Ex Parte*”).

²⁸ DAS networks are typically comprised of a high capacity signal transport medium (typically fiber optic cable) that connects a series of small ancillary antennas, or nodes, to a central communications hub site. While DAS networks provide service to and incorporate wireless facilities at the nodes, DAS providers are typically carriers’ carriers and do not themselves provide mobile service. See generally NextG Networks of California, Inc., Petition For Declaratory Ruling that Its Service Is Not Commercial Mobile Radio Service, WT Docket No. 12-37 (filed Dec. 21, 2011), *dismissed sub nom. Petition for Declaratory Ruling Interpreting the Definition of Commercial Mobile Radio Services*, Order, 27 FCC Rcd 14016 (WTB 2012).

components necessary to deploy DAS and small cells meeting the definition above, including hubs, cables and wires, and new or replacement poles.²⁹

2. The FCC Has Ample Authority to Adopt the Proposed Categorical Exclusion.

The proposed categorical exclusion is consistent with the applicable regulations of the Council for Environmental Quality (“CEQ”) and ACHP. In the case of the relevant CEQ NEPA regulation, the Commission must make a determination that a category of actions “do[es] not individually or cumulatively have a significant effect on the human environment.”³⁰ The corresponding ACHP regulation is that the FCC must determine that the federal undertaking “does not have the potential to cause effects on historic properties.”³¹ The court of appeals in *Save Our Heritage, Inc. v. FAA*, held that an agency need not find that there will be absolutely no effects to warrant a categorical exclusion; it can categorically exclude undertakings that have only “*de minimis*” effects.³² As discussed below,³³ DAS/small cells fitting the definitions and

²⁹ NPRM ¶¶ 45, 62-63, 28 FCC Rcd at 14255, 14261-22. As the NPRM recognizes, the construction of DAS and small cells may include a variety of associated “components,” including “a central hub site and fiber or other cabling connecting the nodes to the hub” and “support structures, such as new poles, that are constructed to support communications nodes.” NPRM ¶¶ 44-45, 28 FCC Rcd at 14255. The recommended definition has been clarified to include these associated components.

³⁰ 40 C.F.R. § 1508.4.

³¹ 36 C.F.R. § 800.3(a)(1).

³² *Save Our Heritage, Inc. v. FAA*, 269 F.3d 49, 58, 62-63 (1st Cir. 2001). The NPRM asks whether, under the ACHP rules, there must be no potential effect, or no more than a *de minimis* effect to adopt a categorical exclusion with respect to historic preservation. NPRM ¶ 56, 28 FCC Rcd at 14259. *Save Our Heritage* clearly so holds. To bar a categorical exclusion in cases with only a *de minimis* effect would serve no useful purpose, as the court there held.

³³ See Section I.A.3.

criteria proposed will have no effect or, at most, an insignificant or *de minimis* effect, and thus the proposed categorical exclusion is appropriate under both CEQ and ACHP rules.³⁴

The revision of Note 1 to adopt a categorical exclusion does not require formal consultation with the ACHP, state historical preservation officers (“SHPOs”), Tribal Nations, Native Hawaiian Organizations, or others.³⁵ ACHP rules simply require that the FCC, before any review process takes place, determine “whether the undertaking at issue has the potential to cause effects on historic properties.”³⁶ If the FCC finds that the undertaking is of a type that does not have the potential to cause such effects, the FCC “has no further obligations under section 106 or this part.”³⁷

If the FCC determines that the deployment of DAS and small cells meeting the definition of Communications Facility Installations will have no effect or only a *de minimis* effect on historic properties, it may adopt a categorical exclusion from NHPA through the normal rulemaking process with “no further obligations.” The Commission has previously adopted

³⁴ Indeed, the Commission has consistently used its rulemaking authority to adopt or amend categorical exclusions from NEPA and NHPA. *See Implementation of the National Environmental Policy Act of 1969*, Report and Order, 49 FCC 2d 1313 (1974), *recon.*, 56 FCC 2d 635 (1975); *Environmental Rules*, Report and Order, 60 Rad. Reg. 2d (P&F) 13 (1985); *Amendment of the Commission’s Environmental Rules*, Order, 3 FCC Rcd 4986 (1988); *id.*, First Report and Order, 5 FCC Rcd 2942 (1990); *id.*, Second Report and Order, 6 FCC Rcd 1716 (1991); *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, Report and Order, 11 FCC Rcd 15123 (1996).

³⁵ NPRM ¶ 56, 28 FCC Rcd at 14259; *see Valley Cmty. Pres. Comm’n v. Mineta*, 373 F.3d 1078, 1090 (10th Cir. 2004). With regard to the establishment of categorical exclusions from NEPA, the Commission has begun the process of consulting with CEQ. *See* NPRM ¶ 13, 28 FCC Rcd at 14243 (citing 40 C.F.R. § 1507.3(a)).

³⁶ 36 C.F.R. § 800.3(a).

³⁷ *Id.* § 800.3(a)(1); *see also Valley Cmty. Pres. Comm’n*, 373 F.3d at 1090. While the ACHP rules do not use the term “categorical exclusion,” a determination that a class of undertakings do not have the potential to cause effects on historical properties, beyond a *de minimis* level, is the functional equivalent of a categorical exclusion for that class of undertakings. *See Save Our Heritage*, 269 F.3d at 62.

categorical exclusions through rulemaking with no indication that a formal consultative process was necessary.³⁸ To the extent coordination with historic preservation stakeholders may be necessary, this rulemaking provides notice to the public and allows all stakeholders, including historic preservation representatives and Indian tribes and Native Hawaiian organizations, the opportunity to comment. The FCC has already reached out to the Tribal Nations to invite their participation in the rulemaking and plans to coordinate with the ACHP and the National Council of State Historic Preservation Officers.³⁹

3. A Categorical Exclusion for DAS/Small Cell Deployments Will Advance the Public Interest.

The proposed categorical exclusion will streamline the deployment of infrastructure that is needed to provide the public with advanced wireless broadband services, and is warranted by the current treatment of similar facilities with comparable negligible impacts on the environment. For example, DAS and some small cells are similar to, and compete with, Wi-Fi and other unlicensed wireless technologies that do not require environmental review under NEPA or NHPA. It is not reasonable to subject DAS and small cell installations that have at most a *de minimis* impact to cumbersome environmental review when commercial Wi-Fi installations have no corresponding requirement.

A categorical NEPA exclusion in many ways is simply a clarification of existing law. In particular, the Commission already categorically excludes most collocations,⁴⁰ as well as the

³⁸ See, e.g., *Amendment of Environmental Rules*, Further Notice of Proposed Rulemaking, 5 FCC Rcd 2950 (1990); *Amendment of Environmental Rules*, Second Report and Order, 6 FCC Rcd 1716 (1991).

³⁹ See NPRM ¶ 13, 54, 28 FCC Rcd at 14243, 14258.

⁴⁰ See 47 C.F.R. § 1.1306 note 1; *Effects of Communications Towers on Migratory Birds*, Notice of Proposed Rulemaking, 21 FCC Rcd 13241, 13268 n.169 (2006).

installation of aerial or buried lines in corridors of prior or permitted use.⁴¹ The proposed exclusion is consistent with these exclusions, which were adopted well before DAS and small cell technologies came to the forefront.

Moreover, other federal agencies have issued categorical exclusions from NEPA that are much broader in scope and potential effect. For example, the Department of Commerce has issued categorical exclusions from NEPA for construction of broadband facilities pursuant to the Broadband Technologies Opportunity Program (“BTOP”) that are significantly larger than any DAS or small cell installation.⁴² Among the undertakings that are eligible for a BTOP categorical exclusion are:

- Construction of buried and aerial telecommunications lines, cables, and related facilities.
- Construction of microwave facilities involving no more than five acres of physical disturbance.
- Construction of cooperative or company headquarters, maintenance facilities, or other building involving no more than 10 acres of physical disturbance or fenced property.
- Changes to existing transmission lines that involve less than 20 percent pole replacement, or the complete rebuilding of existing distribution lines within the same right-of-way.
- Changes or additions to existing substations, switching stations, telecommunications switching or multiplexing centers, or external changes to buildings or small structures requiring one to five acres of new physically disturbed land or fenced property.
- Construction of substations, switching stations, or telecommunications switching or multiplexing centers requiring no more than five acres of new physically disturbed land or fenced property.

Given that the Department of Commerce has categorically excluded these larger-scale telecommunications projects (and others) from NEPA review, the Commission should likewise

⁴¹ See 47 C.F.R. § 1.1306 note 1.

⁴² See National Environmental Policy Act—Categorical Exclusions covering the Broadband Technology Opportunities Program (BTOP), RIN 0648-XA10, 74 Fed. Reg. 52456 (Oct. 13, 2009) (“BTOP Categorical Exclusions”).

categorically exclude the deployment of comparatively smaller DAS and small cell facilities, including any enclosures and associated equipment, meeting the definition of Communications Facility Installations.

The proposed NHPA categorical exclusion is justified because any effects from Communications Facility Installations will, at most, have a *de minimis* effect on historic properties. In many cases, these DAS and small cell installations will be comparable to Wi-Fi installations that do not require historic preservation review.

A DAS and small cell exclusion for Communications Facility Installations is also consistent with the intent of the Collocation Agreement and the 2004 NPA to exclude facilities with at most minimal effects. DAS and small cell solutions are a relatively new development and were not widely used when the signatories entered into the Collocation Agreement and the 2004 NPA. As a result, those agreements largely focused on macro site deployments, including towers. However, newer technologies can be attached to existing physical structures and installed along and within previously permitted corridors—factors that the Collocation Agreement and the 2004 NPA promote.⁴³ The Commission found as much when it recognized that “the likelihood of an incremental adverse impact on historic properties [from antennas on utility-type poles] is

⁴³ See Collocation Agreement, § V (excluding the collocation of antennas on certain existing non-tower structures outside of historic districts); 2004 NPA, § III(E) (excluding certain facilities located in or near specified rights-of-way or utility corridors); *see also* Amos J. Loveday, Ph.D., *DAS/Small Cells & Historic Preservation: An Analysis of the Impact of Historic Preservation Rules on Distributed Antenna Systems and Small Cell Deployment*, at 2-5 (Feb. 27, 2013) (“DAS/Small Cell Report”) (discussing why these exclusions are limited in their practical application for DAS and small cells), submitted as an Attachment to Letter from D. Zachary Champ, PCIA–The Wireless Infrastructure Association and The DAS Forum, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 11-59, GN Docket No. 12-354 (filed March 19, 2013) (“PCIA March 19, 2013 *Ex Parte*”).

minimal.”⁴⁴ As noted historian and former Preservation Specialist for the FCC and State Historic Preservation Officer for Ohio, Dr. Amos Loveday, concluded in a report on DAS and small cells, “[b]ecause DAS and small cell antennas are smaller and the mounting poles lower than those the Commission was referring to in these findings, it follows that DAS and small cell effects are even more *de minimis* and even more unlikely to affect historic sites.”⁴⁵

Moreover, the proposed categorical exclusion promotes historic preservation goals by encouraging the deployment of DAS and small cell installations, which may minimize the need for more obtrusive broadband facility deployments. The Collocation Agreement recognized this benefit, noting that collocations “reduce the need for the construction of new towers, thereby reducing potential effects on historic properties”⁴⁶ In addition, the FCC has found that “it promotes historic preservation to encourage construction of such minimally intrusive facilities rather than larger, potentially more damaging structures.”⁴⁷ As Commissioner Pai has explained, “the greater the deployment of wireless infrastructure like [DAS and small cells], the less

⁴⁴ *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, Report and Order, 20 FCC Rcd 1073, 1098 ¶ 63 (2004) (“2004 NPA Report and Order”).

⁴⁵ DAS/Small Cell Report at 7; *see also* Remarks of Commissioner Ajit Pai at CTIA’s MobileCon (Oct. 10, 2012) (stating that “[DAS] systems are hardly visible, and they have a minimal impact on the surrounding environment.”), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-316746A1.pdf; Statement of Commissioner Ajit Pai, Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies et al. (Sept. 26, 2013) (stating that “[f]ederal regulations that were written with two-hundred-foot tall towers in mind just don’t make sense when applied to recent innovations like small cells”), http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-13-122A4.pdf.

⁴⁶ Collocation Agreement at 2.

⁴⁷ *2004 NPA Report and Order*, 20 FCC Rcd at 1098 ¶ 63.

reliance carriers (and hence consumers) must place on larger, ‘macro’ cell sites and the less power networks and devices consume.”⁴⁸

B. Alternatively, the FCC Should Utilize the ACHP’s Exempted Category Procedure or Find that DAS and Small Cell Installations Are Not Federal Undertakings.

Instead of a categorical exclusion from NHPA, the FCC could ask the ACHP to invoke the “exempted category” provision of the ACHP’s rules.⁴⁹ This provision allows for exemptions from Section 106 of the NHPA when “[t]he potential effects of the undertakings within the program or category upon historic properties are foreseeable and likely to be minimal or not adverse.”⁵⁰ Examples of previously exempted categories include: (1) the Federal Highway Interstate Exemption, which, subject to some exceptions, relieves federal agencies from taking into account the effects of their undertakings on the Interstate Highway System;⁵¹ and (2) the Natural Gas Pipeline Exemption, which relieves federal agencies of the need to take into account the effects of their undertakings on gas pipelines that qualify as historic.⁵² Both of these exemptions involve large infrastructure projects not dissimilar to the National Broadband Plan. DAS and small cell installations that fall within the definition of Communications Facility

⁴⁸ Statement of Ajit Pai, Commissioner, FCC, Hearing Before the Subcommittee on Communications and Technology, “Oversight of the Federal Communications Commission,” (Dec. 12, 2013), <http://docs.house.gov/meetings/IF/IF16/20131212/101585/HHRG-113-IF16-Wstate-PaiA-20131212.pdf>.

⁴⁹ 36 C.F.R. § 800.14(c)(ii).

⁵⁰ 36 C.F.R. § 800.14(c). This discussion assumes, *arguendo*, that the deployment of DAS and small cells is a federal undertaking.

⁵¹ ACHP, *Exemption Regarding Historic Preservation Review Process for Effects to the Interstate Highway System*, 70 Fed. Reg. 11928 (Mar. 10, 2005).

⁵² ACHP, *Exemption Regarding Historic Preservation Review Process for Projects Involving Historic Natural Gas Pipelines*, 67 Fed. Reg. 16364 (Apr. 5, 2002).

Installations would clearly qualify for an Exempted Category given their foreseeable minimal effects, as described above.

While the ACHP Exempted Category procedure is a possible solution in the DAS and small cell space, as PCIA has explained in its March 19, 2013 *ex parte* letter, such a procedure is more time-consuming and complex than establishing a categorical exclusion. It entails a separate protocol prescribed by the ACHP rules, including the review and approval of the ACHP⁵³ and public notice and consultation⁵⁴—and a rulemaking would still be needed to incorporate the final exemption into the FCC’s rules.⁵⁵ By comparison, amending Note 1 to Section 1.1306 of the FCC’s rules to add a categorical exclusion would involve all interested parties, including the ACHP, but all of the comments would be consolidated into this proceeding—saving time and resources for all concerned and speeding broadband deployment through the use of DAS and small cell solutions.

Alternatively, the Commission could determine that deployment of DAS and small cells meeting the specified criteria for Communications Facility Installations is neither a “major federal action” under NEPA nor a “federal undertaking” under the NHPA, and, as a result, such deployments would not be subject to environmental or historic preservation review at all.⁵⁶ The federal government does not assist in the funding of DAS/small cells, nor does the government provide licensing or approval, or other assistance—the touchstones for finding actions to be a major federal action or a federal undertaking.⁵⁷ Accordingly, given the lack of federal

⁵³ 36 C.F.R. § 800.14(c)(5).

⁵⁴ 36 C.F.R. § 800.14(c)(2)-(4).

⁵⁵ See 5 U.S.C. § 553; *Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979).

⁵⁶ See NPRM ¶ 65, 28 FCC Rcd at 14262.

⁵⁷ See 40 C.F.R. § 1508.8; 16 U.S.C. § 470w(7).

involvement with DAS/small cell deployments, the Commission may conclude they are not “major federal action[s]” or “undertaking[s]” and thus fall outside the scope of NEPA and the NHPA.

C. At a Minimum, the Commission Should Adopt Specific Rule Modifications to Facilitate DAS and Small Cell Deployments.

At a minimum, the Commission should adopt several narrower rule changes that will provide more targeted and limited relief from NEPA and/or NHPA review.

1. The FCC Should Update the Note 1 NEPA Exclusion to Include Collocations on All Structures.

The Commission should implement Verizon’s proposal to update the 1.1306 Note 1 categorical exclusion to explicitly cover antenna collocations and associated equipment on “other structure[s],” in addition to those already expressly covered on “existing building[s] and antenna tower[s].”⁵⁸ This will make clear that the categorical exclusion from NEPA applies to the placement of antennas on structures such as utility poles, water tanks, light poles, road signs, and other similar structures. Placing antennas on such structures has little, if any, environmental impact, and certainly no greater impact than placement of antennas on buildings or towers. Accordingly, there is no basis for subjecting collocation on such structures to greater environmental review than collocations on buildings.⁵⁹

The Commission should refrain from clarifying or defining what constitutes associated equipment.⁶⁰ By analogy, such equipment is implicitly covered by the Collocation Agreement and is explicitly included in the definition of “antenna” in the 2004 NPA. Such associated equipment does not raise any particular environmental concerns that would warrant greater

⁵⁸ NPRM ¶¶ 37-39, 28 FCC Rcd at 14253-54.

⁵⁹ *Id.* ¶ 39, 28 FCC Rcd at 14253.

⁶⁰ *Id.* ¶ 40, 28 FCC Rcd at 14254.

environmental review than is warranted by the underlying antenna. Any such definition would be technology-dependent and would diminish flexibility of infrastructure deployers. As with the proposed definition of Communications Facility Installations, use of the term “equipment” by itself is sufficient, and provides the flexibility to employ unanticipated technology or devices in the future without a need for revising the rule.

The FCC should refrain from attempts to define certain additional terms in Note 1. No revision of the exclusion for collocation “on” buildings is necessary.⁶¹ An antenna mounted on the side of a building is clearly just as much “on” the building as an antenna on its roof. There is no basis for subjecting antenna installations on the sides of buildings to greater NEPA review than mounting antennas on the building’s roof. Similarly, no specific definition of “structure” is necessary.⁶² A structure is simply an object capable of supporting an antenna and associated equipment.

2. The Corridor Exclusion Should Include DAS and Small Cell Components.

The wire and cable corridor exclusion in Note 1 should be extended to cover DAS and small cell components in or along such corridors, regardless of whether they are located on new or existing structures.⁶³ Fiber optic and other cable will nearly always fall within the existing corridor exclusion, and the placement of other associated components, including both support structures and associated equipment, should be eligible for this exclusion as well.

⁶¹ *Id.* ¶ 41, 28 FCC Rcd at 14254.

⁶² *Id.* ¶ 39, 28 FCC Rcd at 14254.

⁶³ *Id.* ¶ 51, 28 FCC Rcd at 14257. The wire and cable corridor exclusion excludes from environmental review “the installation of aerial wire or cable over existing aerial corridors of prior or permitted use or the underground installation of wire or cable along existing underground corridors of prior or permitted use, established by the applicant or others.” 47 C.F.R. § 1.1306 Note 1.

Extending this exclusion to these components will have no cognizable environmental effect and a categorical exclusion is warranted.⁶⁴ These corridors already contain utility poles, wires and cables, and a plethora of associated equipment; and, where possible, DAS and small cell components will employ the existing poles. Moreover, electric utilities often use these corridors for placement of bulky equipment other than wire and cable that is associated with their provision of electric service, such as transformers, switches, equipment cabinets, and meters. Telephone and cable companies similarly place junction boxes, electronics, power supplies, and other devices in the same corridors. For the same reason, components of Communications Facility Installations should be readily locatable within established wire and cable corridors without the need for environmental or historic review pursuant to the existing corridor exclusion. There is no record evidence showing facility installations will have any significant environmental or historic effect when located in such corridors, either individually or cumulatively.

The “corridors” subject to this exclusion include not only the wire routes from pole to pole, but “existing corridors of prior or permitted use for both non-telecommunications and telecommunication purposes,” including “corridors used for other purposes, *e.g.*, highways, railroads, and utilities.”⁶⁵ Consistent with the fact that these corridors include existing ground-based disturbances, the Commission should make clear that the categorical exclusion also applies to components installed within the public right-of-way along the corridor that are not pole-mounted, such as ground-mounted fixtures, equipment cabinets, *etc.*

⁶⁴ 40 C.F.R. § 1508.4.

⁶⁵ *Amendment of Environmental Rules*, Second Report and Order, 6 FCC Rcd 1716, 1717 (1991).

3. Certain DAS and Small Cell Components Located Outside of Existing Corridors Should Also Be Excluded.

To the extent the Commission believes it has jurisdiction over building construction that may extend to hub sites,⁶⁶ it should categorically exclude from NEPA the construction of hub sites located outside of existing aerial or underground wire or cable corridors.⁶⁷ A hub site is, at most, a small building, generally only large enough for the placement of transceivers and associated equipment; it is minuscule in comparison with the communications structures that the Department of Commerce's BTOP program categorically excludes from NEPA—" [c]onstruction of cooperative or company headquarters, maintenance facilities, or other buildings involving no more than 10 acres."⁶⁸ Given the BTOP exclusion, an FCC exclusion that includes hub sites is well justified.

The FCC should also exclude the deployment of wire or cable that is not subject to the corridor exclusion.⁶⁹ This would cover power wire and fiber optic cable extending outside the area eligible for the corridor exception, permitting connections to hubs and nodes outside an established corridor. Such an exclusion is consistent with the Department of Commerce's categorical exclusion of all "[c]onstruction of buried and aerial telecommunications lines, cables, and related facilities" from NEPA for broadband buildout under its BTOP framework.⁷⁰

⁶⁶ The Commission generally lacks jurisdiction over the construction of buildings, including transmitter sheds, and by the same analysis lacks jurisdiction over the construction of hub facilities. See *Kitchen v. Bell Telephone Co. of Pennsylvania*, 31 F.C.C.2d 604, 607-08 (1971), *aff'd sub nom. Kitchen v. FCC*, 464 F.2d 801 (D.C. Cir. 1972); *Implementation of the National Environmental Policy Act*, Memorandum Opinion and Order, 56 FCC 2d 635, 639 (1975).

⁶⁷ NPRM ¶ 52, 28 FCC Rcd at 14257.

⁶⁸ BTOP Categorical Exclusions, § B.3, 74 Fed. Reg. at 52458.

⁶⁹ NPRM ¶ 52, 28 FCC Rcd at 14257.

⁷⁰ BTOP Categorical Exclusions, § B.1, 74 Fed. Reg. at 52458.

4. The FCC Should Adopt an NHPA Exclusion for Collocation on Utility Poles and Other Non-Tower Structures Over 45 Years Old.

The Commission should adopt an NHPA exclusion for utility poles and other non-tower structures, such as street lamps or water towers, that are over 45 years old and are not covered by the Collocation Agreement due to their age.⁷¹ While the adoption of a clear and comprehensive categorical exclusion for Communications Facility Installations is the preferred alternative, at a minimum the rules should be amended as broadly as possible to ensure that utility poles and other non-tower structures can be readily used for Communications Facility Installations without the need for extensive historical preservation review resulting merely from the age of the structure.

In implementing the 2004 NPA, the Commission noted that “the likelihood of an incremental adverse impact on historic properties [from antennas on utility-type poles] is minimal.”⁷² By using existing poles and non-tower structures—which already house utility components like lights, wires, and antennas—providers can reduce the visual impact to nearby historic districts. Indeed, DAS deployments on street poles, utility poles, or traffic poles “create minimal impact on the surround environment due to their low visibility.”⁷³ The addition of a

⁷¹ NPRM ¶ 61, 28 FCC Rcd at 14261.

⁷² *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, Report and Order, 20 FCC Rcd 1073, 1098 ¶ 63 (2004) (“2004 NPA Report and Order”). The Collocation Agreement recognized that the effects of collocations on historic properties “are likely to be minimal and not adverse.” Collocation Agreement at 2.

⁷³ Comments of AT&T, *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 (July 18, 2011), <http://apps.fcc.gov/ecfs/document/view?id=7021693736>.

DAS node, for example, will not adversely affect any arguably historic character of a utility pole and is consistent with the pole's general purpose and character.⁷⁴

Accordingly, the Commission should facilitate use of existing infrastructure for new technologies with a minimum of regulation by granting a categorical exclusion for the use of utility poles, light poles, and other non-tower structures, which will virtually always be standardized and devoid of unique character, even when they are over 45 years old. To the extent there may be an unusual case from time to time where a structure in fact has historic characteristics, the Commission can address such situations under its extraordinary circumstances procedures.⁷⁵

5. The FCC Should Adopt an NHPA Exclusion for Collocations and New Pole Deployments in Utility or Communications Rights-of-Way.

To the extent a utility or communications right-of-way is considered an historic property but is already being used for utility or communications purposes, the Commission should exclude from its historic review process collocations and new pole deployments in such corridors.⁷⁶ Requiring historic preservation review of utility corridors before allowing a DAS or small cell installation would “disproportionally thwart the ability of these technologies to be

⁷⁴ See, e.g., *Central Vermont Public Service Corporation for the installation of wireless telecommunications facilities in the Towns of Goshen and West Rutland*, Docket No. 7714, 2011 Vt. PUC LEXIS 390, at *7 (June 27, 2011) (finding that the addition of antennas to existing utility poles and towers “will not have an undue adverse effect on the aesthetics when viewed in the overall context of the existing utility poles and telecommunications towers and equipment located at each site” nor will they “have undue adverse impacts to . . . historic sites within the vicinity . . . because there will be no ground disturbance and because the new facilities represent minor changes to existing infrastructure.”).

⁷⁵ 47 C.F.R. § 1.1307(c)-(d).

⁷⁶ NPRM ¶ 62, 28 FCC Rcd at 14261.

utilized.”⁷⁷ The Commission should find that collocations and new pole deployments in a utility corridor or communications right-of-way should be excluded from historic review because such siting has a little or no impact on the historical integrity of the utility corridor.

DAS and small cells are highly adaptable and can be modified to service future spectrum allocations and communications standards with minimal impact on surrounding areas.⁷⁸ These technologies—not widely used at the time of the Collocation Agreement and the 2004 NPA—meet the intent of those agreements, as these devices can be attached, with minimal visual impact, to existing physical structures and along and within previously permitted corridors.⁷⁹ “Because DAS and small cell antennas are commonly installed on existing structures, often existing poles within or near utility rights-of-way, they cause little ground disturbance and create almost no additional visual effect—a quality that recommends the technologies for use in and near historic districts.”⁸⁰

6. The FCC Should Adopt an NHPA Exclusion for Replacement Utility Poles or Non-Tower Structures.

The Commission should adopt a new NHPA categorical exclusion covering the replacement of an existing utility pole or other non-tower structure.⁸¹ Provided that the same criteria applicable to replacement towers in Section III.B of the 2004 NPA are satisfied,⁸² such an exclusion would facilitate broadband deployment while safeguarding historic resources.

⁷⁷ DAS/Small Cell Report at 3.

⁷⁸ See PCIA March 19, 2013 *Ex Parte*; DAS/Small Cell Report (“DAS/Small Cell Report”).

⁷⁹ See DAS/Small Cell Report.

⁸⁰ DAS/Small Cell Report at 2.

⁸¹ NPRM ¶ 63, 28 FCC Rcd at 14261-62.

⁸² 2004 NPA, § III.B (excluding construction of a replacement tower and any associated excavation that does not (i) substantially increase the size of the existing tower, (ii) expand the boundaries of the leased or owned property surrounding the tower by more than 30 feet in any

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II. THE FCC SHOULD ADOPT RULES IMPLEMENTING AND ENFORCING SECTION 6409(A) OF THE SPECTRUM ACT.

The public interest will be served, and wireless broadband accelerated, by establishing rules to implement and enforce Section 6409(a).⁸³ As the expert agency charged with implementing the Communications Act, the FCC is uniquely positioned to interpret and define the terms of Section 6409(a). Failing to act here and provide needed certainty would allow Section 6409(a) to be interpreted case-by-case through judicial clarifications and one-off municipal interpretations—a lengthy, arduous process that would inevitably lead to patchwork implementation and undermine the streamlining purpose of the legislation.⁸⁴ Definitive regulation from the FCC can prevent the statutory language from being misconstrued by localities or courts, as has been the case with Section 332(c)(7).⁸⁵

(footnote continued)

direction, or (iii) involve excavation outside these expanded boundaries or outside any existing access or utility easement related to the site).

⁸³ NPRM ¶ 90, 28 FCC Rcd at 14272.

⁸⁴ As the NPRM notes, “uncertainties under Section 6409(a) may lead to protracted and costly litigation and could adversely affect the timely deployment of a nationwide public safety network and delay the intended streamlining benefits of the statute with respect to other communications services.” NPRM ¶ 97, 28 FCC Rcd at 14275.

⁸⁵ Despite the passage of eighteen years since Section 332(c)(7) was enacted, there is still a lack of clarity about what essential provisions mean. For example, the Fourth Circuit requires a showing that there is a lack of a reasonable alternative location to demonstrate that a denial has the “effect of prohibiting” service, which in turn requires showing that efforts to gain approval for alternative facilities would be fruitless. *T-Mobile Northeast LLC v. Fairfax County Bd. of Supervisors*, 672 F.3d 259 (4th Cir. 2012); *AT&T Wireless PCS v. City Council of Virginia Beach*, 155 F.3d 423 (4th Cir. 1998). Most other circuits have rejected this approach, requiring a showing that the feasibility of alternative facilities or locations was considered and rejected on reasonable grounds. *Second Generation Props., LP v. Town of Pelham*, 313 F.3d 620, 629 (1st Cir. 2002); *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630 (2d Cir. 1999); *APT Pittsburgh Ltd. P’ship v. Penn Twp. Butler Cnty.*, 196 F.3d 469 (3d Cir. 1999); *T-Mobile Cent., LLC v. Charter Twp. of W. Bloomfield*, 691 F.3d 794 (6th Cir. 2012); *Voicestream Minneapolis, Inc. v. St. Croix County*, 342 F.3d 818 (7th Cir. 2003); *MetroPCS, Inc. v. City & County of San Francisco*, 400 F.3d 715 (9th Cir. 2005). The statute also requires that a denial be “in writing,” and the Fourth Circuit holds that the written word “denied” is sufficient, with no need for written findings or

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Accordingly, it is essential that the FCC establish consistent rules and avoid uncertainty by defining key terms in Section 6409(a), clarifying how and when the statute applies, and adopting a deemed granted rule and other remedies for Section 6409(a) non-compliance. This action is fully within the FCC's authority under Section 6003(a) of the Spectrum Act, which calls for the provisions of Title VI, including Section 6409(a), to be implemented and enforced as part of the Communications Act of 1934.⁸⁶

A. The FCC Should Act Now to Establish Consistent Rules and Avoid Uncertainty.

The FCC should act now to provide consistency and clarity by expeditiously promulgating rules that will benefit wireless service providers, localities, and consumers alike. Neither the pursuit of best practices, nor actions by states to pursue their own legislative solutions, provide a basis to delay interpreting Section 6409(a).⁸⁷

First, as PCIA previously explained, the FCC should not view voluntary best practices as a “substitute for a rulemaking process.”⁸⁸ While best practices can still be an option for further clarification, they should not come at the expense of the consistency and predictability of federal law. Instead, best practices should serve as an appropriate forum for discussions of the type of

(footnote continued)

conclusions are necessary. *AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Bd. of Adjustment*, 172 F.3d 307 (4th Cir. 1999); *AT&T Wireless PCS v. City Council of the City of Virginia Beach*, 155 F.3d 423 (4th Cir. 1998). Other circuits have required that the written decision be separate from the record and describe the reasons for the denial and a sufficient explanation to allow a court to evaluate it against the evidence in the record. *See Southwestern Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 60 (1st Cir. 2001); *New Par v. City of Saginaw*, 301 F.3d 390 (6th Cir. 2002); *MetroPCS, Inc. v. City & Cnty. of San Francisco*, 400 F.3d 715 (9th Cir. 2005).

⁸⁶ Spectrum Act, § 6003(a), 126 Stat. 204, *codified at* 47 U.S.C. § 1403(a) (“Section 6003(a”).

⁸⁷ NPRM ¶ 98, 28 FCC Rcd at 14275.

⁸⁸ PCIA July 22, 2013 *Ex Parte*.

processes that are apposite under a streamlined regime. Best practices can also be used to address how jurisdictions might handle requests that are not entitled to expedited review under Section 6409(a), such as substantial modifications, or how jurisdictions can incent the placement of wireless facilities in specific areas or in a certain manner through a streamlined review process. After the FCC has adopted rules, parties will be in a better position to implement best practices around the FCC's rules.

Second, the Commission should not wait for the states to adopt their own legislative solutions. While several states have enacted legislation that conforms state law with the mandates of Section 6409(a),⁸⁹ it would be more appropriate for the Commission itself to act rather than have each state legislature interpret Section 6409(a) in disparate ways and at different times. Indeed, some states that have enacted streamlining legislation still look to the Commission for action. For example, North Carolina's law states that the rules enacted will be superseded by any Commission action on Section 6409(a).⁹⁰ Moreover, some local jurisdictions are attempting to impose new requirements that limit the protections afforded by Section 6409(a). The fact that

⁸⁹ See, e.g., 2011 N.J. Laws 199, *codified at* N.J. STAT. ANN. § 40:55D-46.2 (2012) (streamlining the state's review process for collocation of wireless facilities to existing, permitted infrastructure; waiving site plan review and notice and public hearing requirements for collocations that will not increase the wireless communication support structure's height by more than 10% or expand the square footage of any existing equipment compound beyond 2,500 square feet); Pennsylvania P.L. 1501, No. 191 (Oct. 24, 2012) (limiting local review costs; eliminating justifications of radiofrequency, technical, or business need of a wireless facility; and broadening facilities modifications subject to streamlined review to include water towers, electric transmission towers, utility poles, buildings and other vertical infrastructure; establishing a statewide shot clock for collocation or modification application review, including a "deemed approved" resolution if the application is not acted upon within 90 days); MICH. COMP. LAWS SERV. § 125.3514 (LexisNexis 2012) (eliminating a redundant approval each time wireless antennas and equipment are added to an already approved structure; capping fees for zoning review of wireless infrastructure; shortening the zoning review process for new builds, modifications and collocations).

⁹⁰ See N.C. GEN. STAT. §160A-400.50 (b) and §153A-349.50 (b).

many jurisdictions have attempted to interpret Section 6409(a)'s definitions indicates a need for consistent federal definitions, rules, and processes for the deployment of wireless infrastructure.⁹¹

It is critical that the FCC act to allow competing providers of communications services and infrastructure to deploy new facilities and add the capacity needed to meet soaring demand for high quality wireless services and ensure consumer choice. With Section 6409(a), the federal government established a baseline for processes surrounding the modification of wireless facilities. While states and localities recognize the economic and social benefits of enhanced wireless services and are taking further steps to incent and facilitate deployment in their jurisdictions, the first, best way the Commission can encourage state and local efforts is by clarifying Section 6409(a). Providing outreach and educational opportunities to states and localities to encourage the adoption of model siting and right-of-way ordinances and codes can supplement, but not supplant, actions by the Commission to bolster the consistency and predictability that began with the enactment of Section 6409(a).

While the FCC should promptly adopt rules implementing Section 6409(a), no transition period is necessary for states and localities to implement the requirements of Section 6409(a) into their laws.⁹² Section 6409(a) was passed nearly two years ago⁹³ and the Wireless Telecommunications Bureau issued its guidance to municipalities and wireless facilities

⁹¹ See, e.g., CITY OF DAVIS, CAL., MUNICIPAL CODE § 40.29.290, *available at* <http://qcode.us/codes/davis/> (adopting unique definitions for substantial change); CITY OF LAFAYETTE, CAL., MUNICIPAL CODE 6-1509(a)(3), *available at* <http://www.ci.lafayette.ca.us/index.aspx?page=141> (ibid).

⁹² NPRM ¶ 100, 28 FCC Rcd at 14276.

⁹³ The Spectrum Act became law on February 22, 2012.

developers, in the form of the *Section 6409(a) Public Notice*, a year ago.⁹⁴ Numerous states, localities, and courts have already begun implementing Section 6409(a), demonstrating that no further transition period is necessary.⁹⁵ Further, a local codification process is not necessary for Section 6409(a) to be properly applied; as a federal, preemptive law, Section 6409(a) is immediately enforceable and can be grounds for injunctive relief.⁹⁶

B. Proper Interpretation of Statutory Terms Will Ensure that the Benefits of Streamlined Review Are Not Unnecessarily Delayed.

As discussed below, the Commission should interpret a number of terms in Section 6409(a) to ensure that the benefits of a streamlined review process are not unnecessarily delayed. Section 6409(a) provides that “a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.”⁹⁷ Section 6409(a) defines the term “eligible facilities request” (“EFR”) as any request for modification of

⁹⁴ See *Section 6409(a) Public Notice*, 28 FCC Rcd. 1.

⁹⁵ NPRM ¶ 100, 28 FCC Rcd at 14276.

⁹⁶ The first reported federal court decision to be based on Section 6409(a) is *New Cingular Wireless PCS, LLC v. City of W. Haven*, 2013 U.S. Dist. LEXIS 95321 (D. Conn. July 9, 2013). The court there issued a mandatory injunction ordering the defendants “to grant AT&T’s special permit application and issue any ancillary permits that may be required,” explaining that “Section 6409 is further evidence of a clear congressional policy demanding the prompt removal of locally imposed, unreasonably discriminatory obstacles to modifications of existing facilities that would further the rapid deployment of wireless technology; Congress has directed that state and local governments ‘may not deny, and shall approve,’ qualifying requests for such modifications. 47 U.S.C. § 1455. Congress’ recent statement on this issue further supports a remedy that will ensure speedy approval of AT&T’s long-pending permit application.” *Id.* (emphasis in original). Other decisions can be expected in the near future. In *N.Y. SMSA Ltd. P’ship v. Town of Hempstead*, 2013 U.S. Dist. LEXIS 37833, *18-21 (E.D.N.Y. Mar. 19, 2013), the district court added an issue concerning the application of Section 6409(a), and in *McKay Bros., LLC v. Zoning Bd. of Adjustment of Randolph*, 2013 U.S. Dist. LEXIS 54878, 7-9 (D.N.J. Apr. 12, 2013), the court remanded a case to the Zoning Board of Adjustment for clarification whether Section 6409(a) was applicable.

⁹⁷ Section 6409(a).

an existing wireless tower or base station that involves (a) collocation of new transmission equipment; (b) removal of transmission equipment; or (c) replacement of transmission equipment—but otherwise does not define any of its terms.⁹⁸

“Wireless” and “Transmission Equipment.” As proposed, Section 6409(a) should apply to all equipment used in connection with 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.⁹⁹ The FCC’s conclusion is consistent with statutory construction of Section 6409(a), which refers to “wireless” broadly without reference to a particular service.¹⁰⁰ By remaining wireless technology neutral, the definition will encompass potential future wireless services not yet contemplated. Further, streamlining only the deployment of one part of an intricate system necessary for the provision of wireless services could create a barrier to deployment.

Similarly, “transmission equipment” should be broadly defined to encompass antennas and all other equipment used in the operation of a cell site, including backhaul facilities. As the FCC recognized in its definition of “antenna” in the NPA, end user connectivity is only accomplished by a system of components including a transmitting device, cabling, power sources, cabinets, and various other necessary elements.¹⁰¹ This remains unchanged for

⁹⁸ *See id.*

⁹⁹ NPRM ¶ 104, 28 FCC Rcd at 14277.

¹⁰⁰ In this respect, Section 6409(a) contrasts with Section 332(c)(7), which provides a detailed definition for the “personal wireless service facilities” to which it applies. *See* 47 U.S.C. § 332(c)(7)(C).

¹⁰¹ The 2004 NPA defines “antenna” as: “An apparatus designed for the purpose of emitting radio frequency (‘RF’) radiation, to be operated or operating from a fixed location pursuant to

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transmission facilities under Section 6409(a). For example, backhaul facilities are vital to wireless operations; as such, a simple modification to swap fiber optic cable for twisted pair cable should be covered by Section 6409(a) and not have to go through a conditional use permit.

Finally, it is vital that equipment providing backup power and other power supply equipment be included in the definition of transmission equipment based on the public interest in maintaining uninterrupted service during emergencies.¹⁰² Streamlining the deployment of backup power solutions will reduce network resilience costs, allowing providers to stretch their capital farther across the network.

The type of wireless service provided or the frequency used should not affect the scope of “transmission equipment” to be collocated, replaced, or removed.¹⁰³ For example, the FCC is currently considering substantial changes to the services in several bands, including 3.5 GHz,¹⁰⁴ and any tie to a specific infrastructure, service type, or frequency band could limit Section

(footnote continued)

Commission authorization, for the transmission of writing, signs, signals, data, images, pictures, and sounds of all kinds, including the transmitting device and any on-site equipment, switches, wiring, cabling, power sources, shelters or cabinets associated with that antenna and added to a Tower, structure, or building as part of the original installation of the antenna.” 2004 NPA § II.A.1.

¹⁰² Comments of PCIA, PS Docket 11-60, at 4-9 (July 7, 2011).

¹⁰³ NPRM ¶ 104, 28 FCC Rcd at 14277.

¹⁰⁴ *See Amendment of the Commission's Rules with Regard to Commercial Operations in the 3550-3650 MHz Band*, Notice of Proposed Rulemaking, 27 FCC Rcd 15594 (2012) (“3.5 GHz NPRM”); *see also* Comments of PCIA, GN Docket No. 12-354, at 4-6 (filed Dec. 5, 2012) (explaining the proposal to create a citizens broadband service that leverages small cells to limit interference with government incumbents).

6409(a)'s future effectiveness. Structures can be used for multiple types of wireless service, thereby reducing the need for additional support structures.¹⁰⁵

“Wireless Tower or Base Station.” “Tower” and “base station,” as defined elsewhere by the FCC,¹⁰⁶ should inform and guide the FCC in this rulemaking; however, the definitions established here should be appropriately designed to meet congressional and public policy goals of effectively streamlining the network deployment for commercial and public safety broadband networks.

The FCC should adopt a definition of “wireless tower or base station” that, at a minimum, includes structures that support or house an antenna, transceiver, or other associated equipment that constitutes part of a base station, even if they were not built for the sole or primary purpose of providing such support.¹⁰⁷ Limiting the definition only to those structures built “solely or primarily” for wireless would fail to recognize the current diverse state of wireless deployment undertaken by providers and encouraged by many states and municipalities to minimize impacts.¹⁰⁸ More specifically, the FCC should allow the definition of tower to

¹⁰⁵ See, e.g., Collocation Agreement §§ I.A (defining “collocation” broadly to include mounting antennas on “an existing tower, building or structure”), I.B (defining “tower” in service-neutral manner).

¹⁰⁶ See, e.g., Collocation Agreement § I.B, 2004 NPA § II.A.14; 47 C.F.R. § 90.7; 47 C.F.R. § 2.1(b); 47 C.F.R. § 24.5; 47 C.F.R. § 27.4; *Section 6409(a) Public Notice*, 28 FCC Rcd at 3.

¹⁰⁷ NPRM ¶ 108, 28 FCC Rcd at 14278-79.

¹⁰⁸ Deploying alternative infrastructure, such as DAS and small cells, on non-purpose built towers alleviates capacity constraints in dense urban areas. See *Small Cell Networks*, DRAGONWAVE INC., <http://www.dragonwaveinc.com/solutions/small-cell-networks> (last visited Jan. 29, 2014) (“[C]ompact units mounted unobtrusively on street lamp poles, utility poles, billboards or the sides of buildings . . . are perfect for delivering 3G and 4G service in the urban core and other high-density areas.”). Collocating on structures such as utility poles puts existing infrastructure to higher use. See *Removing Regulatory Barriers for Utelcos, Municipal Broadband and Wireless Collocation*, UTILITIES TELECOM COUNCIL, http://utc.org/advocacy_issue/removing-regulatory-barriers-utelcos-municipal-broadband-and-

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include those 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. Non-purpose built structures that already support a base station should also qualify for expedited review under Section 6409(a). This would include modifications to an existing base station or installation of an additional base station to encourage deployment by multiple carriers and foster competition for wireless services.

To encourage deployment on a broad variety of structures in lieu of new facility construction, the definition of “wireless tower or base station” should not be artificially limited.¹⁰⁹ For example, the FCC should adopt a definition of “tower or base station” that can support any of the multiple types of wireless services included in the aforementioned definition of “wireless.”¹¹⁰ Consistent with the definition of transmission equipment above, a building or cabinet with equipment inside should be included in the definition of wireless tower or base station. Artificially limiting the definition would ignore the realities of wireless network deployment—buildings and cabinets are often necessary for the provision of wireless as they shelter equipment from the elements and provide necessary climate control. Further, any expansion would likely be constrained by the boundaries of the leased or owned property.

The Commission should define “base station” to include antennas, transceivers, and other equipment associated with and necessary to a base station’s operation, such as fiber and coaxial

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wireless-collocation (last visited Jan. 29, 2014) (explaining how utilities can leverage their infrastructure for alternative purposes, such as broadband, a “win-win for utilities and the communities they serve”). Further, collocation on existing infrastructure reduces the need for new towers. *See* Collocation Agreement at 2 (“[This agreement will] reduce the need for the construction of new towers, thereby reducing potential effects on historic properties that would otherwise result from the construction of those unnecessary towers”)

¹⁰⁹ *See* NPRM ¶ 107, 28 FCC Rcd at 14278.

¹¹⁰ *See supra* Section II.C.

cable, backhaul equipment, and regular and backup power facilities.¹¹¹ As noted above in regard to “transmission equipment,” any definition should recognize and encompass the various components necessary for connectivity and quality service. This approach will ensure that Section 6409(a) will be applicable to current and forthcoming wireless facilities and technologies.

Further, the “base station” definition should cover DAS, small cells, and other Communications Facility Installations.¹¹² These smaller deployments are similar to a macro site in that the various components comprise a base station. While small cells and DAS may be deployed differently—for example, DAS deployments may include multiple nodes spread out over several utility poles with a ground based equipment cabinet—the core components and functionality of these facilities are the same as a macro site, and therefore should be subject to the same streamlined processing.

Consistent with the Bureau’s prior conclusion in the *Section 6409(a) Public Notice*,¹¹³ the FCC should decline to adopt the Intergovernmental Advisory Committee’s (“IAC’s”) interpretation that a “base station” should not encompass structures that support or house only part of a base station.¹¹⁴ According to the IAC, a base station should consist of “radio transceivers, antennas, coaxial cable, a regular and backup power supply, and other associated

¹¹¹ NPRM ¶ 110, 28 FCC Rcd at 14279-80.

¹¹² *Id.*

¹¹³ Intergovernmental Advisory Committee to the FCC, Advisory Recommendation No. 2013-9, “Response to Wireless Telecommunications Bureau’s Guidance on Interpretation of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012,” WC Docket No. 11-59, at 2-3 (dated July 31, 2013, filed in docket Aug. 2, 2013) (“IAC Recommendation”), cited in NPRM ¶ 109, 28 FCC Rcd at 14279; *Section 6409(a) Public Notice*, 28 FCC Rcd at 3.

¹¹⁴ IAC Recommendation at 2-3.

electronics,”¹¹⁵ rather than allowing a base station to consist of a combination or any one of those enumerated pieces. Instead, the Commission should adopt a base station definition that allows for streamlined modifications to facilitate deployment and allow for the replacement of base station components as necessary. Splitting hairs about the replacement of copper for fiber on certain facilities or the installation of back-up power facilities just because they are only one of many necessary components that make up a base station does not serve the public interest. A base station combines multiple essential parts; as such, a modification to any one of these parts may be necessary for new or improved service and thus all necessary parts must be included within the definition.

“Existing.” The FCC should consider a structure built for the primary purpose of supporting or housing transmission equipment as “existing” under Section 6409(a) regardless of whether or not it currently hosts such equipment.¹¹⁶ At a minimum, other structures should be considered “existing” if they currently support or house wireless facility equipment.¹¹⁷ This approach meets the established goal of minimizing the construction of new, dedicated wireless support structures, thereby minimizing environmental impacts, but is also sensitive to the needs of local communities by incentivizing deployment on structures they have traditionally viewed as appropriate for wireless facilities.

First, with respect to purpose-built infrastructure, infrastructure providers generally do not make the significant investment to construct towers on speculation that a service provider may later decide to locate on the tower. Instead, newly constructed towers generally have an

¹¹⁵ *Id.* (emphasis added).

¹¹⁶ NPRM ¶ 111, 28 FCC Rcd at 14280.

¹¹⁷ NPRM ¶ 111, 28 FCC Rcd at 14280.

anchor wireless service provider “tenant” lined up prior to construction. However, debating the exact point at which a tower becomes “existing”—for instance, upon completion of construction or when the anchor tenant’s equipment is placed on the tower—does not reflect the streamlining intent of the legislation. Rather, because structures built for the primary purpose of supporting or housing transmission equipment will have undergone full local review prior to their construction, they should be considered “existing” if constructed prior to an EFR application.

Second, non-purpose-built infrastructure should be considered “existing” for the purposes of Section 6409(a) at a minimum if it has been constructed prior to the EFR application and currently supports wireless facilities. This measured approach will allow wireless providers to swiftly deploy on non-purpose-built infrastructure that the locality has already decided are appropriate for wireless deployment, such as building rooftops, church steeples, water towers, or utility poles.

This definition advances congressional intent to streamline processes, speed deployment and service to the public, and allow providers to realize important cost savings.¹¹⁸ Congress has directed the FCC to eliminate state and local barriers to entry¹¹⁹ and to take steps to increase broadband availability.¹²⁰ Congress has also, in Section 6409(a), sought to reduce the need for

¹¹⁸ NPRM ¶ 112, 28 FCC Rcd at 14280.

¹¹⁹ See 47 U.S.C. § 253(a) (“No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”); see also *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 579 (9th Cir. 2008) (holding that the “effect of prohibiting” language in Section 253(a) is to be read in harmony with the same language in Section 332(c)(7)).

¹²⁰ Section 706(a) of the Telecommunications Act, Pub. L. No. 104-104, § 706(a), 110 Stat. 56, 153 (1996) (“Section 706(a)”), *codified at* 47 U.S.C. § 1302(a) (Section 706(a) directs the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the

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new structures by incenting collocation.¹²¹ As the FCC has repeatedly found, collocation can be the most cost-effective way to deploy new communications infrastructure.¹²²

“Collocation,” “Removal,” and “Replacement.” The FCC should also interpret a modification of a wireless tower or base station to include “collocation,” “removal,” or “replacement” of an antenna or any other transmission equipment associated with the supporting structure, even if the equipment is not physically located upon it.¹²³ Such an approach is consistent with the definition of “collocation” in the Collocation Agreement, which correctly includes the attachment of transmission equipment to existing structures.¹²⁴

Any request to modify an existing tower or other structure that does not substantially change the physical dimensions of the structure should be considered an EFR under Section 6409(a). This includes collocations. Structural enhancements or support structure replacements may be necessary to support the collocation or replacement of transmission equipment.

(footnote continued)

public interest, convenience, and necessity . . . regulating methods that remove barriers to infrastructure investment.”).

¹²¹ See Section 6409(a); see also 158 Cong. Rec. E239 (Daily ed. Feb. 24, 2012) (extended remarks of Rep. Fred Upton) (the sponsor of Section 6409 asserts the section “streamlines the process for siting of wireless facilities by preempting the ability of State and local authorities to delay collocation of, removal of, and replacement of wireless transmission equipment.”).

¹²² See, e.g., *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*, Sixteenth Report, 28 FCC Rcd 3700, 3909, ¶ 331 (2013); *Id.*, Fifteenth Report, 26 FCC Rcd 9664, 9843, ¶ 312 (2011).

¹²³ NPRM ¶ 114, 28 FCC Rcd at 14280.

¹²⁴ Collocation Agreement, § I.A (the definition of collocation includes mounting or installation of an antenna “on an existing tower, building or structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes); see also *id.* §§ I.B-C) (recognizing that installation of an antenna may involve associated facilities, equipment cabinets, and equipment shelters); 2004 NPA § II.A.4 (defining “collocation” as the mounting or installation of an antenna [defined in § II.A.1 to include associated equipment] on an existing tower, building, or structure . . .”).

Enhancements or support structure replacements may also be undertaken as part of efforts to improve resiliency. So long as the hardening or replacement does not constitute a substantial change in the physical dimensions of the existing tower or base station, as outlined below, the modification will have a minimal impact and remain consistent with the original zoning approval or permit. Including structural enhancements or replacement as modifications qualifying for approval under an EFR encourages investment, increases reliability, and allows for economically and environmentally efficient use of already-existing wireless facility sites.

With respect to tower replacement or hardening here, the FCC should distinguish between purpose-built and non-purpose-built structures. For purpose-built wireless support structures, replacing a like structure with a like structure (for example, monopole for monopole) should be an EFR under Section 6409(a). For non-purpose-built structures in a public utility right-of-way—for example, a utility pole—the Commission should consider what the state utility laws would allow the ILEC or electric company to do as a matter of right in the right-of-way. If any utility may replace a wood utility pole with steel, then a wireless attacher should be allowed to make the same modification.

“Substantially Change the Physical Dimensions.” At the outset, the FCC should make clear that while wireless facility modifications typically entail a change to equipment and there may be some visible effects, localities have a right to regulate aesthetic impacts only insofar as those impacts are not preempted by Section 6409(a) or other provisions of federal law. In other words, only modifications that “substantially change the physical dimensions” of an existing tower or base station may be subjected to an extensive zoning review by state and local governments.

To increase clarity, speed deployment, and provide consistency with existing law, the FCC should adopt the Collocation Agreement’s four-part test, with one modification from the

2004 NPA, to define when a modification would “substantially change the physical dimensions” of a wireless tower or base station.¹²⁵ Specifically, the FCC should bring part four of the test in line with the 2004 NPA’s provision for determining when replacement towers will “substantially increase the size of the existing tower.”¹²⁶ The 2004 NPA kept the three initial elements of the definition of substantial increase, but refined the fourth part for replacement towers, allowing expansion outside the existing tower site that does not “expand the boundaries of the leased or owned property surrounding the tower by more than thirty feet in any direction or involve excavation outside these expanded boundaries or outside any existing access or utility easement related to the site.”¹²⁷ The FCC should follow the 2004 NPA’s more recent definition and apply it to all existing infrastructure, which would provide a degree of additional flexibility that was found effective for purposes of the 2004 NPA. This would allow existing tower infrastructure to more readily support additional wireless providers or updated antenna technologies. Such an approach will foster competition and facilitate technology upgrades, such as a move from 3G to 4G—while maintaining a consistent level of service.¹²⁸

To avoid the unlikely scenario where incremental and successive increases over time lead to a substantial increase in size, the FCC should limit any cumulative increases to a combined total that does not exceed the guidelines described above. For example, two modifications over an extended time frame that cumulatively increase the height of the tower by up to no more than

¹²⁵ Collocation Agreement § I.C.

¹²⁶ 2004 NPA § III.B

¹²⁷ NPA § III.B.

¹²⁸ Alternatively, the FCC could accomplish a similar result by adopting a rule that allows expansion of the compound up to 2,500 square feet, which is similar to rules many states have adopted. *See generally* N.J. STAT. ANN. § 40:55D-46.2; MICH. COMP. LAWS. § 125.3514; N.H. REV. STAT. ANN. § 12-K:2.

ten percent would remain an insubstantial modification. To determine the threshold for comparison, the FCC should tie the baseline size of the tower for purposes of the comparison to the size at either the tower's last zoning approval or at the effective date of the rules adopted in this proceeding, whichever is later. Tying the metric for substantial change back to the tower's last zoning approval will ensure that any insubstantial increases in size resulting from minor modifications are similar to the tower as it currently stands or was last approved by the locality. To allow uniform application, the standard should remain the same for all structures.¹²⁹

In defining what constitutes a substantial change, the FCC should clearly indicate that substantiality involves review of the height, width, and depth of the equipment to be added. Other factors, such as the color and weight of the equipment, should not be considered during the EFR application process. Local governments may assess weight in conjunction with building permits and construction standards, but should not do so in determining whether the change in physical dimensions is substantial. However, a modification that undermines the concealment elements of a "stealth" wireless facility, such as screening façade paint or tree branches, should not be considered insubstantial for the purpose of Section 6409(a). For example, while a modification to a tower designed to resemble a pine tree may increase its height by less than ten percent, it would only be an EFR if the existing pine tree elements were maintained.¹³⁰

The Collocation Agreement's four-part test was designed with many of the IAC's concerns in mind,¹³¹ namely minimization of the visual impact of wireless facilities in historic

¹²⁹ NPRM ¶ 121, 28 FCC Rcd at 14282.

¹³⁰ *See, e.g.*, N.H. REV. STAT. ANN. § 12-K:2 XXV(d). ("Substantial modification' means the mounting of a proposed [personal wireless service facility] PWSF on a tower or mount which, as a result of single or successive modification applications Adds to or modifies a camouflaged [personal wireless service facility] in a way that would defeat the effect of the camouflage.")

¹³¹ *See* IAC Recommendation at 2; NPRM ¶ 122, 28 FCC Rcd at 14282.

areas. To this end, the signatories to the Collocation Agreement found that collocations “reduce the need for the construction of new towers, thereby reducing potential effects on historic properties that would otherwise result from the construction of those unnecessary new towers.”¹³² The same rationale applies to other sensitive areas where service must be deployed; facilitating collocations on existing structures enables the deployment of service in a minimally impactful manner. Allowing a “context[ual],” case by case evaluation based on each “particular community’s land use requirements and decisions,”¹³³ as proposed by the IAC, would defeat the streamlining purpose of Section 6409(a) and would return to a piecemeal regime of rules and enforcement for simple modifications and collocations. Percentages and rules that are consistent across the board give carriers and infrastructure providers regulatory certainty and incentive to deploy facilities by efficiently utilizing existing structures.

C. Section 6409(a) Warrants Establishing Rules Regarding the Review and Processing of Applications and Time Limits.

The plain language of Section 6409(a) requires states and localities to approve all EFR applications without exception and without discretionary review.¹³⁴ Municipalities must limit their review to whether a proposed addition or change of equipment qualifies as an EFR. The FCC should specify what constitutes an EFR, consistent with the definitions proposed above. The FCC should also state that an applicant must submit specific information to a local government and, once the applicant does so, the local government must review and approve the EFR application within a specified number of days.

¹³² Collocation Agreement, Recitals ¶ 8.

¹³³ IAC Recommendation at 2.

¹³⁴ NPRM ¶ 124, 28 FCC Rcd at 14283.

1. Section 6409(a) Does Not Affect Compliance with Building and Structural Codes.

State and local jurisdictions cannot apply discretionary review processes to EFRs. When reviewing an EFR, state and local officials “may not deny, and shall approve” that request, as required by Section 6409(a).¹³⁵ In other words, a review process that gives a state or local jurisdiction the ability to deny an EFR cannot be applied to that request. For example, the FCC should make clear that a jurisdiction is not allowed, upon receipt of such a request, to deny or delay that request based on purported inconsistencies with the jurisdiction’s zoning plan or aesthetic concerns.

States and localities may require an EFR to comply with general building codes or other objective, ministerial laws reasonably related to health and safety so long as the laws are clearly related to structural standards,¹³⁶ such as ANSI and TIA-222.¹³⁷ The FCC should remain vigilant to ensure that states and localities do not insert what have traditionally been zoning code and land use criteria into their building or structural codes for the purposes of circumventing Section 6409(a), and to take appropriate steps to prevent such practices. It would defeat the law’s streamlining purpose to allow state and local governments to simply transfer provisions that were formerly reserved for zoning codes into building codes in an attempt to evade the “shall approve” mandate. For example, the City of New Rochelle, New York requires building code approval and a discretionary Planning Board Special Permit amendment process for every

¹³⁵ Section 6409(a)(1).

¹³⁶ NPRM ¶ 125, 28 FCC Rcd at 14283-84.

¹³⁷ The ANSI/TIA-222-G Standard, “Structural Standard for Antenna Supporting Structures and Antennas,” Rev. G, is available at <http://www.tiaonline.org/all-standards/committees/tr-14>. Annex A to the standard, which sets for guidance regarding the standard’s requirements, was filed as Exhibit 2 to the Reply Comments of American Tower Corporation, WC Docket No. 11-59 (filed Sept. 30, 2011) (“American Tower Broadband Acceleration Reply Comments”).

collocation, modification, or removal of transmission equipment.¹³⁸ The limited EFR application review process requires the jurisdiction to look only to whether a substantial change in the physical dimensions of the tower or base station will occur. If not, any zoning, planning, or other land use review is over.

2. Section 6409(a) Precludes Conditions on the Approval of EFRs.

A locality may not condition approval of an EFR subject to contingencies or alterations to the request.¹³⁹ Conditional EFR application approvals are in fact denials that violate Section 6409(a). 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.¹⁴⁰ 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. These rules should remain the same regardless of whether the particular condition was imposed before or after the effective date of Section 6409(a).¹⁴¹

To the extent that a proposed EFR modification may necessitate structural enhancements to support the addition or replacement of transmission equipment, the locality may address this issue consistent with building codes and related procedures. Further, it should not be a condition of EFR approval that an existing structure be hardened. The Commission should not allow

¹³⁸ See CITY OF NEW ROCHELLE, N.Y., MUNICIPAL CODE § 331-99, *available at* <http://ecode360.com/6731798> (requiring that all wireless telecommunications facilities applications, including collocations, go through a special permitting process).

¹³⁹ NPRM ¶ 124, 28 FCC Rcd at 14283.

¹⁴⁰ NPRM ¶ 127, 28 FCC Rcd at 14284-85.

¹⁴¹ *Id.*

jurisdictions to arbitrarily require structural hardening or enhancements.¹⁴² Such arbitrary structural enhancements can be cost prohibitive and delay the deployment of broadband.¹⁴³ To the extent that required structural enhancements are intended to increase the resilience of wireless networks, they intrude unnecessarily into providers' network design and resilience planning. A locality should not be permitted to substitute its judgment for a provider's best-network-design judgment, which also takes into account redundancy and other factors.

3. Section 6409(a) Applies to Legal, Non-Conforming Structures.

To better utilize existing infrastructure, the FCC should make clear that legal, non-conforming structures are made available for modifications under Section 6409(a), including collocations. A "legal, non-conforming" use is a use or structure which was legally established according to the applicable zoning regulations of the time, but which does not meet current zoning regulations. The FCC must be careful not to allow jurisdictions to circumvent Section 6409(a) through code revisions and updates that result in existing, approved infrastructure becoming legal, non-conforming. For Section 6409(a) to work properly and consistent with congressional intent, the FCC must not allow local ordinances to supersede a federal, preemptive law.¹⁴⁴

A structure or use can become "legal, non-conforming" due to rezoning, annexation, or revisions to the zoning code, such as reduction in height limits. Localities have imposed onerous

¹⁴² NPRM ¶ 125, 28 FCC Rcd at 14283-84. For example, increasing a structure's classification from TIA-222 Rev. G class II to class III as a condition of EFR approval should not be permissible.

¹⁴³ See American Tower Broadband Acceleration Reply Comments at 18 (stating that the cost differential between a TIA-222 Rev. G Class II structure and a Class III structure "can range from 30% to 200%").

¹⁴⁴ NPRM ¶ 125.

requirements and conditions on modifications to legal, non-confirming structures.¹⁴⁵ Some localities require a new, full round of zoning review for modifications to legal, non-confirming structures, while others impose conditions such as the expensive task of replacing the structure.¹⁴⁶ Variances or rezoning of the underlying land or conditional use permits are often required by jurisdictions to get approval for any expansion of a legal, non-confirming use regardless of whether it entails a substantial change in physical dimensions.¹⁴⁷ To obtain a variance from the current zoning code, municipalities often require a showing of hardship, an extremely high legal burden and the process can take in excess of three to four months. Yet throughout all of this, the original land use approval—for the provision of wireless service—remains unchanged.

¹⁴⁵ NPRM ¶ 126, 28 FCC Rcd at 14284; *see* American Tower Broadband Acceleration Reply Comments at 11 (filed Sept. 30, 2011) (“The effects [of legal, non-confirming status] are particularly onerous where a local jurisdiction applies its new regulation to an existing wireless facility in a manner that blocks collocations or antenna upgrades that would not have required formal approval under the prior law.”).

¹⁴⁶ The City of Baldwin Park, California has particularly severe code provisions concerning legal, non-confirming wireless facilities, and it was adopted after Section 6409(a) was already in force. It would require towers that do not meet current zoning provisions to be modified or removed completely by June 2017. The City’s code provides: “All wireless communications facilities, in any zone, lawfully constructed and erected prior to the effective date of this subchapter [June 2012], which do not conform to the requirements of the provisions of this subchapter for the particular zoning district in which they are located, shall be accepted as nonconforming uses for a period of five years from the effective date of this subchapter. Thereafter, the wireless communications facilities shall be subject to abatement as set forth below via modification to comply with the standards of this subchapter. . . . When modification is insufficient to meet the requirements of this subchapter, wireless [sic] communications facilities shall be subject to abatement via relocation or removal.” BALDWIN PARK, CAL, MUN. CODE § 153.180.110(B) (2012), *available at* <http://www.amlegal.com/library/ca/baldwinpark.shtml>.

¹⁴⁷ After requesting to exchange like-for-like antennas to upgrade on a cell site in the City of Campbell, California to 4G technology, a PCIA member was told that since the site was a legal, non-confirming site, it was not “existing” for the purposes of Section 6409(a) and the member must seek a new conditional use permit for the antenna upgrade.

A change in a local height limitation is one example of how infrastructure may become a legal, non-conforming use. While any new infrastructure construction may be subject to a jurisdiction's height limit, a modification that increases the height of a tower above the local maximum but does not substantially change the size of the tower should still qualify as an EFR under Section 6409(a).¹⁴⁸ It runs counter to the purpose of Section 6409(a) to allow states and localities to exclude collocations on certain existing towers from the protections of the statute because those towers are declared legal, non-conforming structures.

The FCC should similarly be wary of changes in fall zone or setback ordinances that undermine Section 6409(a)'s goals.¹⁴⁹ Experience has shown that the retroactive adjustment of setback or fall zone ordinances after towers have been constructed can be used to transform compliant towers into legal, non-conforming towers. Fall zones are artificially created setbacks that purport to define the area where a tower would collapse in the event of a catastrophic failure, generally without informed or realistic consideration of the soundness of infrastructure structural design. Catastrophic failures are extremely rare. Setbacks do not exist in building codes, which regulate building safety, only in land use codes, and are therefore not related to the structural safety of the towers themselves. Thus, 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.

4. Concealed or Screened Facilities Should Be Maintained Consistent with Current Mitigation.

The FCC should clarify that a municipality may not require an applicant to provide new or enhanced visual or other mitigation, such as concealment, camouflage, or screening, as part of

¹⁴⁸ NPRM ¶ 125, 28 FCC Rcd at 14283-84.

¹⁴⁹ *Id.*

an EFR. Rather, when an applicant proposes an EFR, any such mitigation should be consistent with the mitigation currently in existence—for instance, painting the new ground furniture to match existing furniture at the site.

For an EFR involving previously concealed or “stealth” facilities, the EFR should qualify as an insubstantial increase as long as the concealment elements are maintained. For example, New Hampshire’s recently enacted “Act relative to collocation and modification of personal wireless services facilities”¹⁵⁰ treats an increase as insubstantial unless it “defeat[s] the effect of the camouflage.”¹⁵¹ However, approval of an EFR should not be conditioned on alteration or intensification of the concealment elements, and the FCC should not consider limits on the number of collocations or a flush-mounting requirement in local code to be concealment or “stealth” provisions. Limitation on the number of collocations is a barrier to both upgrades in technology and new market entrants.

5. Section 6409(a) Necessitates Streamlined, Limited Application Procedures.

Consistent with the *Section 6409(a) Public Notice*,¹⁵² Section 6409(a) permits a state or local government to require an application be filed and to determine whether the application constitutes an EFR.¹⁵³ At the same time, Section 6409(a) requires an expedited, administrative review process such that if the application, as filed, meets the objective criteria for an EFR, the application must be approved. Accordingly, Section 6409(a) both permits and warrants federal

¹⁵⁰ SB 101, codified at N.H. REV. STAT. ANN. § 12-K:2 XXV

¹⁵¹ See N.H. REV. STAT. ANN. § 12-K:2 XXV(d).

¹⁵² See *Section 6409(a) Public Notice*, 28 FCC Rcd at 3-4.

¹⁵³ NPRM ¶ 131, 28 FCC Rcd at 14286.

limits on applications processes, time for review, and unreasonable fees, and the FCC should establish the baseline for these limits.

First, given the narrow scope of permissible review processes under Section 6409(a), procedural limitations are appropriate. EFRs should be subject to a non-discretionary process of clear requirements laid out by the FCC that, when met, result in an approval. The inquiry should be simple and limited, designed to determine whether the proposed modification constitutes a substantial change in the physical dimensions of the existing tower or base station. Setting specific, enumerated criteria for EFRs is precisely the kind of streamlining the legislation envisioned and is an appropriate role for the FCC.

The FCC should also impose a ceiling on the types of information and documentation required in an EFR.¹⁵⁴ EFR applications pursuant to Section 6409(a) should contain: (1) A statement that the application is an EFR, and (2) limited documentation that provides information, in the form of physical dimensions only, about the existing tower or base station, and shows how the proposed addition, removal, or modification of transmission equipment does not substantially change the physical dimensions of the existing tower or base station. The FCC should clarify that certain types of information are not relevant for an EFR, foremost among them any requirement to demonstrate “proof of need” or the business case for the proposed modification.¹⁵⁵

¹⁵⁴ NPRM ¶ 133, 28 FCC Rcd at 14286-87.

¹⁵⁵ See *Crown Castle NG East, Inc. v. Town of Greenburgh*, No. 13-2921, slip op. at 6, 2014 U.S. App. LEXIS 925, *5 (2d Cir. Jan. 17, 2014) (holding that the fact that Crown Castle “had only a single client at the time that would benefit from the proposed facilities was not significant, as there still was a need for the proposed facilities”) (summary order not designated for publication).

Second, the Commission should establish a limited permit application review period for EFRs. Without such time limits, a local jurisdiction could circumvent Section 6409(a) by simply withholding a decision on an EFR, amounting to a denial. In particular, the FCC should impose a maximum forty-five day time frame, but allow states to adopt laws with shorter time frames.¹⁵⁶ With significantly reduced application requirements and correlated reduction in ministerial burden on administrative staff, this time frame should be more than sufficient to render a decision on an application. Consistent with the Commission's interpretation of Section 332(c)(7),¹⁵⁷ a locality will have thirty days from receipt of the EFR to notify the applicant of any application deficiencies. If so notified, the forty-five day time frame will be tolled until the deficiency is cured.

The application process proposed herein is similar to other administrative processes commonly conducted by localities, and normally should not require the review of an elected body. While states and localities may decide who will review an EFR and whether to delegate that responsibility, such applications must be reviewed in a timely manner consistent with the time limits above.

Third, the streamlined review should result in reduced application fees, which should be tied to reasonable cost-recovery.¹⁵⁸ As outlined in these comments, the application review process for EFRs significantly reduces the amount of information to be considered, thereby reducing the time and administrative burden on localities. The FCC should highlight this

¹⁵⁶ NPRM ¶ 134, 28 FCC Rcd at 14287.

¹⁵⁷ *Shot Clock Order*, 24 FCC Rcd at 14014-15 (allowing localities 30 days to notify applicant of incompleteness of application).

¹⁵⁸ *See, e.g.*, GA. CODE ANN. § 48-13-9(a) (prohibiting local governments from imposing regulatory fees for the purpose of raising general revenues; requiring that regulatory fees approximate the reasonable cost of the activity performed by the local government).

correlation in its implementation of Section 6409(a), and provide that non-cost-based fees are presumptively unreasonable and contrary not only to the streamlining goals of Section 6409(a), but also to the national policy imperative of rapid broadband deployment.¹⁵⁹

Finally, the FCC should preempt any moratoria on EFRs pursuant to its authority under Section 6409(a).¹⁶⁰ Moratoria can have adverse effects for communities by delaying or discouraging broadband deployment and/or can effectively prohibit wireless services.¹⁶¹ While moratoria can allow jurisdictions to update their codes to reflect changes in the law, Section 6409(a) is now nearly two years old, and many jurisdictions have successfully modified their ordinances without the use of a moratorium.¹⁶² Moratoria should not apply to covered requests under Section 6409(a) because covered modifications are by definition insubstantial changes to existing structures and Congress has specifically preempted discretionary state and local government zoning relating to these matters.

In creating the guidelines for a streamlined process under Section 6409(a), the FCC could appropriately craft more stringent limitations on process, timing, and fees for certain specialized

¹⁵⁹ NPRM ¶ 131, 28 FCC Rcd at 14286.

¹⁶⁰ NPRM ¶ 135, 28 FCC Rcd at 14287-88.

¹⁶¹ 47 U.S.C. § 332(c)(7)(B)(ii)

¹⁶² See Memorandum from Linn K. Wyatt, Chief Zoning Administrator, City of Los Angeles to Office of Zoning Administration, Public Counters, and Interested Parties (Sept. 3, 2013) (defining “policies and procedures to implement [Section 6409(a)]’s directives”); Memorandum from City of Sammamish, Wash. (Dec. 12, 2012), *available at* <http://www.ci.sammamish.wa.us/files/document/10496.pdf> (granting a permit exemption for EFRs); *Telecommunications Facilities Zoning Code Text Amendment*, CITY OF SANTA ROSA, CAL., <http://ci.santa-rosa.ca.us/departments/communitydev/Pages/TelecommunicationsFacilitiesZoningCodeTextAmendment.aspx> (last visited Jan. 29, 2014) (detailing the city’s plans to update the zoning code to comply with Section 6409(a)).

categories of EFRs.¹⁶³ Because removal and replacement of transmission equipment is less impactful than a new collocation, application review of proposed equipment replacements can be further streamlined. Additionally, the processing of applications for collocations that do not result in a substantial change to the underlying structure should also be streamlined.

D. The FCC Should Adopt a Deemed-Granted Rule for Eligible Facilities Requests and Provide Other Relief for Section 6409(a) Non-Compliance.

The Commission should adopt a “deemed granted” rule implementing Section 6409(a),¹⁶⁴ to carry out Congress’s clear intent that states and localities “may not deny, and shall approve” EFR applications. Deemed granted is a reasonable and appropriate way of enforcing the statute when a locality violates the “shall approve” mandate in Section 6409(a).

The deemed granted remedy should, under the rules, take effect immediately upon the passage of the forty-five days after an EFR application is submitted.¹⁶⁵ Likewise, the rules should provide for a deemed grant immediately in the event a locality impermissibly denies an EFR application for which Section 6409(a) mandates approval. If the applicant requires an actual approved permit and one has not been issued, the applicant should have the option of informing the locality of the deemed granted remedy and requesting issuance of the permit and/or seeking an order from a court of competent jurisdiction directing the issuance of the permit.

The FCC has authority to deem an EFR application granted under these circumstances. As a general matter, the Commission has broad authority to adopt rules to carry out the

¹⁶³ NPRM ¶ 136, 28 FCC Rcd at 14288.

¹⁶⁴ NPRM ¶ 137, 28 FCC Rcd at 14288.

¹⁶⁵ NPRM ¶ 141, 28 FCC Rcd at 14290.

objectives of the Communications Act¹⁶⁶ and to facilitate broadband deployment under Section 706(a) of the Telecommunications Act.¹⁶⁷ It likewise has specific authority to adopt rules to implement and enforce the “shall approve” provisions of Section 6409(a) “as if [those provisions] [were] a part of the Communications Act.”¹⁶⁸ Indeed, the Commission has adopted a “deemed granted” remedy in analogous circumstances.¹⁶⁹ As a result, the Commission can by

¹⁶⁶ Sections 4(i), 201(b), and 303(r) of the Communications Act, 47 U.S.C. §§ 154(i), 201(b), 303(r). The Commission’s authority to engage in rulemaking or declaratory rulings to establish binding rules for carrying out the purposes of the Communications Act extends even to the establishment of rules that bind state and local authorities carrying out their responsibilities that are governed by the Communications Act. *See National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 980-981 (2005). As long as the agency does not overstep the lines drawn by Congress and “‘the agency’s answer is based on a permissible construction of the statute,’” courts must defer to a reasonable interpretation by the agency. *City of Arlington*, 133 S. Ct. at 1874-75.

¹⁶⁷ Section 706(a) directs the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity . . . regulating methods that remove barriers to infrastructure investment.” 47 U.S.C. § 1302(a). The D.C. Circuit recently confirmed the Commission’s conclusion that Section 706(a) is an affirmative grant of authority to the Commission. *Verizon v. FCC*, No. 11-1355, slip op. at 22-27, 2014 U.S. App. LEXIS 680, *31-39 (D.C. Cir. Jan. 14, 2014). Likewise, the court agreed that the Commission has the authority under Section 706(b), 47 U.S.C. § 1302(b), “to take steps to accelerate broadband deployment if and when it determines that such deployment is not ‘reasonable and timely.’” Slip op. at 29, 2014 U.S. App. LEXIS 680 at *42-43.

¹⁶⁸ Section 6409(a) was enacted as part of the Spectrum Act, and Section 6003(a) of that statute provides that the FCC has authority to “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, or a regulation promulgated under such Act, respectively.” Spectrum Act, § 6003(a) (emphasis added). Accordingly, the FCC is entitled to adopt and enforce binding regulations to implement and enforce Section 6409(a); *see also Section 6409(a) Guidance PN*, 28 FCC Rcd at 1 n.3.

¹⁶⁹ *See, e.g., 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, 5103 ¶ 4, 5127-28 ¶ 54, 5132 ¶ 62, 5134-35 ¶ 68, 5139 ¶¶ 77-78 (2007) (“*Cable Franchise R&O*”) (providing that, if a local cable franchising authority has not made a final decision on a franchise application within the specified period, the authority will be deemed to have granted the applicant an interim franchise until it delivers a final decision), *pet. for rev. denied sub nom.*

(continued on next page)

rule determine which EFR applications must be approved, and establish the time frame and remedy for improper denial or failure to act within the permitted time.

As the Commission suggests, a deemed granted approach does not raise any special concerns about impinging on state or local authority under the Tenth Amendment.¹⁷⁰ EFR applications will continue to be filed pursuant to state and local law but must be acted upon consistent with the statute, and here Congress has required approval. As the Commission explains, “other than establishing the automatic grant, a ‘deemed granted’ rule would not prescribe any particular processes or place any obligations on State or local governments, thereby leaving their regulatory authority over the siting matter otherwise undisturbed.”¹⁷¹ This is not compelling a state to administer a Federal regulatory program, *see Printz v. United States*, 521 U.S. 898, 933 (1997).

The Commission may also, as needed, alternatively exercise its authority to preempt state or local authority with respect to EFR applications that have been pending for more than forty-five days under *City of New York*.¹⁷² When a federal agency acts within the scope of its delegated authority, it is empowered under the Supremacy Clause to preempt state laws to the extent

(footnote continued)

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

¹⁷⁰ *See* NPRM ¶ 138, 28 FCC Rcd at 14289. The Tenth Amendment provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. Const. Amend. X.

¹⁷¹ NPRM ¶ 138, 28 FCC Rcd at 14289.

¹⁷² NPRM ¶ 139, 28 FCC Rcd at 14289. As the Supreme Court in that case explained, “‘a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation’ and hence render unenforceable state or local laws that are otherwise not inconsistent with federal law.” *City of New York v. FCC*, 486 U.S. 57, 63-64 (1988) (“*City of New York*”) (quoting *Louisiana Public Service Comm’n v. FCC*, 476 U.S. 355, 369 (1986)).

“necessary to achieve its purposes.”¹⁷³ There can be “no doubt” that Congress itself may preempt state and local laws regulating the construction and operation of a national telecommunications infrastructure,¹⁷⁴ and Congress here has delegated authority to the FCC to implement Section 6409(a) and to remove barriers to infrastructure investment under Section 706(a).¹⁷⁵ Given this broad delegation, the Commission may preempt state or local law to the extent it “stands as an obstacle” to the accomplishment of these federal objectives.¹⁷⁶

III. THE FCC SHOULD TAKE FURTHER STEPS TO IMPLEMENT SECTION 332(C)(7).

As described below, the FCC should take further steps to clarify the *Shot Clock Order*. Consistent with the deemed granted remedy compelled by Section 6409(a) for EFR applications, the Commission should also adopt a deemed granted remedy for violations of the Shot Clock Rule using its authority to interpret Section 332(c)(7).

A. The FCC Should Provide Further Clarity Regarding the Shot Clock.

Substantial Increase in Size. The FCC should apply the test for substantial increase in size under the Shot Clock and Section 332(c)(7) in the same way it interprets the test under

¹⁷³ *City of New York*, 486 U.S. at 63-64; see U.S. CONST., Art. VI, cl. 2.

¹⁷⁴ See *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 96 (2d Cir. 2000) (“We have no doubt that Congress may preempt state and local governments from regulating the operation and construction of a national telecommunications infrastructure . . .”).

¹⁷⁵ See *supra* notes 166-168 and accompanying text.

¹⁷⁶ *Louisiana Public Service Comm’n v. FCC*, 476 U.S. 355, 369 (1986) (“Pre-emption occurs when [*inter alia*] . . . the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress . . . Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.”); see also *Cable Franchise R&O*, 22 FCC Rcd at 5158-59 ¶¶ 128, 130 (finding FCC had delegated authority to preempt local laws, which resulted in substantial delays in awarding cable franchises and stood as an obstacle to achieving federal statutory goals of encouraging growth and deployment of cable systems, promoting new competitive entry, and minimizing regulatory burdens).

Section 6409(a).¹⁷⁷ In the *Shot Clock Order*, the Commission held that the addition of an antenna to an existing tower or other structure constitutes a collocation for purposes of Section 332(c)(7) if it does not involve a “substantial increase in the size of a tower,” as defined in the Collocation Agreement, but did not further define that term.¹⁷⁸ By applying the same Section 6409(a) test to the Shot Clock, the Commission will create consistency in implementation and enforcement of these two parallel provisions of federal law that relate to installing new wireless facilities at locations and on or in structures that currently support or contain wireless facilities. Applying a consistent interpretation of collocations requirements will ease the burdens on wireless providers, state and local governments, the FCC, and the courts. Similarly, terms common to Section 6409(a) and Section 332(c)(7) should be defined uniformly.

Completeness of Application. The FCC should establish a specifically enumerated floor for when a new siting application (not an EFR application) is considered complete for the purpose of triggering the *Shot Clock Order*’s established time frame. The Shot Clock would begin running when the application is submitted with all necessary documents as per the FCC requirements. The FCC should also clarify 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.¹⁷⁹

If a municipality indicates that an application is not complete, certain steps should be taken to ensure adequate notice to the applicant. Any municipal request for additional

¹⁷⁷ NPRM ¶ 153, 28 FCC Rcd at 14293.

¹⁷⁸ See *Shot Clock Order*, 24 FCC Rcd at 14012 ¶ 46.

¹⁷⁹ 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.”

information from an applicant for a new siting application 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 applicant to submit this particular information. Indeed, PCIA members have given examples of jurisdictions tolling the Shot Clock when asking for additional information above and beyond the requirements of the ordinance, including asking for revised drawings, responding to referral agency requests, or requesting further information not outlined in the requirements.¹⁸⁰

Local Moratoria. The presumptively reasonable period for state or local government action on an application under the Shot Clock should run regardless of any local moratoria. While many jurisdictions revise their wireless siting ordinances without employing moratoria, moratoria can still be used as a delay tactic to stall the deployment of infrastructure. Where they are used, members have found that they often last longer than six months, running counter to the 1998 industry-community agreement which found that moratoria longer than six months contravene public policy.¹⁸¹ Further, because the *Shot Clock Order* did not discuss moratoria, some jurisdictions have used that as a loophole to escape the Shot Clock.¹⁸² The FCC should take action to close the loophole and speed deployment.

Application to DAS Node and Small Cell Siting. Section 332(c)(7) was enacted with technology-neutral terms to provide forward-compatibility with emerging technologies, such as

¹⁸⁰ *See id.*

¹⁸¹ *See* Guidelines for Facilities Siting Implementation and Informal Dispute Resolution Process, available at <http://transition.fcc.gov/statelocal/agreement.html>.

¹⁸² In the City of Lafayette, California, a second notice of incomplete application was provided to a member over five months after the date of the initial application; the City advised the member that the application was incomplete so long as (1) the member continued to receive requests for additional information, and (2) the interim moratorium adopted by the City remained in effect.

DAS, that were not necessarily contemplated when statute was adopted in 1996. DAS and small cell facilities should be subject to the same presumptively reasonable time frame.

Municipal Property Preference. While siting wireless facilities on municipal property can benefit both the community and the provider, certain jurisdictions have used a preference for siting on municipal property to effectively prohibit the provision of wireless services.¹⁸³ Municipal “preferences” become effective mandates when jurisdictions couple them with ordinances that make it extremely difficult to site facilities on non-municipal property. By making it extremely onerous to site anywhere except municipal facilities, a jurisdiction has an effective monopoly on siting that can create market distortions and discourage wireless deployment.

B. The FCC Should Adopt a Deemed Granted Remedy in Cases Where States or Localities Fail to Abide by the Shot Clock.

The Commission should revise its Shot Clock to adopt a deemed granted remedy that applies to all facilities—including new tower requests—in addition to those covered by Section 6409(a).¹⁸⁴ Whereas EFR applications covered by Section 6409(a) must be approved, the Shot Clock currently requires only that applications be acted on within the requisite time frames or the applicant may go to court. Such a discrepancy should be eliminated going forward.

¹⁸³ For instance, a member had difficulty siting in St. Paul, Minn. due to a municipal property preference which coupled high municipal lease fees with onerous regulations that made it difficult to site on non-municipal property.

¹⁸⁴ NPRM ¶ 162, 28 FCC Rcd at 14296. NPRM ¶ 162, 28 FCC Rcd at 14296. To be clear, all EFRs must be processed pursuant to the non-discretionary “shall approve” mandate of Section 6409(a). Consistent with statutory construction canons that the more recent statute takes precedence over an earlier one and that the specific governs the general, Section 6409(a) should govern where the subject matters of Section 6409(a) and Section 332(c)(7) overlap. NPRM ¶ 143, 28 FCC Rcd at 14290. The discussion below focuses on extending a parallel deemed granted remedy to non-EFRs that are not covered by Section 6409(a) and remain subject to Section 332(c)(7), such as new tower requests.

Where the state or locality fails to act under the Shot Clock, applicants must decide whether to litigate, potentially involving considerable time and expense, or continue to pursue the application with an uncertain time frame for action and outcome. And even if an applicant decides to expend the funds and risk future ill will by taking the jurisdiction to court, it is still not guaranteed a positive outcome. Adding a deemed granted rule is critical to ensuring that states and localities act within the prescribed timelines for *all* siting applications—including both new siting requests as well as EFRs covered by Section 6409(a). Doing so will also reduce costly and time-consuming litigation, allowing resources to be used to fund, rather than litigate, the expansion of broadband deployment. Thus, the Commission should declare by rule that when a jurisdiction fails to act within the Shot Clock time frames, the application will be deemed granted.

As discussed above in Section II.D, a deemed granted rule is compelled for EFRs by the “shall approve” language in Section 6409(a). For other facility siting requests, including new tower applications, the Commission may adopt a deemed granted rule using its broad authority to adopt rules to carry out the objectives of the Communications Act¹⁸⁵ and to facilitate broadband deployment under the Telecommunications Act.¹⁸⁶ In particular, the Commission may use its authority to implement Section 332(c)(7), which provides that states and localities must act on

¹⁸⁵ See 47 U.S.C. §§ 154(i), 201(b), 303(r).

¹⁸⁶ See 47 U.S.C. § 1302(a); *Verizon v. FCC*, No. 11-1355, slip op. at 29 (agreeing that the Commission has the authority under Section 706(b) “to take steps to accelerate broadband deployment if and when it determines that such deployment is not ‘reasonable and timely’”). For the same reasons discussed above regarding adoption of a deemed granted remedy in the Section 6409(a) context, a deemed granted approach under Section 332(c)(7) does not raise any concerns about impinging on state or local authority.

siting requests “within a reasonable period of time” and that applicants are aggrieved when there has been a “failure to act.”¹⁸⁷

Indeed, the Commission’s authority to adopt such a rule implementing Section 332(c)(7) that may have the effect of overriding local or state law was squarely confirmed by the Supreme Court in *City of Arlington*. There, the Court rejected the notion that the statute, by preserving local authority over zoning, denied the FCC authority to implement Section 332(c)(7) through establishment of the presumptively reasonable time for action by local zoning authorities. The Court held that the FCC’s determination that it had such authority was entitled to deference.¹⁸⁸ The fact that the FCC’s ruling appeared to impinge on a matter of traditional local concern was found to be “faux-federalism,” since Section 332(c)(7) “explicitly supplants state authority” by requiring decisions under local law to be made within a reasonable period of time.¹⁸⁹ Consistent with that ruling, adopting a deemed granted approach to address “failure[s] to act” on siting applications within “a reasonable period of time” falls well within the Commission’s interpretive authority under Section 332(c)(7).¹⁹⁰

Accordingly, the Commission should revisit its decision not to apply a deemed granted rule to applications when jurisdictions fail to act.¹⁹¹ To the extent legal uncertainty arguably existed at the time the Commission chose not to adopt a deemed granted approach as part of the

¹⁸⁷ 47 U.S.C. § 332(c)(7)(b)(ii), (v).

¹⁸⁸ 133 S. Ct. at 1871.

¹⁸⁹ *Id.* at 1873.

¹⁹⁰ 47 U.S.C. § 332(c)(7)(b)(ii), (v); *see City of Arlington*, 133 S. Ct. at 1874-75 (courts must defer to a reasonable interpretation by the agency as long as the agency does not overstep the lines drawn by Congress and “the agency’s answer is based on a permissible construction of the statute”). As noted above, the Commission has adopted a “deemed granted” remedy in analogous circumstances. *See, e.g., Cable Franchise R&O*, 22 FCC Rcd at 5103 ¶ 4, 5127-28 ¶ 54, 5132 ¶ 62, 5134-35 ¶ 68, 5139 ¶¶ 77-78.

¹⁹¹ *See Shot Clock Order*, 24 FCC Rcd at 14009 ¶ 39.

Shot Clock, the *City of Arlington* case provides much more certainty regarding the Commission's authority to adopt rules to enforce Section 332(c)(7). It is now clear that the FCC is authorized to adopt rules to enforce Section 332(c)(7), despite the fact that the statute preserves local zoning authority. While the Commission expressed concern in the *Shot Clock Order* that a deemed granted remedy might render the judicial relief provisions of Section 332(c)(7)(b)(v) superfluous, and therefore inconsistent with Congressional intent, this is not the case.¹⁹² Even with a deemed granted remedy, applicants may still need to seek injunctive relief where a state or locality fails to act in order to compel the issuance of a permit, where needed.

IV. THE FCC SHOULD ADOPT A PERMANENT ENVIRONMENTAL NOTIFICATION EXEMPTION FOR TEMPORARY TOWERS.

The FCC should make permanent its waiver exception from the public notice requirements set forth in Section 17.4(c)(3)-(4) for temporary towers.¹⁹³ Temporary towers meeting the certain criteria were exempted from environmental review, historical review, and federal antenna structure registration. Since the waiver was enacted, significant public interest benefits have accrued without significantly impacting the environment, migratory birds, or air safety. Comments in the docket have been uniformly positive, and the Commission should solidify the positive results of its waiver by creating a permanent exception for temporary towers meeting its measured criteria.

The FCC should also adopt its proposed guidelines for temporary towers. Under the proposed guidelines, temporary towers are exempt if they (i) will be in use for 60 days or less, (ii) require notice of construction to the FAA, (iii) do not require marking or lighting pursuant to FAA regulations, (iv) will be less than 200 feet high, and (v) will involve minimal or no

¹⁹² *See id.*

¹⁹³ NPRM ¶ 77, 28 FCC Rcd at 14267.

excavation.¹⁹⁴ Temporary towers that meet these characteristics do not have the potential for significant environmental effects, but will benefit the public by addressing important short term coverage and capacity needs.

¹⁹⁴ NPRM ¶ 78, 28 FCC Rcd at 14267.

CONCLUSION

By adopting the measures recommended herein to further improve wireless facility siting policies, the Commission can take another critical step toward meeting “one of the great infrastructure challenges of our time”—increasing broadband deployment throughout the nation.¹⁹⁵ PCIA and its members stand ready to assist the Commission in support of such efforts.

Respectfully submitted,

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¹⁹⁵ *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*, Notice of Inquiry, 26 FCC Rcd 5384 (2011).